EVOLUTIONARY IMPULSES IN LAW

by

Feler Bose
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Evolutionary Impulses in Law

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DEDICATION

This is dedicated to my Cassia Arpudha. *Deus vult.*
ACKNOWLEDGEMENTS

I would like to thank many who have made this dissertation possible. For Professor Charles Rowley for guiding me through the whole process of writing and rewriting the dissertation and providing me his expertise and constructive criticism. For the rest of my dissertation committee (Professor Richard Wagner and Professor Todd Zywicki) for providing me with valuable comments. My thanks to Charles Lipper for editing parts of the dissertation. Thanks to Professor Walter Williams for providing me with a Bradley Foundation fellowship during my fourth year at George Mason University. To my parents who encouraged me to get my Ph.D. in economics. My wonderful wife, Caroline, who assisted me in various ways in my research and provided the resources to do so. To Theophilus Arudhal, for providing me much needed relaxation.
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ABSTRACT

EVOLUTIONARY IMPULSES IN LAW

Feler Bose, Ph.D.

George Mason University, 2007

Dissertation Director: Dr. Charles K. Rowley

This dissertation is composed of three different essays. Each essay discusses how laws change over time. The first essay focuses on marriage in the United States. It starts with the Beckerian model and then develops the relational contract model to analyze the role religion plays in marriage. The second essay focuses on abortion law and how it had changed over the centuries in the United States. A model of social entrepreneurship is developed and incorporated with other theories from Public Choice. From this, one can understand social movements from the left and the right and how they work differently. The final essay is on the Indian constitution and how it has evolved in the area of civil and economic rights. Two Public Choice models (Congleton Model and Tsebelis Model) are used to analyze the evolution of the Indian constitution. In India, civil rights has been strengthened but economic rights has been weakened.
Chapter 1: Introduction

This dissertation is composed of three unrelated essays, however the overall theme of the three essays follows the title of the dissertation: “The Evolutionary Impulses in Law.”

The first essay is titled, “Legal entry and exit costs and the role of religion: Implications on the stability of marriage.” This essay will test the hypothesis that states that the stability of the family is tied to the entry and exits costs of marriage. The focus of this paper is on US families in the 20th century. I first use the Beckerian model and extensions to analyze the family. Then the focus of the paper will shift to how changes in religion and religious practice affect the stability of the family by changing entry and exit costs. I use the relational contract model to study the role of religion. Economists have largely ignored the religion factor.

The second essay is titled, “How Extremes become Norms in Democracies: Legal Changes in Abortion Laws.” The hypothesis to be tested is that if extreme ideas come from the left or right, social entrepreneurs act on different nodes to leverage action to bring about a shift in the median voter’s opinion and subsequently change policy. The essay will look at and analyze changes in abortion laws over two hundred plus years between two “self-evident truths.” The first self-evident truth is that abortion is murder and needs to be stopped and the other self-evident truth is that a woman has a choice and
that there is a right to privacy. This interaction between those who believe in these two self-evident truths has resulted in fascinating legal changes.

The third essay is titled, “Evolution of the Constitution of India with respect to Civil and Economic Rights since Independence.” The hypothesis to be tested in this essay is that India has moved decidedly in favor of civil rights and hesitatingly in favor of economic rights since independence. I used economic theories from Public Choice developed by Roger Congleton and George Tsebelis. The evolution of the understanding of the Indian constitution has been the due to the tug of war between the Supreme Court and the Legislature since Independence. The evolution can be partially explained by Oliver Wendell Holmes Jr. who wrote an article for *Harvard Law Review* (1897), titled “The Path of the Law.” He wrote, “the development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so.”
Chapter 2: Legal entry and exit costs and the role of religion: Implications on the stability of marriage

1) Introduction

This essay will test the hypothesis that the stability of marriage is tied to entry and exit costs of marriage. The different cases of entry and exit costs are found in the different religions that are practiced in the United States. The analysis of the different entry and exit costs, which has been neglected by economists and legal scholars, will be based on a contractual framework. The more stable the marriage; the more couples are able to pursue long-term and cross-generational goals, which is beneficial to society\(^1\). Analyzing what religions say on entry and exit costs add to the other works on marriage like those by Gary Becker and others.

From the mid to late 20\(^{th}\) century, the US saw many changes from the increased divorce rate to the increased cohabitation rate to changes in the age of first marriage. Figure 2:1-1 initially shows a decline of the median age of first marriage and by the middle of the century an increase in median age of first marriage. The median age for women ends up 3.2 years higher than at the beginning of the century and for men it is 0.9 years higher. The differences between the maximum and minimum median ages are 5.2 years for women and 4.6 years for men.

\(^1\) Linda Waite and Maggie Gallagher have written a book bringing together various studies on how married people are “happier, healthier and better off financially” (2000).

Figure 2:1-2 shows the marriage and divorce rate per 1000 total population. The divorce rate has increased from 0.8/1000 at the beginning of the century to 4.1/1000 at the end of the century. The divorce rate peaked at 5.3/1000 in 1979 and 1981 and has been declining ever since. Further, the marriage rate has decreased from 9.3/1000 at the beginning of the century to 8.5/1000, but overall has been more stable than the divorce rate. The continuing decline of the marriage and divorce rate has not yet stabilized. Part of the reason for the continuing decline in marriage is likely tied to the increased numbers of couples that cohabit (See Table 2:1-1). As the stigma tied to cohabitation declines in society, more couples are willing to get into “trial marriages.”


<table>
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<tr>
<th>Age</th>
<th>Total 1987-88</th>
<th>Total 1992-94</th>
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<tr>
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<td>27</td>
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<td>25-29</td>
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<td>50-54</td>
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Figure 2:1-3 indicates that many people do not stay in marriages anymore for the sake of the children. As more children grow up in unstable marriages, this has long-term consequences for individuals and society. On average, “children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings” (Waite and Gallagher 2000: 124). However, the issue of whether children of divorced parents would have been better off with their parents staying together is controversial and unclear. Nevertheless, there has been decline in the average number of children involved in a divorce since 1968 (Stevenson and Wolfers 2007: 30).
The notion that half of all marriages end in divorce seems to be true for those who married in the 1970’s (48% of marriages ended by 25 years). The percentage for the 1980s has come down and the percentage has so far come further down for the 1990s (See Figure 2:1-4) (Stevenson and Wolfers 2007: 30).
This essay is organized as follows: Section 2 details the economic theory of Becker and its implications. Section 3 incorporates some of the extensions, confirmations, and criticisms of the Beckerian approach. Section 4 details how the institution of religion (through entry and exit costs) affects the stability of marriage. The relational contract model is used to understand religion and marriage. Section 5 discusses the history of evolution of marriage laws in the 20th century. Section 6 concludes.
2) Theory

2.1 Household Production Model

The essence of the Beckerian rational choice approach is using the “combined assumptions of maximizing behavior, market equilibrium, and stable preferences, used relentlessly and unflinchingly” (Becker 1976: 5). Individuals/families choose actions that maximize a certain objective subject to constraints. Tastes remain stable. The utility function for household production can be generally written as:

\[ U = U(Z_1, \ldots, Z_m) \]

Where \( Z_1, \ldots, Z_m \) are various commodities like children, health, pleasure, envy etc. Each of the \( Z \)'s are self-produced.

\[ Z_i = f_i(x_i, t_{hi}; E_i), \text{ for } i = 1, \ldots, m \]

where \( x_i \) and \( t_{hi} \) are goods and time used to produce the commodity in question. \( E_i \) “represents household ability, human capital, social and physical climate and other environmental variables” (Becker 1981: 8). Commodities have shadow prices that equal:

\[ \pi_i = p_i \frac{x_i}{Z_i} + w \frac{t_{hi}}{Z_i} \]

where \( \pi_i \) is the “average cost of goods and time spent on each unit of \( Z_i \)” (Becker 1981: 8).

Using the shadow commodity prices, the full income constraint can be written as:

\[ \sum p_i x_i + w \sum t_{hi} = \sum \pi_i Z_i = S \]
Now maximizing the utility function with the full income constraint based on two different commodities gives:

\[
\frac{\delta U}{\delta Z_i} = \frac{MU_i}{M_k} = \frac{\pi_i}{\pi_k}, \text{ for all } i \& k
\]

If the relative price of \(Z_k\) increases, then the demand for \(Z_k\) reduces. More technically by taking into account the relationship between goods and services:

\[
\frac{\delta U}{\delta x_i} = \frac{\delta U}{\delta Z_i} \cdot \frac{\delta Z_i}{\delta x_i} = \frac{\delta Z_i}{\delta t_h} \cdot \frac{\delta t_h}{\delta x_i} = \frac{MP_{x_i}}{MP_{t_h}} = \phi(x_i, t_h), \text{ for } i = 1, ..., m.
\]

Becker has used extensions of this model and the human capital model\(^2\) to discuss ideas tied to the family like the division of labor in families, polygamy vs. monogamy, assortative mating, the demand for children, altruism in the family, marriage and divorce etc (Becker 1981). Others (discussed in section 3) have also used the Beckerian model for their analysis of the family.

### 2.2 The Demand for Children

The general utility function for a family is:

\[
U = U(n, q, Z_1, ..., Z_m)
\]

where \(n\) is the quantity of children, \(q\) is the quality of children and \(Z\)’s are other commodities. In the case where the demand for children alone is of interest and where all other commodities are considered as \(Z\), the utility function becomes:

\[
U = U(n, Z)
\]

\(^2\) The human capital model models consumption of commodities in different ages.
Moreover, the budget constraint for a family is:

\[ p_n n + \pi_z Z = I \]

Where I is full income, \( p_n \) is the cost of producing and rearing children, and \( \pi_z \) is the cost of \( Z \). Solving this utility function subject to the constraint give the marginal utility conditions:

\[
\frac{\delta U}{\delta n} = \frac{MU_n}{MU_z} = \frac{p_n}{\pi_z}
\]

if the relative price of children rises relative to the price of other commodities, the demand for children reduces and the demand for other commodities increases. Now when including the issue of quality and other factors like the fixed cost of each child \( (p_n) \), costs that are independent to the number of children \( (p_q) \), constant costs for a unit of quality \( (p_z) \), the budget constraint becomes:

\[ p_n n + p_q q + p_z (q)n + \pi_z Z = I \]

Maximizing the general utility function for the family subject to the budget constraint gives:

\[
\frac{MU_n}{MU_q} = \frac{\pi_n}{\pi_q} = \frac{q}{n} \frac{(1 + r_n)}{n(1 + r_q + \epsilon_{pq})}
\]

The “ratio of shadow prices of \( n \) and \( q \) now depend not only on the ration of \( q \) to \( n \), but also on the ratios of fixed to variable costs \( [r_n, r_q] \), and on the ratio of marginal to average variable cost of quality \( [1+\epsilon_{pq}] \)” (Becker 1981: 107). Economists have used this model to discuss the “quantity-quality” tradeoff in children.
2.3 Marriage and Divorce

If both the husband and wife expect to be better off being divorced then divorce would occur. If the transactions costs are low then for the case of mutual consent:

\[ Z_{mf} \equiv Z^m + Z^f < Z^m_d + Z^f_d = Z^mf_d \]

Where the subscript d indicates a divorce, m indicates male, f indicates female, mf is combined male & female, and Z is commodity wealth. This issue has been studied by various authors under the Coasian framework (Friedberg 1998; Peters 1986; Wolfers 2006). Under mutual consent, the bargaining power of the spouse who wants to stay in the marriage is stronger than in a case where there is the unilateral right to divorce (See section 3).

2.4 Assortative Mating

The discussion on assortative mating is important to determine who gets married to whom, and who marries and who remains single. Individuals maximize their utility by choosing the traits that are suitable to them. One of the key results of the Beckerian analysis is that “the marriage market chooses not the maximum output of any single marriage but the maximum sum of the outputs over all marriages” (Becker 1981: 70).

Traits that are complementary such as age, religion, education etc results in positive assortative mating. Positive assortative mating of different traits and characteristics, results in reduced variation of these traits in the children in the family but increases variation with children across families (Becker 1974: 20). When dealing with
traits that are substitutes such as wages and hours worked, negative assortative mating is predicted by Becker (1981: 89).

The aspect of sorting that is directly tied to this paper is what happens when there are unequal numbers of men and women. In a monogamous society, if there are more men than women, then a number of men will remain single. Therefore, to raise their chances of getting married, men could resort to lump sum transfers to induce a woman to marry him.

2.5 Division of Labor

In each household people, invest in two types of human capital i.e. in the market sector and in the household sector (H1 and H2). There will be an initial accumulation period of human capital. After the initial period, one allocates time to maintain one’s capital stock with the rest of the time allocated towards the two sectors to maximize consumption. Aggregate consumption \( Z \), for the year is given by:

\[
Z = Z(x, t_h') = \left[ \frac{a H^1_{t_w}}{p_x}, t_h \varphi(H^2) \right]
\]

Where \( H^1 \) and \( H^2 \) “hat” are the optimal capital stocks. The numerator of the first term in the bracket is the wage rate multiplied by time allocated to the market sector \( (t_w) \), the second term in the bracket is the “effective amount of household time, and \( p_x \) is the price of market goods” (Becker 1981: 15). The time constraint is:

\[
t' = t_h + t_w
\]
Where \( t_h \) is time allocated to household sector and \( t' \) is the time available in the year after taking out the time for maintaining capital. Solving this equation gives:

\[
\frac{\delta Z}{\delta t_w} = \frac{\delta Z}{\delta x} \frac{a H^1}{p_x} = \frac{\delta Z}{\delta t_h} = \frac{\delta Z}{\delta t_w} \psi(H^2)
\]

Time allocation is optimal when the “marginal product of working time equaled the marginal product of household time” (Becker 1981: 16). Now complicating this setup where there is a household with more than one person, aggregate consumption after the initial investment period for a \( n \) household becomes:

\[
Z = Z\left(\sum_{i=1}^{n} x_i, \sum_{i=1}^{n} t_{h_i}\right) = Z\left[\sum_{i=1}^{n} \frac{a H^1 t_{x_i}}{p_x}, \sum_{i=1}^{n} \psi(H^2 t_{h_i})\right]
\]

The \( \Sigma t \) terms are aggregate hours supplied to each sector. Solving this (Becker 1981: 17) gives a number of interesting conclusions. One key conclusion is that if everyone in the household has different comparative advantages, no more than one person will allocate time between the two sectors. Others will specialize completely either in the market or in the household sector.

If the woman has a comparative advantage in the household sector, then in an efficient household, the woman will allocate most of her time to the household sector and the man will allocate most of his time to the market sector.

### 2.6 Altruism in the Family

The general utility function for altruism is:
\[ U_h = U[Z_{1h}, \ldots, Z_{mh}, \psi(U_w)] \]
and \[ \frac{\partial U_h}{\partial U_w} > 0 \]

where \( U_h \) is the utility of the altruist and \( U_w \) is the utility of the beneficiary. \( \psi \) is a positive function of \( U_w \), \( Z_{jh} \) is the jth “commodity consumed by h” (Becker 1981: 173).

The budget constraint of \( h \) is:
\[ Z_h + y = I_h \]
where \( y \) is the amount spent on \( w \) and \( I_h \) is h’s income “imputed by the marriage market.”

The spouse’s incomes is:
\[ Z_w = I_w + y \]
where \( I_w \) is the spouse’s income which is also imputed by the marriage market. Putting these two equations together gives the family income \( S_h \):
\[ Z_w + Z_h = I_w + I_h = S_h \]

By maximizing the utility function subject to the family income constraint we have:
\[ \frac{\delta U}{\delta Z_h} / \frac{\delta U}{\delta Z_w} = 1 \]

An altruist is made better of if his actions help improve the family income, even if it means lowering his income to improves her income. Becker also extends this model to include more beneficiaries like those that of children, parents etc and similar results hold as the case of a single beneficiary. One famous application of this theory is the “Rotten Kid Theorem.” This theorem suggests that if there is one altruistic member in a family, then even if one of the beneficiaries (children) is selfish/”rotten,” the rotten kid has the
incentive not to harm his siblings. Rather the rotten kid has the incentive to increase the happiness of his siblings as it affects the money he gets.

3) Extensions, Confirmations and Critiques of Beckerian Approach

This section will focus on some of the extensions and confirmations of the Beckerian model that are relevant to this paper. Further, there will be a discussion on the critiques of the Beckerian approach from the economic perspective.

3.1 Bride Price and Dowry

Becker writes about bride prices and dowries as methods to get one’s spouse. He derives the issue of bride price or dowry as monetary transfers to clear the marriage market. When bridegrooms are fewer in number than brides, the dowry is practiced, but when brides are fewer in number than bridegrooms, the bride price is practiced. And if the transfer is to compensate parents for example in the case of bride price, the parents of the daughter would “invest optimally” in their daughter’s accumulation of human capital (Becker 1981: 86f). The Beckerian price model has spawned a numerous literature discussing how dowry brings in high quality men into the marriage market (Rao 1993) or how brides use dowries to draw high quality grooms if there is a heterogeneity of men’s earnings and if social stratification exists (Anderson 2003). And how under certain conditions dowries can disappear but the same conditions do not necessarily result in the disappearance of the bride price (Botticini and Siow 2003)³.

---

³ The literature is rich when discussing dowries, but lean when dealing with issues of bride price.
Another model sees dowries not as prices to clear the market rather dowries are seen as bequests. Here parents transfer wealth to their daughters at the time of marriage as an inheritance. In virilocal societies (where daughters at marriage leave their parents), dowries give property rights to the bride in a marriage and gives her leverage in the “ex post distribution of products within the family” (Zhang and Chan 1999: 788). Another model looks at dowries as an inheritance to daughters, so that the sons have an incentive to work the parents’ estate (Botticini and Siow 2003: 1386). In addition to dowry being a pre-mortem inheritance, it also improves a daughter’s bargaining power in marriage and improves her marital welfare (Brown 2003: 26).

Others have tried to bring together both aspects of the dowry (price and bequest model). In homogenous societies, dowries act like bequests, but with increased heterogeneity brought about by economic development, dowries become transfers to the groom (Anderson 2004). Further, some have suggested that in some societies the dowry can serve both as a transfer and as a bequest. When the dowry functions as a bequest, households are better off “as measured by a variety of socioeconomic indicators, including education and assets” (Arunachalam and Logan 2006: 27).

3.2 Divorce

The Beckerian prediction of divorce rates given changes in law from mutual consent divorce to unilateral divorce has been proven right. If both the husband and wife expect to be better off being divorced then divorce would occur. Equation 3-1 shows the
case of when divorce would occur, with $M$ being the married state and $S^h$ and $S^w$ being the state of being single for the husband and wife respectively.

$$M < S^h + S^w$$

(3-1)

“Although divorce might seem more difficult when mutual consent is required than when either alone can divorce at will, the frequency and incidence of divorce should be similar with these and other rules if couples contemplating divorce can easily bargain with each other (Becker 1981: 226). This is the application of the Coase Theorem if getting a divorce has low transaction costs (1960). Peters extended Becker’s work (1986) and included empirical work. Under symmetric information and costless bargaining, changing the law from mutual consent to unilateral divorce does not make divorce more likely. But if there is asymmetric information, more divorce is likely under the unilateral divorce regime (Peters 1986: 443). If we exclude asymmetric information and transaction costs, divorce laws just shift property rights from the spouse who wants to stay in the marriage (mutual consent) to the spouse who wants to leave the marriage (unilateral divorce). Under mutual consent divorce case, the spouse who wants to leave the marriage has to compensate the spouse who wants to stay in the marriage for efficient outcomes and vice versa. Therefore the law change “would alter the property rights and resulting compensation scheme between the spouses without making them more likely to divorce” (Friedberg 1998: 610).
Table 2:3-1: Surplus of marriage to two couples.

<table>
<thead>
<tr>
<th></th>
<th>Surplus of Marriage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Couple 1</strong></td>
<td><strong>Couple 2</strong></td>
</tr>
<tr>
<td>John</td>
<td>$14</td>
</tr>
<tr>
<td>Jane</td>
<td>-$10</td>
</tr>
<tr>
<td>Tom</td>
<td>-$24</td>
</tr>
<tr>
<td>Nancy</td>
<td>$20</td>
</tr>
<tr>
<td><strong>Net Value</strong></td>
<td><strong>$4</strong></td>
</tr>
</tbody>
</table>

In table 2:3-1, under the case of mutual consent divorce, John and Jane stay together with no payment, but Tom pays Nancy to get a divorce. Whereas, under the case of unilateral divorce, John pays Jane to stay together (his surplus moves from John to Jane) and Tom and Nancy divorce with no payment. The results are the same under Coasian assumptions regardless of what the law says.

Various empirical studies have been conducted to test this theorem. Peters finds that the switch from mutual consent divorce to unilateral divorce has no effect on the number of divorces in the US, but finds that there is an effect on compensation in the form of spousal support at divorce⁴ (1986). Friedburg, using new econometric tools (time trend fixed effects), finds that the switch has a positive and permanent effect on the divorce rate. But it only explains 17% change on divorce rates (1998). Wolfers says that Friedberg’s effect is temporary and that there are no long run effect on the number of divorces. He separates pre-existing time trends from dynamic effects of a policy shock (2006). The Coase theorem holds up well empirically and Becker’s application of Coase is correct.

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⁴ It is lower in unilateral states.
3.3 The Marriage Premium

Marriage premiums exist for married men over single men. While many economic explanations have been proposed after controlling for various factors like age, education etc, a student of Becker has proposed the idea that marriage itself raises productivity. The idea that spouses augment productivity is an extension of Becker’s division of labor model.

Augmenting productivity of one spouse takes the time of the other spouse. For example, a wife could augment her husband’s productivity by taking care of childcare issues, health related issues, allowing for more and better sleep for her husband etc. Time can be divided three ways: time on the job, time spend augmenting spouse’s productivity, and “non-market time” (Daniel 1995: 117). If a man is benefiting from his wife’s augmenting productivity, then he is more productive in his job. The employer pays more for more output. Just as a person benefits from human capital in performing his job, similarly a husband benefits from augmentation capital.

In a divorce prone society, it is in the best interest of the wife to provide augmentation capital as a “flow of services” as opposed to a “stock of capital.” With the former, if a divorce occurs the flow of services stops, whereas with the latter, the husband takes the capital with him (Daniel 1995: 118). This analysis while useful does not take into account the role of the courts when a spouse seeks exit from the marriage. The court could award large damages to compensate the wife if she provided a stock of capital.

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\[5\] This augmentation model is not wife or husband specific.
which could encourage the wife to provide both types of augmentation capital to her husband (Scott and Scott 1998: 1318ff).

The model has interesting conclusions. A family with a large number of children will have a lower marriage premium. Since children demand more time from their parents, this would reduce the time available for productivity augmentation. This point is disputable, and likely an issue for some parenting styles. Further, the marriage premium “should be inversely related to the wife’s (or husband’s) hours of work” (Daniel 1995: 120). Additionally, there will be a cohabitation premium if the relationship is modeled similar to a marriage.

3.4 Critique on Becker’s Model

Various criticisms of the Beckerian model are found in fields other than economics like sociology, political science, and “feminist” studies. This paper will instead focus on criticisms from the economics side.

As the traditional Judeo-Christian, view of marriage comes under increasing attack and scrutiny, various other marital arrangements might be considered in the near future. One of them is polygamy. According to the Beckerian model, if $Z_{\text{married}} > Z_{\text{single}}$, one gets married. If a second spouse increases the value of $Z$ to a household (or marginal product), then the model predicts that there will be polygamy. Similarly, the model can be extended to a third spouse etc. The polygamous household can take advantage of the division of labor and produce the optimal output.
When either women or men outnumber each the other, polygamous societies are feasible. When women outnumber men, polygyny will be practiced and when men outnumber women polyandry will be practiced\(^6\). In reality, when comparing polygyny to polyandry the former is more prevalent. Polygamous relationships are likely to be followed by men who for example can afford many wives and where the household can capitalize on the division of labor.

While the economic theory of Becker makes sense, it is clear that over the past millennia, societies that shunned polygamy have had the greatest economic growth regardless of the numerical differences in the sexes (Westley 1998: 68). Therefore, monogamy is superior to polygamy regardless of the economic wealth maximizing laws expounded by Becker\(^7\). Monogamous committed nuclear families provide children with stability and have easily identifiable governance structures within the family. Stable nuclear families provide for a stable society. Further, when there is a lack of spouses for “inferior” men, negative externalities would occur in polygamous societies. For example, prostitution and pornography would increase to satisfy the sexual gratification for males. Bride/girl snatching could occur, adultery could increase, etc (Westley 1998: 72).

Economists have also extended Becker’s one period Rotten-Kid theorem. The “Samaritan’s Dilemma\(^8\)” occurs in a multi-period setting. In a two period game, if the parent transfers only in the second period, the child chooses efficient actions but the child

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\(^6\) At birth, boys outnumber girls (Parazzini, et al. 1998). However, eventually, women outnumber men. The sex ratio, barring some shock like war, equalizes at around twenty years of age (Statistical Abstract of the United States, table 29 (1981)).

\(^7\) Becker suggests that in societies where polygamy is illegal and divorce is high, divorce and remarriage tends to allow for a different type of polygamy i.e. “serial monogamy.”

\(^8\) This is the term Buchanan used in the context of government welfare programs (1975).
will save very little in the first period, which induces the parent to transfer more in the second period (Samaritan’s Dilemma). However, if the parent chooses to make the transfer in only the first period, the kid saves optimally, but in the second period will maximize his income at the expense of the family, this violates the rotten kid theorem in the second period. Therefore, in a two period setting, with an altruistic parent, the child does not act efficiently (Bruce and Waldman 1990: 136).

Other economic critiques on Becker come from alternate models that are offered. For example, for the altruistic model within marriage other economists use models such as cooperative bargaining models under which one finds “divorce-threat” models and “separate-spheres” model. Another starting point for economists is the non-cooperative models. These models are briefly discussed by Pollack (1994).

Other forms of economic critiques have come from those who have empirically tested Becker’s models and have found that his predictions do not match with the empirical results. The Friedburg paper on divorce had initially contradicted Becker’s claims but with more careful analysis and more data Wolfers was able to confirm Becker’s claims (Friedberg 1998: ; Wolfers 2006). Some authors have done some empirical testing of Becker’s intergenerational model and found deficiencies (Behrman and Taubman 1985).

In the division of labor argument, the home vs. market distinction might not be a useful distinction in most cases. This is because household production could require different skills from the father and mother when for example raising children (Lundberg 2005).
3.5 My Economic Critique

The cost benefit analysis of Becker is in general a very useful model to look at non-economic areas such as the family. There are many useful predictions that the Beckerian model allows to be tested. However, the method also has limitations. The main problem I see with the Beckerian model is the insufficient discussion on institutional arrangements and their effects on the family. Institutional effects on the family could play a considerable role in family arrangements and decisions. Further, the Beckerian approach to exit in marriage fails to take into account the role of the courts in assigning compensation to the spouses.

The discussion regarding the demand for children focuses mainly on quality vs. quantity of children. Large families also provide positive externalities that do not figure in the Beckerian model. For example, some of the positive externalities include leadership skills, networking effects, negotiation skills, cooperation, alliance building etc. These quality skills are useful in the real world. Moreover, in wealthy countries with few but quality children, there is a shortage of workers. Apparently, the increased quality of children is not sufficient to overcome the lack of quantity needed to keep society wealthy. Further, a more useful analytical framework for understanding the number of children parents prefer is tied to the future orientation of societies (time preferences of societies). Pessimistic societies (discount the future highly) will likely have smaller families and optimistic societies will likely have larger families.
One area the Beckerian approach fails to take into account is the role of the courts in exit\(^9\). While most marriages likely have minimal bargaining costs, when the courts are involved, bargaining costs can be high. The assignment of property rights to the spouse likely depends on the exit costs that the court imposes when one tries to divorce. In states with equitable distribution rules, the courts have considerable flexibility in determining property distribution. States allow for finding of fault in determining property distribution. Some states allow for marital and economic misconduct for finding fault, other states allow for only marital misconduct. Some states do not consider misconduct in disposition of marital property. The courts also consider joint assets, separate assets, inheritance, gifts etc., in the distribution of property. The courts further look at monetary and non-monetary contributions ("Divorce" 1998: 124). In theory, either spouse could get between 0 to 100\% of the assets.

In community property states, the court starts at 50:50 regarding debts and assets. Exceptions to this division occur with inherited property, gifts, and property brought into marriage ("Divorce" 1998: 125). Community property states will likely have more Coasian results since bargaining within marriage will be easier since information regarding exit is clearly known, but we see Coasian results in equitable property states too. This is likely because most couples do not use the courts to aggressively litigate their divorce due to legal fees, court fees, time, etc. In addition, the courts through precedent have likely established their desire to give equitable damages, which allows couples to bargain efficiently.

\(^9\) The courts will apply the law that the legislature passes.
Another problem with Becker’s model is that he does not discuss the role of the institution of religion in family decisions and family stability and neither do other economists. This is partly due to the lack of data. Many irrational things occur from an economic standpoint when one considers the role of religion\(^{10}\). For example, the paying of bride price is not linked to the numbers of women or men in the marriage market and in theory is a fixed standard. On the other hand, when a husband dies, the women should immolate herself but not vice versa. Some religions encourage the having of children regardless of the quantity-quality issue.

4) **Religion as and Institutional Constraint**

In this section, I will use the ideas from the economics of contract law to discuss marriage and the role that religion plays in a marriage contract. The marriage contract can be ideally seen as a life long contract although it is “undoubtedly far more than a contract when viewed from religious, social, cultural, psychological, and philosophical perspectives” (Cohen 1987: 271).

According to the contract literature, there is a tradeoff between making promises and more enforceability of the promises. If the Courts enforce promises through awarding excessive damages, then one can rely more heavily on the value of the promises. The trade off here is that it could lead to the reduction of the number of promises made and promises will be highly qualified. The goal of the courts is to find the optimal level of enforcement. Under the case of reciprocal promises the optimal damage

\(^{10}\) While it might be irrational from an economic standpoint, could be rational within the framework of the religion.
award is the expectation damages (get damages in full measure as if the contract was carried out) (Goetz and Scott 1980: 1284). If the court awards expectation damages then Coase theorem holds, but if damages are above expectation damages, then marriage is strengthened, but it is not optimal from an economic perspective. However, if damages are less than expectation damages then we have sub optimal outcomes\(^\text{11}\).

Under the no-fault regime, contract law suggests that there will be more promises made and more promises broken if and only if the damages awarded by the Courts are less than expectation damages. Evidence seems to suggest that people are marrying later in the lives, and divorcing more (see previous sections of paper). Further, high value types (those valuing marriage highly) will tend to marry later in their life under the no fault regime as they will have to spend more time searching, whereas the low value types will marry sooner as they can be less selective under the no fault regime since they can easily exit the marriage (Allen 2006: 970).

The religions that are discussed are Judaism, Christianity, Islam, and Mormonism. All of the religions discussed in this paper are “collective exclusive religions” meaning they have membership constraints, strong brand loyalty, high level of participation, contributions are common, comprehensive services, rarely are goods and services purchased, etc. This is in contrast to “private inclusive religions” which typically include Asian and New Age religions and don’t have membership constraints, they have weak brand loyalty, they have low levels of participation, contributions are rare, they have specialized services, goods and services are commonly purchased, etc (Iannaccone 1995).

\(^{11}\) The courts could also enact punitive damages which again would change the bargaining position of the spouses.
Therefore, the following analysis will likely be broadly suitable only for the collective exclusive religions and some of the analysis of these four religions will overlap. Religions also give ex ante guidelines for responsibilities in marriage, means to adapt to future contingencies, and what to do in case of failure to fulfill the marriage contract. Table 2:4-1 shows the religious makeup of the US.

<table>
<thead>
<tr>
<th>Religious Composition</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Christian</td>
<td>84.12%</td>
</tr>
<tr>
<td>Non-Religious</td>
<td>9.26%</td>
</tr>
<tr>
<td>Jewish</td>
<td>1.92%</td>
</tr>
<tr>
<td>Muslim</td>
<td>1.55%</td>
</tr>
<tr>
<td>Buddhist</td>
<td>0.91%</td>
</tr>
<tr>
<td>Other</td>
<td>2.24%</td>
</tr>
</tbody>
</table>

### 4.1 Judeo-Christian Legislation

While Judaism and Christianity are different religions, they have some common areas of understanding. The Mosaic legislation, which is found in the Torah, has substantive comments on marriage. Jews practiced this legislation in the past but this practice has undergone several changes. Some Christian scholars also have an interest in this legislation and see it as a model for application in Christian marriages.

The institution of “bride price” is the case of high entry cost into marriage and it is also tied to the high exit cost of marriage. The bride price was typically a large amount of money paid by the bridegroom or the groom’s father to the bride’s father, not a “bride-
purchase fee but the bridal gift by the bridegroom to the bride to seal the marriage in terms of godly responsibility” (Rushdoony 1973: 417). The term used in the Bible for brideprice is the *mohar* (Zeitlin 1933: 3). Typically this sum would be the equivalent to three years worth of income that the bride’s father would invest and eventually give to the bride and her children (Rushdoony 1982: 7). The father could also set the *mohar* very high to discourage certain grooms. The groom’s family could also pay the *mohar* in kind or in service. Additionally there is also the *matton* which was the gift given to the bride by the groom (Schauss 1950: 127). Occasionally in a well to do family, the father would provide his daughter with property, servants and an inheritance (Schauss 1950: 129). Since the bride price is very large, the family of the bridegroom helps the bridegroom accumulate the bride price. Further, since the bride’s father keeps the bride price, a typical marriage involves both the families very closely and therefore becomes a mechanism of social pressure for the couple to stay married for their lifetime. And if the families are involved in the marriage contracting process, this resolves the feminist critiques of the marriage contract, which states that women lose out because they are poor bargainers (Becker 1996: 1170ff).

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12 Some scholars do see the bride price as a “purchase price for the bride” (Schauss 1950: 129).
13 What the bride’s father does with the bride price is subject to debate. One of the options for the father is to invest the money, but it is conceivable that the father uses the bride price for his own use (Epstein 1923: 270). If the latter case occurred, the father would be considered “unkind” and “harsh” (Schauss 1950: 128).
14 This is inferred from the Dinah incident as recorded in Genesis 34.
15 The story of Jacob illustrates (Genesis 29) the sum of 7 years worth of work that he had to perform before he could marry one of Laban’s daughters. The story of Caleb and Othniel where Othniel captures a city and is given Caleb’s daughter in marriage as his reward (Joshua 15).
The stigma of lost virginity by premarital sex whether by consent or rape, required the payment of the *mohar* as a fine to the father\textsuperscript{16}. Further, the wife was protected from her husband if he accuses her falsely of not being a virgin when married. This accusation is likely motivated by the husband’s desire to obtain a divorce for if the accusation is true then his wife would be stoned to death. But if false, Deut 22:13-19\textsuperscript{17} states that a substantial fine of 100 shekels of silver was to be paid to the bride’s father and this was in addition to the earlier bride price he would have paid. Further, the husband forfeited his right to divorce. This provision forces specific performance from the husband.

The exit cost of the Mosaic legislation was high. Divorce was justified for some reasons. During divorce, the innocent party was given the property rights to the bride price: if the husband was innocent, he got back the bride price he paid, plus interest, and so was guaranteed he could pay a bride price to remarry; if the wife was innocent, her father kept the bride price, which would guarantee for his daughter that he could negotiate another husband for her. The bride price that the father kept makes his

\textsuperscript{16} Ex 22:16-17
16 "If a man entices a virgin who is not betrothed, and lies with her, he shall surely pay the bride-price for her to be his wife. 17 If her father utterly refuses to give her to him, he shall pay money according to the bride-price of virgins. NKJV

\textsuperscript{17} Deut 22:13-19
13 "If any man takes a wife, and goes in to her, and detests her, 14 and charges her with shameful conduct, and brings a bad name on her, and says, 'I took this woman, and when I came to her I found she was not a virgin,' 15 then the father and mother of the young woman shall take and bring out the evidence of the young woman's virginity to the elders of the city at the gate. 16 And the young woman's father shall say to the elders, 'I gave my daughter to this man as wife, and he detests her; 17 now he has charged her with shameful conduct, saying, "I found your daughter was not a virgin," and yet these are the evidences of my daughter's virginity.' And they shall spread the cloth before the elders of the city. 18 Then the elders of that city shall take that man and punish him; 19 and they shall fine him one hundred shekels of silver and give them to the father of the young woman, because he has brought a bad name on a virgin of Israel. And she shall be his wife; he cannot divorce her all his days. NKJV
divorced daughter more “attractive” to potential mates even though women after divorce are “less highly valued” in the marriage market than before their first marriage (Cohen 1987: 268).

From a contractual perspective, the bride price is a form of hostage taking that forces performance of both the husband and the wife. It also protects the quasi-rents of mainly the wife. The bride price also eliminates strategic or opportunistic terminations of the contract by the breadwinner. Cohen suggests that the bride price is tied only to the husband’s performance and under certain conditions can be seen as a payment for sex (1987: 292). Accumulating the bride price allows the bridegroom to signal his high quality to prospective brides and hence would make his marriage vows more believable. “A higher quality promise motivates a more valuable return promise” (Goetz and Scott 1980: 1285). If the marriage vows are believable and any breach is compensated to the party not at fault, it allows a more traditional family to exist i.e. the husband as the breadwinner, and the wife in a more marriage specific relationship of homemaker and child rearer. Further, it allows families to invest in children and have more children.

Moreover, in a married state with the bride price in the bride’s home, it increases the bargaining power of the bride. The bride price also discourages divorce and consequent break up of the family by making divorce costly for both the husband and wife. Table 2:4-2 shows the effect of the bride price in changing the surplus for two couples (Note: This table is a modification of table 2:3-1). The positive surplus for both

\[\text{18 A quasi rent is a “return to one party in a contract above what the party could receive if the contract could be dissolved at will at that moment” (Cohen 1987: 287).}\]
\[\text{19 A useful thing if the religion like numerical growth, which most evangelical religions do.}\]
couples results in them staying together regardless of whether the laws are based on mutual consent divorce or unilateral divorce. The bride price that is paid upon a contractual breakdown to the innocent party is quite large and from today’s economic perspective, it could be argued is above the expectations damages level.

**Table 2:4-2: Surplus of marriage to two couples under a bride price regime.**

<table>
<thead>
<tr>
<th>Value of Marriage</th>
<th>Couple 1</th>
<th>Couple 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>John</td>
<td>$14</td>
<td>Tom</td>
</tr>
<tr>
<td>Jane</td>
<td>-$10</td>
<td>Nancy</td>
</tr>
<tr>
<td>Initial Value</td>
<td>$4</td>
<td>-$4</td>
</tr>
<tr>
<td>Bride Price</td>
<td>$6</td>
<td>Bride Price</td>
</tr>
<tr>
<td>Final Value</td>
<td>$10</td>
<td>$2</td>
</tr>
</tbody>
</table>

The bride price serves as a mechanism for reducing uncertainties in the future. The uncertainties of the future could reduce the benefits from marriage or make performance difficult but the bride price makes for a less risky marriage (Scott and Scott 1998: 1267). For example, the bride price serves as life insurance on the husband, protecting the wife and children in case of the husband’s premature death.

Another avenue for remarriage was through the death of one’s spouse. Death by capital punishment resulting from unlawful acts created a lawful separation and so justified divorce and remarriage\(^{20}\). Rushdoony argued that any unlawful act punishable by death under the Mosaic legislation should, if committed today, still justify divorce, whether or not the act is today considered a capital offence or actually results in death.

\(^{20}\) Obviously, the person wanting to exit the marriage is not going to openly commit a capital crime, making exit very difficult if not impossible.
Rushdoony lists nineteen capital crimes that men could commit, including adultery, rape, homosexuality, premeditated murder, apostasy, and blasphemy (Rushdoony 1973: 402). Seven crimes punishable by death applied specifically to women, including unchastity before marriage, adultery and prostitution, but they were not exempt from other general capital crimes, such as murder (Rushdoony 1973: 402).

Substantial failure to perform the marriage vow was also grounds for divorce. For example, failing to provide food, clothing, and sexual relations was sufficient cause for divorce. Divorce was allowed in cases of consanguinity and mixed marriages (Rushdoony 1973: 403). Finally, a husband could write his wife a “certificate of divorce” (Deuteronomy 24:1-4) for some uncleanness, which, according to Rushdoony, was probably referring to lesbianism (Rushdoony 1973: 405), which was not a crime punishable by death unlike male homosexuality. This passage has also been seen as giving the husband the right to unilateral divorce, this right is only limited by the ketubah (Broyde and Reiss 2004: 10).

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21 Deut 24:1-4

24:1 "When a man takes a wife and marries her, and it happens that she finds no favor in his eyes because he has found some uncleanness in her, and he writes her a certificate of divorce, puts it in her hand, and sends her out of his house, 2 when she has departed from his house, and goes and becomes another man's wife, 3 if the latter husband detests her and writes her a certificate of divorce, puts it in her hand, and sends her out of his house, or if the latter husband dies who took her as his wife, 4 then her former husband who divorced her must not take her back to be his wife after she has been defiled; for that is an abomination before the LORD, and you shall not bring sin on the land which the LORD your God is giving you as an inheritance.\n
NKJV

22 The premarital contract “contained terms regulating the conduct of each party in the marriage and discussing the financial terms would the marriage dissolve through divorce or death” (Broyde and Reiss 2004: 11).
4.1.a The Evolving Jewish Application of the *Mohar*

The application of the *mohar* by the Jews has evolved over time. Some of the innovations on the Mosaic legislation increased the bargaining power of the man at the expense of the woman and her family thereby decreasing the stability of marriage. The *ketubah* evolved to the point where the husband paid to the wife a fixed amount of 200 *zuz* and 200 *zekukim* of silver (Broyde and Reiss 2004: 1). This fixed sum unlike a proportional amount based on one’s earnings created many problems. Many men could not afford to pay this amount and many women were not willing to marry without the *mohar*. Therefore, economic and human necessity produced innovations. Consequently, to encourage marriage and lower the immediate entry cost the bridegroom was allowed to pay the *mohar* later\(^{23}\). Further, while the bride’s father was the initial trustee of the *mohar*, this changed when the father-in-law became the trustee. This allowed the husband to have access to the *mohar* that typically was invested in household utensils. While the husband benefited immediately from the *mohar*\(^{24}\), the wife’s position was weakened in case of a divorce (Friedman 1976: 24). In the end, the bridal price during the late biblical and post biblical times “became a lien to be paid by the husband in case of divorce, or by his heirs in case of his death” (Schauss 1950: 142). Other changes occurred among the Jews as they were dispersed around the world. The Hellenized Jews of Egypt practiced the dowry (Satlow 2001: 201). The Babylonians and Palestinian Jews had variations in the practice of the *ketuba* (Satlow 2001: 202).

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\(^{23}\) In some circumstances, the bride’s father paid a dowry so the marriage could occur.

\(^{24}\) This enhances the wife’s ability to provide augmentation capital as a flow of services.
In the US, the value of the 200 zuz and 200 zekukim has been valued from $180 to $55,000 depending on how the Rabbi’s calculates it. The latter high estimate is tied to one year’s support. These amounts can be further reduced by 87.5% since pure silver is not needed (Broyde and Reiss 2004: 7). The financial components of the ketubah have rarely been enforced in US courts and it is usually not litigated. The New York Supreme Court has said “even for the observant and Orthodox, the ketubah has become more a matter of form and ceremonial document than a legal obligation” (In Re Estate of White, 1974). In a later case, the New York Court of Appeals, required the couple to arbitrate with the bet din (Jewish religious court) without discussing financial obligations of the ketubah (Avitzur v. Avitzur, 1983). An Arizona court has ruled that the courts might enforce the ketubah if the ketubah was very specific (Victor v. Victor, 1993). In conclusion, while the miniscule value of the ketubah reduces the wife’s bargaining power, women cannot be divorced against their will. The husband has to negotiate with his wife and provide her with sufficient compensation to leave the marriage (mutual consent). This compensation could be higher than the value of the ketubah. Hence, one should see lower divorce rates among the Jewish population in the United States since Jewish divorce includes mutual consent and a exit cost (see table 2:4-3). If there is the issue of fault with one spouse, it does strengthen the other spouse’s negotiating power.

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25 Values are based on the value of silver on August 6, 2002
26 The last estimate is not changed as it is based on a years’ salary.
4.1.b The Christian influence in Shaping Marriage and Family Law

The Christian influence in family law has been substantial when seen from a contractual perspective. Primarily it raised the level of women to be equal to a man which meant it made her an equal partner in the contract. Secondly, it defined the marriage along quantitative\(^\text{27}\) (two persons) and qualitative (male and female) lines eliminating various other contractual and competing arrangements. Thirdly, it increased the status of children allowing them to be more effectively used as hostages in keeping the family together. Fourthly, it increased the status of the family government over and above civil and church government\(^\text{28}\) thereby strengthening marriage and family and changing social mores to support the family.

Family law in the west has changed overtime in the past 2000 years. Starting in the fourth century AD, attempts were made to collect all imperial ordinances in a codex or corpus juris. The first two attempts resulted in the Codex Gregorianus and Codex Hermogenianus, of which only fragments remain. The Codex Theodosianus, which was compiled between 429 and 438 AD under Theodosius II, contained laws passed by Christian emperors from Constantine onwards along with certain non-Christian elements.

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\(^{27}\) Polygamy creates various problems. They include the man having to spend equal time and equal resources for each of his wives. Further issues of jealousy, in-laws, child up bringing, and other disputes weakens families.

\(^{28}\) The Christian influence can be seen in the 1828 Webster dictionary’s definition for government. Webster’s first and second definitions of “government” refer to individual self-government, his example being: "Men are apt to neglect the government of their temper and passions." Secondly, government meant the family, the basic governmental institution. "Exercise of authority by a parent or householder.” Webster’s fourth definition, clearly speaks of the family. Here, one learned about family "law," execution of those laws, God, and life's lessons. His third definition of government and his definition of “churchdom” imply government by the church. This broad, third definition also deals with school, business/vocation and private associations, which by social expectations also serve to govern. Finally, in his fifth through eighth definitions, Webster focuses on the state as government, i.e., “civil” government, “civil” distinguishing this form of government from the others (Webster 1828).
(Schaff 1867: 110). Between 527 and 534 AD, during the reign of Justinian I, the celebrated *Codex Justinianeus* was compiled and became the law of the Roman Empire. It, too, contained both Christian and non-Christian elements. The *Codex Justinianeus* has this preface for the section on family law:

Previous Legislation has dealt with aspects of these matters piecemeal. Now we seek to put them all together and give the people certain clear rules of conduct so as to make the family (*de nuptiis*) the standard form of life for all human beings for all time and everywhere. The purpose of this is to guarantee artificial immortality to the human species. This is the Christian way of life (Zimmerman and Cervantes 1956: 61).

In 321 AD, Constantine permitted women to have the same rights as men in controlling property. He also removed old Roman penalties against celibacy and childlessness\(^\text{29}\); he forbade marriage between certain degrees of blood relationship (prohibitions derived from the Old Testament); made adultery a serious crime; and made rape of widows and consecrated virgins punishable by death. In 390 AD, Theodosius I allowed a mother to have “certain right” of guardianship of her children. Justinian forbade marriage between godparent and godchild. The state wavered between the Church doctrine of limiting divorce strictly to instances of adultery and the much more liberal old Roman view\(^\text{30}\). Constantine forbade concubinage and broadened the definition of adultery (which previously applied only to “illicit sexual relations with a married woman who was a free citizen”). The laws stopped short, however, of criminalizing sexual relations with female slaves (Schaff 1867: 113).

\(^{29}\) The *Julian laws* for example did not allow one to get inheritances (www.wikipedia.org, Lex Julia)

\(^{30}\) Note: The Mosaic legislation allowed for divorce for other cases also.
Alexander Severus and Constantine rescinded the old Roman or Pompeian law, which allowed fathers to kill their children. The selling of children as slaves and exposure of children by their fathers was difficult to stop and was practiced by those especially in the laboring and agricultural classes, despite legislation by Valentinian and Theodosius I designed to minimize such practices (Schaff 1867: 114).

Zimmerman and Cervantes give a five-point analysis of the reform of the emperor Justinian and his empress Theodora: First, only marital heterosexual relations were considered legal; Second, the law applied to all social classes with no exceptions; Third, those sexual acts deemed illegal were punishable by law, especially commercialized sex; Fourth, “contracts involving non-family sex activities as repayment for support or gifts were made illegal” and concubinage lost their legal status; And fifth, these reforms strengthened the family and established it as the foremost factor in societal progress (1956: 61f).

The laws of inheritance and property were also changed to reflect the dominant role of the family. For example, only the legitimate wife and her children could inherit the property, not a concubine or mistress. The family was “now far more than the basic social unit: it was in essence the social system” (Rushdoony 1973: 200) enhanced by Christianity with a present and forward looking perspective.

These reforms by Justinian in family law held for many centuries. However, starting in the Age of Reason (enlightenment), the family law started changing from the earlier era of the Age of Faith back to the even earlier era of pre-Christian Rome. “The Age of Reason saw man as reason incarnate, and woman as emotion and will, and
therefore inferior” (Rushdoony 1973: 349). This change can be seen in the early 19th century law books and clearly were instrumental in decreasing the bargaining power of the wife in the marriage contract. For example:

The legal theory is, that marriage makes the husband and wife one person, and that person is the husband. He is the substantive and she the adjective. In a word, there is scarcely a legal act of any description, which she is competent to perform. The common reason assigned for this legal disfranchisement of the wife, is, that there may be an indissoluble union of interest between the parties. In other words, lest the wife might be sometimes tempted to assert rights in opposition to her husband, the law humanely divests her of rights (Walker 1837: 223)\(^31\).

In one case when the wife was charged with murder of her illegitimate child by failing to provide proper food, the judge in the case talks about the wife as the servant of her husband (Wharton 1853: 163). In the 20\(^{th}\) century this change has continued where, there is now a “battle of the sexes.” In the United States divorce is granted on demand for pretty much any reason, unborn children are killed with the mother being the controlling authority now, and traditionally custody has been granted to the women\(^32\).

During the 20\(^{th}\) century, a number of Christian scholars advocated a return to a body of family law that was in accord with Judeo-Christian model of marriage to strengthen the family. However, to make this work, couples will have to write special prenuptial agreements since modern law does not reflect the Judeo-Christian model. Table 2:4-3 shows the result of religion (Christianity and Judaism) on divorce. Attending religious service frequently lessens the likelihood of divorce. There is a difference between Protestant and Catholics. The Catholics in general have strongly come out

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\(^{31}\) This language carries through until the 10\(^{th}\) edition of this book which was published in 1895.

\(^{32}\) This is now changing in favor of joint legal and physical custody (Lecter 2005: 407).
against divorce unlike many protestant denominations hence providing an extralegal mechanism to strengthen marriage. Further, Christians do not practice any form of bride price other than the engagement ring, hence entering and exiting the marriage is relatively easy. In another study, when one moves from those whose religious beliefs are “somewhat important” to “very important,” there is a 22 percent decrease in “subsequent divorce.” (Knoester and Booth 2000: 90).

Table 2:4-3: Percentage of Marriages ending in separation/divorce each year by religious characteristics (Call and Heaton 1997: 386).

<table>
<thead>
<tr>
<th>Affiliation:</th>
<th>Husband</th>
<th>Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>3.6%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Liberal Protestant</td>
<td>1.7</td>
<td>2.0</td>
</tr>
<tr>
<td>Moderate Protestant</td>
<td>2.0</td>
<td>1.7</td>
</tr>
<tr>
<td>Conservative Protestant</td>
<td>2.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Catholic</td>
<td>1.8</td>
<td>1.9</td>
</tr>
<tr>
<td>Jewish</td>
<td>1.6</td>
<td>1.0</td>
</tr>
<tr>
<td>Other</td>
<td>1.7</td>
<td>2.3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Attendance:</th>
<th>Husband</th>
<th>Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>2.8</td>
<td>2.7</td>
</tr>
<tr>
<td>Once a year</td>
<td>2.6</td>
<td>3.3</td>
</tr>
<tr>
<td>Several times a year</td>
<td>2.5</td>
<td>2.5</td>
</tr>
<tr>
<td>About once a month</td>
<td>2.4</td>
<td>2.4</td>
</tr>
<tr>
<td>2–3 times a month</td>
<td>1.7</td>
<td>2.1</td>
</tr>
<tr>
<td>Every week</td>
<td>1.1</td>
<td>1.1</td>
</tr>
<tr>
<td>More than once a week</td>
<td>1.4</td>
<td>1.6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Religious Belief:</th>
<th>Husband</th>
<th>Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td>(have traditional orthodox religious beliefs)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strongly agree</td>
<td>1.5</td>
<td>1.8</td>
</tr>
<tr>
<td>Agree</td>
<td>2.0</td>
<td>2.1</td>
</tr>
<tr>
<td>Neither agree nor disagree</td>
<td>2.1</td>
<td>2.1</td>
</tr>
<tr>
<td>Disagree</td>
<td>2.0</td>
<td>1.9</td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>2.6</td>
<td>2.1</td>
</tr>
</tbody>
</table>

One puzzle that economists have not looked at is why with increasing church membership (see Figure 2:4-1) there are still high divorce rates amongst Christians in the US. Even though Christian doctrine discourages divorce, the divorce rate amongst Christians is still high compared to the past. As stated earlier very few if any Christians
actually pay a bride price for entry, but there are other reasons that economists have not looked at\textsuperscript{33}. One hint comes from Stephen Prothero a historian of American religion. He notes that in America faith is “almost entirely devoid of content” (2007: 1). He remarks that early in the History of the United States, the “God-fearing faith of Calvinism yielded to the Jesus-loving faith of evangelicalism, and American religion became less intellectual and more enthusiastic” (Prothero 2007: 46f). He states that in the 19\textsuperscript{th} century the battle between piety and learning resulted in piety winning. Christianity today is about “loving Jesus; it does not require knowing much of anything at all” (Prothero 2007: 87). This lack of understanding of basic Christian teaching much less more advanced doctrine like marriage, divorce, and family government is a driving force in the increasing divorce patterns in the United States where more than 80\% of the people profess Christianity. Therefore, Christianity in the United States through the Church does not provide any efficient extralegal enforcement mechanism through community expression of norms.

While this ignorance (lack of knowledge) might be easy to quantify today, going back decades might be difficult to quantify without using some sort of proxy. This quantification I have not been able to find in the literature today. However, some hints emerge as to what occurs when doctrines from a religion do not play a part in people’s life. In Denmark, since there is no stigma attached to cohabitation, 78\% of marriages have been preceded by “trial marriages.” And those who engage in this lifestyle and marry have a lower risk for divorce (Svarer 2004). This contradicts many earlier studies.

\textsuperscript{33} Various theologians have studied this matter.
done on cohabitation in the United States where cohabitation still does carry a stigma among a large percentage of the population.

Figure 2:4-1: Church membership in America 1776-1980 (Iannaccone, et al. 1997: 357).

4.2 Islamic Legislation

Islam seeks to expand through natural increase, persuasion, and conquest. Therefore, the Quran encourages the having of children, polygamy\(^{34}\), and marrying non-believers regardless of economic considerations from the Beckerian model. From a

\(^{34}\) During war, the male population will decrease allowing the remaining men to marry more women and propagating the faith of the man through the children.
relational contract perspective, Islam gives the man the stronger bargaining position. Allowing polygyny results in a non-secure monogamous marriage contract. Some of the analysis on the Jewish bride price will apply here.

The case of high entry and low exit costs is found in Islamic legislation. Islamic legislation requires that a dowry (mahr) be paid. The dowry is to be paid from the man to the woman, is to be equitable, and cannot be forfeited. The dowry is considered a gift from the man to the woman and belongs exclusively to the woman. The husband and wife can adjust the dowry and this is possible only because the full dowry is usually not paid at the time of marriage. This later provision weakens the bargaining position of the woman who could be pressured by her husband to reduce the amount. Since the man does not have to pay up front the dowry, this allows for younger age of marriages.

If a woman initiates the divorce (this procedure is more difficult than for men), she is responsible for returning either part or the full amount of the dowry. This divorce is called khula meaning literally ‘to take off clothes and then to lay down one’s authority over a wife’ (Syed 2004: 67). If there are legitimate reasons for the divorce (“such as cruelty, mental cruelty, breaking of the marriage contract, adultery, desertion, incurable insanity, long-term imprisonment, abandonment of Islam” (http://www.islamfortoday.com/ruqaiyyah07.htm), then the woman usually does not have to return the dowry. If the divorce is by mutual consent and mutual aversion, then it is called mubaraa. In this case, who compensates whom has been debated by various Muslim scholars (Syed 2004: 68).
For a man to exit the marriage, he has to finish paying the dowry if there is a portion left. He will then have to provide lawful maintenance (nafaqah) for his wife and children (Darsh and Droubie 1985: 124) the length of time and amount of which is widely variable (Syed 2004: 92), but it is usually the length of the idda. The idda is a period of four months and ten days (occasionally less), and for a husband to provide maintenance for that period of time is not a heavy financial burden (Swarup 2002: 82). Further, all he has to do is say “talaq” (literally means “undoing the knot”) three times. While saying the triple talaq all at once is discouraged it is nevertheless binding in some countries (Syed 2004: 64)\(^{35}\). For example, a drunken husband’s triple talaq can be binding. Usually saying the triple talaq is a lengthy affair of around three months (but not necessarily costly in terms of monetary issues) and for the Shiites the process is even more cumbersome. If the man wants to remarry his wife after the triple talaq, the procedure is cumbersome. He has to first allow her to marry another man. This second man must consummate the marriage and then divorce her. Only then will she be able to remarry her original husband (Quran 2:230\(^{36}\)).

Among a certain sect of Shiite Muslims, a practice called muta or sigeh is practiced. Muta is a temporary marriage where a contract is dictated by the man as to the length of the marriage. Money is also exchanged during this period. This marriage can last for a few minutes to many days. Critics of this arrangement consider it prostitution. For example, many well to do Arabs visit poorer societies like India and Indonesia and

\(^{35}\) The easy exit for men and their ability to have 4 wives has led to the abuse by some of gifting their wife’s or divorcing their wife for another woman (Swarup 2002: 78).

\(^{36}\) [2:230] If he divorces her (for the third time), it is unlawful for him to remarry her, unless she marries another man, then he divorces her. The first husband can then remarry her, so long as they observe GOD's laws. These are GOD's laws; He explains them for people who know (http://www.submission.org).
marry local girls for a few days and divorce them when they return to their home countries (http://www.freenewmexican.com/news/45724.html). The local population accepts this practice because the girls get a large gift from the Arabs that can then be used to make themselves attractive to a local husband.

Islam permits polygyny. Men are allowed to marry up to four wives (Quran 4:3) and there is no prohibition as to the number of slave concubines they can have (Swarup 2002: 68). Polygyny is permitted conditional on there being justice otherwise only one wife is recommended and the Quran acknowledges that justice is difficult (Quran 4:129). Men can marry nonbelievers (Jews or Christians) but female Muslims cannot marry a nonbeliever (Quran 5:5).

The allowance for polygyny in Islam would make marriage not a reciprocal contract. While the contract might be reciprocal between the man and each of his two wives for example, the relationship between the two wives is unlikely reciprocal. The dowry makes for a higher quality promise between the husband and wife but the different exit paths for men and women results in weakening the position of the woman and allows for strategic breach. The threat of the husband proposing a second and younger wife weakens the promise between the first wife and her husband. The division of the marital

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37 [4:3] If you deem it best for the orphans, you may marry their mothers - you may marry two, three, or four. If you fear lest you become unfair, then you shall be content with only one, or with what you already have. Additionally, you are thus more likely to avoid financial hardship (http://www.submission.org).
38 [4:129] You can never be equitable in dealing with more than one wife, no matter how hard you try. Therefore, do not be so biased as to leave one of them hanging (neither enjoying marriage, nor left to marry someone else). If you correct this situation and maintain righteousness, GOD is Forgiver, Most Merciful (http://www.submission.org).
39 …Also, you may marry the chaste women among the believers, as well as the chaste women among the followers of previous scripture, provided you pay them their due dowries...(http://www.submission.org).
surplus (like love, friendship, raising children etc) is also in question in a polygamous marriage. The concurrent ownership rule is impractical and fraught with mistrust and jealousies. The distribution of assets if one of the wife’s divorces her husband or is divorced by her husband also gets complicated in terms of compensation over and above the mahr and nafaqah.

In the US, there are now millions of foreign-born residents living here. Many of these foreign born are Muslims many of whom have agreed to pay a mahr for their marriages. Since the mahr can be paid after the marriage has occurred, the Courts have found themselves in the midst of divorce proceedings where the mahr is at issue. In many ways, these agreements are similar to the ketubah. In Chaudry v. Chaudry (1978), a New Jersey Court enforced the $1500 mahr and monthly support of $430 for a couple whose wife and three children were living in Pakistan and the husband was a psychiatrist in New Jersey. The couple had married in Pakistan. On appeal, the court enforced the mahr but not the child support since Pakistani law does not allow for alimony after a divorce (http://www.divorcesource.com/research/dl/antenuptial/03mar41.shtml). A 1988 case in California (In Re Marriage of Dajani), the couple had married in Jordan, the court voided the marriage contract as it encouraged divorce and hence was against public policy. In a recent case in New Jersey (Odatalla v. Odatalla, 2002), the court found that the mahr could be enforced as long as the court can rely on principles of contract law

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40 The amount of the dowry was 3000 Jordanian dinars, plus 2,000 dinars in cash or household furniture if the marriage ended in divorce or death. Note that the GDP/capita (current prices) in 1982 (the year of the marriage) was 708.79 dinars (http://econstats.com/weo/woe/C083V016.htm). Therefore, this was the equivalent of over 7 years income in 1982.
without getting involved in doctrinal matters. Muslims cannot practice Polygyny in the US, as it is not legal.

For many foreign born Muslims who were married in their home countries and who now live in the United States, paying of the *mahr* will be relatively easy and therefore the exit cost of marriage is reduced and marriage less secure. This is because the *mahr* in their home countries is likely very large but when coming to the United States, it will be a relatively a lot smaller. There is some evidence to suggest that the divorce rate among Muslims in the US is quite high relative to the divorce rates in many Muslim majority countries (http://montclairmsa.com/alarming-divorce-rates-amongst-muslims-and-reasons-24.htm). Table 2:4-4 shows the divorce rates in majority Muslim countries. Other than Maldives, these numbers are relatively low.
Table 2:4-4: Divorce rate in Muslim countries. The Divorce rate in the United States is 4.0/1000 people in 2002. Source: Divorce rates researched and compiled by Gulnar Nugman of Heritage Foundation (2002).

<table>
<thead>
<tr>
<th>Country</th>
<th>Divorce rate (per 1.000 people)</th>
<th>% Muslim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Azerbaijan</td>
<td>0.7</td>
<td>83.67</td>
</tr>
<tr>
<td>Bahrain</td>
<td>1.31</td>
<td>82.31</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>0.4</td>
<td>60.06</td>
</tr>
<tr>
<td>Brunei</td>
<td>0.72</td>
<td>64.39</td>
</tr>
<tr>
<td>Egypt</td>
<td>1.18</td>
<td>86.52</td>
</tr>
<tr>
<td>Iran</td>
<td>0.69</td>
<td>99.02</td>
</tr>
<tr>
<td>Jordan</td>
<td>1.22</td>
<td>96.19</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>2.35</td>
<td>60.5</td>
</tr>
<tr>
<td>Kuwait</td>
<td>1.58</td>
<td>87.43</td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>1.3</td>
<td>78.08</td>
</tr>
<tr>
<td>Libya</td>
<td>0.24</td>
<td>96.5</td>
</tr>
<tr>
<td>Maldives</td>
<td>10.97</td>
<td>99.41</td>
</tr>
<tr>
<td>Qatar</td>
<td>0.97</td>
<td>79.43</td>
</tr>
<tr>
<td>Syria</td>
<td>0.73</td>
<td>90.32</td>
</tr>
<tr>
<td>Turkey</td>
<td>0.5</td>
<td>99.64</td>
</tr>
<tr>
<td>Turkmenistan</td>
<td>1.1</td>
<td>91.84</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>0.87</td>
<td>65.45</td>
</tr>
<tr>
<td>Uzbekistan</td>
<td>0.61</td>
<td>83.5</td>
</tr>
</tbody>
</table>

4.3 Mormonism (Church of Jesus Christ of Latter-day Saints)

Mormonism from a relational contractual perspective has some similarities to Christianity and some similarities to Islam. However, a lack of entry costs weakens the marriage contract, but extra legal mechanisms like social pressures and Church teachings encouraging family life strengthen the marriage contract.

Mormonism allows for polygamy (polygyny) but the question is why? Census figures indicate that in the past the West (including Utah) had more men than women (see Table 2:4-5). Some have suggested that polygyny was encouraged to satisfy the male sex-drive, but to get another wife the husband has to get the permission of his bishop and
his first wife. Giving the first wife the veto power increases her bargaining power in the marriage. Further, some have suggested that Mormons encourage polygamy to increase their birthrate, but evidence suggests polygamous wives on average have fewer children than monogamous wives. The only reasonable explanation is that it was revealed to the prophet Joseph Smith (Kephart and Zellner 1994: 244).

Table 2:4-5: The population of Utah from 1850 to 1900. This is the time when the Mormon Church accepted polygamy. Source: United States Bureau of Census.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>1850</td>
<td>11,380</td>
<td>6,046</td>
<td>5,334</td>
</tr>
<tr>
<td>1860</td>
<td>40,273</td>
<td>20,255</td>
<td>20,018</td>
</tr>
<tr>
<td>1870</td>
<td>86,786</td>
<td>44,121</td>
<td>42,665</td>
</tr>
<tr>
<td>1880</td>
<td>143,963</td>
<td>74,509</td>
<td>68,454</td>
</tr>
<tr>
<td>1890</td>
<td>210,779</td>
<td>111,975</td>
<td>98,804</td>
</tr>
<tr>
<td>1900</td>
<td>276,749</td>
<td>141,687</td>
<td>135,062</td>
</tr>
</tbody>
</table>

The initial divine revelation on polygamy was kept a secret, but as more people in the leadership of the Mormon Church took on more wives, it could not be kept a secret anymore. The estimate of how much polygamy went on in the 19th century is between 3 and 30 percent. The likely number is somewhere in-between these two numbers. Upper level Mormon men mostly practiced polygamy and most of them had only two wives. While an extra wife and children might help with labor in a farm, additional help will result in diminishing returns.

Mormons also practiced a concept called “celestial marriage.” This marriage was for time and eternity and this marriage was done in Mormon temples. All other marriages (civil or religious) are non-celestial marriages and are for time only and end
with the death of the spouse. This concept ties with polygamy since one could be married to a man for time and eternity and if he dies the woman could remarry another man for time only (Kephart and Zellner 1994: 246).

The popular press attacked Mormonism because of Polygamy. While many laws were passed to try to limit polygamy, they were not very successful in curbing its practice. For example, the Merrill Bill of 1862 against bigamy was not enforceable as in Utah marriages were not registered. The Mormon leadership was confident that the first amendment protected their right to polygamy but the Supreme Court did not side with them. In a case in 1890, the Supreme Court (Davis v. Beason, 1890) ruled:

Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance (pg. 343).

The Edmunds-Tucker Act of 1887 repealed the incorporation of the Church of Jesus Christ of the Latter-Day Saints and set up procedures for confiscating church property. The challenge of this act in the court system resulted in a failure where the Supreme Court upheld the Edmunds-Tucker Act by a 5-4 decision (Mormon Church v. United States, 1890). In 1890, the Mormon church decided to advise its members against polygamy (Davis, et al. 2005: 105ff).

While the Mormon Church encourages the formation of families, there is no high entry or high exit costs in marriage. Therefore, it is likely that Mormon marriages in the United States will follow the pattern in the rest of society. A Barna study seems to indicate that this is in fact the case.
(http://www.mormonstoday.com/000102/N1Divorce01.shtml). However, the divorce rate among the Mormons, which is considered highly sectarian in the economics of religion literature, is at the national average unlike other highly sectarian (Christian) groups which have higher rates.

5) **History of Evolution of Marriage Laws in the US in the 20th Century**

Marriage laws in the US have undergone tremendous change in the 20th century. There are various reasons for the various changes in family law in the United States. Some see laws as driving family change, however, the exogeneity of the legal environment is subject to debate. This section will deal with changes in antimiscegenation laws, divorce laws, taxes etc, and how they affect the family.

**5.1 Entry and Exit in Marriage**

The history of divorce in the early part of the twentieth century is a case of states vying to assert control over its citizens. Many decisions by foreign (other states) jurisdictions were not enforceable in the home state. For example if one was married and lived in New York and moved to Ohio for a divorce and came back to New York, the Ohio divorce would not be recognized in New York. Further, as states were vying for asserting their jurisdictions, many people who wanted a divorce would many times move to another state for obtaining the divorce. Moreover, depending on the state, they would not return to their original state of domicile. Conflicting rulings in the various states resulted in the US Supreme Court interjecting itself three times in the first decade of the
20th century. The Supreme Court emphasized the importance of matrimonial domicile as the area of primary jurisdiction in regards to marriage and divorce and the application of the full faith and credit clause (*Atherton v. Atherton* (1901), *Bell v. Bell* (1901), & *Haddock v. Haddock* (1906)). The *Haddock* case was the key precedent used for solving foreign divorces for the next four decades. It forced conservative states like New York to recognize some foreign divorces based on wife’s domicile (Hartog 2000: 276).

One key development in 1933 was the allowance for divorce based on incompatibility. New Mexico was the first state to allow this and this reduced the need for spouses to show fault ("Divorce" 1998: 123).

From the 1940’s, “migratory divorce” was the next phase of divorce. During this time, Nevada became the Mecca of an easy divorce with residency requirements of only six weeks. Many people from conservative states came to Nevada to establish their residency and get a divorce. One couple (not married to each other) came to Nevada from North Carolina to obtain a divorce from their spouses so they could marry each other. After their marriage in Nevada, they moved back to North Carolina. North Carolina charged them with bigamy and this couple was convicted. The US Supreme Court overturned their conviction and the court’s holding suggested that Nevada’s divorces was entitled to the full faith and credit clause (*Williams v. North Carolina*, 1942). This decision reversed the *Haddock* decision.

The North Carolina prosecutors again took the couple to court on the basis that the couple were never resident in Nevada and hence North Carolina laws still applied. This was again appealed to the US Supreme Court where the holding of the North
Carolina Supreme Court was upheld. *Williams II* (1945) seemed to suggest that Nevada divorces had to be done with professional help. Further, with time the US Supreme Court eroded the holding of *Williams II* and showed disinterest in marriage cases. This forced the conservative states to change course.

Current divorce laws illustrate that marriage is no longer considered a sacred union. Couples do not even stay in “bad” marriages for the sake of the children anymore. Previously, to get a divorce, the pleading party had to show that the other party was at fault. The pleading party had to show that the spouse “had committed some act or activity believed ruinous to the marital relationship, such as adultery, cruelty, or desertion” (Lecter 2005: 411). “Fault” was the basis not only for divorce, but also for judgments regarding alimony and property divisions. Fault-based divorce law did have problems as spouses had to make up stories of fault to be granted divorce. Fault based divorce proceedings could be acrimonious and this was the cause for people advocating reform ("Divorce" 1998: 123).

Today, all the states in the U.S. have no-fault divorce laws, either as the only ground required for divorce or as an additional ground\(^4\). Under these laws, fault does not have to be proven, “all that is required is to claim that there exists irretrievable breakdown or irreconcilable differences between spouses or desertion” (Lecter 2005: 411). The pleading party has merely to show that they are unhappy and that “leaving home or dissolving the marriage is the only solution” (Lecter 2005: 411). Still, some

\(^4\) California started the no-fault divorce law in 1969 (Riley 1991: 163).
states have lengthy separation requirements, Idaho, for instance, at five years and Virginia at one year.

The State of Louisiana passed the “Covenant Marriage Act” in 1997, making more secure any marriage by “covenant contract” by requiring serious grounds for divorce (Waite and Gallagher 2000: 196). Other states that have passed similar legislation include Arkansas and Arizona. Additional states such as Oregon, Georgia, Texas, and Oklahoma are also considering such arrangements.

The changes in family dissolution laws could have been driven by technology as technology changes the costs and benefits of being married (Stevenson and Wolfers 2007: 40f). The introduction of the birth control pill in 1960 in many ways revolutionized the ability of the woman to limit pregnancy and led to the decriminalization of its use. The natural progression for the Courts from birth control pill liberalization led to the liberalization of abortion laws\(^\text{42}\). Further, the introduction of time and labor saving household devices like washing machine, dryer etc might have increased female labor force participation (Greenwood, et al. 2005) which in turn would reduce the need for bride price and drive the need for easy exit in marriage.

There is nothing like a bride price or dowry in the U.S. before entering the marriage. The poor approximation is the diamond engagement ring, which traditionally cost the prospective groom a few months salary. The diamond engagement ring came

\(^{42}\) In *Griswold v. Connecticut* (1965) the Supreme Court found the right to marital privacy in the issues of contraception. The right to privacy though not explicitly stated in the constitution, was found in the penumbra of other constitutional provisions like in the Third, Fourth, Fifth and Ninth Amendment (Hull and Hoffer 2001: 84). The Supreme Court extended the right to privacy to unmarried couples in *Eisenstadt v. Baird* (1972). Finally, in 1973, in *Roe v. Wade* (1973) and Doe v. Bolton (1973) the Supreme Court said that the right to privacy includes abortion and abortion was to be legal for any reason till full term.
about with the abolition of “breach of promise to marry.” When the fiancé breaks of a marriage, the woman could sue for damages. This was to compensate the women from the stigma of the possible loss of virginity (Brinig 1990: 205).

Starting in the mid 1930’s many states eliminated the breach of promise laws. This according to Brinig increased the demand for a bond or pledge. The diamond ring served as a collateral such that the person breaking the contract would lose property rights to the ring (1990: 213).

5.2 Tax Laws

Economists have written very little about tax laws and how they affect marriage. When the federal government initially passed the federal income tax, one’s marriage status did not determine the tax one paid. The federal government taxed everyone as an individual. In 1948, Congress allowed married people to join their tax returns; this provided a “tax advantage” to those who were married. Initially the joining of tax returns was to maximize tax revenue as many upper income tax payers were passing on income producing assets to their wives to reduce their tax burden under the progressive tax. Further, states with Spanish heritage considered earnings and assets of husband and wife as “community” property meaning they were jointly owned. This automatically reduced their federal tax liability if the wife was not employed. Many people moved to these states to take advantage of these rules. From 1948 to 1969, there was no “marriage penalty” (Davis, et al. 2005: 193).
The income tax law was modified in the 1960’s to eliminate the “singles’ penalty.” However, as more families tended towards dual income status, the filing jointly return had a marriage penalty. In 1986, Congress tries to mitigate this penalty by introducing the standard deduction, but even then in 1988, 40 percent of married couples still paid penalty of approximately $1100 (Bartlett 1995). The 1993 tax increase further exasperated this problem by creating two new tax brackets and provisions in the Earned Income Tax Credit increased the marriage penalty. Therefore, the tax increase affected mostly the poor and the rich (Bartlett 1995). In the late 1990’s, further criticisms were raised to minimize or eliminate the marriage. In 2003, Congress passed the “The Jobs and Growth Tax Relief Reconciliation Act of 2003” which eliminated the marriage penalty for those in the 15 percent tax bracket or below. However, this provision is set to expire unless renewed. Ultimately the real solution to eliminating the marriage penalty would be to eliminate the progressive nature of income tax.

One study by economists has shown that the marriage penalty does have a small but significant effect on marriage. For men there is no effect, but for women, the marriage penalty does reduce the likelihood of marriage\footnote{Women are considered secondary earners.} and that the changes in the marginal tax rate also has a significant effect (Alm and Whittington 1999).

Additionally, there continues to be a marriage penalty in the Social Security benefit system. Couples where both worked in the labor force, get fewer benefits if they are married than if they were divorced. This has discouraged some senior citizens from remarrying after a divorce or death of their spouse.
Further, the Negative Income Tax experiment of the 1960’s and 1970’s also affected the stability of marriage. The negative income tax (NIT) “provides payments to persons whose income falls below a certain floor” (Murray 1994: 149). Studies indicate that when comparing families that received NIT payments with a control group not receiving payments, the dissolution of marriage was higher by 36 percent for whites and 42 percent for blacks. These numbers were from Seattle and Denver, but other locations also indicated disastrous consequences for marriage stability (Murray 1994: 152).

5.3 Anti-Miscegenation laws

Various states in the US banned interracial marriage for many years. Even the Supreme Court in the 19th century did not favor overturning state laws that banned interracial marriage\(^{44}\). In 1912, Seaborn Roddenbery, a Representative from Georgia introduced an amendment to the US constitution banning the intermarriage between the Negro race and Caucasian race\(^{45}\). While the ban on interracial marriage was strongly favored in the early part of the 20th century, the rest of the century proved to be one of rolling back the laws against interracial marriage (Wallenstein 2002: 136).

Until the 1940’s, 30 states had laws against interracial marriage. The enforcement of these laws affected people’s liberty and property. For example, the death of one’s spouse could result in the other spouse not getting the property because of the race issue.

\(^{44}\) In *Pace v. Alabama* (1883) and *Maynard v. Hill* (1888) cemented the Supreme Court position. The latter case made marriage not a federal matter. Marriage was not to be looked to as a contract protected by the full faith and credit clause (Article IV, Section I) of the constitution.

\(^{45}\) The proposed amendment states: “Interruption between Negroes or persons of color and Caucasians or any other character of persons within the United States…is forever prohibited, and the term Negroes or persons of color…shall be held to mean any and all persons…having any trace of African blood” (Wallenstein 2002: 133).
Those who worked to overturn these laws by appealing to the fourteenth amendment equal protection clause met with failure from the judicial system both within the federal judiciary and within state courts.

The first break through in these marriage laws came from California. A black man (Sylvester Davis) and a white woman (Andrea Perez) were denied a marriage license. They took legal action and argued based on the fourteenth amendment as they were denied rights to marry due to their race. They also argued based on the First amendment where they were denied religious freedom to participate fully in their religion of Catholicism. In October 1948, in a 4-3 decision, the California Supreme Court favored the marriage of Davis with Perez. The majority argued for marriage being a fundamental right and more than a contract and made creative use of precedent. One of the judges compared the notion of keeping the purity of the race with Hitler’s vision laid out in Mein Kampf. If the US went to fight the Nazis, then their ideology should not be tolerated in the United States (Wallenstein 2002: 189ff).

After this California decision, many western states followed suit. Moreover, by 1959, over half the states in the US allowed for interracial marriages (see Table 2:5-1). In the 1960s, only seventeen states (all in the South) banned interracial marriage. The Loving v. Virginia decision of the Supreme Court overturned all bans on interracial marriage. Mr. & Mrs. Loving lived in exile in Washington D.C. to avoid jail time in Virginia which did not recognize their marriage. Their desire to move back to Virginia to be with family meant that Virginia’s miscegenation laws had to be changed. An ACLU

46 Their case took on many names as it progressed: Perez v. Moroney, Perez v. Lippold, Perez v. Sharp (1948)
attorney helped them reopen their case. While the Virginia Courts did not side with the Lovings, the lawyers appealed the case to the US Supreme Court. The Supreme Court ruled in 1967 that antimiscegenation laws were unconstitutional (Wallenstein 2002: 223).

Table 2:5-1: States with antimiscegenation laws and when they overturned their laws through state action.

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>1780</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1843</td>
</tr>
<tr>
<td>Iowa</td>
<td>1851</td>
</tr>
<tr>
<td>Illinois</td>
<td>1874</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1881</td>
</tr>
<tr>
<td>Maine and Michigan</td>
<td>1883</td>
</tr>
<tr>
<td>Ohio</td>
<td>1887</td>
</tr>
<tr>
<td>California (court decision)</td>
<td>1948</td>
</tr>
<tr>
<td>Oregon</td>
<td>1951</td>
</tr>
<tr>
<td>Montana</td>
<td>1953</td>
</tr>
<tr>
<td>North Dakota</td>
<td>1955</td>
</tr>
<tr>
<td>South Dakota and Colorado</td>
<td>1957</td>
</tr>
<tr>
<td>Idaho and Nevada</td>
<td>1959</td>
</tr>
<tr>
<td>Arizona</td>
<td>1962</td>
</tr>
<tr>
<td>Utah and Nebraska</td>
<td>1963</td>
</tr>
<tr>
<td>Wyoming and Indiana</td>
<td>1965</td>
</tr>
<tr>
<td>Maryland</td>
<td>1967</td>
</tr>
</tbody>
</table>

* The following states had antimiscegenation laws that were overturned by the Loving decision: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Source: (Wallenstein 2002: 254).

Two economic models can be used while discussing interracial marriage. One model is the search/interaction model and the other is equilibrium sorting marriage model. The latter is an extension of Becker and the former was developed by Adachi (2003). Fryer finds that the search/interaction model simulations over predict interracial marriage compared to what really occurs. Further, this model fails to capture how trends change over time (Fryer 2007: 88). The extension of Beckerian assortative model uses
individuals with two traits. The first trait identifies race (black or white) and the second trait identifies human capital (low or high). If race is more costly to household production compared to a low education then there is race segregation. If the cost is vice versa, then interracial marriage will occur and positive assortative mating on education. However, marriage within the same race will still dominate as interracial marriage still has some costs. This model also predicts what happens over time. Since interracial marriage was costly in the past, there was less interracial marriage, but now with less cost associated with interracial marriage interracial marriages occur more frequently (Fryer 2007: 89).

5.4 Post marriage arrangements

Historically children have been awarded to the mother at divorce. Today, the judge has more leeway. If the divorcing couple is conciliatory, then joint custody is popular. Marital misconduct is also an important factor in custody issues. Child support is based on the means of both the parents. The primary caretaker of small children might be exempt from having to find a job, as their care of the child is considered equivalent to providing support ("Divorce" 1998: 124).

Property distribution after marriage can be a very contentious issue. Property includes real estate, stocks, bonds, cash, retirement benefits, personal property, etc. Each state has different laws on how property is divided, but in general, there are two categories of states. The first category is equitable distribution and the second category is community property. The first category is followed by most states and this method
“provides that courts divide a divorcing couple’s assets in a fair and equitable manner
given the particular circumstances of the case” ("Divorce" 1998: 124). In the second
category, any property that is acquired during marriage is considered belonging to the
marital community. This means that at divorce, the husband and wife get half of the
property. There are exceptions to this rule (For additional details, see section 3).

Alimony or spousal maintenance is defined as when one spouse provides
financial support to the other spouse. In the past, the common law provided support to
the wife from her husband. Under contemporary law, either spouse can theoretically get
spousal maintenance. Sometimes the spousal support is temporary until the other spouse
either remarryes or is self-supporting. Fault is also an important consideration in many
states in determining issues of spousal maintenance. Premarital agreements can also play
a role in determining spousal maintenance ("Divorce" 1998: 125).

5.5 Miscellaneous Laws

The dower system was given to the widow, who typically did not own property,
from the husband’s estate at his death. The dower system has essentially been replaced
by “laws of descent and distribution, divorce and property distribution, and use of joint
tenancies, tenancies-in-common, and tenancies by the entirety” (Lecter 2005: 429).

Marriage as a contract appealed to some. “Feminists [prenuptial] contracts” lay
out what the obligations of the husband and wife were in marriage. Some prenuptial
contracts also discussed what would occur if a divorce occurred. The courts take
Annulment and certain prohibitions define the boundaries of acceptable marriages. Annulment is allowed for a variety of reasons including “insanity, fraud, force, duress, impotency, being underage and polygamy” (Lecter 2005: 365), and, in some states, if the bride or groom has AIDS or venereal disease. A marriage that would unite close blood relatives is that most commonly prohibited.

In the 1990’s, welfare reform law (The Personal Responsibility and Work Opportunity Act) was passed. Aid to Families with Dependent Children almost tripled its caseload from the mid 1960’s until the early 1990’s. The welfare reform law focused on marriage as a solution to the increased welfare caseload. This Act encouraged states to reduce out of wedlock pregnancies and went after “deadbeat” dads. The Act required people to work and get married (Davis, et al. 2005: 221).

Always prohibited, but very recently subject to controversial challenge, was “marriage” between those of the same sex. In the United States, homosexual marriages are illegal and many states have constitutional amendments against recognizing these types of marriages even if other states okay them. The 21st century will continue to see this issue debated vigorously unless the courts co-opt this issue.

6) Conclusion

Since marriage is an important (foundational) institution in society, it is a topic of interest for various social scientists. Many economists and lawyers have studied this issue especially since Becker. While economists have given various explanations regarding changes in the family and the stability of the family in the United States, the
role of religion in addressing marriage stability has largely been ignored. This is likely due to the lack of data to guide the analysis and certain “irrationalities” tied to religion from an economic perspective. However, religion plays a major role in the marriage contract.

In the United States, couples wishing to use their faith to guide their marriage when writing a prenuptial contract face many hurdles in the legal enforcement area. For example it is difficult to write a contract to escape the no fault divorce provisions in state laws (Scott and Scott 1998: 1327) and there are in general excessive constraints on marital contracting (Scott and Scott 1998: 1327). It might make sense to offer a menu of choices for couples to write a contract to fit their needs. While enforcement might be costly, using the decisions of church courts in determining fault for example could reduce the costs to society as a whole.

Entry and exit costs are important determinants in the stability of marriage. Religions that have an entry cost in marriage increase the value of the promises made and hence strengthen marriage and improve the status of women. Exit costs are also important to determine the stability of marriage. In the US since there is no entry cost into marriage, the only way to allow for equal bargaining power is to allow for easy exit and have the courts involved to make sure there is an equitable settlement.

\[\text{The Louisiana Covenant Marriage Act (1997) does take a step in this direction.}\]
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Chapter 3: How Extremes Become Norms in Democracies: Legal Changes in Abortion Laws

1) Introduction

This paper will look at how extreme ideas become norms in a democracy and consequently how norms become extremes. Extreme ideas can exist either in the economic space or in the social space. The hypothesis to be tested is that when extreme ideas come from the left or the right, social entrepreneurs act on different nodes to leverage action to bring out a shift in the median voter’s opinion and subsequently change policy. The leftist approach prefers to impose their values on society using preferably the institutions of the central government, whereas the rightist approach tries to impose their values on society using local governance structures that might include local and state civil governments.

To test this hypothesis, an in-depth historical analysis, using the tools of economics, of abortion in the USA will be done. Abortion is the ideal subject, as clearly there exists an extreme Left, which wants to make abortion legal and socially acceptable, and an extreme Right, which wants to make abortion illegal and socially unacceptable\(^1\). The insights gained from this analysis of abortion can be applied to the study of other extremist movements – pro homosexuality, environmentalism, home schooling, etc. - and their efforts to gain legal status and social acceptability.

\(^1\) Not everyone in the extreme right wants abortion illegal and vice versa.
The definition of “norms” is quite diverse in the various literatures, some quite broad, some quite narrow, but in general, norms can be thought of as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done” (Sunstein 1996: 914).

Posner’s definition of a “social norm” is “a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with” (Richard Posner 1997: 365). Furthermore, he states that norms “are both a source of law and often a cheap and effective substitute for law—and sometimes they are an antagonist to law” (Richard Posner 1997: 365).

Political scientist Robert Axelrod states that a “behavioral norm” “exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way” (1986: 1097).

Morris defines norms as “generally accepted, sanctioned prescriptions for, or prohibitions against, others’ behavior, belief, or feeling, i.e. what others ought to do, believe, feel—or else. Norms must be shared prescriptions and apply to others, by definition…Norms always include sanction” (Morris 1956: 586).

Gibbs classifies all the definition of norms into three definitional attributes: 1) a “collective evaluation of behavior in terms of what it ought to be.”; 2) a “collective expectation as to what behavior will be.”; and 3) “reactions to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct” (Gibbs 1965: 589) (All italics are in the original).
The matter of deviance from norms can be illustrated by the following equation, where E represents “extreme,” N represents “the norm,” and B represents the “behavior” in question (Hawkes 1975: 892):

\[ E = N - B \] (1-1)

When E is small, the behavior is slightly deviant and possibly within the norm; but when E is large, the behavior we are dealing with is highly deviant or extreme. Further, when E becomes the new N, the old N will become the new extreme.

The economic literature on this subject is limited. Law and Economics scholar Cass Sunstein, in an article examining how groups become polarized during discussions and how they move away from the median preferences expressed before the discussions, explores two mechanisms that explain group polarization: The first deals with people’s desire to “stand in a particular relation to the group.”; the second with ”argument pools” or argument groups wherein participants hear many arguments pro-issue but few con-issue. And consequently tend to move towards the dominant view. On the other hand, groups can become depolarized if a variety of views is espoused during group discussion (Sunstein 2000: 118). The Sunstein essay is a good analysis of what seems to be short-term and micro trends.

Economists have also written about why vote-maximizing politicians take extreme positions. This is because vote-maximizing politicians want to increase voter turnout of their base and voter contributions. Further, politicians using informational asymmetry hope to target their messages to increase their voter turnout margin and not excite the opponent’s supporters (Glaeser, et al. 2005). While this argument does have
value in understanding why politicians take extreme positions, it does not explain how extremes become norms. Can the voters at the extremes be fooled all the time without getting results for their cause?

The sociology literature has dealt with the issue of extremes to norms in a substantive manner, the scholars have made efforts to unify the different strands of research in this area, and their analysis has incorporated long term trends. However, the sociology literature has in general focused on movements from the left rather than movements from the right and hence is lacking in comprehensive analysis. To whit, the vast majority of the literature has focused on leftist movements like environmentalism (Lounsbery 2005: 76), homosexuality (Armstrong 2005: 161), civil rights movements (McAdam 1982), modern peace movements (Marullo and Meyer 2004: 645), poverty movements etc. and the key examples are from the mid 20th century².

Since my analysis uses theory derived primarily from public choice, I will define norms as behavior, belief, or feelings that are shared by the median person in a single peaked distribution and those persons between the first and third quartile of the distribution; and extremes as behavior, belief, or feelings that are shared by those persons who are beyond the interquartile range, either to the left or the right³. Moreover, since norms can be a source of law, I am interested in how changing norms affect law. This essay specifically explores how (abortion) norms are changed through different social processes in a networked fashion, which in turn leads to changes in abortion law.

² Sociologists have also studied movements before the mid-20th century, for example, the Bolshevik revolution and the French revolution have been studied deeply.  
³ While this delineation is somewhat arbitrary, the proper delineation would have to be done on a case-by-case basis. However, the interquartile range captures at least 50 percent of the population (25% of either side of the median).
The terms used in this essay will be accurate terms instead of euphemistic marketing terms. For example, terms such as “anti-abortion,” “pro-abortion” and “unborn baby” will be used in place of terms such as “pro-life,” “pro-choice,” “fetus,” “conceptus,” “product of conception,” etc. Section 2 deals with the economic theories employed in my analysis and provides a theoretical model on social entrepreneurship; Section 3 discusses the history of abortion in the USA from colonial times until the early 1900’s; Section 4 examines the work of extreme Leftists to overthrow abortion restrictions; Section 5 examines the interaction between the antiabortion and proabortion movements; and Section 6 looks at efforts of the extreme Rightists to contain abortion. The final Section 7 will conclude the essay.

2) Economic Theories Employed

I have used four main economic theories to conceptualize how extremes become norms in the political space: first, the idea of the median voter, second, idea of cyclical majorities, third, interest group theory, and fourth, judicial theories tied to precedent and stare decisis. Further, when the discussion focuses on the social space (in this case, abortion), a model of social entrepreneurship is needed to explain the early stages of social entrepreneurship.
2.1 The Median Voter

The idea of the Median Voter is important for understanding how extremes become norms since once the median voter accepts an idea, politicians will converge to that point and implement policies to please the median voter.

Duncan Black (1948) found that under conditions where preference ordering is single peaked and over a single dimensional issue space, the most desired position of the median voter could not be defeated. Politicians converge in policy space to the unique and stable equilibrium that reflects the values of the median voter. Anthony Downs (1957), on the other hand, seems to have reinvented the Black’s discovery without giving credit to Black’s Median Voter when he extended the model of the median voter to a two party representative democracy and declared that parties formulate policies to win elections rather than focusing on winning and then implementing their preferred policies. Downs’ work is based on a number of assumptions, including: two political parties must contest the election; voter preferences must be single-peaked over policy space; everybody should vote, etc. While these conditions are useful in understanding the median voter model, they rarely are seen in political markets and many such assumptions must be relaxed to gain a proper understanding of political markets (Rowley 1984). This would make the median voter not necessarily the dominant player.

Downs also spoke of political competition “converging to the center of the voter distribution” even though he did not distinguish between the median, mode or mean. This view can be considered an extension of Harold Hotelling’s (1929) theory of spatial competition, which was refined by Arthur Smithies (1941). Hotelling wrote that two
competing political parties tend to take positions close to the middle of the political spectrum: "The competition for votes between the Republican and Democratic parties does not lead to a clear drawing of issues, an adoption of two strongly contrasted positions between which the voter may choose. Instead, each party strives to make its platform as much like the other's as possible" (Hotelling 1929: 54).

These two interpretations, by Black and Downs, of the median voter do not necessarily differ substantially and may be seen as complementary. Further, when including the work of Bowen (1943) and Black (1958), “the median voter model suggests that in many different institutional settings—referenda, committee decision-making, or representative democracy—when decisions are made by majority rule, the median voter’s demand is the group’s demand” (Holcombe 2003: 453).

Figure 3:2-1 shows the median voter graph (Down’s model) in a stable country with the median voter at the center of the normally shaped distribution.4

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4 If the distribution is skewed, then there will be a difference between the median, mode, and mean.
Figure 3.2-1: Down’s Median Voter in a stable country in a single-issue space.

If the median voter position is the dominant strategy, the only way to create change on an issue dimension is by shifting the position of the median voter. Changing the position of the median voter is a process that takes time. If we assume the median voter position is initially closer to the antiabortion side, then mathematically we may write (Hinich and Munger 1997: 36):

\[ |X_{\text{anti}} - X_{\text{med}}| < |X_{\text{pro}} - X_{\text{med}}| \]

where \(X_{\text{anti}}\) is the position of the antiabortion side just to the right of the median voter (\(X_{\text{med}}\)); and \(X_{\text{pro}}\) is the position of pro-abortion side, which is to the extreme left of the median voter position.
median voter (see Figure 3:2-2). We can assume in general that those in the broad middle to the left of median voter also support the antiabortion policies, but not “strongly” support\(^5\).

**Figure 3:2-2:** The anti-abortion position ($X_{\text{anti}}$), the median voter position ($X_{\text{med}}$) and the pro-abortion position ($X_{\text{pro}}$) in a stable country in a single-issue space.

\(^5\) If the antiabortion position was on the left of the median voter, it would not change the analysis that follows.
In our hypothetical example, then, the initial goal of the pro-abortion activists is then to have the median voter indifferent between the pro-abortion position and anti-abortion position. This can be shown as:

\[ |X_{\text{anti}} - X'_{\text{med}}| = |X_{\text{pro}} - X'_{\text{med}}| \]  

(2)

where \( X'_{\text{med}} \) is the new position of the median voter. Figure 3:2-3 shows the shift of the median voter to the indifferent position.

**Figure 3:2-3:** Shifting the Median Voter to the left to make him indifferent, between \( X_{\text{anti}} \) (anti-abortion position) and \( X_{\text{pro}} \) (pro-abortion position).
Finally, the pro-abortion activists must move the median voter completely to their position. Mathematically this is:

\[ |X_{\text{anti}} - X'_{\text{med}}| > |X_{\text{pro}} - X'_{\text{med}}| \]  

\[ (3) \]

2.2 Limitations of the Median Voter—Cyclical Majorities

Many authors have pointed out that cycling exists in the median voter model. Black (1948) and Arrow (1951) discussed the issue of cyclical majorities. Arrow demonstrates that under certain conditions when there are three or more choices, then under majority rule cycling will exist. McKelvey (1976) points out that if many dimensions were included, even if they were all single peaked, there would be cycling.

Tullock (1981) noted that political outcomes in reality are stable and issued a challenge to economists to come up with an explanation. Tullock believed that the lack of cycling is because of logrolling (vote trading). Logrolling allows legislators to trade votes on issues they care about with those issues they care little about. Some then wonder why there is no cycling in logrolling. Tullock’s challenge resulted in bringing together of voting models with models on interest groups, logrolling, and political institutions. These latter models could result in the median voter failing to have his preferences realized.

An agenda setter could also prevent cycling. It is possible for the agenda setter to come to his preferred point. “Any one voter, with knowledge of other voter's
preferences, and the power to set the agenda could, using binary, majority rule based procedures, arrive at any outcome he wants to” (McKelvey 1979: 1106).

Shepsle and Weingast advocate a theory of structure-induced equilibrium. Structure induced equilibrium refers to stable points that are induced by rules or structure even under majority rule (Shepsle and Weingast 1981). Others like Kadane (1972) suggest that there is stability if preferences are separable and issues are voted on one at a time.

Further, the median voter model does not reflect voter turnout, nor does it clearly explain the “impact of political campaigning and interest groups on voter preferences” (Holcombe 2003: 454), instead it assumes fixed voter preferences.

2.3 Interest Group Theory

Another complementary avenue of analysis for moving from the extreme to the norm is using interest group analysis.

Mancur Olson (Olson 1965, 1971) believed that interest groups/special interests are hard to form because of the problems of free riding by members in the groups. One avenue to reduce free riding problems is when you are able to coerce supply. These groups are typically professional groups (e.g. lawyers, doctors etc) and trade unions. Secondly, small groups that are homogenous are able to effectively execute collective action (e.g. farmer’s lobby). Further, in small groups monitoring costs are lower. Small groups also have lower decision-making costs.
Members of small groups tend to supply more effort (time and money) on the
group’s behalf to achieving the group’s goals. “A small number of zealots anxious for a
particular collective good are more likely to act collectively to obtain that good than a
larger number with the same aggregate willingness to pay…The great historical
significance of small groups of fanatics no doubt owes something to this consideration”
(Olson 1965, 1971: 34 (1965)).

Large diffuse groups typically have difficulty in forming due to the problems of
free riding. To form large groups, they have to provide selective (private) benefits to
their members. For example, the American Association of Retired Persons (AARP)
provides among its various benefits access to group life insurance policy and discounts to
prescription drugs. This helps fund the group so it can successfully lobby. Additionally
large groups benefit from their non-profit status.

Olson’s theory would suggest that pressure by interest groups could be used to
move the equilibrium away from the median voter under conditions stated by Duncan
Black (1948). Interest groups will supply votes, campaign contributions, and other
contributions such that politicians will cater to their demands even over that of the
median voter. Additionally, interest groups prefer subsidies and regulations to lump sum
transfers (Olson 1965, 1971).

In the example of abortion, interest group behavior is evident. The pro-abortion
and anti-abortion side lobby and work using various methods to move the median voter to
their side and they work using different means to influence the politicians.
2.4 Judicial Precedent and *Stare Decisis*

This model describes the role of judicial precedent and its affects on policy. There are four economic attributes of precedent: precedent minimizes the costs of error; it “maximizes the public-good aspect of judicial decision-making” (Macey 1989: 94); it reduces review costs; and finally, precedent “increases societal demand for judge made rules relative to legislative created rules and thereby enhances the power of the judiciary relative to that of the legislature” (Macey 1989: 94).

The more judges follow a particular precedent, the more that precedent gains legitimacy and the easier it is for individuals to reply upon it in their actions. “Such a system provides a higher level of predictability because it increases the level of certainty and legal stability” (Macey 1989: 69).

Judicial predictability allows individuals to regulate their behavior to minimize sanctions and limit liability. It also increases economic efficiency. For example, when individuals sign a contract, it must conform to the law established by precedent, else they are risking costly *ex post* defense. Society as a whole benefits when the level of litigation is low and predictability deters frivolous lawsuits and allows for better planning.

While holdings have superior value in predictability, judicial dictums can signal possible change in precedent, by indicating how the court might rule in the future on an unresolved issue, which ruling could then be used to change precedent. While dictums could signal instability in future court decisions, individuals can take preventative measures to avoid problems or take advantage of this instability (Macey 1998: 70).
Sometimes following precedent robotically can lead to judicial “missteps,” yielding incorrect results; following bad precedent could also result in overall economic inefficiency. Therefore, while precedents may be generally followed, they should always be carefully considered in a given case: an ironclad rule to follow precedent is not desirable. If precedents are inefficient, it is possible for legislatures to intervene with statute changes, but the preferred solution is to have private parties contract around inefficient precedent.\textsuperscript{6}

One theory suggests that the Courts maintain a strategic equilibrium with the other political branches of civil government in an effort to avoid a backlash. Major shifts in judicial doctrine usually occur when there are major electoral shifts, i.e., when the Median Voter changes his preference, the other branches pressure the courts to establish socially optimal precedents (McNollgast 1995: 1668ff).

\textbf{2.5 Model of Social Entrepreneurship}

The economics of political entrepreneurs and interest groups that seek rent in the political process has been written about extensively in the public choice literature, but the literature is largely silent about social entrepreneurs and interest groups that work in the social space. How does a rational social entrepreneur get resources to sustain a long-term battle in the social sphere, especially in the early stages\textsuperscript{7} of agitation where political rents

\textsuperscript{6} Legislatures are driven by interest groups, and hence new statutes might not make things better but rather worse.

\textsuperscript{7} Some social issues might not have any political rents.
are non-existent? How does a rational social entrepreneur take into account the probability that their social battle might end in failure?

Even though social movements eventually affect the political process, initially they do not. Therefore, to sustain themselves, social entrepreneurs on the Right and Left have to get resources/rents from other sources. The leftist strategy favors obtaining resources from the elite, either directly or through their foundations, whereas the rightist strategy favors obtaining resources from independent and independently financed grass roots institutions, like the Church or tithing agencies or similar organizations.

Elites, especially those in large foundations, would like society to accept their ideology as a norm. However, elites are subject to ”reputation constraints” as they have a lot to loose if they are tied to extremist ideas. Therefore, a social entrepreneur must signal to the elite that he is willing to promote the ideologies of the elite without risk to their reputation, at least in the initial stages. Further, since the elites are in political power or have access to political power, their comparative advantage is in using their networks and therefore they would prefer that the social entrepreneurs to discreetly use their networks.

On the other hand, the leaders and the members in churches maximize their utility, which is tied to the teachings in the Bible subject to the constraints of the congregational budget. Hence, social entrepreneurs on the right must be willing to foster activities that maximize the utility of the leaders (and congregants) in the churches. Many of these entrepreneurs might be from within the churches.
This is fundamentally how social entrepreneurs on the left and on the right secure funding to sustain their social movements\(^8\) to convert the median voter and influence legislation and/or judicial rulings.

### 2.5.a. The Church

The role of the church in the 20\(^{th}\) and 21\(^{st}\) century is quite predominant in the abortion debate in the United States but not so in Europe, where, unlike in the U.S. where voluntary donations provide necessary financial support, many churches are funded via taxes or some other form of state sponsorship, which makes them simply another interest group spending scarce resources in lobbying to secure state financing. Said state funding results in state control through regulation and other means, making these churches largely ineffective in Europe’s many political debates\(^9\) (Bose 2006).

With the privatization of religion in the US and consequent support by voluntary funding, Christian churches have turned to pledges, special appeals, tithing, capital funds, funding for things outside of local church life, and fees for services such as religious schools. Privatization resulted in increases in religiosity (religious mobilization), religious diversity, and religious competition\(^10\) (Finke 1990: 620; Olds 1994: 295) and

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\(^8\) Eventually the social entrepreneur can obtain funding from the state, but this might be many years down the road.

\(^9\) An alternative view of Europe is that it has become more secular and hence the effect of religion is negligible. However, the secularization thesis has been proven untenable. In fact, “levels of subjective religiousness” has remained high in Europe, but Christianity in Europe has historically only been nominal at best (Stark and Finke 2000: 57ff).

\(^10\) Many social science religion scholars prefer to model demand as stable, and supply and other constraints as being allowed to vary (Stark and Finke 2000: 86).
with independent financing came an independent church government that operates within its own jurisdictional boundaries\textsuperscript{11}.

Since the Christian church is a collective and exclusive religion, there are issues of free riding which are controlled by placing on the members costly demands, such as dietary restrictions, distinctive clothing, entertainment restrictions, etc. These costs reduce free riding by removing the less committed members and increase the value of the group activities (Iannaccone 1992; Iannaccone 1994).

In view of the fact that independent churches and various denominations exist in competitive economies, their competitive advantage lies in using grassroots strategies in the social space\textsuperscript{12}, which means that social entrepreneurs obtaining funding from churches prefer to use the churches to provide nodes for organizing large decentralized networks,\textsuperscript{13} which are geared towards certain goals (in this case overturning laws that legalized abortion).

\textbf{2.5.b. Modeling Interactions between Opposing Social Movements}

Modeling leftist strategies and rightist strategies is relatively simple. However, when the two opposing movements using different preferable strategies/nodes confront each other, the model has to take into account this complicating factor. The economic

\textsuperscript{11} In his book, \textit{Law and Liberty}, Rushdoony writes that only fairly recently has the word "government" come to refer exclusively to the state. Previously, it referred to the individual, then to the family, the church, the school, one’s business or vocation, private associations and finally to the state (1984: 59).

\textsuperscript{12} The one major exception to this in the US is the Roman Catholic Church, which is the largest denomination in the US, and centrally managed (http://www.thearda.com/mapsReports/reports/US_2000.asp).

\textsuperscript{13} These nodes would probably not exist in independent “private inclusive religions” like Hinduism and Buddhism due to the lack of regular collective worship experiences. However, Islam would provide these nodes, as it is a “collective exclusive religion.”
model that might best suit the discussion of this interaction is the model of duopoly, where two opposing interest groups/social movements compete strategically in making price and output decisions. In the social market, the competition is between the methods interest groups use in deploying their different strategies. The sponsors for leftist strategies are those elites, both political and financial, who take part in the scissors strategy (see section 4); the sponsors for rightist strategies are grass roots organizations that typically consist of independent churches.

The theory of games will be useful in making a distinction between the “pattern of payoffs and the protocol of play” (italics in original) (Hirshleifer and Hirshleifer 1998: 284). Payoffs show the possible outcomes and protocol is the rules by which the two sides play. A positive payoff might have the interest groups pleasing the median voter and satisfying the sponsors of those interest groups. If the sponsors are satisfied with the outcome, i.e., the shift of the voter or change in legislation, then the interest groups continue to get funding.

There are two plays possible: simultaneous play and sequential (reactionary) play. In the simultaneous play indicated in Figure 3:2-4, the strictly dominated strategy is for the proabortion side to use the leftist strategy and the antiabortion side to use the rightist strategy. In sequential play, the results will be the same but the payoffs will be different. What makes the sequential play interesting, then, is if the payoffs are a function of time and if there is an infinite time horizon. This super game, or sequence of games, would allow for studying interactions that are more interesting. This would

\[14\] The first mover will gain even more.
probably help explain why Planned Parenthood successfully used a rightist approach to change the South Dakota law and how antiabortionists seem to be successful in turning the court towards overturning Roe v. Wade and reversing precedent\textsuperscript{15} (see section 5).

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Pro Abortion} & Leftist & Rightist \\
\hline
Leftist & 20, -10 & 5, 5 \\
Rightist & -5, -5 & -10, 20 \\
\hline
\end{tabular}
\caption{Simultaneous play of proabortion and antiabortion interest groups. Leftist indicates leftist strategy, and rightist indicates rightist strategy.}
\end{table}

3) \hspace{1em} \textbf{A Review of the History of Abortion in the USA until the Early 20\textsuperscript{th} Century}

It is clear to anyone studying the history of abortion in the US that it has always been a politically charged issue and, as we all know, it remains so. Consequently two basic versions of this history emerge, one according to and preferred by those positioning themselves on the proabortion side, one according to and preferred by antiabortion proponents: proabortion writers cite the influential Mohr’s thesis as the authoritative history of abortion in the US (Mohr 1978) while the antiabortion side sees more merit in the works of Olasky (Olasky 1995; ; Olasky 1988).

The central state during this period was relatively weak during this period, and, since the Elites needed a powerful state to help create their comparative advantage, their

\textsuperscript{15} Modeling a supergame taking into account discount factors, strategies whose efficacy could increase or decrease with time and where the game ends when only decisive victories are obtained is very difficult.
leftist strategies were unsuitable\textsuperscript{16}. Surprisingly, the churches were quiet on the abortion issue, especially during the 19\textsuperscript{th} century, partly because churches were being privatized and were therefore not suitable nodes for effective use of rightist strategies (Olds 1994). On the other hand, many well-financed private organizations used the rightist strategy successfully. Alexis de Tocqueville calls these organizations “private associations” and Rushdoony more accurately describes most of these private associations as Christian tithe agencies: “Christians created a tithe agency to minister to every kind of need; to preach the gospel to people in foreign lands, to immigrants landing in the U.S., to seamen at American ports, and so on…As problems arose, new missions were created to minister to them” (Powell and Rushdoony 1979: 26). Hence, this period saw a proliferation of rightist strategies at work.

The weak central state means most social movements must work to get the support of the median voter. Hence, the median voter model will be relevant to the discussion that follows. However, the other theories discussed in section 2 will continue to be relevant on a state level basis.

\textbf{3.1 The Colonial Era}

During the 17\textsuperscript{th} and 18\textsuperscript{th} centuries, scientists believed that life began before conception and held to one of two theories: “animalculists” held that sperms contained little people which were implanted in the womb; “ovists” held that sperms activated little

\textsuperscript{16} It is possible that when the central state is weak Elites do not really exist due to limited rent seeking opportunities.
people that were already in the womb (Olasky 1995: 35). Animalculism was the predominant view until around 1800. The idea of sperm/egg conception emerged in 1827 (Olasky 1995: 35).

During the colonial era, abortion and infanticide were dealt with severely. For example, a woman in 1648 Massachusetts, who was seduced, killed her baby; she was executed. In 1656, a man in Maryland impregnated his servant, then abused her and gave her “wormwood to drink,” inducing a premature birth. To avoid prosecution for murder, he married his servant. It was not clear if a woman in 1719 New York had given birth to a stillborn or live baby, so the jury acquitted her of murder. She was still given thirty-one lashes and expelled from the county (Olasky 1995: 20ff).

Attempts were made to reduce the number of abortions. Massachusetts passed a law in 1668 requiring unwed mothers to name the father. The “reputed father” was then required to pay child support, though he was not necessarily charged with adultery, as such a charge required additional witnesses (Olasky 1995: 30). Out-of-court settlements of these paternity lawsuits usually resulted in a marriage, (Olasky 1995: 31). In 1716 New York City passed a law prohibiting midwives from recommending or aiding in abortions, thereby limiting access to abortions (Olasky 1995: 37). A 1719 Delaware law punished those who counseled abortion, charging them as accessories to murder and imposing on them the same sentence imposed on the principal (Olasky 1995: 85). To avoid punishing the children for the sins of their parents’ states allowed illegitimate children to inherit property and learn a trade (Olasky 1995: 33).
Moreover, the Anglican and Lutheran Churches joined with New England’s Presbyterian and Congregational churches - who believed with Calvin that life began in the womb and should not be terminated - in condemning abortion (Olasky 1995: 33).

Consequently, abortions were relatively rare during the 17th and 18th centuries and most, it seems, were forced on the pregnant woman by the man responsible. If the popular method of chemically inducing a miscarriage failed and the woman went on to give birth, infanticide was considered an option (Olasky 1995: 29).

“Abortion in short, was the last resort of a particular segment of the unmarried: seduced, abandoned, and helpless women, generally between the ages of sixteen and twenty-five” (Olasky 1995: 40).

3.2 The Early to Mid 19th Century

Historian Mohr contends many “American women sought abortions” in the Early to Mid 19th Century; that abortion was “relatively common” (Mohr 1978: 16, 172). Rather it seems that abortions increased only within three sections of the community: seduced women, prostitutes, and certain married women. Efforts by the American Medical Association and various grassroots organizations to limit abortion gained strength during this period. Antiabortion legislation and the effectiveness thereof varied from state to state but it seems that abortion was mostly an urban phenomena concentrated in the North East United States (Sauer 1974: 55).
3.2.a Factors Increasing the Frequency of Abortion

The 19th century saw a large influx of people—men and women—to cities. It was easy for a woman “in the big city,” away from family or social support, to encounter men who would take sexual advantage of them. With little pressure on these anonymous men to marry the woman they had impregnated, many pregnant women turned to abortions in an attempt to save their honor.

Whereas, during the Colonial Era, prostitution was relatively rare, by the 19th century the “profession” had become far more common, especially in urban areas. And while there were many riots aimed at shutting down brothels, they merely forced brothels to move from one neighborhood to another (Olasky 1995: 45), where they continued to operate.

As prostitution thrived in the large cities, and until the arrival of effective contraception in the mid to late 1800’s, pregnancy was common among prostitutes. Many contraceptive methods used during this period were simply ineffective and unless a woman was naturally infertile or had a bout of gonorrhea conception was quite possible: a conservative estimate of the number of abortions per prostitute was 1.8 per year. In 1858, there were six thousand prostitutes in New York and an estimated sixty thousand nationwide, which meant that before the Civil War there were at least one hundred thousand abortions among prostitutes (Olasky 1995: 56).

Finally, some married women got abortions. Mohr suggests that these women were “native-born, Protestant women, frequently of middle-or upper-class status” (Mohr 1978: 86), but it seems more likely that most of these women were involved in spiritism.
(Olasky 1995: 61), a pseudo religion/movement of about 7 million with influence and followers confined largely to the northern states, as the movement was despised in the South.\footnote{Calvinism still strongly influenced the South}

According to Benjamin Hatch, an ex-spiritist, their code was “‘if another can develop in me more love than my husband or wife, in virtue of that very love I am newly married, and the old should be absolved, for we should be true to nature and no law has any right to interfere in my affections’” (Olasky 1995: 63). Another influential spiritist, Henry Wright, wrote that an un-welcomed child would grow up to be doomed, so he justified abortion as something good for the aborted child and the aborting mother. If the woman saw the unborn child as “‘a sacrilegious intruder into the domain of her life; an invader of the holy of holies of her being,’ the woman had ‘a right to protect herself from further evil’” (Olasky 1995: 69). Wright further devalued children that were not conceived in a “spiritual union,” i.e., if a child was conceived because of “sensual indulgence” then the child would live a “soulless life.” Therefore, it would be a rational act to kill children before they were born (Olasky 1995: 69).

Spiritists considered marriage legalized adultery unless two “affinity-mates” Married, and it took a lot of experimenting to find just the right match. A child conceived while experimenting was doomed to a life of misery, they insisted. Dr. Thomas Nichols declared that a woman had “‘the right to decide who’ll be the father of her children, [and] she has the equal right to decide the time to have children.’” He then added the logical conclusion: ‘Since the Woman alone has the right to decide whether
her ovum shall be impregnated, she must also have the privilege of determining the circumstances which justify the procurement of abortion”’ (Olasky 1995: 74).

This Spiritist movement had the affect of devaluing marriage among the proponents and many husbands and wives abandoned their spouses so that they could search for their affinity mate. Many of the resulting pregnancies ended up in abortions, and while there are no official statistics, estimates in New York City in the 1860’s suggest that one in five unborn children were aborted or miscarried and these numbers were probably indicative of other urban areas18 (Mohr 1978: 79; Olasky 1995: 78).

Newspaper advertising of abortion services was effective in increasing the number of abortions. Many newspapers, which relied primarily on advertising to generate revenue, began accepting abortion advertising in the 1830s and, not surprisingly, stopped criticizing abortion19 in their editorial pages. A war of words ensued, newspaper criticizing newspaper for their position on abortion advertising, pro versus con. Nevertheless, new-found abortion ad money often leads former opponents to go silent. The most famous abortion advertisers were Anna and Charles Lohman of New York City20, whose advertising generated sufficient income to warrant additional offices in Boston and Philadelphia (Olasky 1988: 7). Other abortionists followed, finding the abortion business highly profitable (Mohr 1978: 97).

18 These estimates probably did not include abortions from prostitutes as they generally lived outside the law and official records (Olasky 1995: 78).
19 Since abortion was illegal, abortion advertising contained word such as pills to treat “monthly irregularities and obstructions” or “menstrual pills” for “irregularities” etc (Olasky 1988:12).
20 Anna and Charles took on the names Madame Restell and Dr. Mauriceau.
3.2.b Efforts to minimize Abortion

The American Medical Association (AMA), though a relatively weak organization at the time, mounted a campaign to limit the number of abortions performed, even though views on the subject differed among its member physicians: some advocated that only the mothers should make the decision regarding an abortion; Others thought abortions should be legal only for medical or psychological reasons (which were large loopholes); and many advocated ending abortions entirely, as they saw the unborn child as an independent human being. Today’s proabortionists claimed that the AMA was merely trying to form a cartel of “regular” doctors and limit the entry of homeopaths and midwives into the medical arena: “In securing criminal abortion laws, the Regulars won recognition of their particular views as well as some state control over the practice of medicine” (Reagan 1997: 11).

Dr. Horatio Storer was the primary mover behind the AMA’s stand against abortion. First, he successfully lobbied a Boston medical society to take an anti-abortion stance. Even though actual support was limited, many doctors simply did not want to be openly in favor of abortion. Then he began pressuring doctors to pressure legislators to pass antiabortion laws. His major victory came in 1859 when the AMA committee he chaired recommended that the full AMA declare abortion “murderous destruction.” The AMA passed a weaker resolution, however, that declared abortion an “unwarrantable destruction of human life” and that state laws should be revised as necessary to stop abortion (Olasky 1995: 114ff).

21 The “irregulars” (non-doctors) heavily influenced the abortion business.
Private groups such as the White Cross Society and Women’s Christian Temperance Union (the largest woman’s group at that time) made educating men their top priority. These groups taught young men to protect the purity of women and encouraged men to be pure themselves. Women, too, were called upon to be chaste. Such abstinence education helped contain abortion (Olasky 1995: 177).

Private organizations (interest groups) lobbied legislatures to raise the age of consent to protect young women from older men and thereby reduce abortions. In 1894, Delaware’s ”age of consent was seven years, in nine other states (mostly southern but also Idaho, Minnesota, Colorado and South Dakota) it was ten, in six states it was twelve, and in three others thirteen. Seventeen states fixed the age of consent at fourteen, two at fifteen, and six at sixteen. Only Florida (age seventeen), Kansas (eighteen) and Wyoming (eighteen) came close to doing the right things, according to social reformers” (Olasky 1995: 177). By 1900, twelve states had raised the age of consent to eighteen, and in only two states or territories was the age of consent less than fourteen. By 1920, almost every state had established either sixteen or eighteen as the age of consent. If men had sexual relations with girls below the age of consent, the man could be charged with statutory rape. The seduction and abandonment of women of any age also resulted in punishment for men (Olasky 1995: 178).

Private parties also focused on the supply side, hoping to reduce the number of these female victims of sexual exploitation. For example, the YMCA set up booths in train stations to meet and offer aid and direction to young women as they arrived in cities. “Immigrants’ Protective Leagues” helped recent immigrant women get settled in the
United States and avoid shady recruiters who would lead them to brothels (Olasky 1995: 180).

Adoption also limited abortion. Many children were placed in good homes and this encouraged pregnant mothers to consider adoption as an alternative (Olasky 1995: 182). Opponents of abortion alerted women of the condition called “post-abortion syndrome,” which described a woman’s mourning the loss of her aborted baby (Olasky 1995: 185).

Early on in the struggle to contain abortion, the National Police Gazette seemed to be the only newspaper that opposed abortion in its editorials; neither did they accept abortion advertising. Rather, it printed many articles condemning abortion, exposing doctors who performed them, complaining about the lack of enforcement of antiabortion laws. It also followed abortion cases as they moved through the courts. The Gazette fought a lonely battle for many years until, in 1869, the New York state legislature passed a law banning all abortions and abortion advertisements. With one of the co-owners of the New York Times dead that year and with the new ban on abortion advertisement in effect, the editor of the New York Times took a stand to create public outrage against the abortion industry. The Times ran hard-hitting articles that compared abortion to murder and unborn babies to human beings and uncovered facts that fueled public outrage and resulted in the authorities taking action against abortionists (Olasky 1988: 24).

Surprisingly, Christian churches did not get actively involved in the issue, many simply keeping quiet, presumably due to the influence of “transcendentalism and pantheism, ‘higher criticism’ and ‘free thinking’” on their leadership (Olasky 1988: 7).
Only the Presbyterian Church in the US condemned abortion. Mohr notes that the religious press “maintained a total blackout on the issue of abortion from the beginning of the nineteenth century through the end of the Civil War” (Mohr 1978: 183). The National Police Gazette and the AMA condemned the churches’ silence.

Though reformers pressed for laws that would limit or eliminate abortion advertising and several states eventually passed such statutes, most, with the exceptions of New York’s in 1868 and California’s in 1873, were generally ineffective and laxly enforced, harming little the targeted abortionists. In contrast, Anthony Comstock, backed by wealthy banker Morris Jessup, mounted a successful campaign that resulted in the passage in March 1873 of a Federal ban on the use of the “nation’s mails to circulate obscene material” which included abortion advertising and contraception information (Olasky 1995: 191). Comstock was then appointed as a special agent to enforce the law.

Comstock was further able to use an 1873 New York state law to arrest those selling abortifacients, the nature of which substances the law labeled “immoral and indecent,” and the sale of which it prohibited. While initially Comstock was successful in driving the abortion industry underground, he did not continue the battle and the 1880’s saw the situation revert, as abortion advertisements started reappearing in spite of laws against them (Olasky 1995: 190).

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22 Federal power during this time was also expanding.
23 Comstock indicted 55 likely abortionists in this role (Mohr 1978: 97).
24 Many organizations like his started focusing on other vices like pornography, gambling etc and did not focus too much on abortion a.
3.3 The Late 19th Century and Early 20th Century

Abortion was not eliminated but largely contained during this period.

3.3.a Containing Abortion

Improved male contraceptives, made possible by the new technology of vulcanization of rubber, helped prevent undesired pregnancies (Olasky 1995: 198).

After the Civil war the influence of spiritism faded, resulting in fewer abortions among a portion of the married population. Further, the bloodshed during the Civil War also seemed to change the views of many towards the antiabortion cause especially those of male doctors and the thousands of female nurses who volunteered for the war (Olasky 1995: 119ff). Evidence suggests that most women who sought abortions during this period were unmarried (Mohr 1978: 241).

Shelters for women were established in many cities. City investigators in Chicago “reported that ‘[i]n each institution the girls are placed under wholesome moral influences and given practical and industrial training. In each the religious motive is emphasized…but in each, girls of all faiths and none are received without discrimination’” (Olasky 1995: 199). During this period, organizations such as the Salvation Army and the Crittenton homes grew to become national in scope, the latter helping over five hundred thousand unmarried women between 1883 and 1933 (Olasky 1995: 200).

The women in these shelters were taught marketable skills, the children born were often adopted, and some women were reconciled and returned to live with their parents. If men committed crimes by impregnating the women prosecution would be pursued
where possible. These shelters were viewed as crucial in the fight against abortion, more important even than prosecuting abortionists (Olasky 1995: 216).

Feminists of this time did not support abortion and did not want it adopted wholesale by women. In fact, most feminists were also against the use of contraceptive devices. “For most feminists the answer to unwanted pregnancies was abstinence” (Mohr 1978: 112). Many feminists supported the AMA’s effort to limit abortions and did not question abortion laws (Sauer 1974: 60).

3.3.b Abortion Unleashed

Even though abortion had been largely contained, two notable antiabortion forces - doctors and newspapers - seemed to tire of the conflict.

Abortion was illegal in the US in the early 1900’s, but the lack of consistent enforcement in the states discouraged the doctors of the AMA. For example in New York state, according to the “report of the Secretary of State on the statistics of crime for the ten year period 1895-1904, there were only nine convictions in the entire State, of which two were in New York City” (Olasky 1995: 230)\(^{25}\). Additionally, more doctors started performing abortions (Olasky 1995: 229). Doctors were also disappointed that clergy and other societal leaders were not condemning abortion. By the early 1930’s, there were three main camps among the doctors: the proabortion group advocated the legalization of abortion; the antiabortion group thought life began at conception and abortion should be illegal as it violated one of the commandments; while the undecided

\(^{25}\) Part of the problem with prosecuting abortionist was that many abortionists typically did not commit abortion with witnesses present. Therefore, any case in court would be one’s word against another (Olasky 1995: 228).
stood somewhere in the middle (and outnumbered the decided), favoring, for example, legal abortion in certain limited circumstances (Olasky 1995: 236).

The *National Police Gazette*, which had successfully pressured abortionists, started accepting first, in the 1880s, soft-core pornography advertising, followed by abortion advertising. Moreover, while the *Gazette* continued to editorialize against abortion, it did so less frequently and less vigorously. The *New York Times* continued to oppose abortion strongly, but with a change of ownership in 1896\(^{26}\), coverage reduced dramatically.

### 3.4 The Legal Environment in the 19\(^{th}\) Century

This sections looks at the development of laws in the arena of infanticide and abortion. The 18th century serves as a backdrop to discussing the laws passed during the 19\(^{th}\) century.

Generally, when social problems arose during the 18\(^{th}\) and 19\(^{th}\) centuries, churches, families, and private groups were called upon to provide a solution. Only when private efforts failed did the state got involved legislatively (Olasky 1995: 85).

In 1710, the Virginia colony passed an Act entitled “An Act to prevent the destroying and murdering of Bastard Children” In an attempt to prevent women from concealing pregnancies so that newborn illegitimate children could not be killed. It carried a death penalty. Other colonies followed suit but with varying penalties\(^{27}\). In

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\(^{26}\) The new owner was Adolph Ochs.

\(^{27}\) The difficulty in convincing the jury beyond a reasonable doubt that the mother killed her baby was the reason many colonies/states moved away from the death penalty for the mother.
1801, Kentucky adopted the Virginia law with a less severe punishment of two to seven years imprisonment. Georgia passed a similar law in 1816, with penalties up to one-year in prison, more if murder could be proven. With the increase in prostitution in the 1830’s, other states and federal territories passed anti-concealment laws (Olasky 1995: 86ff).

As the preferred method for killing the infant moved from infanticide (with or without concealing) to abortion, the laws started changing to reflect the change. In 1821, Connecticut passed a “crimes and punishments” law that included a section against abortion, the first of its kind. Mohr suggests that Connecticut legislators were following the example of the British parliament, which passed a similar law nearly two decades earlier (Mohr 1978: 23), but Olasky delves deeper and finds that this legislation was in response to the case of a Connecticut minister, Ammi Rogers, who was sent to prison for “causing an abortion through ‘the use of pernicious drugs’” (1995: 91). The issues in the case revolved around whether the woman was actually pregnant\(^{28}\), whether “an abortifacient cause [d] the miscarriage if one actually occurred,” and what an appropriate punishment would be (Olasky 1995: 92). The Connecticut law addressed these three issues.

It stated that punishment was suitable only for a woman who was “quick with child.” “Quickening” was, at that time, the only legally “established indicator of unborn life” (Olasky 1995:93). Mohr contends that before “quickening” abortion was not a crime; this understanding was consistent with the common law (1978: 22). However,\

\(^{28}\) The defense suggested that Asenath Smith (the lady) had a “supposed child.”
Rogers was convicted under common law, the unborn child was four months old and there were no records to suggest that the doctor in the case was asked whether the child was “quick” (Olasky 1995: 93).

In the 1830s, newspaper circulation grew, sustained by revenue from advertising, including that for abortions, which featured such euphemisms as curing “irregularity of females.” Legislatures during this period had to deal with how to contain abortion when there were no corpses, no autopsies, few if any witnesses, second-hand declarations, dying declarations, etc. Some of the abortifacients even had beneficial uses. How could a prosecutor convince a jury that a crime even occurred? The New York Legislature found itself enacting and amending laws concerning abortion ten times from 1828 to 1881 (Olasky 1995: 96). Some states had insignificant penalties for the women to encourage them to testify that an abortion had occurred. Other states gave the woman immunity for her testimony if she had an abortion. This generated the evidence prosecutors needed to pursue abortionists in court (Olasky 1995: 99).

Between 1840 and 1860, states had passed many anti-advertising laws against abortion. Thirteen out of the thirty-three states had yet to pass any antiabortion laws. At least thirteen states had laws banned abortions during all stages of pregnancy and other states still had the quickening distinctive (Mohr 1978: 145; Olasky 1995: 102).

More antiabortion laws went into effect between 1860 and 1880, and punishment was met out to those who tried to induce abortions before quickening. If the jury was convinced that an abortion occurred, then the punishment was to be more severe. Some states defined abortion as “manslaughter.” Some imposed the same penalty for both
deaths if mother and unborn child died during an abortion. Some states, to increase prosecution of abortion related cases, removed the requirement that pregnancy be proved. After the Civil War, many southern states passed antiabortion laws, which stood even after the northern troops left (Olasky 1995: 102). Mohr writing about this time says the “fundamental legal doctrines [the laws] embodied were destined to remain little changed for a hundred years” (Mohr 1978: 201).

Between 1880 and 1900, abortion was illegal in the United States. The various states’ laws were now unambiguous in their condemnation of abortion. Furthermore, the courts took a harder stance against abortion and were less lenient. For example, in the Massachusetts case *Commonwealth v. Taylor (1882)*, the Massachusetts Supreme Court ruled that the prosecutor did not have to prove that an alleged abortee was pregnant (Mohr 1978: 226ff).

4) **The Revolution from the Left**

Extreme Leftist’s organizations and interest groups use several strategies to persuade the median voter to support their positions. This section will first describe those leftist strategies and then examine how they influenced the history of abortion law during the first three quarters of the 20th century.

The first three quarters of the 20th century saw the power of the central government increase considerably hence providing an opportunity for elites to fund new strategies. These elites support the social entrepreneurs in their efforts to legalize
abortion. Further, the elites are able to use other means other than trying to persuade the median voter (e.g. agenda control through legislative means) to change the status quo.

4.1 Leftist Strategies

The initial goal of all these interactive and interdependent strategies (see Figure 3:4-1) is to manipulate the median voter towards a position of preference falsification where he misrepresents his genuine position “under perceived social pressures” (Kuran 1995: 3)\(^{29}\). Strategies include the three-step process of “Desensitizing, Jamming, and Converting”; the “Pincer Strategy”; the “Long March through Institutions” or “Institutional Capture”; marketing using “asymmetric information”; Suppressing and Harassing Intransigents, and “Latching On.” While the proabortion side has used all these strategies, the explanation of these strategies comes from various other leftist movements.

\(^{29}\) The final goal would obviously be to have the median voter’s position be his genuine position.
Figure 3:4-1: The pathway of Leftist interest groups in the context of the social space.

A: Infusion of cash from the Elites.
B: “Latching On” to other causes or a political party (coalition building).
C: Institutional Capture
D: Some grass roots activists move towards Elite roles.
E: Elites work behind scenes and have political access and/or involved in politics.
F: Provide institutional support to the grass roots and provide advertising.
G: Possible Cycling.

4.1.a Desensitizing, Jamming and Converting

Leftist Marshall Kirk and Hunter Madsen, Harvard-trained professionals in neuropsychiatry, public persuasion, and social marketing, use this three-part strategy to promote pro-homosexual issues. According to them, desensitizing requires a continuous stream of “gay-related advertising” (Kirk and Madsen 1989: 149) i.e., talking about
“gayness until the issue becomes thoroughly tiresome” (Italics in original). It does not require “trying up front to persuade folks that homosexuality is a good thing. But if you can get them to think that it is just another thing — meriting no more than a shrug of the shoulders — then your battle for legal and social rights is virtually won” (Kirk and Madsen 1989: 177).

Jamming is “psychological terrorism meant to silence expression of or even support for dissenting opinion” (Rondeau 2002: 449). It employs “Associative Conditioning (the psychological process whereby, when two things are repeatedly juxtaposed, one’s feelings about one thing are transferred to the other) and Direct Emotional Modeling (the inborn tendency of human beings to feel what they perceive others to be feeling)” (Kirk and Madsen 1989: 150).

Finally, converting occurs when a person comes over to the other side. “We mean conversion of the average American’s emotions, mind, and will, through a planned psychological attack, in the form of propaganda fed to the nation via the media. We mean ‘subverting’ the mechanism of prejudice to our own ends – using the very processes that made America hate us to turn their hatred into warm regard – whether they like it or not” (Kirk and Madsen 1989: 155).

4.1.b The Pincer Strategy

The Pincer Strategy (also known as the Scissors Strategy) was explained by William Z. Foster, national chairman of the American Communist Party from 1933 to 1957, as “parliamentary action inside legislative bodies with ... mass action outside and fights to force all possible concessions from the government.” Further “the key to the
strategy's success lies in the fact that the two supposed antagonists are consciously collaborating in the covert effort to radicalize society. In the ‘pincers strategy,’ political elites acting through legislative and other government bodies apply ‘pressure from above’ by expanding the power of the state through proposed ‘reforms.’ At the same time, ‘grassroots’ radical groups controlled by the same elites30 apply ‘pressure from below’ by agitating on behalf of the same subversive proposals in the name of ‘the people’” (Grigg 1999: 17-20).

The Czech communist theoretician Jan Kozak further details how the pincer strategy is used to subvert a free representative nation towards socialism. He writes that the pressure from “above” is the:

\[[P]ressure of a revolutionary government (parliament, and the other organs of power in the state apparatus or its part) and it has, in substance, a dual effect—\textit{the direct suppression by power of the counter-revolution and its machinations and, at the same time, exerting pressure on the citizens, inciting and organizing them for the struggle for a further development of the revolution} (italics in original)\] (Kozak 1962: 17).

To keep parliament and other organs holding power revolutionary, the popular masses must apply pressure “from below.” This pressure quiets enemies and strengthens the resolve of those on the margins of the cause; it enhances the strength of revolutionaries in power and “makes up for numerical weakness”; and it “\textit{breaks through the onerous circle of intimidation and spiritual terror of the old institutions, the Church, etc}” (all italics in original) (Kozak 1962: 21).

\footnote{30 Usually these elites provide financial aid and institutional assistance to the radical groups.}
4.1.c The Long March through Institutions or Institutional Capture

Rudi Dutschke, follower of the communist theoretician Antonio Gramsci, first coined the term “the long march through the institutions” which refers to one group’s taking over institutions in a society to serve the purposes of the group. Key institutions include, for example, universities, schools, the entertainment industry, the media, tax-exempt foundations, religious bodies, political parties, the courts and labor unions, all of which can be used to convince the median voter and the next generation to support certain policies.

The less the “captured” institution has to respond to public pressure the better for Leftist strategists/entrepreneurs. For example, it is easier and more cost-effective for Leftists groups to control public schools that are administered from the federal level than those administered from the local level, since lobbyists need focus their energies only on a single Federal entity instead of many state or local Leftist governments31.

Carl Boggs, another admirer of Antonio Gramsci, does a good job of elucidating the important aspects of Gramsci’s numerous works. According to Boggs, "the transition to socialism must occur on two distinct but interwoven terrains — the state and the economy.” "It is not enough," Boggs explains, "for movements to simply overthrow the existing state machinery, or destroy the old institutions, or even to bring into power leaders calling themselves 'communists.' Beneath the level of insurrection and statecraft there must be a gradual conquest of social power, initiated by popular subversive forces

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31 In the same vein, Leftists would prefer public schools to further decentralized private schools or home schools.
emerging from within the very heart of capitalist society” (emphasis added) (Boggs 1984: vii).

4.1.d Marketing and Asymmetric Information

In the context of this paper, proponents are marketing an ideology or movement, hoping the “buyer” will adopt the idea or join the movement. Naturally, such marketing may be untruthful, or “asymmetrical” or unbalanced. Creating, maintaining and increasing information asymmetry plays a key role in leftist marketing,\(^\text{32}\) since the median voter might not support the marketed position were he given full and accurate information. Information may be made “asymmetrical” by redefining and subverting terms, creating information blackouts, monopolizing information, suppressing information and so on.

Information asymmetry requires the subversion of language and control of elite institutions.

While ordinary people participate in the construction of their own private worlds, the development and articulation of the more elaborate systems of meaning, including the realm of public culture, falls almost always to the realm of elites. They are the ones who create the concepts, supply the language, and explicate the logic of public discussion. They are the ones who define and redefine the meaning of public symbols. Public discourse, then, \textit{is largely a discourse of elites} (Hunter 1991: 59) (Italics in original).

Richard Mitchell, who is quoted by Erwin says: “The great masters of social manipulation ... know ... that the establishment of a flexible and subtle language for the ruling classes is only half of what’s needed. The other half is the perpetuation of an

\(^{32}\) Information asymmetry occurs when one party to the transaction knows more or better information than the other.
ineffective and minimal language among the subjects” (Erwin 1990: 76). The subversion of language is the key to a leftist approach to fooling the median voter, so it is not surprising when scholars affirm “language planning is a state concern” (Davies 1987: 158). Therefore, the control of institutions that can facilitate language subversion is quite important for leftist strategists.

4.1.e Miscellaneous Strategies

Efforts aimed at “Suppressing and Harassing Intransigents” are generally seen after the median voter is won over.

In order to position themselves closer to the median voter, Extremist groups have to “latch on” to or network with larger, sympathetic mainstream organizations, building coalitions with those organizations, whether they be a political party, a church, or another larger extremist group (See Figure 3:4-2). (“Latching on” is used by both the pro and the anti abortion movements.) An obvious ”latch on” target for the Leftist’s strategy is a political party, and one method of “latching on” is becoming an organized constituency within the party. The labor movement in the Democratic Party is a good example (Greenstone 1969). “Latching on” to a political party could give the group a large influence within the party or it could be co-opted by the party establishment (Frymer 1999).
4.2 Making Abortion Legal in the 20th Century

At the beginning of the 20th century, state laws prohibited abortions. Further, the Comstock Law banned the transmission via the federal postal system of “obscene and lascivious” material, which included birth control material. There was also a concern about the declining overall U.S. birth rate and about the differing fertility rates among the different people (racial and ethnic) groups. However, from the beginning of the 20th century, two groups retreated from the battle to contain abortion: the doctors of the AMA

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33 Due to the lack of proper enforcement of the laws, many illegal abortions took place.
and the Newspapers (see discussion on these two points in section 3). Moreover, by 1973 abortion became legal in all 50 states for any reason.

4.2.a The Influence of Margaret Sanger, the Entrepreneur

A history of abortion in the 20th century would be incomplete without a discussion of the role of the political/social entrepreneur, Margaret Sanger. Sanger grew up in a large, impoverished family, left home when she was able and eventually attended Claverack College, where she was introduced to radical politics and unfettered sex. After college, she married William Sanger a relatively wealthy man, who reintroduced her to radical politics. Moreover, while William dabbled, Margaret jumped headlong into radical politics and made her specialty talking about sex. After separating from her husband, Margaret started The Woman Rebel, a radical monthly “feminist” newspaper, to support herself. The first issue “denounced marriage as a ‘degenerate institution,’ capitalism as ‘indecent exploitation’ and sexual modesty as ‘obscene prudery’” (Grant 1992: 53) and subsequent issues dealt with contraception, sexual liberation, social revolution, the tyranny of Christianity, and political assassinations.

She was soon found in violation of the Comstock Law and, facing five years in jail, exiled herself to England, where she attended lectures by various radicals and the ones that inspired her the most were the lectures by the Malthusians and the various Malthusian offshoots34. She also met35 the elite Fabians who led her to Havelock Ellis, with whom she plotted a strategy for her to change America (Grant 1992: 57).

34 The disciples of Malthus believed that if Western civilization is to survive, the “physically unfit, the materially poor, the spiritually diseased, the racially inferior and the mentally incompetent had to be
When she returned to America, she was able to get the charges against her dropped. She went on a successful speaking tour; she tried to open a birth control clinic in New York (which the authorities shut down); and she started a successful new magazine called *The Birth Control Review*. In 1922, she wrote a book called *The Pivot of Civilization* in which she expounded Malthusianism and Eugenics. Sanger writes:

[The philanthropists who give free maternity care] encourage the healthier and more normal sections of the world to shoulder the burden of unthinking and indiscriminate fecundity of others; which brings with it, as I think the reader must agree, a dead weight of human waste. Instead of decreasing and aiming to eliminate the stocks that are most detrimental to the future of the race and the world, it tends to render them to a menacing degree dominant (Sanger 1922).

She also writes in this book about sterilization of inferior races, “feeble minded,” and criminals, and segregation of the “moron class,” the misfits, and the defectives. Her reputation increased with its publication.

A very wealthy and conservative man, J. Noah Slee, who was madly in love with her, courted Sanger, but since Sanger viewed marriage as a “degenerate institution” and did not want to be tied down. She wrote up a prenuptial agreement that he would have to agree to before she married him\(^{36}\). For her, marrying into money allowed her to extend the reach of her organization. Further, she was able to secure funding and other help from some of the mega foundations - the Rockefeller’s, the Ford’s, and the Mellon’s (Grant 1992: 61) - who would be providing the other blade for the scissors strategy. With

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\(^{35}\) Meetings included sexual relations.  
\(^{36}\) The agreement required Slee to phone her to get dinner appointments. Further, she was to have her own apartment and own servants. She would be able to entertain whomever she wished behind closed doors, and Slee would not be able to question her.
the money flowing in, Sanger worked on redeeming her image, disassociating herself from a position similar to the Nazis, and furthering her cause.

She first renamed her organization “Planned Parenthood” to convey a wholesome image; then brought numerous other birth control organizations under the Planned Parenthood umbrella and followed with a massive advertising blitz that, while she hid her radical leanings and illicit affairs, focused on “patriotism and family values” (Grant 1992: 62). The advertising paid off and she and Planned Parenthood won the support of a large percentage of the population. (This is a fine example of using marketing to create asymmetric information to influence the median voter.)

4.2.b Prior to 1960

In the 1920’s, social workers saw pregnancy outside of marriage not as a moral problem, but as a planned activity that needed “‘scientific treatment.’” Professional social workers criticized those volunteer counselors working in the Crittenton homes and others who counseled pregnant women to marry. The social work movement at that time was agitating to force homes staffed by volunteers to “professionalize”: they said the volunteers were unfit and untrained to help needy women. This constant pressure to professionalize worked: the national headquarters of the Crittenton homes gave in to the demands37, which resulted in a change of character from Christian homes to neo-pagan homes (Olasky 1995: 247). (This is a classic case of Institutional Capture.)

37 While the headquarters succumbed in the late 20’s, the regional homes resisted for longer times.
In the 1930’s, some, including some in the medical community, raised voices in support of legalizing abortion, as the Soviet Union had. Others voices called for a gradual change of the laws so that abortion on demand can be a reality in the future (Olasky 1988: 69). Newspapers occasionally carried articles on abortion. Condoms and diaphragms used during this time had a high chance of failure, creating a false sense of security and resulting in higher demand for abortions. (Olasky 1995: 252). The 1930’s also saw Margaret Sanger’s now infamous “Negro Project,” the intentions of which are found in a private letter:

The most successful educational approach to the Negro is through a religious appeal. We do not want word to go out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members (Gordon 1974, 1976: 332).

America experienced a baby boom after world War II and illegal abortions occurred at what was probably a reduce rate. Proabortion strategists built on their 1930’s gradualism, hoping to sway the median voter with public relations campaigns suggesting that antiabortion laws violated the separation of church and state, that antiabortion laws hurt women, that the only way to stop illegal abortion was to legalize it and that legalization would prevent maternal death (Olasky 1988: 78). They saw success in the decades that followed. During this time, newspaper coverage of abortion was still rare and advocates of birth control were starting to become ambivalent on the issue of abortion (Olasky 1988: 79).

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38 By the late 1930’s, abortion for a time was again illegal in the Soviet Union.
39 The discovery of penicillin in the 1940s reduced maternal death by over 90% (Olasky 1988:82).
40 While Sanger publicly campaigned for using birth control to end abortion, she privately linked clients seeking abortion with doctors. Further, much of the rhetoric used to support birth control was easily
The only indicator of the number of abortions that might have occurred during the 1950’s comes from the Kinsey study (Sauer 1974: 62), but it has been shown to be fraudulent (Reisman and Eichel 1990). Nevertheless, the estimates varied widely from 200,000 to 1.2 million per year41. Proabortionists advocated legal abortions for rape victims and certain hardship cases in addition to cases involving the health of the mother. Newspapers and magazines advocated more flexibility in abortion law (Sauer 1974: 63) and newspapers started writing more favorably about abortion. Very little was said about the unborn child, rather the discussion pitted “good abortionists” against “butcher quacks” and examined the risks to the mother. Newspapers openly advocated abortion without conveying the whole truth, in an effort to shift the median voter to support the liberalizing of abortion laws42 (Olasky 1988: 88ff). (This is an example of using asymmetric information to sway the median voter.)

Proabortionists were also able to successfully target lawyers, physicians, and liberal theologians. In 1959, the Leftist and influential American Law Institute (ALI) proposed a model penal code for abortion which proposed legalized abortion for cases involving rape, incest, fetal deformity and if the doctor believed that continuing the pregnancy was a risk to the mother’s physical or mental health (Olasky 1988: 91).

4.2.c 1960-1973

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41 The number of births was 4 million per year.
42 Newspapers started reporting the number of illegal abortions as high as 1,300,000 without substantiation. And left the impression that most abortions were done under non-sterile conditions. The proabortion Kinsey Institute estimated that at least 85% of abortions were in sterile environments (Olasky 1988, 90).
With groundwork laid in the earlier decades, the movement to legalize abortion proceeded rapidly in the Sixties and early Seventies. Two key events proved to be boons to those marketing abortion to the median voter via the media. When the birth defects resulting from thalidomide use during pregnancy prompted - one Arizona woman, who was unable get an abortion here, to travel abroad to get one, the media gave overwhelming national coverage to her plight and argued that the law preventing her abortion was cruel. The second event was the epidemic of German measles in 1964, a disease that could cause birth defects. These two events led to increased legislative support of the ALI legal code (Blanchard 1994: 22). In 1967, Colorado adopted the ALI model code. In 1970, New York went even further and legalized abortion on demand up to the 24th week and three other states follow suit. By 1972, 13 states had ALI type statues on the books; 31 states allowed abortion only to save the mother’s life.

Success in legalizing abortion through legislative means was limited; so proabortion forces focused their attention on the courts, where they had had greater success in getting the courts to act as an agenda setter. The proabortion interest groups (and birth control interest groups) were able to maximize the ideological interests of

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43 Some writers think that legalizing abortion took only a few years from the mid 60’s (Lader 2003: 56), but this version of the story is misleading as the paper shows. “A wealth of inside information, now available in private and government archives, suggests that the eugenics movement...had enormous influence on the legalization of abortion. Civil libertarians and feminists were certainly in the picture, but in many cases they were handy instruments of the eugenicists and population controllers. Moreover,...abortion supporters received enormous aid from the American establishment or 'power elite'” (Meehan 1998).

44 Courts in many instances are typically seen as veto players.
judges more effectively than those of legislators (Pritchard and Zywicki 1998-1999: 494). Building on precedent, these interests groups were able to move the Courts in their direction successfully, as shown by *Griswold v. Connecticut* (1965) in which the Supreme Court found the right to marital privacy in the issues of contraception. The right to privacy, though not explicitly granted in the constitution, was found in the penumbra of other constitutional provisions, like the Third, Fourth, Fifth and Ninth Amendments (Hull and Hoffer 2001: 84). The Supreme Court extended the right to privacy to unmarried couples in *Eisenstadt v. Baird* (1972). Finally, in 1973, in *Roe v. Wade* (1973), the Supreme Court said that the right to privacy includes abortion and, further, in *Doe v. Bolton* (1973), defined “health of a woman” in terms so broad that abortion was basically legalized for any reason, through full term. These rulings were beyond what the median voter preferences indicate (See Appendix A).

Proabortionists used other tactics in the 1960s: they openly defied abortion laws (one clinic in Chicago performed over 11,000 abortions between 1969 and 1973); clergy and feminists in the Midwest and East formed referral services; and “[a]bortion activists picketed and invaded AMA conventions, legislative hearings, and courtrooms. Sit-ins at public hospitals and public speak-outs were held” (Blanchard 1994: 24). These mass actions and demonstrations had their desired effect and in 1967, the AMA voted in favor of changes to abortion laws.

45 While ideological interests of judges are constrained by their concern for reputation and status, the shift towards legalizing abortion likely increased the reputation for these judges since the media was predominantly in favor of legalizing abortion.
Various surveys in the early 1960’s indicated that support for unrestricted abortion was weak. Leftist elites started implementing the top portion of the “scissors” strategy by openly advocating through the media a position supporting the proabortion lobby. The media worked to promote an abortion crisis that needed a radical solution. For example, *Time*, on Christmas 1964, stated that there were approximately 1 million illegal abortions per year. Nine months later, their number had increased to 1.5 million. *Newsweek* agreed with the 1 million while other magazines talked about up to 3 million, in spite of there being no evidence to support such a high number. The media was also touting large numbers of maternal deaths (Olasky 1988: 98).

These numbers were indeed fabricated in an attempt to persuade the median voter. Bernard Nathanson, a co-founder of NARAL46 (originally known as The National Association for the Repeal of Abortion Laws47), wrote that before the *Roe v. Wade* decision “[We] aroused enough sympathy to sell our program of permissive abortion by fabricating the number of illegal abortions done annually in the U.S. The actual figure was approaching 100,000, but the figure we gave to the media repeatedly was 1 million.” The number of woman dying annually from illegal abortions was between 200 and 250 but “the figure we constantly fed to the media was 10,000. These false figures took root in the consciousness of Americans, convincing many that we needed to crack the abortion law” (http://www.catholiceducation.org/articles/abortion/ab0005.html). More from Nathanson:

46 Rockefeller and other elites funded NARAL for another classic case of scissor strategy (Nathanson 1996: 91).
47 The organization has undergone a number of name changes and is now known as NARAL Pro-Choice America.
The manipulation of the media was crucial, but easy with clever public relations, especially a steady drumfire of press releases disclosing the dubious results of surveys and polls that were in effect self-fulfilling prophecies, proclaiming that the American people already did believe what they soon would believe: that all reasonable folk knew that abortion laws had to be liberalized (Nathanson 1996: 88).

Furthermore, from reading the press, one would have thought all Protestants supported abortion, all abortions were back-alley abortions, and the only way to stop illegal abortions was to make all abortions legal (Olasky 1988: 106).

Another component of the top portion of the scissors strategy emerged in 1970 when President Nixon asked Congress to set up a commission on Population Growth and the American Future. John D. Rockefeller III, then one of the leading funders of the abortion and population control movement, chaired the commission that included elites48 such as the executive vice president of Ford Foundation, a trustee of the Rockefeller Foundation, the chairman of Planned Parenthood and the president of Population Council. While posturing as “non-partisan” and “objective,” this commission proposed ideas that were radical for their time. They proposed:

- That abortion, sterilization, and contraceptive services and information be made available to all Americans, whether married or single.
- That ‘abortion be specifically included in comprehensive health insurance benefits, both public and private.’
- That federal, state, and local funding be provided for abortion services.
- That minors be given access to abortion, sterilization, and contraceptive services without the consent of parents or guardians.
- That sex education/population education programs be integrated into the school curriculum (Jasper 1998).

48 Many elites supported this commission from the outside.
4.2.d The Church

In the early part of the 20th century, theological liberals took over the mainstream protestant denominations, but it was another generation before they were able to shift the their denominations’ position on abortion (Olasky 1995: 261). As stated earlier, by the 1960’s many clergy from these liberal denominations were providing referral services for abortion.

By 1971, even some relatively conservative denominations had retreated to the middle ground on abortion. For example, the Southern Baptist Convention "urged Baptists to work for legislation permitting abortion under certain conditions. These include: rape, incest, deformity, [and] emotional health" (Stafford 1989). And when the Supreme Court ruled in Roe v. Wade (1973), prominent Southern Baptist pastor W. A. Criswell declared:

I have always felt that it was only after a child was born and had life separate from its mother that it became an individual person, and it has always, therefore, seemed to me that what is best for the mother and for the future should be allowed (Stafford 1989).

(He later repudiated this position.)

The Roman Catholic Church, however, stood steadfastly against legalizing abortion49 and the proabortionists responded by trying to suppress and harass this intransigent and labeling everyone who opposed abortion “Catholic.” They “tarred all

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49 There were other denominations like the Eastern Orthodox Church, Churches of Christ, American Baptist Association, Lutheran Church-Missouri Synod, African Methodist Churches, etc that were also against abortions (Nathanson and Ostling 1979: 294ff).
opposition with the brush of the Roman Catholic Church or its hierarchy, stirring up anti-
Catholic prejudices, and pontificated about the necessity for ‘separation of church and
state’…All of this religious line was, of course, necessary political strategy” (Nathanson
and Ostling 1979: 172).

5) Movements and Counter movements and their Interaction

The swift success of the proabortion movement’s strategy prevented any
organized and serious threat from the antiabortion movement from the mid-1960s
through 1973. While the antiabortion movement was active before 1973, it was not until
the Roe v. Wade decision that the move to contain and limit abortion shifted to a higher
gear and concerted opposition to abortion rose to the national level (Blanchard 1994: 28),
leading to inevitable clashes between the two movements. While the antiabortion
movement is ideally a rightist movement similar to what was witnessed in the 19th
century American history (see next section for a detailed discussion since 1973), now due
to the interaction with the proabortion movement, a mixed strategy emerges. Similarly,
the proabortion movement succeeded in the first two thirds of the 20th century by being
mostly a leftist movement, but now with the interaction effect, the proabortion movement
has to also incorporate some rightist strategies.
5.1 The Mixed Strategy of the Antiabortion Movement

There exists abundant literature documenting the use by antiabortion political entrepreneurs of leftist strategies (Blanchard 1994). But while the leftist approach has had some success in slowing down the proabortion movement, its effectiveness has been limited up to this point: it has not afforded legal protection to the unborn. This could be because the antiabortion movement lacks media support, which makes a leftist approach difficult. Alternatively, it could be that the funding needed to sustain a leftist approach is being directed towards rightist approaches.

Supreme Court (leftist approach) decisions have seldom favored the antiabortion side, as cases such as these attest: Planned Parenthood of Central Missouri v. Danforth 50 (1976), Akron v. Akron Center for Reproductive Health 51 (1983), Thornburgh v. American College of Obstetricians and Gynecologists 52 (1986) and Planned Parenthood v. Casey 53 (1992) (See Appendix B for a list of cases from 1973 till 1992). Lobbying the federal legislature successfully produced the Hyde Amendment, which prohibits Medicaid funding of abortions in most cases. Mixed success came in the form of Reagan’s “Mexico City Policy”, which denies funds to organizations that "perform or actively

50 The Supreme Court struck down a Missouri law that required spousal consent and banned the use of saline amniocentesis. The Court okayed the requirement that minors needed one parent’s consent, but said the state law should have a “judicial bypass” if the teen did not want her parents involved.

51 The Supreme Court struck down requirements that abortions after the first trimester had to be done in a hospital. The court overturned 24 hour waiting periods, informed consent, and parental consent.

52 The Supreme Court struck down state laws that required the abortionist to use the method that is most suitable for the child to born alive if viability of the unborn baby is reached. The Court also struck down “right to know” laws and waiting periods.

53 The Supreme Court reaffirms Roe v. Wade. The Court allows for certain restrictions on abortion. It adopts the “undue burden” test.
promote abortion as a method of family planning in other nations” (http://www.nrlc.org/) but had no effect in the US\textsuperscript{54}. Finally, many attempts to limit abortion at the state level have been thwarted by the courts.

5.2 The Mixed Strategy of the Proabortion Movement

The proabortion strategists have also adapted some rightist strategies in reaction to the antiabortion side. Since the proabortion side is adept at the leftist strategy, using the rightist strategy is not their forte.

One recent successful effort by the proabortion side using the rightist approach occurred after South Dakota lawmakers in early 2006 passed a law banning abortion in the state for nearly all reasons. Doctors who performed abortions were to be charged with a “Class 5 felony, punishable by up to five years in prison” (Rose 2006: 22). While the initially strategy of Planned Parenthood was a lawsuit to test the constitutionality of the ban (leftist approach), Planned Parenthood reversed course for a rightist approach\textsuperscript{55}. Planned Parenthood decided to take the issue up with voters to see if the ban would hold. In November 7, 2006, the voters rejected the ban by 55 percent to 45 percent (http://www.usatoday.com/news/politicselections/vote2006/SD/2006-11-08-abortion-ban_x.htm).

\textsuperscript{54} President Clinton reversed this policy but President Bush reinstated it in 2001.

\textsuperscript{55} Part of the shift in strategy might be tied to the changing make up of the Supreme Court, which could overturn Roe v. Wade.
6) **Counter Revolution of the Right**

This section will focus on the rightist strategy of the antiabortion movement and discuss the role of the Church as one of the key sponsors in the antiabortion movement in the US.

The movement to contain abortion is still in progress and has many analogies to what occurred in the 19th century. One major difference with the 19th century analogy is that in the 19th century abortion was illegal whereas today abortion is legal. Further, the groups that were active in the 19th century were private organizations and today the Church has taken over that active role. Social entrepreneurs in the extreme right will use grassroots activism to move the median voter and change laws using more responsive government institutions (local/state legislatures). Churches typically fund these social entrepreneurs. It is possible that abortion can be effectively contained without passing laws making abortion illegal.

Since the effort to make abortion illegal is still underway, this section will not include a separate section on history of making abortion illegal. Rather some of the history of the modern antiabortion movement is incorporated in the discussion that follows.

6.1 **Rightist Strategies**

The antiabortion movement’s aim is to contain abortion, change the median voter’s viewpoint and change laws. To do this various strategies have been used which are also applicable to other similar rightist movements.
6.1.a Out Breeding the Left

The most effective long-term strategy for winning at the grassroots level is to just out breed one’s opponents. Given enough time, this strategy would shift the median vote, even allowing for some conversion\textsuperscript{56, 57}. Mother Teresa of Calcutta once said: “Have a big family. That is the best way to end abortion!” While the Catholic Church has long and consistently opposed birth control, a recent Protestant movement called the “Quiver Full” also opposes any method of birth control, the obvious effect being large families and large families that beget large families result in the change of the median voter, even when taking into account some conversion (www.quiverfull.com). This could in the end result in a skewed distribution favoring the antiabortion side.

6.1.b Marketing and Symmetric Information

While the proabortion strategy uses marketing to create asymmetric information, the rightist antiabortion strategy is exactly the opposite; its goal is to give the median voter all the information s/he needs, i.e., the “full story”, to make an informed decision. For example, slogans like “Abortion stops a beating heart” humanize the “fetus.” A term like “Partial-birth” abortion conveys more information to the median voter than the term “Dilation and Extraction” which only conveys information to medical specialists. The term “partial-birth” linked “life to choice by protecting the fetus and its mother from

\textsuperscript{56} The left like to use the institutions it has captured like the public schools and universities to convert those on the right. The right has responded with new institutions like home schooling or sending their children to private schools.

\textsuperscript{57} There have been numerous articles written recently about the red state and blue state divide and how the population growth is different in these two areas. Most of these articles have pointed out that the conversion rate is around 20% when dealing with political affiliation a number that is likely similar for religious affiliation (http://www.sfgate.com/cgi-bin/article.cgi?file=/g/a/2007/03/28/notes032807.DTL&type=printable).
violence aimed at both” (Saletan 2003: 7). Other marketing efforts have been successful in shifting the debate from “a woman’s body” and “choice” to the “unborn baby.” Some of the avenues used to convey information have been the Internet, radio, cable TV, religious broadcasting networks, and publications etc.

6.1.c Setting Up New Institutions

When the proabortion movement captures an institution, the right may fight to retake the institution, but frequently the rightist approach seems to favor setting up new institutions: In the 1920’s proabortion social workers captured the Crittenton homes; today’s antiabortion movement has established many “crisis pregnancy centers”, which are highly decentralized, and therefore less prone to capture (Olasky 1988: 143).

The Internet has also allowed for a proliferation of new institutions. For example in the case of the media, alternative news outlets (e.g. www.Worldnetdaily.com) offer news that takes a more positive spin on antiabortion activities.

6.1.d Technology

While technology in itself is neither leftist nor rightist, it certainly has made a difference in the rightist movement to contain abortion. Just as the birth control pill, approve by the FDA in 1960, energized the birth control/proabortion lobby (Lader 2003: 86), the use of real- time ultrasound technology, electronic fetal heart monitors, intrauterine photography, and fetal surgery has energized the antiabortion activists. These technologies have shifted the perception of many women who might have considered an abortion and of doctors who might have considered a future in the abortion industry. The
introduction of ultrasound led to a rapid increase in publications on the subject of
“fetology” (Nathanson 1996: 129), which might be one of the factors that have created a
shortage of doctors entering the abortion industry. A shortage of abortion-performing
doctors is likely to make abortion, even if legal, harder to obtain and more expensive.

6.1.e Legal Avenues

The predominately rightist legal strategy employed by antiabortion organizations
finds them filing suit instead of trying to change precedent. Suits charging malpractice,
failure to report statutory rape, child abuse and code violations have all caused abortion
clinics to close their doors. Such legal actions increase the cost of being in the abortion
business and seem to be one reason that abortion clinics are shutting down (Crutcher E-
book).

6.1.f Other Efforts

Attempts at state level to obfuscate the term “choice” have met with success in
recent years, and could lead to changes in abortion laws. For example, some new laws
provide for two charges to be brought against anyone who hurts a pregnant woman, one
charge for the mother and one for the unborn child; some would penalize pregnant
women who smoke (Detroit free press, July 11, 2006); and the fetal pain bills passed by
some states would require that doctors inform the mother that their unborn child will
possibly feel pain during an abortion (Rose 2006: 22). Such cases could eventually
change precedent and overturn Roe v. Wade, which would leave the abortion issue to be
decided on a state-by-state basis.
Efforts to market to students in medical school to discourage them from becoming abortionists have continued to be successful (Crutcher E-book). Small and large-scale protests outside the courts or abortion clinics have continued.

Finally, Article III, Section II\(^58\) of the Constitution grants Congress the power to provide exceptions to and regulation of the Supreme Court’s appellate jurisdiction. Limiting the Supreme Court’s ability to hear abortion cases would undermine the precedent of *Roe v. Wade* and eliminate the need to change that Court’s makeup or amend the constitution\(^59\).

### 6.2 The Church

In 1973, the group most visible and seemingly standing alone against abortion was the Roman Catholic Church\(^60\). Even some top conservative Protestant ministers saw abortion as a Catholic issue. Nevertheless, with time, many large protestant churches started opposing abortion as well.

Many mainline denominations suffered institutional capture by the extreme Leftists. Further, as seen in appendix A, it is clear that the median voter did not support abortion on demand. Since, in the US, religion is privatized and churches can be

\(^{58}\) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with *such Exceptions, and under such Regulations* as the Congress shall make (italics mine).

\(^{59}\) Recently, Ron Paul sponsored H.R. 776, entitled "Sanctity of Life Act of 2005." If it had passed, H.R. 776 would have removed abortion from the jurisdiction of the Supreme Court. In general, Congress has not successfully used this power in recent years. If used it could bring the Supreme Court in line with the median voter preferences if it there is a perception that the Supreme Court is catering to extremist and well-organized interest groups.

\(^{60}\) Some protestant churches like the Lutheran Church—Missouri Synod also opposed abortion, but was not as visible as the Catholic Church in the abortion debate.
modeled as profit maximizing firms, many churches rose to meet the demand of this vast segment around the median voter that did not support abortion on demand. By using voluntary financing and minimizing free riding, churches are able to provide grass roots institutional support to the antiabortion social entrepreneurs. Churches tend to sermonize against abortion, fund crisis pregnancy centers, sustain Christian schools, support lawsuits against abortion clinics and so on and antiabortion interest groups active in the political arena need to please their sponsors. Finally, many individuals and families who attend these churches, while not actively involved in politics, indirectly support the antiabortion cause by having larger families, adopting children, home schooling, providing foster care and so on. With a large number of people attending church regularly in the US, the Church is effectively able to get its message out on issues that are relevant to it (Glaeser, et al. 2005).

6.3 The Results so far

These strategies have borne fruit over the last thirty plus years. At one time, America had over 2,000 abortion clinics; today there are fewer than 800. “Physicians are forsaking the practice in droves”, which means, given enough time, there will be a shortage of supply, making abortion very difficult to obtain and very expensive even when abortion is legal (http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=54039).

The Harris Poll® shown below demonstrates how these efforts have moved the

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61 Some churches might not directly support all antiabortion activities, but many members within the church might separately support and even work in these groups.
median voter. (While this poll focuses only on the first three months of pregnancy, both the *Roe v. Wade* and *Doe v. Bolton* decisions allow for abortion under any circumstance at any time. Only a slender majority now supports abortion in the first three months.)

"In 1973, the U.S. Supreme Court decided that state laws which made it illegal for a woman to have an abortion up to three months of pregnancy were unconstitutional, and that the decision on whether a woman should have an abortion up to three months of pregnancy should be left to the woman and her doctor to decide. In general, do you favor or oppose this part of the U.S. Supreme Court decision making abortions up to three months of pregnancy legal?"

<table>
<thead>
<tr>
<th>Base: All Adults</th>
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<tbody>
<tr>
<td>%    %    %    %    %    %    %    %    %    %    %    %    %</td>
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<tr>
<td>Favor 52   59   60   56   59   65   61   56   52   57   52   49</td>
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<tr>
<td>Oppose 42   28   60   56   59   66   61   61   42   41   41   47   47</td>
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<tr>
<td>Not Sure/Refused 7   13    3    3    3    4    4    4    3    7    2    1    4</td>
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Note: Percentages may not add up exactly to 100% due to rounding.

7) **Conclusion**

The interest groups on either side of the issue have used different strategies to influence the median voter and set the agenda. This has met with varying degrees of success. These two interest groups will continue to use their preferred nodes and networks.

In recent years, the debate on abortion has moved to discussions regarding the beginning of human life: does life begin at conception or at some other point in time? The battle currently rages over “embryonic” stem cells research, “morning after” pills (chemical abortions) and invitro fertilization and there is no end in sight. How we define
the beginning of human life will decide the victor.

Technology has played a catalytic role over the past two hundred years in the framing the debate on infanticide and abortion. This will continue to be the case in the future.

Institutional and regulatory shifts in the future could change the debate in the social sphere: un-privatizing the church in the US would effectively end its independence and shutdown many rightist social movements; eliminating large foundations after a certain number of years could also shut down certain nodes in leftist strategies; and a reduction of the power of the State would limit the role of the elite.

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62 This would be hard to fathom with the current interpretation of the first amendment, but with the increased funding of charitable faith based organizations by the federal government, this might be possible.
Appendix A

Judith Blake’s paper contains all these opinion polls (Blake 1977). She has a detailed discussion on the biases of each opinion polls and what she did to overcome any bias.

Gallup Survey Question of voting age adults:

“Do you think abortion operations should or should not be legal where parents simply have all the children they want although there would be no major health or financial problems involved in having another child?”

National Opinion Research Center of voting age adults:

“Please tell me whether you think it should be possible for a pregnant woman to obtain a legal abortion if she is married and does not want any more children.”

Table 3:A-1: Information from the Gallup Survey and the National Opinion Research Center.

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<td>Gallup surveys</td>
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<td>Approving</td>
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<td>13</td>
<td>14</td>
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<td>6</td>
<td>7</td>
<td>8</td>
<td>6</td>
<td>5</td>
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<tr>
<td>Total</td>
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<td>Total respondents</td>
<td>(1,611)</td>
<td>(1,517)</td>
<td>(1,560)</td>
<td>(1,525)</td>
<td>(1,513)</td>
<td>(1,550)</td>
<td>(1,583)</td>
<td>(1,549)</td>
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<td>NORC surveys</td>
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Survey commission by Blake and conducted by Gallup Survey of voting age adults to avoid bias?
Do you believe that there should be no legal restraint on getting an abortion—that is, if a woman wants one she need only consult her doctor, or do you believe that the law should specify what kinds of circumstances justify abortion?

Table 3:A-2: Results from the Blake commissioned Gallup Survey.

<table>
<thead>
<tr>
<th>Sex and Response</th>
<th>September 1972</th>
<th>September 1974</th>
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<tbody>
<tr>
<td><strong>Men</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No legal restraint</td>
<td>40</td>
<td>41</td>
</tr>
<tr>
<td>Law should specify circumstances</td>
<td>52</td>
<td>50</td>
</tr>
<tr>
<td>No opinion</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td><strong>Total respondents</strong></td>
<td>(765)</td>
<td>(790)</td>
</tr>
<tr>
<td><strong>Women</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No legal restraint</td>
<td>37</td>
<td>38</td>
</tr>
<tr>
<td>Law should specify circumstances</td>
<td>56</td>
<td>55</td>
</tr>
<tr>
<td>No opinion</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td><strong>Total respondents</strong></td>
<td>(781)</td>
<td>(793)</td>
</tr>
<tr>
<td><strong>Men and Women</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No legal restraint</td>
<td>39</td>
<td>40</td>
</tr>
<tr>
<td>Law should specify circumstances</td>
<td>54</td>
<td>53</td>
</tr>
<tr>
<td>No opinion</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td><strong>Total respondents</strong></td>
<td>(1,546)</td>
<td>(1,583)</td>
</tr>
</tbody>
</table>

In 1970, the National Fertility Study asked the following question. In April 1975, Blake commissioned Gallup Survey to ask the same question:

“Are you in favor of a law which permits a woman to have an abortion even if she is more than three months pregnant?”
Table 3:A-3: Results from the National Fertility Study and the Blake commissioned Gallup Survey.

<table>
<thead>
<tr>
<th>Response</th>
<th>Married, under Age 45</th>
<th></th>
<th>All Marital Statuses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>12</td>
<td>18</td>
<td>27</td>
</tr>
<tr>
<td>No</td>
<td>84</td>
<td>72</td>
<td>61</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Don’t know</td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Total respondents</td>
<td>(5,981)</td>
<td>(327)</td>
<td>(259)</td>
</tr>
</tbody>
</table>
### Table 3:B-1: Supreme Court Abortion Cases from 1973 to 1992 (Gober 1994: 235).

<table>
<thead>
<tr>
<th>Date</th>
<th>Case</th>
<th>State</th>
<th>Provision</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>Roe v. Wade</td>
<td>Texas</td>
<td>Restrict abortion to save life of mother.</td>
<td>Overtuned</td>
</tr>
<tr>
<td>1973</td>
<td>Doe v. Dalton</td>
<td>Georgia</td>
<td>Restrict abortion to incidents of rape, incest, and save life of mother.</td>
<td>Overtuned</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Required Georgia-licensed physician, hospital accreditation, and review committee.</td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>Mather v. Roe</td>
<td>Connecticut</td>
<td>Restrict state Medicaid payments to “medically necessary” abortions.</td>
<td>Upheld</td>
</tr>
<tr>
<td>1979</td>
<td>Colautti v. Franklin</td>
<td>Pennsylvania</td>
<td>Employ methods that promote fetal survival.</td>
<td>Overtuned</td>
</tr>
<tr>
<td>1981</td>
<td>H. L. v. Matheson</td>
<td>Utah</td>
<td>Parental notification.</td>
<td>Upheld</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Informed consent. 24-hour waiting period. Humane disposal of fetal remains.</td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>Planned Parenthood of Kansas City v. Ashcroft</td>
<td>Missouri</td>
<td>(1) Restrict second trimester abortions to hospitals. (2) Pathologist report.</td>
<td>Overtuned</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(3) Second physician after viability. (4) Maintain abortion records.</td>
<td>1 and 4, Upheld 2 and 3.</td>
</tr>
<tr>
<td>1986</td>
<td>Simopoulos v. Virginia</td>
<td>Virginia</td>
<td>Parental consent with judicial bypass.</td>
<td>Upheld</td>
</tr>
<tr>
<td>1986</td>
<td>Thornburgh v. American College of Obstetricians and Gynecologists</td>
<td>Pennsylvania</td>
<td>Restrict second trimester abortions to state-licensed facilities.</td>
<td>Overtuned</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Informed consent after receipt of state-mandated information 24 hours prior to procedure. Employ method to promote survival of fetus. Maintain abortion records.</td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>Webster v. Reproductive Health Service</td>
<td>Missouri</td>
<td>Fetal testing to determine viability. Prohibit use of public funds for abortion counseling. Ban use of public facilities and employees for abortion procedures.</td>
<td>Upheld</td>
</tr>
<tr>
<td>1991</td>
<td>Hodgson v. Minnesota</td>
<td>Minnesota</td>
<td>Parental notification with judicial bypass.</td>
<td>Upheld</td>
</tr>
</tbody>
</table>
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Greenstone, J. David  

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Hotelling, Harold  

Hull, N.E.H., and Peter Charles Hoffer  

Hunter, James Davison  

Iannaccone, Laurence R.  

—  

Jasper, William F.  

Kadane, Joseph B  

Kirk, Marshall, and Hunter Madsen

Kozak, Jan

Kuran, Timur

Lader, Lawrence

Lounsbury, Michael

Macey, Jonathan R.

—

Marullo, Sam, and David S. Meyer

McAdam, Doug

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McKelvey, Richard D.

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Meehan, Mary  

Mohr, James C.  

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Rose, Michael S.

Rowley, Charles K.

Rushdoony, Rousas John

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Tullock, Gordon

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Chapter 4: Evolution of the Constitution of India with respect to Civil and Economic Rights since Independence

1) Introduction

This essay will look at the past 50 plus years of the Indian constitutional experiment. The hypothesis to be tested is that India has moved decidedly in favor of civil rights and hesitatingly in favor of economic rights. To test the hypothesis regarding economic rights, an in-depth analysis of the development of the Basic Structure Doctrine will be necessary with additional analysis of the Public Interest Litigation. To test the hypothesis regarding civil rights, the development of Public Interest Litigation will be examined closely.

The paper is organized as follows. Section 2 gives the historical perspective, section 3 details the key parts of the Indian constitution, section 4 focuses on economic rights, section 5 is an economic analysis of the conflict between Parliament and Supreme Court, section 6 focuses on civil rights both individual and group rights, and section 7 concludes.

2) Historical Perspective

When the East India Company came to India in the 17th century, its primary objective was to trade. In the 18th century with wars ravaging in Europe, the conflict
between European traders in India increased. This resulted in traders seeking alliance with local Indian princes to establish themselves. Having now involved itself in Indian politics, the East India Company became a fully-fledged political power. As the East India Company’s power grew, it drew the attention of the British Parliament which increased it’s control over the company and its activities (Gledhill 1964: 4).

In 1857, the Indian mutiny or “First War of Indian Independence” took place. While the mutiny was suppressed, India came under the direct control of the British Crown and the British East India Company was abolished. Even when India was under the British Crown, there were large parts of India that remained under the control of Indian Princes. These Princes ruled their territories under the usually careful watch of the British.

The first seed of the Indian legislature came with the passage of the Charter Act of 1833. This Act established the office of Governor-General and the All-India Legislature. The Charter Act of 1853 separated the powers between the legislature and the executive. In 1861, the Indian Councils Act enabled the establishment of Provincial Legislatures. Further, this act enabled the introduction of the portfolio system in the Executive and hence was the birth of cabinet government. In 1862, three Indians had been appointed to the Central Legislative Council and it was not till 1909 the first Indian was appointed to the Executive Council (Gledhill 1964: 20).

The Indian Councils Act of 1892 increased the power and the size of the legislature and allowed the legislature to take up issues such as the budget. The Morely-Minto Reforms was embedded in the passage of the Government of India Act of 1909.
that further increased the size of the central legislature to sixty of whom twenty-seven
were elected by certain portions\(^1\) of the electorate. The Act also enlarged the provincial
councils. Due to pressure from the minority Muslim population, communal
representation was approved, where Muslims alone would select local representatives
(Gledhill 1964: 20).

Further steps towards self civil-government occurred during World War I, in
which India participated as a component of the British Empire. The Congress and the
Muslim League lobbied for further Indian participation in the civil government. In 1919,
the Montagu-Chelmsford Report recommended “popular control of local bodies”
(Gledhill 1964: 21). The Provinces were to be more independent of the Center, but the
Center was to retain supremacy and be under the British Parliament. Further, the
legislatures were to be more representative and influential. The Government of India Act
of 1919, introduced bicameralism to the Center and expanded the number of seats of the
lower chamber (or Legislative Assembly) to one hundred and forty five out of which one
hundred and five were elected. The tenure was for three years. The upper house (or
Council of State) had sixty seats of which thirty-five were elected. The tenure for the
upper house was for five years. The franchise was given to those with a
specified/minimum amount of property. The Governor-General could veto bills passed
by the legislature. If the legislature rejected a bill, the Governor-General, in the name of
safety and tranquility for certain regions of the country could make a bill as a law.

\(^1\) Included for example landowners, members of chambers of commerce etc.
In 1927, the Simon Commission was setup to write a new constitution. The Indians opposed this, as they did not want a constitution written by the British. In 1928, an all parties’ conference was held to design a constitution. The British rejected the report from this conference as it was seen as a document designed to separate India from the British Empire. The British Parliament passed the Government of India Act of 1935, a very comprehensive piece of legislation that was to serve as the last pre-independence constitution for India. It envisaged a federation of the provinces and the princely states. But the princely states did not agree to this while the British were in power and this Act failed in that point (Gledhill 1964: 26). The most important feature of the 1935 Act was the issue of distribution of powers between the Center and the Provinces. Three lists were made (center, provincial and concurrent) to take into account the realities of the conflict between Hindus and Muslims. The Muslims advocated more power to the provinces whereas the Hindus advocated more power at the center.

After the end of World War II, the leaders of India demanded a constituent assembly to write their own constitution. The newly elected Labour government in Britain favored this development. The Muslim League headed by Mohammed Ali Jinnah distrusted the Indian National Congress (or Congress) and the Hindus and so advocated a two-nation theory i.e. a separate nation for Muslims and a separate constituent assembly. The Congress, which was also made up of non-Hindus, felt that India was for Indians regardless of one’s religion. All efforts to bring together the Congress and the Muslim League failed.
The members of the Constituent Assembly were selected from the provincial legislatures. Hence, the provincial legislative election in December 1945 was crucial and Congress won 58% of the seats\(^2\). The elections to the Constituent Assembly occurred in July 1946 and out of the 296 allotted to the provinces, Congress won 208 seats (Austin 1966: 9).

The constituent assembly was represented by all cross sections of Indian society. The Fabian and Laski-ite socialists were the vast majority of the members in the Constituent Assembly and they believed that “‘socialism is everyday politics for social regeneration’ and that ‘democratic constitutions are…inseparably associated with the drive towards economic equality’” (Austin 1966: 41). Marxism, Fabianism and Annie Besant influenced Jawaharlal Nehru in the 1920’s but over time, he became an “empirical gradualist” socialist. Sardar Vallabhbhai Patel, who supported property rights and free enterprise, provided the counter weight to the socialists in the Constituent Assembly.

Many streams of thought conflicted during the deliberations of the Constituent Assembly. Mahatma Gandhi submitted two plans\(^3\). The second plan was submitted on the day of his murder on January 1948. He advocated a decentralized society based on a network of *panchayats* located in each village. Gandhi and his supporters did not like the concept of political parties and were against certain aspects of the European and American models. Gandhi believed that “the achievement of social justice as the common lot must proceed from a character reformation of each individual, from the heart

\(^2\) There was no universal suffrage in this election. Only about a quarter of the population could vote.

\(^3\) Gandhi submitted the first plan in January 1946. Gandhi’s second plan was the more comprehensive plan.
and mind of each Indian outward into society as a whole. The impetus for reform must not come downward from government, and a reformed society would need no government to regulate or control it” (Austin 1966: 31) Hence Gandhi and his supporters advocated a minimalist state. The Constituent Assembly rejected the Gandhian ideas, as the desire for centralization was dominant among its members. In the end, the constitution embodied democracy and a socialist bent.

The Indian Independence Act of 1947 separated British India into two. India was considered a Dominion and governed by the Act of 1935 until the constitution of India was written. As a Dominion, the acts of British Parliament does not extend to the Dominion, unless the Dominion parliament accepts it as is or with modifications (Gledhill 1964: 41). The Princely states were forced to join the Indian union. The Constituent Assembly, after much deliberation, passed the constitution of India on November 26, 1949. It came into effect two months later on January 26, 1950. The constitution heavily borrowed from the Government of India Act of 1935 (Gledhill 1964: 73). The constitution of India is considered to be the lengthiest constitution in the world (Siwach 1985: 15).

3) **Key Parts of the Constitution**

This section focuses on various key parts of the constitution that provide the context for the evolution of civil rights and property rights in India.

The Fundamental Rights (see Appendix) are rights enforceable by the courts and divided into seven parts: “the Right of Equality, the Right of Freedom, the Right Against
Exploitation, the Right to Freedom of Religion, Cultural and Educational Rights, the Right to Property, and the Right to Constitutional Remedies” (Austin 1966: 51). These rights included both negative and positive rights and are not absolute, as they are subject to limitations. For example, in the case of freedom of religion, should society allow for devadasi (temple prostitution), sati (widow burning), and purdah (full body covering), in the name of religion? When originally written, the Fundamental Rights included both property rights and civil rights but now does not include property rights.

The Directive Principles of State Policy (see Appendix) “represent the conscience of the Constitution“ (Siwach 1985: 17). The directive principles have a strong socialist bent, and hence have been a threat to economic rights and civil rights in India. The Directive principles guide the state when it sets laws and policies and were seen by socialists as an avenue to be used to nationalize many industries. The Directive Principles are not enforceable by the courts if the state (Parliament and state legislatures) fails to act in accordance with these principles.

The center-state relationship is mainly dominated by the central government. There are two main reasons for this dominance. The first reason is that the constitution accords power to the center to dismiss duly elected state legislatures for reasons such as the break down of the constitution in the state (Article 356). The second reason is that the center controls the purse strings. The center collects most of the taxes and then redistributes some of it to the states to do their duties. This has resulted in increased dependence of the states upon the center. The pressure on the individual states to satisfy

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4 The point of enforcement by the courts was hotly debated during the Constituent Assembly.
their median voter has resulted in many states going into deficits with funds borrowed from the center with interest. Therefore the states have become financially dependent on the center (Siwach 1985: 25).

There are three ways to amend the Indian Constitution. The first way to amend the constitution is when a bill is passed by a two-third majority of the members present in each house separately (Article 368). If the amendment affects the federal structure, then the bill has to further be ratified by half the state legislatures. The third way to amend the constitution is through a majority of the Parliament. This last method is relevant mainly in redrawing state borders (Article 3).

The Lok Sabha (House of the People) is the lower house of Parliament. The constitution allows for a maximum of five hundred and fifty two members. Out of this, five hundred and thirty members are elected by direct election by the people from the states, up to twenty members are elected by direct election by the people from the union territories, and up to two are appointed from the Anglo Indian Community if the President determines that they do not have adequate representation (http://Parliamentofindia.nic.in/). One has to win the most votes (‘first past the post’) in each legislative district to become a member of the Lok Sabha.

The seats allocated to each state in the Lok Sabha are based on the population of the states. The term of each member is five years unless Parliament is dissolved or an emergency is declared. It holds some exclusive powers such as control of the council of ministers, control over the purse, and disapproval of an emergency. The power of the purse is strong such that the Rajya Sabha has only 14 days to consider the bill and send it
back to the Lok Sabha, if not the bill is considered passed. Further, the Lok Sabha can reject or accept the changes the Rajya Sabha makes to the monetary bill (Siwach 1985: 148ff).

The Rajya Sabha (Council of States) is the upper house of Parliament. According to Article 80 of the constitution, twelve members are to be nominated by the President with “special knowledge or practical experience in the field of literature, science, art and social service” (Siwach 1985: 161ff). Another two hundred and thirty eight representatives are chosen from the states or union territories. The representation is again based on population of the states. The state legislative assemblies choose the representatives of the Rajya Sabha using proportional representation by means of the single transferable vote.

The term in the Rajya Sabha is six years and every two years, a third of the members retire. When there is a disagreement between the Lok Sabha and the Rajya Sabha on a bill, a joint sitting is held where the decision is decided by a majority of those present. The Rajya Sabha has limited powers in the area of monetary bills. The Rajya Sabha has no control over the executive, but plays an equal role in approving emergencies. The chairman of the Rajya Sabha is the Vice President of India. The Rajya Sabha plays an equal role with the Lok Sabha in the area of constitutional amendments and the impeachment of the President. The Rajya Sabha does not always protect the interests of the states but it has in recent years.

Some of the state legislatures are bicameral, but the vast majority of the states are unicameral. The states have powers to make laws that are on the state list and on matters
in the concurrent list (both lists are found in the seventh schedule). However, in matters of the concurrent list, the central government bill overrides any state government provisions. The state legislatures are sometimes involved in the amending of the constitution.

The courts in India are composed of the Supreme Court at the top, followed by 18 High Courts some of which represent more than one state. Below the High courts are various subordinate courts. The Supreme Court is composed of a chief justice and up to twenty-five 5 other justices. The compulsory retirement age of judges is age sixty-five. Usually two or three justices hear individual cases at the Supreme Court, but a larger number hear more important and controversial cases. The President appoints the Supreme Court justices in consultation with the Chief Justice and other members of the Supreme Court or High court, as he deems necessary. Consultation with the Supreme Court does not mean concurrence. The Chief Justice is usually based on seniority, but occasionally there are supersessions.

Judicial independence is not new to modern India and is granted by the constitution. Under British rule, the judicial system was independent and impartial and trained many Indians both at the bar and at the bench as to what the judicial system should be. The first Prime Minister Nehru said, “’the independence of the judiciary has been emphasized in our Constitution and we must guard it as something precious’…He wanted first-rate judges, not subservient courts” (Austin 1999: 124).

5 The total number of justices has increased from 8 to 26 presently. This is due to a backlog of cases and the need for handling cases expeditiously.
The Supreme Court has original, appellate and advisory jurisdiction. The original jurisdiction extends to cases between the states or between the center and the states. Article 32 lists other items where the court has original jurisdiction. “The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution” (http://supremecourtofindia.nic.in/). Other areas of advisory jurisdiction also exist.

The President of India is elected by an electoral college of voters consisting of members of both houses of Parliament and the state legislators. The votes for the members of Parliament are equal to the votes for the state legislators. The President is voted for 5 years with a possible second term. The President has limited powers, and has to agree to all money bills and can override any other bill only once. If the bill is sent back to him, he must sign it. Either house can impeach the president by 2/3 votes and then the other house has to investigate the charges. In the second house, the President can defend himself but if the second house impeaches him by 2/3 votes, then he is removed.

The executive power in India lies with the Council of Ministers and the Prime Minister. The President appoints the leader of the party with the majority representation in the Lok Sabha to be the Prime Minister. If no party has a majority, the President appoints a leader of a coalition with majority members. The President also appoints the Council of Ministers, but the Prime Minister is the one who allocates their portfolios. The Prime Minister’s power hence is dependent on whether his/her party is the majority

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6 Since the total number of the state legislatures is greater than the total number of the members of parliament, the weight given to the vote of a state legislator is based on the population of his/her state.
in the Lok Sabha or whether it is in a coalition government. The President can dismiss members of the council of ministers, but most times, many resign, or are forced out by the Prime Minister. The power of the Prime Minister in the cabinet meetings again depends on the political reality (Siwach 1985: 10ff).

4) Economic Rights

This section focuses on the evolution of economic rights in India. An economic right is the right to property. The right to property includes both “possessory rights” and a “right to transfer a possessory right” (Shavell 2004: 10). Further, when a state actor or non-state actor expropriates one’s property are there legal remedies available. In the modern era, societies have moved beyond dealing with physical property (land, buildings etc). Now societies deal with property rights in information (intellectual property). A property right in information revolves around the issues of patents, copyright and trademarks. This section deals with the right to property and traces the development of the Basic Structure Doctrine. The securing of the Basic Structure Doctrine meant that India has secured itself a state with multiple veto players rather than a unitary state. In the end, a brief discussion follows about additional veto players in India.

4.1 Basic Structure Doctrine

The idea of the Basic Structure Doctrine is that certain key parts of the constitution (e.g. Fundamental Rights, independence of the judiciary, secularism etc.)
cannot be changed by a constitutional amendment. The Basic Structure Doctrine evolved over many years because of the conflict between the Parliament and the Supreme Court. This conflict revolved around the right to property. In the end, while the right to property suffered a setback, the lawlessness of a powerful parliament was checked.

Before delving into the conflict, some background information is useful. Harold Laski, a Fabian Socialist from England taught “political equality…is never real unless it is accompanied by virtual economic equality” (Austin 1999: 72). This view influenced the early leaders of modern India. Industrial owners and entrepreneurs were looked down upon. Wealthy people were seen as people who had gotten their gain by ill means and were exploiters. Socialism was therefore the tool by which to change India. Socialism was to “mobilize national resources for development, to assure some balance in development among the country’s regions,” (Austin 1999: 73) and the state was to be involved in projects considered outside the scope of the private sector for e.g. building of dams.

The discussion on the right to property and due process if the property was taken for public use, took the Constituent Assembly two years to resolve (Austin 1966: 88). The discussion revolved around the issue of just compensation and whether that would require the courts to be involved. There were two camps in the discussion. One camp, led by Nehru, favored the legislature having a broad discretion when compensating owners of property and the other camp led my Matthai argued that ‘adequate compensation’ must be paid to maintain the credit of the country and that judicial review

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7 There is nothing in the original constitution that limits the right of parliament to amend any part of the constitution.
must be allowed (Austin 1966: 96). In the end, property could be taken if the law named
the compensation or the principles used to compensate the affected. This compromise
position was the one that Sardar Patel was willing to support and hence this became
Article 31 of the constitution (Austin 1966: 99). Article 19 gave the right to acquire, hold
and dispose of property (subject to limitations) and gave the right to do any trade or
occupation.

A major part of the conflict between the Supreme Court and the Parliament was
also a conflict between the Fundamental Rights portion of the constitution and the
Directive Principles portion of the constitution. The socialists in Parliament thought that
the Directive Principles portion of the constitution could be used to trump the provisions
of the Fundamental Rights, whereas the Supreme Court interpreted the Fundamental
Rights as part of the Basic Structure Doctrine, and hence not subject to change by
amendment or law.

Further the Congress party after independence had a large influence in the
political process. The Congress party in the years following independence had two-thirds
majority in the Lok Sabha, which meant that it could easily amend the constitution (see
Table 4:4-1) when it did not like a Supreme Court decision.
Table 4:4-1: Composition of Lok Sabha from 1952 to 1989 (Pelinka 2003: 115).

<table>
<thead>
<tr>
<th>Year</th>
<th>Composition of Majority</th>
<th>Prime Minister</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Lok Sabha (1952-1957)</td>
<td>2/3 Majority for Congress</td>
<td>Nehru</td>
</tr>
<tr>
<td>2nd Lok Sabha (1957-1962)</td>
<td>2/3 Majority for Congress</td>
<td>Nehru</td>
</tr>
<tr>
<td>3rd Lok Sabha (1962-1967)</td>
<td>2/3 Majority for Congress</td>
<td>Nehru, Shastri, I. Gandhi</td>
</tr>
<tr>
<td>4th Lok Sabha (1967-1971)</td>
<td>Simple Majority for Congress</td>
<td>I. Gandhi</td>
</tr>
<tr>
<td>5th Lok Sabha (1971-1977)</td>
<td>2/3 Majority for Congress</td>
<td>I. Gandhi</td>
</tr>
<tr>
<td>7th Lok Sabha (1980-1984)</td>
<td>Simple Majority for Congress</td>
<td>I. Gandhi</td>
</tr>
<tr>
<td>8th Lok Sabha (1984-1989)</td>
<td>2/3 Majority for Congress</td>
<td>R. Gandhi</td>
</tr>
</tbody>
</table>

The conflict between the Supreme Court and the Parliament played out in many court cases and constitutional amendments. The key events of this conflict are discussed below.

4.1.a The First Battle (Abolishing of Zamindari system: late 40’s and early 50’s)

The first battle between Parliament and the Supreme Court came indirectly with the attempt by state legislatures to abolish the Zamindari system. The acts passed by various state legislatures were to take the land and then not to provide compensation to the Zamindars. This was immediately challenged by the Zamindars in the various High Courts as they were being deprived of fundamental rights under the constitution, which allowed for compensation if land was taken. While some of the High Courts supported

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8 The Zamindars are basically large landholders who collected revenue from the peasants and passed it onto the British rulers of India. The Zamindar system seems to have started from the Mughal rule of India. ([http://en.wikipedia.org/wiki/Zamindari](http://en.wikipedia.org/wiki/Zamindari)).
the government, others did not. This case then went to the Supreme Court. To preempt
the Supreme Court, Parliament passed the first amendment to the constitution to remove
jurisdiction of this matter from the Supreme Court. Immediately those affected
challenged the legality of the first amendment on grounds that it was passed only by one
legislature (Lok Sabha) and that it needed states ratification.

In the first ruling (Shankari Prasad Singh Deo v. The Union of India and the State
of Bihar (1952)), the Supreme Court upheld the right of Parliament to amend the
constitution. Not long after the first ruling, the government’s appeal of the Patna’s High
Court (in the state of Bihar) decision was in the hands of the Supreme Court. Even
though the first amendment was passed by Parliament, the Supreme Court ruled that the
Bihar Land Reform Act was invalid (State of Bihar v. Maharajadhiraja Sir Kameshwar
Singh of Darbhanga (1952)). According to the Court, the real principles for
compensation had to be fixed and that Bihar had done it incorrectly. The Supreme Court
upheld the land reform Acts from other states for example the one from Madhya Pradesh
(Viseshwar Rao v. The State of Madhya Pradesh (1952)).

4.1.b Additional Property Battles

Additional property rights battles occurred in the early 1950’s. In The State of
West Bengal v. Mrs Bela Banerjee (1954) case from Calcutta, the Supreme Court ruled
that “compensation” meant, “a just equivalent of what the owner has been deprived of.”

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9 The death of property proponent Sardar Patel paved the way for anti-property forces to move
quickly.
10 The first amendment also added the Ninth Schedule to the Indian constitution. The objective of
the Ninth Schedule was to immunize certain acts from judicial challenge if the acts were challenged on the
grounds that they violated the Fundamental Rights.
In *The State of West Bengal v. Subodh Gopal Bose* (1954) case, the Supreme Court decided that it had the authority to decide the rightness of compensation. In the *Dwarkadas Srinivas v. Sholapur Spinning and Weaving Co.* (1954) case, the Supreme court sided with a shareholder in saying that the government taking over of the management of a company is equal to taking over the company and hence under Article 31, compensation had to be paid.

Then Parliament decided to amend Article 31 of the constitution so that its economic socialist reforms could continue. Nehru commented on the Supreme Court decisions and said that there was “‘an inherent contradiction in the constitution between the Fundamental Rights and the Directive Principles of State policy…It is up to this Parliament to remove this contradiction and make the Fundamental Rights subserve the Directive Principles of State Policy’” (Austin 1966: 100-01). The fourth amendment was passed which ruled that unless the government took over the property, taking over management was not compensate-able\(^\text{11}\). This amendment also prohibited the courts from questioning the compensation provided by the law. The fourth amendment was passed by both houses of Parliament and received the President’s assent.

\(\text{4.1.c The Golak Nath Case}\)

The Indira Gandhi years were to be the greatest testing years between the Judiciary and the Parliament. The *I.C. Golak Nath v. State of Punjab* (1967) inheritance case was the first major test between the two sides. Henry Golak Nath and his brother

\(\text{\(^{11}\) Parliament saw taking over management of a company as an attempt to regulate the company, not as an acquisition.}\)
William bought some 500 acres of land in Punjab over many years. After the passage of Punjab Security of Land Tenures Act of 1953, the brothers decided to deed the land to their six children. The Collector of Jalandhar allowed the brothers to own only 30 acres each and some additional acres, and the rest was considered surplus property. In 1962, the collector reversed his decision allowing the children to get 30 acres each and declared a smaller area surplus property. Another collector reversed this decision. Further, the Punjab Financial Commissioner decided that 418 acres was surplus property. This latter ruling was taken to the Punjab High court where the heirs lost and then this decision was appealed to the Supreme Court. The heirs challenged the Act under Article 32, which allowed people to acquire and hold property and practice any profession (Article 19). They wanted the first, fourth and seventeenth amendments\textsuperscript{12} declared 	extit{ultra vires}. They also sought “equality before and equal protection of the law (Article 14)” (Austin 1999: 197).

The Supreme Court ruled in 27 Feb 1967 that Parliament could not use its power of amendment to abridge the Fundamental Rights. The amendment was deemed a ‘law’ and according to Article 13, laws cannot abridge Rights. The Chief Justice implied that the Parliament did not have unlimited power to amend the constitution. The dissent in the case focused on why Parliament had the power to amend any part of the constitution, as there was no such limitation on Parliament proscribed by the constitution. This ruling reversed earlier precedents.

\textsuperscript{12} The seventeenth amendment broadened the definition of ‘estate’. It also added many state land reform acts in the Ninth Schedule including the Punjab Act (Austin 1999: 197).
4.1.d Bank Nationalization case

Two other cases related to property also came up during this time. The first case was the Bank Nationalization case and the second case was the Privy Purses case. The second case is not discussed here, as it is similar to the first case. With the nationalization of the Imperial Bank (renamed State Bank of India) in 1953, the government controlled about 1/3 of commercial banking. Article 39 of the Directive principles states, “The state shall, in particular, direct its policy towards securing—(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment” (Majumdar and Kataria 1996). This article was initially used in the early 1960’s to justify further nationalization of banks, but it was held back from being introduced partly in fear of having to pay compensation. Nevertheless, in 1967, the Bank Nationalization Act was passed. Immediately it was challenged in the Supreme Court by shareholders as violating their rights under Article 14 (right to equality before law as only certain banks were nationalized), Article 19 (right to acquire, hold and dispose of property), and Article 31 (right to property). Ten of eleven justices sided with the shareholders and Justice Shah writes, “The broad object underlying the principles of valuation is to award the owner the equivalent of his property with its existing advantages and potentialities (Rustom Cavasjee Cooper v. Union of India, (1970)).” Later another

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13 Privy purse was a grant given to various princes in the subcontinent to join with the Indian nation.
improved nationalization act was passed with compensation and this was acceptable to the Supreme Court.

4.1.e The Parliament’s Reaction—Passage of Amendments

Political parties increasingly attacked the idea of property rights and the leaders of India hailed socialism with yet more vigor. With the Supreme Court in the way, the only solution was to amend the constitution. The twenty-fourth amendment cleared the way for Parliament to amend any part of the constitution. The twenty-fifth amendment focused on property issues. It changed the word ‘compensation’ to ‘amount.’ When the directive principles (Article 39 b and c) are used as the guiding principle for laws passed, equality before law (Article 14), freedoms listed in Article 19, and property issues in Article 31 are to be subordinate and beyond judicial review, this became Article 31C (i.e. some Fundamental Rights were to be subservient to the Directive Principles) (Austin 1999: 239). Following the passage of these amendments, many industries were nationalized including coal and copper mines, steel plants, textile mills, shipping lines etc.

4.1.f The Kesavananda Bharati Case

Swami Kesavananda had a monastery like establishment in the state of Kerala. The government of Kerala tried to impose restrictions on the management of the property through two land reform acts. The government justified its actions under Article 31. The lawyers for Kesavananda suggested fighting this case under Article 29 regarding one's ability to manage religious owned property. With the passage of the twenty-fourth,
twenty-fifth, and twenty-ninth amendments, Kesavananda also decided to test the constitutionality of these three amendments.

The court majority (7-6) upheld the constitutional validity of twenty-fourth and twenty-fifth amendments with some changes. The court reversed the Golak Nath verdict. Further, it ruled that an amendment could not alter the basic structure of the Constitution (His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala, 1973). “This ‘basic structure doctrine’ is fairly said to have become the bedrock of constitutional interpretation in India” (Austin 1999: 258).

4.1.g Supersession of Judges

With the retirement of the Chief Justice of India after the Kesavananda Bharati case, the usual procedure was to have the most senior judge take over the Chief Justice position. The President through the Prime Minister Indira Gandhi appointed A.N. Ray as the Chief justice bypassing other senior judges. Four senior judges resigned their positions in protest. This move by the government was to make the judiciary subservient to the Parliament by altering the make up of the court. The motive for supersession was the “furtherance of the social revolution, for which an accommodating Supreme Court was needed” (Austin 1999: 278).

4.1.h The Emergency

On 26 June 1975, Indira Gandhi declared an Emergency in India. Fundamental rights were suspended. Thousands of politicians of the opposition were arrested. Public
gatherings were banned. The emergency was declared to preserve democracy, national integrity and social revolution. While the people supported the emergency for the first few months, fear settled in among them. It became clear that the emergency was to stop democracy, to centralize power, and to protect the political fortunes of one person\textsuperscript{15}. The thirty-eighth amendment was passed to protect the declaration of emergency from judicial review (Austin 1999: 335). The thirty-ninth amendment was passed which removed from judicial review the elections of the Speaker and Prime minister and this was to be applied retroactively (Austin 1999: 319). The Supreme Court struck down parts of the thirty-ninth amendments but allowed laws to be changed retroactively, this latter part of the ruling legalized Gandhi’s election in 1971.

During the emergency, the government tried to get the court to review the 
Kesavananda Bharati case, which the Supreme Court declined to do. Additional threats to the independence of the Judiciary occurred with the transfer of judges of the High Court who ruled against the government in various cases.

The forty-second amendment was the most radical change. The amendment was designed to further protect Indira Gandhi’s election in 1971, and to move the country towards a unitary system and away from a multiplayer and federal system. It strengthened the central government at the expense of the state governments, and it protected the “social revolutionary legislation” from judicial challenge. All amendments to the fundamental rights were to be beyond judicial review. It removed limits on parliament’s power to amend the constitution. It made “equality before the law and the

\textsuperscript{15} Indira Gandhi’s election to Parliament in 1971 was challenged in the courts because she spent above the allowed amount for her reelection and due to the use of official machinery in her reelection bid.
‘freedoms’ of the Fundamental Rights subservient to all of the Directive Principles may have been its most appalling provision” (italics in original) (Austin 1999: 658).

4.1.i Post Emergency

During the elections of March 1977, the Congress Party under Indira Gandhi was defeated. In its place a coalition government was formed. One of the tasks of the government was to decide whether to repeal the forty-second amendment wholly or piece meal. The forty-third amendment was the first step in selectively repealing parts of the forty-second amendment with the heavy lifting to come in the forty-fourth amendment. The forty-fourth amendment allowed the right to life and liberty (Article 21) to be valid even under an emergency declaration (Austin 1999: 426). The right to property was to be removed as a fundamental right16. Articles 14 and 19 of the Fundamental Rights were still to be subservient to the Directive Principles (Austin 1999: 426). Further, it became harder to declare an emergency. On 30 April 1979, the amendment was passed.

4.1.j The Return of Congress and the Minerva Mills Case

During the elections of January 1980, the Congress party under Indira Gandhi returned to power with a large but simple majority. The Minerva Mills Ltd. v. Union of India (1980) case came to the Supreme Court in 1979. It had to do with the nationalization of the mill. The lawyer bringing the case decided not to fight the nationalization based on property rights. Rather he fought it under whether Parliament

16 Property is now located in Article 300-A, where it reads, ‘No person shall be deprived of his property save by authority of law’.
had the unlimited power to amend the constitution, and whether Article 31C which was expanded by the forty-second amendment violated not only the fundamental rights but also the preamble of the constitution. While reaffirming the basic structure doctrine, the court also affirmed that the power of amendment could not destroy the constitution and therefore not an unlimited one. The court then limited the scope of Article 31C to that of what existed prior to the forty-second amendment i.e. affecting only property rights and Articles 14 and 19 (Austin 1999: 504). Additionally, in a related case (Waman Rao v. Union of India, (1981)), the court ruled that laws placed in the Ninth Schedule after the Kesavananda Bharati decision can be reviewed17.

4.1.k Post Minerva Mills

From the time of the Minerva Mills case, the Supreme Court has “exercised maximum restraint in using the basic structure doctrine against constitutional amendments. Since then, no effort was made on behalf of the government to overturn the basic structure doctrine”(Sathe 2002: 87). Since the Kesavananda Bharati case, the basic structure doctrine has been invoked successfully in only five cases.

4.2 Additional Veto players

In 1971, Indira Gandhi 'delinked' the elections to the Lok Sabha with the elections for the state legislatures. This delinking occurred because the Lok Sabha is to have

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17 This decision has been reconfirmed recently by the Supreme Court in an unanimous verdict. In their decision they state: “The power to grant absolute immunity at will is not compatible with the basic structure doctrine and, therefore, after April 24, 1973 the laws included in the Ninth Schedule would not have absolute immunity. The validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these Articles” (The Hindu, January 12, 2007).
elections every five years, but the Lok Sabha could be dissolved sooner. This move by
Indira Gandhi allowed for the development of regional parties and caste based parties to
gain in strength as they could focus on state or regional races rather than national races.
With elections now more often, for either the central or the state governments, the parties
were more accountable to the electorate and this provided a more credible veto player in
the electorate. Now the composition of the Rajya Sabha, which represents the states,
could be different from that of the Lok Sabha. This made it more difficult to ram things
through the legislative process especially constitutional amendments. Hence, the Rajya
Sabha became a credible veto player. Further, with the rise of regional parties, the
regional parties insisted on more power being devolved from the center to the state if
their parties were to support a national coalition. Additionally coalition governments at
the center now required consensus building to accomplish anything and therefore were
less prone to abuse power.

5) Economic Analysis of the Conflict Between Parliament and Supreme Court

Two models are used to analyze the conflict between Parliament and Supreme
Court. Both of these models are merged to understand what happened in India in the last
50 years.18

The first model to be used for analysis is the bipolar model of “king and council”
developed by Congleton (2001). This model might not have universal applicability
when it comes to kingdoms that become democracies, but some of the tools the model

18 A recent article by Jaivir Singh analyzes the erosion of property rights in India using a “Heuristic
analytical framework” which has some similarities to what I discuss in this section (2006: 314ff).
provides give it explanatory power in the Indian context. In this essay, the Parliament (stronger party)\textsuperscript{19} is the “King” and the Supreme Court (weaker party) is the “Council.” The constitution of India is the context where the struggle between Parliament and Supreme Court is played out.

The second model to be used is the veto player framework developed by Tsebelis (1995). The argument of Tsebelis can be summarized this way: “systems with multiple incongruent and cohesive veto players will present higher levels of stability in policy making than systems with one veto player or a small number of incohesive and congruent veto players” (1995: 317).

5.1 Congleton

In Congleton’s paper, when the stronger party and weaker party clash over an issue, and as long as the weaker party is able to resist the stronger party\textsuperscript{20}, then the Nash Equilibrium between two parties in an “asymmetric power game” results in intense resistance of the weaker party and intense aggression by the strong party (Congleton 2001: 199). Table 4:5-1 shows the results of this intense struggle where the Nash Equilibrium is 2,12 whereas the ideal position (least struggle) is 6,14. Because of the resources used in this conflict between the two parties, immense resources are wasted, and therefore welfare shrinks for both parties. To solve the problem of wasted resources in the intense conflict, Congleton suggests a flexible bipolar king and council template

\textsuperscript{19} I have assigned the role of stronger party to the Parliament, as I believe the constitution originally intended this to be the case.

\textsuperscript{20} If the weaker party is not able to resist the stronger party then we would have a dictatorship or in India’s case, a “mobocracy.”
where there is a division of power that could be produced by a “quasi-constitutional contract.21” This allows for shifts in power to occur generally in a peaceful and gradual manner.

Table 4.5-1: The Asymmetric power game between Parliament and Supreme Court (Congleton 2001: 200). The Nash Equilibrium is bolded. The ideal position is with little aggression and little resistance (italicized).

<table>
<thead>
<tr>
<th>Weaker Party</th>
<th>Stronger Party</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Little Aggression</td>
<td>Moderate Aggression</td>
<td>Intense Aggression</td>
<td></td>
</tr>
<tr>
<td>Little Resistance</td>
<td>6,14</td>
<td>3,16</td>
<td>0,18</td>
<td></td>
</tr>
<tr>
<td>Moderate Resistance</td>
<td>7,10</td>
<td>4,12</td>
<td>1,14</td>
<td></td>
</tr>
<tr>
<td>Intense Resistance</td>
<td>8,8</td>
<td>5,10</td>
<td><strong>2,12</strong></td>
<td></td>
</tr>
</tbody>
</table>

In the Indian context, the ability of the Parliament and the Supreme Court to negotiate the meaning and scope of the constitution and their subsequent role in the constitutional context was the essence of the struggle. Does the Parliament, which embodied the “will of the people”, have absolute power in determining what the constitution means or does the Judiciary have the ability to maintain its independence and relevance? The result of this bipolar struggle was the creation of a stable equilibrium with the development of the Basic Structure Doctrine. During this struggle, the Courts have overstepped in their interpretation of the constitution (e.g. *Golak Nath* verdict) and there were times when Parliament overstepped in their interpretation of their power to amend the constitution (e.g. forty-second amendment).

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21 The difference in my analysis is that the power struggle I portray will be played in a template within an already existing constitution.
Further discussion in Congleton’s paper goes in the direction of agenda control and veto power and how that can be used in bargaining between the parties. In the Indian context, the agenda control is with the Parliament and the veto power with the Supreme Court. The ideal point of either the Parliament or Supreme Court can be defended as long as either branch has agenda control or veto power.

The results of veto power and agenda control with decisive councils (decisive Supreme Court) vs. non-decisive councils (non-decisive Supreme Court) are quite stark when there is a shock, for example a technological or political shock\(^{22}\).

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**Figure 4:5-1**: Case of decisive council (Congleton 2001: 202). With point K being Parliament’s ideal point and B being the Court’s ideal point (B being the median position of the justices).

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\(^{22}\) Shocks change the ideal points of both king and council.
With decisive councils, shocks are moderated because of stable policies that result in a legal framework that is “more predictable for both firms and consumers” and hence aids economic development (Congleton 2001: 203). In figure 4:5-1 regardless of which branch is given veto power or agenda control, if the initial position is 2, then it will be very difficult for Parliament to get to its ideal point, K. The Parliament can best achieve point 3. Non-decisive councils (due to cycling) could result in the king securing “his ideal policy combination” by playing of members of the council to his preferred position even if the council has veto power. In figure 4:5-2, if the initial position is two, and Parliament sets the agenda and wants to be at 3, they can play the justices of the Court amongst each other and secure this point even if the Court has veto power.

Note, due to cycling the non-decisive council cannot have agenda control.
In the Indian context, figure 4:5-1 applies, as the Supreme Court is a decisive council unified under the Basic Structure Doctrine. Further, a major shock occurred in the political landscape when the Prime Minister Indira Gandhi declared an emergency. Because the Supreme Court is a decisive council, the shock’s effect was moderated with time hence policy stability exists.

5.2 Tsebelis

The discussion of Congleton on veto power and agenda control fits in nicely with the discussion by Tsebelis. Tsebelis paper has three main propositions that he developed using winset analysis in two-dimensional space. The first proposition states that as the
number of players increase, then for a change in the status quo to occur, the winset size does not increase or policy stability\textsuperscript{24} does not decrease. The second proposition states that as the distance between players along the same line increases, policy stability increases. The third proposition states that “as the size of the yolk of the collective players who are required to agree for a movement of the status quo increases...policy stability decreases” (Tsebelis 1995: 301).

The number of veto players has increased in India. Initially the struggle was between two players (Parliament and Supreme Court) even though Parliament’s actions indicated a desire for only a unitary player. Today there are many players with veto power. For example in the area of institutional veto players, the Rajya Sabha has now become a credible veto player to the Lok Sabha except in the area of finance bills. Further, with coalition governments, the number of partisan veto players has now increased. According to proposition one, this does not decrease policy stability.

The distance between the veto players has also varied over time. Parliament tried to reduce the distance between the Supreme Court and itself with the supersession of judges but it met with limited success. Since the 1980’s, with the Basic Structure Doctrine settled, the distance between the Supreme Court and the Parliament has remained stable. However, the distance between other veto players has increased. For example, in area of coalition governments, presently the Congress party, which favors economic reforms towards free markets, is in a coalition with communist parties who

\textsuperscript{24} Note: Policy Stability is not same as government stability.
want very limited economic change. The large distance between these coalition partners constrains the Congress party to move in a slower fashion\textsuperscript{25}.

Figure 4:5-3 shows how the winset decreases ($WAB_2 < WAB_1$) when the distance between two veto players (player A and player B) increases. Initially when player B is at position B1 the winset is $WAB_1$ and SQ is the status quo point. Then when player B moves to position B2, the winset that includes the status quo changes to $WAB_2$. Therefore, according to proposition two, policy stability should increase and policy should change slowly if the distance between veto players increases.

\textsuperscript{25} Slow policy changes towards a free market might actually be the best for India as it allows for the education of the median voter to occur. Further economic disruption is slower and institutional changes can keep pace with economic reforms.
If there is a more cohesive party system, the yolk size is small and hence there is increased policy stability. With India being a parliamentary system and coalition governments becoming a permanent feature of the political landscape, the way negotiations are carried out with other coalition partners will determine policy stability. For example if party leaders get together and signed an agreement without discussing the issues with the party, this would reduce the yolk size and increase policy stability. Each
party could also discuss the issue first and come to an agreement about their ideal point. Then each party discusses their position with the other parties in the coalition. This also would reduce the yolk size and increase party stability. But, if leaders of the parties first come to an agreement and then have a discussion with their own parties, this would decrease party stability (Tsebelis 1995: 311f).

Tsebelis suggests that with increasing policy stability there is likely more government instability. This is likely due to the fact that multiple veto players lack “ideological congruence between them” and hence when shocks occur and a response is needed there could be immobility (Tsebelis 1995: 321). This argument can be tied to Congleton’s argument of decisive councils, where as long as there are decisive councils, even with a shock and multiple veto players, it is possible that government instability can be minimized. This seems to be the case when India faced a major financial crisis (shock) in the early 1990’s and even with multiple veto players, the decisive leadership of key players allowed for the shock to be moderated.

In conclusion, the development of the Basic Structure Doctrine has resulted in India moving away from a country run by a unitary player to a country run by a credible and beneficial multiplayer system, which has resulted in more policy stability.

6) Civil Rights: Individual & Group Rights

Civil rights in the context of India can be defined as individual rights and group rights guaranteed under the fundamental rights found in the Indian Constitution. The fundamental rights tied to civil rights include the rights to equality, right to freedom, right
to life and personal liberty, right against exploitation, cultural and educational rights, and right to constitutional remedies. These rights as interpreted and applied are not always harmonious with economic rights.

One of the main avenues of civil rights development in India was through the development of Public Interest Litigation (PIL). While the term PIL can be misleading the term “social action litigation” might capture the essence more clearly. PIL while solidifying civil rights did not consistently benefit economic rights. PIL cases resulted in the courts moving away from being a neutral umpire to being an activist judiciary.

This section looks at the development and application of PIL. The main areas of PIL focused on individual rights, some PIL cases also focused on group rights. This section further analyzes problems associated with PIL and how PIL affected civil and economic rights.

6.1 Development of Public Interest Litigation

During the emergency in India (1975 to 1977), the rule of law was suspended and the rule by decree by the Prime Minister Indira Gandhi was instituted. The right to life and liberty were affected adversely. The forty-second amendment as stated earlier, made amendments to the fundamental rights beyond judicial review and made the fundamental rights subservient to the directive principles. During the emergency thousands of protestors were arrested. Police held innocent people without notification to families and without charge. Abuse and torture of prisoners occurred. Many men were forced to undergo vasectomy and even castration as a “family planning” initiative.
After the emergency period, as the abuse of power became clear, a number of activist judges, social activists, media personalities, etc had in mind to make justice accessible to the common person. Further with the conflict between Parliament and Supreme Court over the Basic Structure Doctrine winding down, a new doctrine called the PIL was developing. “This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction” (http://www.supremecourtofindia.nic.in/new_s/juris.htm).

To improve access to justice, the Supreme Court liberalized the rules of *locus standi* (Sathe 2002: 202). First, this allowed the courts to be accessible by the poor and the underprivileged. Even if one were not physically able to approach a court, a letter was to be sufficient. Second, the courts enabled “individuals or groups of people to raise matters of common concern arising from dishonest or inefficient governance.” The liberalized rules increased “public participation in the process of constitutional adjudication” (Sathe 2002: 202). In *S.P. Gupta v. Union of India* (1982), Justice Bhagwati C.J. writes,

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons…and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction…

The first PIL case to come forward to the Supreme Court is the *Hussainara Khatoon v. State of Bihar* (1979). The newspaper “The Indian Express” highlighted the cases of under trial prisoners in the prisons of Bihar. In this case, many prisoners awaiting trial had already spent more time in jails than the maximum punishment their
crime required. The Supreme Court declared that the right to a speedy trial is a basic fundamental right under Article 21 and hence a speedy trial was not to be denied these prisoners.

Another PIL came up in 1981 after newspaper reports showed that police had blinded some of the suspected criminals awaiting trial. In the case of *Anil Yadav v. The State of Bihar* (1982), the Supreme Court ordered that the government of Bihar pay for the treatment of the blinded men and ordered that the guilty policemen face trial. The right to free legal aid if one was accused was to be considered a fundamental right. “Anil Yadav signalled the growth of social activism and investigative litigation” (Grant 1992).

### 6.2 Avenues of PIL

There are three main avenues of PIL. The first main avenue of PIL centers on violations of fundamental rights. A second main avenue of PIL is against state lawlessness, abuse of power and lack of good governance. A third main avenue of PIL is in the area of the environment. These avenues do interact with each other and many cases may fit under more than one avenue. There are additional avenues of PIL that will not be discussed here.\(^{26}\)

#### 6.2.a The First Main Avenue: Violations of Fundamental Rights

The cases in this category focused on issues such as inhumane working conditions, police treatment of prisoners, asbestos related cases, cases of rape of nuns, sexual exploitation of children, treatment of inmates in mental hospitals etc. Due to

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\(^{26}\) Different authors categorize PILs differently.
liberalized *locus standi*, activists on behalf of victims brought many of these types of PIL cases to the Supreme Court.

In a major case called *D.K. Basu, Ashok K. Johri v. State of West Bengal, State of U.P* 1997, the Supreme Court acting on a petition by Legal Aid Services looked into the large number of custodial deaths in the state of West Bengal. In this instance the court laid down the procedure that the police has to follow when a person is arrested:

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means…. No. [sic] society can permit it.

Further, the court instructed that prisoners must be notified of their basic rights. The court also laid out principles of compensation stating that:

Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitutions is remedy available in public law since the purpose of public law is not only to civilise [sic] public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved.

Another PIL was filed to look at abuse of police powers (*People’s Union for Civil Liberties v. Union of India*, (1997)). In this instance, the police used a fake encounter to kill two villagers in the troubled state of Manipur. Initial investigations revealed that there was no fake encounter rather the deceased were killed while in custody. The Supreme Court ruled even in the troubled state that ‘Administrative Liquidation’ was not

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27 Some have defended fake encounters as it allows the Police to mete out justice quickly without waiting for the slow process of justice through the courts.

28 Where terrorism is a problem.
an option for the police and that the law was to be followed when people were arrested. The court ordered compensation for the families of the two villagers.

In *M.C. Mehta v. State of Tamil Nadu* (1997), a petition was filed regarding the employment of child labor in the hazardous matchbox industry in Sivakasi, Tamil Nadu. The Court instructed the offending employers to pay compensation to the children, directed the state to either provide a job to the adult in the family or deposit an amount for the child, and declared other compensation measures.

In the case titled *Delhi Domestic Working Women’s Forum v. Union of India* (1995), a number of men from the Army were accused of raping tribal girls. The court saw the abuse and ordered an *ex-gratia* payment to each victim of this crime.

6.2.b The Second Main Avenue: State Lawlessness, Abuse of Power and Poor Governance

Cases under this category included compelling the state or another public agency to do what it is to do or to prevent the state or public agency from doing things it is forbidden to do. Additionally, the courts wanted to increase accountability of public officials.

In 1980 case of *Municipal Council, Ratlan v. Shri Vardhichand* (1981), the court instructed the concerned authorities in Ratlan, Gujarat to build community sanitation facilities to help the residents to avoid the stink and stench of open drains and public excrement. The court specifically instructed the municipality to build public latrines, construct drains and cesspools, provide water supply and scavenging services, and basic
sanitation to the public. It was recognized for the first time that people could approach the courts if their collective rights were violated (Sathe 2002: 214).

Some lawyers and journalists due to the dissatisfaction of how the Central Bureau of Investigations (CBI) investigated hawala transactions to politicians filed PIL in 1993 (*Vineet Narain v. Union of India*, (1998)). The ‘Jain brothers’ paid hawala transactions to gain government contracts. From 1994, onwards the Court followed the investigations closely and gave its final judgment in December 1997.

The court used a new tool in the hawala case called ‘continuing mandamus.’ The court issued “‘directions from time to time and keep the matter pending requiring the agencies to report the progress of the investigation…so that the court retained seisen [sic] of the matter till the investigation was completed and the chargesheets were filed in the competent court for being dealt with, thereafter, in accordance with law’” (Muralidhar 1998). Further, the court removed the CBI from having to report on this case to political authorities thereby insulating them undue pressure. After this case was over, the Supreme Court dealt with the larger issue of independence of the investigating agencies and issued instructions in this matter.

In another case (*Shiv Sagar Tiwari v. Union of India*, (1996a)), the Court stopped Sheila Kaul who while serving as Union Minister of Urban Development had used her position to provide “out-of-turn” allotment of government accommodation to those close to her. The allotments for housing in Delhi had a waiting period of over twenty years. While the minister did have some discretion in allotments, the court ruled that there was a
criminal breach of trust. The Court imposed a hefty fine on Sheila Kaul as exemplary damages (*Shiv Sagar Tiwari v. Union of India* (1996b)).

Additional cases under this category include cases tied to the failure of state run hospitals to provide timely emergency care, petitions for educating the children of prostitutes, appointment of consumer courts, preventing police from participating in *bandhs* organized by political parties, etc.

6.2.c The Third Main Avenue: Environment

The courts focused here mainly on the failure of government to implement laws passed in the area of the environment. The forty-second amendment that was passed during the emergency did have a provision for the protection of the environment as a duty for the citizens and the state. The Environmental Protection Act of 1986 gave the central government power to shut down polluting industries and established the “Ministry of Environments and Forests.” Amendments to the Air Act of 1987 allowed Pollution Control Boards (PCBs) to shut down polluting industries. Before this 1987 amendment, the state and central PCBs were generally ineffective in their work. Now the Air Act of 1987 gave the state PCBs the “power to cut off the water and electricity supply to industries that violated the emissions standards set forth by the PCBs effectively forcing industries to comply with environmental regulations” (Rosencranz and Jackson 2003).

In 1988, in *M.C. Mehta v. Union of India* (1988), the court ruled that industries along the Ganges River were to compensate those affected by their pollution. In *Rural

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29 The original Air Act was passed in 1981. The Water Act was passed in 1974. Both these acts set up Pollution Control Boards to develop and enforce standards.
Litigation and Entitlement Kendra v. State of Uttar Pradesh (1989), the court stated that the right to life included the right to live in a “‘healthy environment with minimum disturbance of ecological balance.’” Further, in the Charan Lal Sahu v. Union of India (1989), the court ruled that since the government has the obligation to protect the fundamental rights, it therefore must protect the environment.

Since the Supreme Court interpreted the right to life to include the right to a healthful environment, conditions for a healthful environment became a concern for the courts. In the Bandhua Mukti Morcha v. Union of India (1984) case, the Supreme Court ruled in favor of rock quarry workers, as they were not working in humane conditions. The court stated that it must “‘abandon the laissez-faire\(^{30}\) approach in the judicial process particularly where it involves a question of enforcement of fundamental rights and forge new tools’ to make ‘fundamental rights meaningful for the large masses of people’”.

### 6.3 Some Problems with PIL

With the advent of PIL cases, problems associated with PIL arouse. With the relaxation of locust standi, the number of cases increased. Between January 1987 and March 1988, the Supreme Court received 23,772 letters for consideration (Cassels 1989: 508). To prevent a tremendous backlog of cases, a screening process had been instituted, but even this has not been sufficient. Many cases still take many years to process.

\(^{30}\) The laissez-faire approach is what was suitable during the laissez-faire economy and the idea of the minimum state. The judicial approach under the laissez-faire system was a passive role (Sathe 2002: 195).
In certain PIL cases, the Supreme Court started micromanaging its rulings and hence took on administrative functions. With the help of expert committees to advise the courts, the courts are able to micromanage their rulings. Taking on administrative functions has been severely criticized by those who favor a more traditional judiciary. Further, it slows down the court and prevents it from taking other matters of importance. Additionally, if the ruling of the court has to be administered by the courts then the issue of legitimacy of the court’s ruling comes to the forefront.

The courts also had a hard time setting consistent standards that could be applied. In one case the court asked the polluter to pay for the pollution caused and in another case environmentalists who wanted to change the status quo had to bear the burden of proof (Sathe 2002: 225). The courts recognized this problem and Judge J. Pathak said “Indeed, both certainty of substance and certainty of direction are indispensable requirements in the development of the law, and invest it with the credibility which commands public confidence in its legitimacy” Bandhua Mukti Morcha v. Union of India (1984).

Further, the Court did not want to be perceived as anti-development and anti-industrialization and hence used an important non-PIL case, Raunaq International Limited v. IVR Construction Ltd (1999), to make an important point. The court held that if a party brings a case to court under PIL and loses, the loser needs to reimburse the winner any costs associated with any stay orders granted and the delayed implementation of projects. This precedent restrained lower courts from interfering with projects through stay orders.
The activist Court through PIL cases has entered the area of policy making and policy implementation. This has concerned the policy makers. Further with legislative powers, it makes the Court attractive to rent seekers. The debate in Parliament about PIL has shown that the members of Parliament have serious reservations regarding some of the PIL cases that the courts have reviewed (Desai and Muralidhar 2000). This was a concern picked up by Judge J. Pathak (Bandhua Mukti Morcha v. Union of India, (1984)):

But there is always the possibility, in public interest litigation, of succumbing to the temptation of crossing into territory which properly pertains to the Legislature or to the Executive Government…In the process of correcting executive error or removing legislative omission the Court can so easily find itself involved in policy making of a quality and to a degree characteristic of political authority and indeed run the risk of being mistaken for one.

6.4 Civil Rights and Economic Rights in PIL

PIL has been a “mixed bag” when dealing with economic rights, as the Supreme Court is not necessarily focused on property rights and “wealth maximization.” Many times the Court has had to balance environmental rights with developmental rights. Nevertheless, PIL has increased access of the courts for the majority of the Indians. This increased access has increased civil rights in India. Further, the court has taken up cases affecting the poor, oppressed, and downtrodden and this has allowed it to champion the civil rights of individuals.

Article 21 states “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Starting in 1978, the Court started reading this right in a more expansive manner. It subjected state action that interfered with this
right to be tested for reasonableness. The Court required not only that the “procedures be authorized by law, but that they are ‘right, just and fair’” (Cassels 1989: 502).

In Olga Tellis v. Bombay Municipal Corporation (1985), the court found that the right to life included the right to a livelihood. In Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981), the court found that “the right to life includes the right to life with human dignity and all that goes along with it and …must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.” In Bandhua Mukti Morcha v. Union of India (1984), the court interpreted its Francis Mullin decision to include the right to be “free from exploitation.” As noted earlier, in environmental litigation, the court found that Article 21 meant the right to a healthful environment and regarding prisoner rights, the court that found Article 21 meant the right to a speedy trial.

These expansive definitions of Article 21 have been used to enhance civil rights. However, some of these expansive definitions are detrimental to economic rights. For example, the right to basic necessities of life means that resources must be forcibly transferred from one individual to another individual to provide these basic necessities. The right to healthful environment will in many instances limit people from using their property in an efficient manner.

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The courts have also used Articles from the Directive Principles and have tied it to Articles in the Fundamental Rights and have hence made portions of Directive Principles enforceable. The right to free legal Aid (Article 39A) and environmental protection (Article 48-A) from the Directive Principles has been tied to Article 21 of the Fundamental Rights.
The area where PIL has expanded both civil rights and economic rights is in cases where state lawlessness is curbed and relief granted. When the court required the state and its administrators to be accountable for their actions and act in a transparent manner, it increases people’s ability to trust their civil governments and make long-term decisions. For example, in the Sheila Kaul case the court forced the state’s agent to be impartial in housing allocations. In the hawala case, the courts pursued those guilty (both public officials and private individuals) of breaking the law. Additionally, in the case of prisoners awaiting trial, this increases not only the civil rights, but also economic rights, as the prisoner can now become a productive member of society instead of languishing in prison for a time longer than their crime deserves.

On the other hand, critics charged that PIL’s impact must not be overestimated and some even doubted whether PIL had really improved anything. Three factors put “its success in doubt. The first is the unreliability of court-order enforcement, the second is the limited access to a remote, English-speaking judiciary\textsuperscript{32}, and the third is the inherently slow and onerous judicial administration” (Dembowski 2001: 59). Some of the critics of PIL suggested that enforcement of PIL decrees fails due to the lack of proper administration by the authorities. Further, if one has to travel ten hours to present a case in a high court in a state capital, the cost becomes prohibitive. Finally, if a court case drags on for years, then it would discourage many people from seeking justice.

\textsuperscript{32} Article 348 (2) of the Constitution permits court proceedings to be held in regional languages if approved by the president. At present five High Courts in India use proceedings in the regional language (The Hindu, Dec 2, 06).
Critics further contended that PIL only seemed to increase the prestige of lawyers and social activists involved in the cases. PIL might only have benefited the middle class without really benefiting the poor class of India who constitute the majority. Further, if a PIL decree is not enforced, the Court is left with only contempt of court proceedings, which the courts have used rarely.

7) Conclusion

India has seen over the past 50 years an increase in civil rights through the development of Public Interest Litigation. However, PIL has been a mixed bag in regards to property rights. Further, property rights suffered a serious set back during the development of the Basic Structure Doctrine.

The passage of the forty-fourth amendment to the constitution, settled the ambiguity in the constitution between the Fundamental Rights portion which stressed property rights and the Directive Principles portion which stressed re-distributive ideals. The forty-fourth amendment came out of a long struggle between Parliament and Supreme Court and resulted in the removal of property as a fundamental right. Further, this struggle between Parliament and Supreme Court resulted in the establishment of the Basic Structure Doctrine. In the end, the positive outcome of the struggle was that of an independent judiciary and the negative outcome of the struggle was the loss of property rights as a fundamental right.

The right to property is now located in Article 300-A, where it reads, ‘No person shall be deprived of his property save by authority of law.’ Hence, the right to property is
now only a statutory right. Therefore, the only check against Parliament or state legislature when it appropriates property are the voters. Further, the relatively free press in India has been able to highlight the legislative abuses against property expropriation and has had some restraining influence against state expropriation.

The law that now governs India in regards to land acquisition is called the Land Acquisition Act 1894 (hereafter referred to as the Act). This Act has been amended many times since its original passing. The last major amendment was in 1984. The individual states also have power to pass amendments to suit the local conditions. The preamble to the Act states that those whose property has been taken have “a right to receive compensation” (Singh 2004: 19). The rest of the Act lays out a detailed procedure about how property is to be taken for public purposes, how one is to be compensated, and how the courts are to interpret the law in the area of compensation. For example, the court is supposed to consider the market value of the land on the day that the state declares its intention to take the land, and the court is not supposed to take into account the increased value of the land with its new use. While the Act does offer some protection for property rights, the acquisition of property for ‘public purpose’ is not subject to judicial review (Singh 2006: 313).

The tide towards a stronger property regime has occurred in the last two decades, but there is still a long way to go. With the collapse of the Soviet Union and a general discrediting of the socialist system, things have been changing in India. A financial crisis

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33 The Act fails to adequately define ‘public purpose.’
34 While the market value might be easy to calculate in small-scale takings, it can be difficult to calculate in large-scale takings (Singh 2006: 319).
caused by the short-term commercial borrowing by Prime Minister Rajiv Gandhi in the mid 1980’s resulted in India being basically bankrupt.

Narasimha Rao, the Prime Minister from mid-1991 until mid-1996 decided to choose a Finance Minister (Manmohan Singh) who was not a politician. Manmohan Singh was to implement reforms to prevent India’s slide into bankruptcy. Major achievements occurred within two years. Many key variables such as the fiscal deficit, inflation, and foreign exchange reserves showed improvement (Das 2002). Narasimha Rao changed the socialist legacy of the Congress party in two years. The socialist legacy of Nehru and Indira Gandhi, which destroyed property rights as a fundamental right, was being reversed. However, with the pressure from International Monetary Fund and World Bank on the wane, the reforms have recently taken on a much slower pace.

With the arrival of the “information age” and the global economy, the need to strengthen the property rights regime in terms of laws and enforcement became important. India became a signatory to the Uruguay Round of General Agreement on Tariffs and Trade (GATT) that included the Trade Related Intellectual Property Rights (TRIPS). The TRIPS agreement covers a large area including Patents, Copyrights, trademarks, layout designs of integrated circuits etc.

Since TRIPS has a strong enforcement mechanism through the World Trade Organization’s dispute settlement mechanism and trade sanctions, India is faced with a need to be a complaint state as there is another powerful veto player involved. Hence, in a belated fashion, the right to property might be slowly regaining stature35.

35 The law is not “settled” in this area.
Historically, Parliament perceived that property rights favored the wealthy in society at the cost of hurting the poor. The irony today is that if property rights were a fundamental right it would help the poor the most. With India becoming a global economic player, the poorer sections of society are suffering the loss of their property. For example, as India opened up and liberalized its economy, people have gotten wealthier. Increased wealth resulted in increased air travel. Therefore, to accommodate increased air travel (mainly for the upper middle class, the rich and the foreign travelers) airports had to be expanded. To expand the airports, land had to be acquired from people who usually are poor or middle class. Another example of interpreting ‘public purpose’ has been to use land acquisition as a tool to help large local and transnational industries setup their plants near cities (Singh 2006: 320). Therefore, it is becoming clear now that property rights do need to become a fundamental right in order to protect the poor.

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36 Articles in Newspapers regularly appear about people who are concerned about airport expansion, for example an article appeared in “The Hindu” on May 23, 2006 about the expansion of the Chennai airport.
Appendix

This appendix contains the main articles in the Indian constitution. It was obtained from this website: http://www.constitution.org/cons/india/const.html. Some of the articles below are just summaries or just the titles.

**Fundamental Rights.**

13. Laws inconsistent with or in derogation of the fundamental rights.-
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,-
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

14. Equality before law.-
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

19*. Protection of certain rights regarding freedom of speech, etc.-
(1) All citizens shall have the right-
to freedom of speech and expression;
to assemble peaceably and without arms;
to form associations or unions;
to move freely throughout the territory of India;
to reside and settle in any part of the territory of India;
to practise any profession, or to carry on any occupation, trade or business.

21. Protection of life and personal liberty.-
No person shall be deprived of his life or personal liberty except according to procedure established by law.

29. Protection of interests of minorities.-
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

31. [Compulsory acquisition of property.]
Repealed by the Constitution (Forty-fourth Amendment) Act, 1978, s. 6 (w.e.f. 20-6-1979).

31C. Saving of laws giving effect to certain directive principles.-
Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.]

32. Remedies for enforcement of rights conferred by this Part.-
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[32A. [Constitutional validity of State laws not to be considered in proceedings under article 32.]
Repealed by the Constitution (Forty-third Amendment) Act, 1977, s. 3 (w.e.f. 13-4-1978).

Directives Principles of State Policy.

38. State to secure a social order for the promotion of welfare of the people.
39. Certain principles of policy to be followed by the State.-
The State shall, in particular, direct its policy towards securing-
(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;_40[
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.]

39A. Equal justice and free legal aid

40. Organisation of village panchayats.

41. Right to work, to education and to public assistance in certain cases.

42. Provision for just and humane conditions of work and maternity relief.

43. Living wage, etc., for workers.

43A. Participation of workers in management of industries.

44. Uniform civil code for the citizens.

45. Provision for free and compulsory education for children.

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

48. Organisation of agriculture and animal husbandry.

48A. Protection and improvement of environment and safeguarding of forests and wildlife.

49. Protection of monuments and places and objects of national importance.

50. Separation of judiciary from executive.

51. Promotion of international peace and security.

**Miscellaneous**

300A. Persons not to be deprived of property save by authority of law
No person shall be deprived of his property save by authority of law.
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Chapter 5: Conclusion

In the area of marriage, economists have largely ignored the role of religion. Some religions focus on entry and exit costs and those religions that have entry and exit costs do strengthen marriage and improve the status of women, however it might not be economically efficient. In the US since there is no entry cost into marriage, one way to allow for a more equal bargaining power between the husband and wife is to allow for easy exit and have the courts involved to make sure there is an equitable settlement.

On the issue of abortion, the social entrepreneurs on either side of the issue have used different strategies to influence the median voter and set the agenda. The social entrepreneurs will continue to use their preferred nodes and networks. Technology has continued to play a catalytic role over the past two hundred years in the framing the debate on first infanticide and then abortion. Resolving the question on when human life begins is the key to ending the contest on abortion. While one side might see laws changing in an evolutionary manner, the other side will see it as devolution of laws.

India has seen over the past 50 years an increase in civil rights through the development of Public Interest Litigation. However, PIL has been a mixed bag in regards to property rights. Further, property rights suffered a serious set back during the development of the Basic Structure Doctrine. However, the tide towards a stronger
property regime has occurred in the last two decades especially with the arrival of the global economy, but there is still a long way to go.
CURRICULUM VITAE

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