

Chapter One **An Alternative to Neoliberalism**

We cannot go on living like this....And yet we seem unable to conceive of alternatives.
Tony Judt¹

The failure of government is everywhere to be seen. Unregulated, excessive risk taking by Wall Street pushed the United States economy into a recession from which it has yet to recover three years later.² The catastrophic blowup of BP's Deepwater Horizon oil well killed eleven workers and led to the largest oil spill in American history.³ A series of combustible dust, mine, natural gas pipeline and refinery explosions killed hundreds of people and injured many more.⁴ Sudden, unintended acceleration in Toyota cars were responsible for over one hundred deaths and even more injuries.⁵ The use of the drug Vioxx likely caused between 88,000 and 139,000 heart attacks and strokes.⁶ Outbreaks of food poisoning (E. coli and salmonella) have sickened thousands and killed dozens.⁷ Thousands of homeowners in thirty-eight states installed dry wall imported from China that emits potentially dangerous sulfur fumes,⁸ and there were massive recalls of lead-paint coated toys and other defective toys, also imported from China.⁹

More systemic failures have also been all too common. The United States has done little or nothing to address global climate change, and efforts to establish renewable energy options have just left the starting gate.¹⁰ The economic security of millions of Americans has deteriorated. The poverty rate (15.1 percent of the population) in 2010 constitutes the largest number of people in poverty in the 52 years for which there are records.¹¹ At the same time, the disparity in wealth in the country remained at record levels.¹² One bright spot, legislation that would extend health care to millions of uninsured Americans, is under strong legal and political attack, and may not survive.

Government has the capability to prevent health and safety problems and to ensure economic security, but these capabilities have been eroding in the United States since 1980. The government stands on the brink of dysfunction,¹³ yet few politicians have stepped forward to urge that government's capacity be restored. Instead, so many legislators have signed pledges not to raise taxes that it is impossible to fund government at adequate levels. Similarly, political obstruction on Capitol Hill has prevented deficit reduction efforts by the Obama administration even as many citizens who would benefit from more progressive government policies support efforts to decrease the role of government in society.¹⁴

This state of affairs is related to the strong hold that neoliberalism has had on American politics. This philosophy of free market fundamentalism is fed by economic analysis of when government regulation may be justified, but it is a distortion of

conventional economics. Moreover, it is at odds with American history and experience. Despite these serious problems, progressives have been unable to dislodge the influence of neoliberalism in American politics.

We understand that political rhetoric and policy analysis are two separate subjects,¹⁵ but we believe the lack of a broader, more robust conception of government policy has hampered progressives in finding ways to remind voters of the way in which positive government can serve their interests. It is unnecessary to invent an alternative to neo-liberalism. At an earlier moment in the United States, philosophical pragmatism, and particularly John Dewey's understanding of democracy, underpinned a view of government that made it responsible for promoting the health, safety and economic security of Americans. The alternative pragmatic vision has lost its focus, however, explaining why President Obama has foundered in defending the new health care legislation, yet alone the concept of affirmative government, in the face of the Tea Party movement and right conservatism.

This chapter describes the essential elements of neoliberalism and introduces pragmatism as an alternative. We indicate how neoliberals have distorted convention economic analysis, but we also explain why conventional economic analysis, even if not distorted, is an incomplete view of how and when government should act. The country's values are not limited to economic efficiency, but instead include non-economic values, such as equality and fairness. Policy analysis must be up to the task of analyzing when government should act on behalf of both non-economic and economic values. Our preference for a pragmatic approach to policy analysis rests fundamentally on this necessity.

NEOLIBERALISM

Neoliberals believe private markets should take precedence over public regulation. Markets, in short, are a preferred form of social ordering. This preference springs from two general beliefs. Because markets are decentralized and competitive, they are more efficient than government in arranging social relations. Further, market ordering maximizes individual freedom because trades in markets are voluntary and mutually beneficial, while government ordering is dictatorial and creates winners and losers. But, as has been well developed,¹⁶ these beliefs fail both as a matter of theory and practice.

First, neoliberalism has politicized the market failure model of economics.¹⁷ The market failure model is the standard economic justification for when government intervention in private markets is justified. Consistent with neoliberalism, it sees markets as being the primary institution of social arrangements, but it assigns the government the secondary role of intervening to address market failures, should they occur.¹⁸ In practice, however, the ideological preference of neoliberals for market ordering has led to skepticism about the existence of market defects.¹⁹ The prime example is the loosening of government regulation of financial and monetary institutions and practices,²⁰ led by former Federal Reserve Chair Alan Greenspan, who

insisted that Wall Street firms would accurately assess risk and that their self-interest would protect them from excesses. Testifying before Congress, Greenspan later confessed error: "Those of us who have looked to the self-interest of lending institutions to protect shareholder's equity (myself especially) are in a state of shocked disbelief."²¹

Second, neoliberals have supported tax and fiscal policies that have drained the government of its funding. By fighting two wars without making any effort to pay for them, the Bush administration quickly spent the budget surplus that the Clinton administration bequeathed to it. Additionally, the Congressional Budget Office estimates that the seven major tax cuts of the Bush administration have added \$2.2 trillion to a cumulative deficit of \$6.2 trillion from 2002-2011.²² The financial bailout and fiscal stimulus efforts have further driven up the deficit. By making it a political anathema to raise taxes, neo-liberals are close to achieving their goal of radically downsizing government, a plan that was originated in the Reagan administration. The goal is well captured in Grover Norquist's stated desire to shrink government to the size that it can be drowned a bathtub.²³ The result is a government that lacks the funding to protect its citizens, let alone carryout the redistribution necessary to address poverty and other social ills.

Third, neoliberals have inverted the relationship between democracy and markets.²⁴ For neoliberals, policy analysis starts with markets and government is justified only if there is an identifiable market defect. This starting point ignores that the reality that markets are impossible without government. At the most basic level, common law rules of torts, contracts and property – often referred to as the common law baseline – constitute markets. These rules define property, set the terms for it exchange, and protect it against misappropriation and damage. In other words, the common law baseline is one form of regulatory institution, an institution which of necessity must precede markets. More fundamentally, this inversion ignores that democracy is the way in which free societies determine the type of society in which they wish to live. A democracy might choose neoliberalism, a choice we would oppose, but the choice is for citizens to make. As we elaborate below, the role of democracy is to guide and implement citizen preferences about the type of society in which we want to live, including the extent to which we organize our affairs by relying on market transactions.

Fourth, the neoliberal assumption that government always inhibits freedom while private markets always maximize is fundamentally mistaken. Government can expand liberty as well as retract it. If someone cannot afford to go to college and would benefit from it, for example, her freedom is restricted. More fundamentally, if some one has cancer and cannot obtain adequate medical treatment, his freedom is limited, not enhanced, by a market system that requires private payments to obtain medical care. In this sense, government has a long record of expanding individual freedom, as we will develop. The key, of course, is how to balance government enhancements and restrictions of freedom, a subject to which we will return.

Fifth, a sound theory of markets and capitalism is conscious of fair wealth distribution,²⁵ but neoliberals assert that they are indifferent to the distribution of economic wealth and political power. The market defect model of economics is expressly agnostic about fairness in the distribution of wealth, a limitation that makes it unsuitable as a theory of democracy, a limitation that most economists admit. Nevertheless, neoliberalism, with its ideological preference for shrinking the state, ignores the ways in which unchecked capitalism can be economically and politically perverse, while, at the same time, enabling the wealthy to use their political power to enhance their interests and downgrade the interests of the poor and middle class.²⁶

Sixth, an additional source of neoliberal distrust of government is public choice analysis demonstrating that regulatory agencies are prone to capture, allowing private interests to gain economic rents. Further, institutional economics posits that government managers do not have the same array of tools that private sector principals can use to align the interests of a principal and agents, creating agency costs that cannot be easily reduced. While this analysis has merit, a subject we take up in Chapter __, this is another area in which neoliberals over interpret the available evidence. Despite a long history of government acting against powerful corporate interests, described in Chapter Two, an ideological distaste for government leads neoliberals to overlook or disregard this inconvenient evidence, in much the same way they tend not to overlook evidence of market failures.

Seventh, to the extent that government is necessary, neoliberals prefer that government services be privatized, including national parks, prisons, social security, and many other government functions. It is assumed private administration of these functions is more efficient because private firms, unlike government, operate in competitive markets, which gives them a stronger incentive to resolve principle-agent problems. While privatization can be a useful tool, it depends on the nature of the government function,²⁷ a subtlety neoliberals rush by. Moreover, the bias towards privatization ignores market defects, which can decrease efficiency or have other disturbing outcomes. Consider Medicare for example, which has significantly lower administrative costs and higher public satisfaction ratings than do private insurance companies.²⁸ Or consider private prisons. The direct economic incentive of privatization is to put more persons in prison for longer terms to increase profits even if it mean bribing judges to do so.²⁹ Also, neoliberal distrust of government has produced a double whammy: a rush towards privatization while budget cuts have incapacitated the government's ability to oversee the contracting out process..³⁰

Finally, neoliberals believe that government intervention to address market failure is justified only if the economic benefits of such actions exceed their costs. Cost-benefit analysis ensures that government intervention increases economic efficiency, but even if one believes in this touchstone as the test for appropriate government action, it fails in practice. As Chapter __ will elaborate, costs and benefits are not commensurable in many areas of government regulation, especially social regulation. The cost of installing pollution control technology cannot be compared with the benefits attributed to reduced illnesses and fatalities because those benefits are not

neatly monetizable. More fundamentally, cost-benefit analysis does not purport to account for non-economic justifications for regulation, which are often the purpose of regulatory legislation. A legitimate theory of public policy must account both for the limitations of cost-benefit analysis as a methodology, and for its inability to instruct regulators how to carry out non-economic goals.

A PRAGMATIC METHODOLOGY

Despite its serious limitations as a theory of democracy, neoliberalism has shown remarkable staying power, crowding out the pragmatic approach that preceded it. We consider why this might be the case in Chapter __. Chapter __ provides the foundation for our claim that we should return to pragmatism as a general theory of democracy. It is useful at this point, however, to identify several key aspects of pragmatism and then to focus on how they differ from neoliberalism.

The foundational idea of pragmatism is its rejection of essentialism. Pragmatists do not believe it is possible to find universal and certain foundations for belief. Instead, a determination of what is “true” is “grounded in history and experience, rather than being fixed in the nature of things.”³¹ As William James explained, “The true is the name for whatever proves itself to be good in the way of belief, and good too, for definite and assignable reasons.”³² Put another way, a belief is true when “holding the belief leads us into more useful relations in the world.”³³

Pragmatists are suspicious of essentialism because they understand that the world is marked by “radical contingency and chance.”³⁴ In pragmatism, “contingency and chance are not merely signs of human ignorance, they are inescapable and pervasive features of the universe.”³⁵ Since we can never hope to master what is unforeseen and contingent, the best we can do is determine what appears to be true today, understanding that current ideas about what is true may change over time as experience indicates that an existing idea may no longer be useful to us. For the pragmatist, reality is constructed by us, rather than constituting an actual embodiment of how the world works.³⁶

The baseline for determining whether a belief serves the community better than existing ideas is furnished by history and experience. Pragmatism starts with a society’s current political and social values. This is an appropriate baseline because these values have stood the test of time; that is, they have proven to be useful to the society over time. This makes pragmatism a “kind of ethical argument that is culturally and historically situated and conditioned but that proceeds without foundations.” It is “animated and constrained by consciousness of its situation within, and answers to, a public normative culture and history....”³⁷

These judgments take place within “critical communities of inquiry” or groups of persons who study, debate, and deliberate whether a solution has achieved its intended purpose. These are found in science, business, public policy, and everywhere else that judgments are reached about the nature of the world in which we reside.

Dewey conceived of democracy as the ultimate community of inquiry, a place where citizens would be engaged in ongoing study, debate and deliberation concerning what constitutes the public interest.³⁸ As Chapter __ will discuss, Dewey had faith in both the capacity of citizens to address public policy issues and that they would adopt a different yardstick than their own private interests when engaged in public decision-making. But he also insisted on the necessity of education to bring citizens to these positions. One reason is that Dewey anticipated that many other critical communities of inquiry, including those involves in scientific and policy analysis, would inform citizens about current policy issues.

Finally, by rejecting essentialism, pragmatism must consider any belief or thesis as worthy of consideration, based on history and experience. This makes pragmatism pluralistic in the sense that it considers a variety of perspectives and academic orientations. Pragmatism's mission is "to test, clarify, and mediate impulses generated elsewhere within a large community of ideas."³⁹ This can make pragmatism a messy business since it accepts an idea if it corresponds to the world in which we live, rather than whether it coheres to some theoretical set of beliefs. Nevertheless, pragmatic reasoning can offer a more persuasive account of the world than can any one discipline. As Charles Sanders Peirce, an early pragmatist, explained, an argument based on a unified theory from a single discipline is "no stronger than its weakest link." By comparison, a pragmatic argument is like a "cable," and although its "fibers may be ever so slender," a pragmatic insight is "strong" if its fibers are "sufficiently numerous and intimately connected."⁴⁰ Or, to take a different metaphor, a pragmatic approach is more like a "web" because it is constructed from multiple sources, rather than being a "tower, built on a single unified foundation."⁴¹

Pragmatism can be a messy process for another reason. Because pragmatism is anchored to the normative culture and history of a place, it will not produce a clear answer to some pressing social problem if the problem involves multiple, conflicting values. In this situation, the goal of pragmatism is to find solutions that accommodate conflicting values to the greatest extent possible.⁴² There is a related problem. It is often possible to construct different approaches to public policy from the same fundamental value because the values are stated in general terms, such as equity or fairness. The choice of an approach therefore requires an act of judgment.⁴³ Ultimately, pragmatism judges the worthiness of the approach adopt in these situations on the basis of actual experience. Did the approach effectively balance conflicting values, or did it actually result in a social improvement? For this reason, policy making through pragmatism is experimental and iterative, and it is crucial that policies be evaluated on the basis on actual experience.

PRAGMATISM VERSUS NEOLIBERALISM

When the previous elements of pragmatism are applied in the context of public policy analysis, they create an alternative approach to public policy. We see significant distinctions between the public policy discourse in neoliberalism and pragmatism.

Perhaps the most fundamental distinction is that pragmatism recognizes multiple social values, and it offers a methodology of reconciling them when they are in conflict. Regulatory legislation passed in the United States over the years reflects both non-economic and economic concerns, yet the market failure understanding can only explain government in terms of a quest for economic efficiency. More fundamentally, the political culture of the United States includes such non-economic values as fairness, equity, personal autonomy, and environmentalism, among others. As previously noted, the quest for economic efficiency can be at odds with these other values, and vice-versa. Yet, economics regards these values as outside of its ambit, and neoliberals pay little or no attention to noneconomic values except to the extent that they are thought to support unregulated markets. An approach to public policy that does not offer a means of discussing and applying multiple social values is too impoverished to be a useful guide for democracy.

Because pragmatism is nonessentialist, it rejects ideology as a basis for public policy. Instead, it insists of measuring the worth of a belief by how well it actually works. As shown earlier, neoliberals tend to elevate ideology over experience, ignoring policy evidence that is inconsistent with their preference for relying on markets to order society. Moreover, as a vast literature establishes, experience with neoliberalism demonstrates it is defective both as a matter of theory and practice. In particular, the neoliberal preference for relying on markets to order society belies the historical experience of the country. Reliance on unfettered markets has produced both economic and social ills over the country's history, and the people have turned to government to remedy those problems. Government's track record in accomplishing this task, while hardly perfect, nonetheless, provides strong evidence of the capacity of government to promote both the economic and non-economic goals of the country.

The nonessentialist quality of pragmatism produces another significant distinction. In neo-liberalism, markets are *a priori* to government. Government is only justified if a market defect is detected and government can remedy it, making the market more efficient. Since pragmatism does not privilege any particular understanding of society, public policy analysis in pragmatism does not start with a market system. Instead, pragmatism sees democracy as prior to markets. In this understanding, citizens gather together to debate the type of society in which they wish to live, and this process can put limits on the role of markets in society. As Richard Andrews explains, "government is ... [a] central area in which members of society choose and legitimize their collective values. The principal purposes of legislative action are to weigh and affirm social values and to define and enforce the rights and duties of members of society, through representative democracy."⁴⁴ Thus, market failures justify intervention, but so do equality and other fundamental values. For pragmatists, democracy is a political construct, not an economic one.

Finally, unlike neoliberalism, which favors powerful political interests that benefit from unregulated markets, pragmatism furnishes a methodology for the democratic achievement of a country's fundamental goals and values. Business and conservative interests have historically opposed government interference, and they have

had at times considerable success in doing so, including during the last 30 years when neoliberalism has reigned supreme. Their power has been enhanced by the Supreme Court's decision in *Citizens United*,⁴⁵ which made it unconstitutional to restrict the amount of money that corporations can spend on political speech. We will consider the impact of these factors on progressive public policy. For now, we note that the political influence of these interests always ensures that there will be work for progressives to do, including fashioning institutions that promote democracy and the faithful implementation of policies adopted in that process.

ROOSEVELT'S SECOND BILL OF RIGHTS

President Roosevelt's 1944 State of the Union Message stands out as an illustration of the distinction between neoliberal and pragmatic discourse.⁴⁶ The speech, given at a time when the Allies were nearing victory in World War II, began with the observation that "I do not think that any of us Americans can be content with mere survival." Instead, Roosevelt proposed that "security" was the objective for all nations, and "security" meant "not only physical security which provides safety from aggressors," but also "economic security, social security, moral security." Thus, a "decent standard of living" was "essential to peace" because "[f]reedom from fear is eternally linked with freedom from want."

In the United States, the President continued, "[W]e cannot be content, no matter how high [the] general standard of living may be, if some fraction of our people ... is ill fed, ill-clothed, and insecure." He then noted that the country had grown under the protection of "certain inalienable political rights – among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures." But, the president observed, these rights have proven to be "inadequate to ensure us equality in the pursuit of happiness," which has led to the "clear realization that "true individual freedom cannot exist without economic security and independence." Americans had therefore "accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed." These new rights included, among others, the right "to a useful and remunerative job"; to earn enough to provide adequate food and clothing and recreation"; "to a decent home"; to "adequate medical care and the opportunity to achieve good health"; to adequate protection from the economic fears of old age, sickness, accident, and unemployment"; and "to a good education."

Roosevelt's speech has all of the hallmarks of pragmatic thinking. He bases his appeal for a new set of rights rests on not only the need for security, but "equality in the pursuit of happiness," a phrase that refers back to the commitment in the Declaration of Independence that it is "self-evident" that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." His argument that government is necessary to achieve this non-economic goal is rooted in experience, the Great Recession, and more broadly, the economic conditions that gave risk to Fascism and the world war. And the

President turns to the democratic process to produce “true individual freedom” in the form of “economic security and independence.”

Cass Sunstein has suggested Roosevelt’s speech “has a strong claim to being the greatest speech of the twentieth century.”⁴⁷ This claim rests on the influence of the speech on international and domestic affairs. The speech influenced the Universal Declaration of Human Rights, and the United States signing of that commitment, and the drafting of dozens of constitutions around the world that adopted as constitutional rights the commitments of economic security and independence envisioned by the President.⁴⁸ While the United States has not followed suit, the country has adopted a statutory framework of economic security that seeks to achieve the same ends, although this legislation falls short of realizing Roosevelt’s hopes.

PLAN OF THE BOOK

There are two parts to *Achieving Democracy*. In Part I, we build our case for a renewal of pragmatism as the language of public policy discourse. We will describe, historically and as a matter of political theory, the democratic values and gains that have been made by citizens as a result of the active participation of government in our lives and in our economy. Historically, government played and continues to play a crucial role in building the necessary infrastructure upon which our national economy has been based. Additionally, as a result of the concentration of corporate and industrial power, during the Progressive Era, the government served as a counterweight to that concentration thus protecting citizens from a variety of caustic ills such as tainted food, monopoly pricing, and oppressive hours and low wages for workers. Further, during the New Deal-Great Society Era, the government was instrumental in expanding the middle class as well as providing opportunities for political participation and protecting the civil rights and liberties of previously disenfranchised citizens.

As a matter of political theory, these gains were made possible by a commitment to a pragmatic form of government, which aimed at strengthening the democratic order. More significantly, however, is that this commitment to pragmatic and democratic government is not only a matter of historical curiosity. Instead, as we will show, these principles are enduring, they connect with the American values of liberty, equality and fairness, and have an application both now and for future.

Reestablishing pragmatism as the basis of public policy requires reorienting policy analysis away from rational instrumentalism and towards practical judgment. We will therefore propose a pragmatic methodology of policy analysis. It is open to the insights of economic reasoning and data, when they are useful, but it rejects the privileged position it now holds in policy analysis. Necessarily, our process is therefore qualitative, resembling legal analysis.

In Part II, we apply these historical and theoretical lessons to current controversies including our energy future, the structure maintenance and regulation of our financial system, the continuing protection of health and safety for workers and

consumers, and the need for environmental sensitivity. Chapter Six considers redistributive policies, Chapter Seven covers economic regulation, and Chapter Eight discusses environmental, health and safety regulation. These chapters demonstrate how a pragmatic methodology can lead us to recapture the democratic gains that have been either lost or eroded during this period of antigovernment hostility.

End Notes

¹ TONY JUDT, *ILL FARES THE LAND 2* (2010).

² See, e.g., ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM AND THEMSELVES* (2009); DAVID WESSELL, *IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC* (2009)

³ See Alyson Flournoy et al., *The BP Catastrophe: When Hobbled Law and Hollow Regulation Leave Americans Unprotected*, Center for Progressive Reform (Jan. 2011), http://www.progressivereform.org/articles/BP_Catastrophe_1101.pdf.

⁴ See Loren Steffy, *From a new book on BP: Texas City blast is part of the tale, BP has a deadly history*, HOUS. CHRON. (Dec. 10, 2010), <http://www.chron.com/news/houston-texas/article/From-a-new-book-on-BP-Texas-City-blast-is-part-1545937.php>; Andrew W. Lehren, *Gas Blasts Spur Questions on Oversight*, N.Y. TIMES, Sept. 24, 2010, <http://www.nytimes.com/2010/09/25/us/25pipeline.html?pagewanted=all>; Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES, Apr. 10, 2010, <http://www.nytimes.com/2010/04/10/us/10westvirginia.html>; U.S. Chem. Safety & Hazard Investigation Bd., *Investigation Report: Sugar Dust Explosion and Fire (14 Killed, 36 Injured)* (Feb., 2008), http://www.csb.gov/assets/document/Imperial_Sugar_Report_Final_updated.pdf.

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⁷ See Lyndsey Layton, *Unsafe Eggs Linked to U.S. Failure to Act*, WASH. POST, Dec. 11, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR2010121007485_pf.html; Meg Marco, *453 Illnesses, 5 Deaths Connected To Tainted Peanut Butter*, CONSUMERIST, Jan. 20, 2009, <http://consumerist.com/2009/01/453-illnesses-5-deaths-connected-to-tainted-peanut-butter.html>; Elizabeth Weise & Julie Schmit, *Spinach Recall: 5 Faces. 5 Agonizing Deaths. 1 Year Later*, U.S.A. TODAY, Sept. 21, 2007, http://www.usatoday.com/money/industries/food/2007-09-20-spinach-main_N.htm

⁸ See Andrew Martin, *Drywall Flaws: Owners Gain Limited Relief*, N.Y. TIMES, Sept. 17, 2010, http://www.nytimes.com/2010/09/18/business/18drywall.html?_r=1&src=me&ref=general.

⁹ Hearing on the Consumer Product Safety Modernization Act, H.R. 4040, before the Subcomm. On Commerce, Trade and Consumer Protection of the U.S. House Committee on Energy and Commerce, November 6, 2007 (Statement of Rachel Weintraub, Consumer Federation of America), http://www.consumerfed.org/elements/www.consumerfed.org/file/health/Testimony_of_Rachel_Weintraub_Product_Safety_Hearing_11-6-07.pdf; Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent from China*, N.Y. TIMES (August 16, 2007), <http://www.nytimes.com/2007/08/15/business/worldbusiness/15imports.html?pagewanted=all>.

¹⁰ JOSEPH P. TOMAIN, *ENDING DIRTY ENERGY POLICY: PRELUDE TO CLIMATE CHANGE* (2011).

¹¹ U.S. Census Bureau, Department of Commerce, *Income, Poverty, and Health Insurance Coverage in the United States: 2010* (Sept. 2011), at 14.

¹² *Id.* at 46, Table A-4.

¹³ See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND GOVERNMENT* (2010).

¹⁴ See THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004).

¹⁵ See DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISIONMAKING* (1997).

¹⁶ See JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* (2009); JUSTIN FOX, *THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET* (2009); ROBERT B. REICH, *AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S FUTURE* (2010); ANATOLE KALETSKY, *CAPITALISM 4.0: THE BIRTH OF A NEW ECONOMY IN THE AFTERMATH OF CRISIS* (2010).

¹⁷ See JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* (2009); JUSTIN FOX, *THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET* (2009); Peter g. Brown, *The Failure of Market Failures* 21 J. OF SOCIO-ECON. 1 (1992).

¹⁸ See, e.g., W. KIP VISCUSI, JOHN M VERNON & JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST* (2nd ed. 1995); ANTHONY OGDEN, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* (1994);

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¹⁹ See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); DAVID M. DRIESEN, *ECONOMIC THOUGHT AND U. S. CLIMATE CHANGE POLICY* (2010).

²⁰ JOSEPH E. STIGLITZ, *FREEFALL: FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010).

²¹ Kara Scannel & Sudeep Reddy, *Greenspan Admits Errors to Hostile House Panel*, WALL STREET J., Oct. 24, 2008, <http://online.wsj.com/article/SB122476545437862295.html>.

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²³ Interview, National Public Radio, Morning Edition (May 25, 2001); available at <http://www.npr.org/templates/story/story.php?storyId=1123439>.

²⁴ See e.g. Francis Fukuyama, *The Future of History: Can liberal Democracy Survive the Decline of the Middle Class?*, 91 FOREIGN AFFAIRS 53 (January/February 2012).

²⁵ See ROBERT B. REICH, *AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S FUTURE* (2010).

²⁶ See e.g. JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010).

²⁷ See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L. REV. 389 (2004).

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²⁹ See Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youth for Profit*, N.Y. Times (February 12, 2009) available at <http://www.nytimes.com/2009/02/13/us/13judge.html?pagewanted=all>; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discusses the racial consequences of our dramatic increase in the prison population).

³⁰ PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* ____ (2007).

³¹ Morris Dickstein, *Introduction: Pragmatism Then and Now*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON THOUGHT, LAW & CULTURE* 1, 5 (Morris Dickstein, ed. 1998).

³² Louis Menand, *An Introduction to Pragmatism*, in PRAGMATISM: A READER XIV (Louis Menand, ed. 1997) (quoting William James).

³³ *Id.*

³⁴ Richard Bernstein, *Pragmatism, Pluralism, and the Healing of Wounds*, in PRAGMATISM: A READER 383, 388 (Louis Menand, ed. 1997).

³⁵ *Id.* at 389.

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³⁷ Frank Michelman, *Bringing Life to the Law: A Plea for Disenchantment*, 74 CORNELL L. REV. 265, 258 (1989).

³⁸ CHARLES W. ANDERSON, PRAGMATIC LIBERALISM 46 (1990)

³⁹ Gene Shreve, *Rhetoric, Pragmatism, and the Interdisciplinary Turn in Legal Criticism—A Study of Altruistic Judicial Argumentation*, 46 AM. J. COMP. LAW 41, 58 (1998).

⁴⁰ Bernstein, *supra* n. , at 387 (quoting Pierce).

⁴¹ Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 820 (1993).

⁴² SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 21 (2003).

⁴³ ANDERSON, *supra* n. , at 8-9.

⁴⁴ Richard Andrews, *Cost-Benefit Analysis As Regulatory Reform*, in COST-BENEFIT ANALYSIS & ENVIRONMENTAL REGULATIONS, POLITICS, ETHICS, & METHODS 107, 112 (David Swartzman, Richard A. Liroff, & Kevin Croke, eds., 1982.)

⁴⁵ *Citizens United v. Federal Election Com'n.*, 130 S.Ct. 876 (2010).

⁴⁶ Franklin D. Roosevelt, State of the Union Message to Congress (January 11, 1944), available at http://www.fdrlibrary.marist.edu/archives/address_text.html.

⁴⁷ Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 206 (2005).

⁴⁸ *Id.* at 210.