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**Economic Empowerment in the Alabama Black Belt:  
A Transactional Law Clinic Theory and Model**

Casey E. Faucon

ABSTRACT

*This essay argues that transactional legal clinics that serve university, urban, and rural communities with cultures and ecosystems shaped by the long-term impacts of racial segregation, Civil Rights, and socioeconomic disenfranchisement can play both a powerful symbolic role and a practical material role in regional economic development by providing direct client representation to historically and economically significant organizations and by training lawyers in transactional methods to use the law to impact the industrial identity and economic vitality of their communities. This essay concludes with a design for a transactional law clinic model.*

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## INTRODUCTION

There is nothing new about poverty. What is new, however, is that we have the resources to get rid of it. —Dr. Martin Luther King, Jr.<sup>1</sup>

“Thank you ALABAMA!!” read the late-night, December 12, 2017 triumphant tweet from newly elected U.S. Senator Doug Jones,<sup>2</sup> a lifelong civil rights attorney and activist and the first Democratic candidate to clinch an Alabama U.S. Senate seat in 25 years.<sup>3</sup> In a closely watched special election that shocked the world,<sup>4</sup> Senator Jones outgunned Republican candidate Roy Moore by grabbing 50% of the state’s votes to Moore’s 48%.<sup>5</sup> Senator Jones won by a narrow 21,924 votes in a traditionally deep-red state that President Trump won in 2016 by 28 points.<sup>6</sup> While many intersecting synergies and concerted efforts contributed to one of the greatest political upsets in modern history,<sup>7</sup> exit polls make clear that Senator Jones and the Democrats owe the victory to the voters in the Alabama Black Belt, who overwhelmingly voted for Jones by a margin of 65,000 votes.<sup>8</sup>

The Alabama Black Belt is part of a larger geographical area known as the Southern Black Belt, which stretches from East Texas to the Chesapeake Bay and includes approximately 200 contiguous counties.<sup>9</sup> The term “black belt,” in use for more than a century, is presumably derived from early settlers’ descriptions of the rich, dark soil found throughout the region that supported a wealthy economy of cotton produced by the labor of enslaved African-Americans.<sup>10</sup> The term only later took on racial connotations, referring to the resulting

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<sup>1</sup> Dr. Martin Luther King, Jr., Address at the Nobel Peace Prize (Dec. 10, 1964).

<sup>2</sup> Doug Jones (@DougJones), TWITTER (Dec. 12, 2017, 7:30 PM), <https://twitter.com/dougjones?lang=en>.

<sup>3</sup> Dartunorro Clark, *Meet Doug Jones, Alabama’s First Democratic Senator in 25 Years*, NBC NEWS (Dec. 13, 2017), <https://www.nbcnews.com/storyline/2017-elections/meet-doug-jones-alabama-s-first-democratic-senator-25-years-n826606>.

<sup>4</sup> Molly Ball, *How Doug Jones Beat Roy Moore and Shocked the World*, TIME (Dec. 13, 2017), <http://time.com/5062625/doug-jones-alabama-senate-results-upset/>.

<sup>5</sup> *Alabama Senate Election Results*, WASH. POST, [https://www.washingtonpost.com/special-election-results/alabama/?utm\\_term=.eee581306c52](https://www.washingtonpost.com/special-election-results/alabama/?utm_term=.eee581306c52).

<sup>6</sup> See Alan Blinder, *Alabama Certifies Jones Win, Brushing Aside Challenge From Roy Moore*, N.Y. TIMES, <https://www.nytimes.com/2017/12/28/us/politics/roy-moore-block-election.html>; Ball, *supra* note 4.

<sup>7</sup> Jessica Taylor, *An Upset in Trump Country: Democrat Doug Jones Bests Roy Moore in Alabama*, NPR (Dec. 12, 2017), <https://www.npr.org/2017/12/12/570291123/will-it-be-moore-or-jones-polls-are-closed-in-divisive-alabama-senate-election>.

<sup>8</sup> See, e.g., Kim Soffen, Dan Keating, Kevin Schaul & Kevin Uhrmacher, *Why Jones Won: Moore Missed Trump’s Standard in Every Alabama County*, WASH. POST (Dec. 13, 2017), [https://www.washingtonpost.com/graphics/2017/politics/alabama-election-analysis/?utm\\_term=.dedbd9213a2c](https://www.washingtonpost.com/graphics/2017/politics/alabama-election-analysis/?utm_term=.dedbd9213a2c); Annalisa Merelli, *Right of Soil: The Ancient Geological “Black Belt” Underlying Democrats’ Epic Win in Alabama*, QUARTZ MEDIA (Dec. 13, 2017), <https://qz.com/1154807/doug-jones-wins-in-alabama-what-is-the-black-belt/>.

<sup>9</sup> Robert M. Gibbs, *Reconsidering the Southern Black Belt*, 33 REV. REGIONAL STUD., 254, 255 (2003).

<sup>10</sup> EDWIN C. BRIDGES, ALABAMA: THE MAKING OF AN AMERICAN STATE 72 (2016); Terance L. Winemiller, *Black Belt Region in Alabama*, ENCYCLOPEDIA ALA., (Sept. 19, 2009), <http://www.encyclopediaofalabama.org/article/h-2458>.

dense concentration of African-Americans, who make up at least 25% of the overall Southern Black Belt population and approximately 50% of the Alabama Black Belt population.<sup>11</sup>

The Alabama Black Belt, traditionally composed of 17 counties along a strip through the lower-central portion of Alabama,<sup>12</sup> is historically significant as the center of the Civil Rights Movement of the 1950s and 1960s.<sup>13</sup> Several pivotal events occurred in the region and in urban areas of Alabama, including the Montgomery Bus Boycotts;<sup>14</sup> the bombing of the Sixteenth Street Baptist Church in Birmingham;<sup>15</sup> and the march for equal rights from Selma to Montgomery,<sup>16</sup> inspiring the Lowndes County Freedom Organization (later the Black Panther Party).<sup>17</sup> When the Supreme Court ordered the integration of public schools, then-Alabama Governor George Wallace enshrined himself in the national firmament by his ceremonious “Stand in the Schoolhouse Door” to protest the admittance of two African-American students at the University of Alabama on June 11, 1963,<sup>18</sup> an act still memorialized on the University’s campus today. These pivotal events all helped to pass the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>19</sup>

Today, the Alabama Black Belt is most distinctly characterized by its poverty and conjures images of deprivation, economic depression, and a lack of access to resources.<sup>20</sup> When United Nations official Philip Alston, whose job it is to visit poverty-stricken areas throughout the world, toured counties in the Alabama Black Belt in December 2017, he was shocked by the harsh conditions of poverty he found, particularly with respect to a lack of sewerage infrastructure and the raw sewage disposal methods used.<sup>21</sup> Lowndes County, just 20 miles from the state’s capital of Montgomery, once referred to as “The Place God Forgot,”<sup>22</sup> is just one county in the Alabama Black Belt where residents “straight-pipe” their raw sewage, which involves self-installing PVC pipes to carry human waste into small ditches or open air ponds, often within a few feet of the residents’ homes.<sup>23</sup> The heavy Alabama rains often cause

<sup>11</sup> Gibbs, *supra* note 9, at 255; Winemiller, *supra* note 10.

<sup>12</sup> The 17 traditional Black Belt counties are Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pike, Russell, Sumter, and Wilcox. Winemiller, *supra* note 10.

<sup>13</sup> JEFF BINGAMAN, ALABAMA BLACK BELT NATIONAL HERITAGE AREA ACT, S. REP. NO. 111-265, 2d Sess. (2010) [hereinafter *Heritage Act*].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 153 (1981).

<sup>18</sup> See Debra Bell, *George Wallace Stood in a Doorway at the University of Alabama 50 Years Ago Today*, U.S. NEWS (June 11, 2013), <https://www.usnews.com/news/blogs/press-past/2013/06/11/george-wallace-stood-in-a-doorway-at-the-university-of-alabama-50-years-ago-today>.

<sup>19</sup> *Heritage Act*, *supra* note 13.

<sup>20</sup> See Gibbs, *supra* note 9, at 255.

<sup>21</sup> Carlos Ballesteros, *Alabama Has the Worst Poverty in the Developed World, U.N. Official Says*, NEWSWEEK (Dec. 10, 2017), <https://www.newsweek.com/alabama-un-poverty-environmental-racism-743601>.

<sup>22</sup> Michael Harriot, *Lowndes County, Ala.: The Place God Forgot*, ROOT (APR. 27, 2018), <https://www.theroot.com/lowndes-county-ala-the-place-god-forgot-1825483659>.

<sup>23</sup> *Id.*

flooding and spreads the sewage throughout the area, resulting in incidents of third world diseases, such as hookworm.<sup>24</sup>

Statistically, in 2017, the per capita personal income for all of Alabama was 79% of the national U.S. average, ranking 46 out of 50 states and D.C., and one in six Alabamians currently live below the federal poverty line (less than \$25,100 for a family of four).<sup>25</sup> The state poverty rate of 19% is higher than the national rate of 15.9%.<sup>26</sup> In the Alabama Black Belt, however, that rate escalates to 30% and higher.<sup>27</sup> Nine of the ten poorest counties in Alabama are in the Black Belt, with an average estimated per capita income in 2010 of \$15,826.<sup>28</sup> In Dallas County, the location of the historic city of Selma, the poverty rate is 36.8%, and almost 60% of Dallas County children live below the poverty line.<sup>29</sup>

While several factors contribute to this high rate of poverty, such as poor education, lack of access to healthcare, lack of infrastructure, such as sewerage or internet access, and lack of access to employment opportunities, the resulting effects to the poverty-stricken area include high rates of diabetes and heart disease, a high rate of low birth weights, a high proportion of families living in mobile homes,<sup>30</sup> the inability to apply online for benefits, and the inability to use Wi-Fi in rural public schools and in public places of business. Throughout the years, numerous government agencies and NGOs have not only supplied humanitarian aid efforts to the people living in the Alabama Black Belt, but also established economic development programs to help bridge the educational and economic gap between Black Belt residents and the rest of the state.<sup>31</sup>

To aid in that effort, institutions of higher learning, law schools and legal clinics, in particular, can play both a symbolic and material role in instituting programs and initiatives aimed at improving the human rights crisis in the Alabama Black Belt. In his 2018 book, *Innovations as Symbols in Higher Education*, J. David Johnson argues that innovative programs at institutions of higher learning are often merely symbolic in nature and are otherwise “decoupled” from any material or practical applications to that innovation or research.<sup>32</sup> He is particularly critical of the recent development of R & D parks, often affiliated with or supported by public and private institutions of higher learning in order to replicate the apparent success of Silicon Valley and our growing U.S. entrepreneurial culture.<sup>33</sup> In response to Johnson’s critiques, this essay argues that law school legal clinics can overcome that divide,

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<sup>24</sup> *Id.*

<sup>25</sup> Bureau of Econ. Analysis, *Alabama*, U.S. DEP’T OF COMMERCE (Sept. 25, 2018), <https://apps.bea.gov/regional/bearfacts/pdf.cfm?fips=01000&areatype=STATE&geotype=3.pdf>; *Poverty Biggest Problem Facing Selma, Black Belt*, AUBURN UNIV. (July 11, 2014), <http://www.cla.auburn.edu/livingdemocracy/blog/poverty-biggest-problem-facing-selma-black-belt/> [hereinafter *Poverty Biggest Problem*].

<sup>26</sup> *Poverty Biggest Problem*, *supra* note 25.

<sup>27</sup> *Id.*

<sup>28</sup> *Data and Reports – Demographics*, BLACK BELT ECON. DEV. ALL., <http://www.blackbelteda.com/data-and-reports/demographics.cfm> (last visited Oct. 14, 2018).

<sup>29</sup> *Poverty Biggest Problem*, *supra* note 25.

<sup>30</sup> Gibbs, *supra* note 9, at 256–57.

<sup>31</sup> *See infra* Part I.C.1.

<sup>32</sup> J. DAVID JOHNSON, *INNOVATIONS AS SYMBOLS IN HIGHER EDUCATION* 10 (2018).

<sup>33</sup> *Id.* at 113–15.

taking such innovative programs beyond their symbolic value and creating practical and material benefits to the community stakeholders supporting and supported by the institution.

This essay further argues that transactional legal clinics that serve university, urban, and rural communities with cultures and ecosystems shaped by the long-term impacts of racial segregation, Civil Rights, and socioeconomic disenfranchisement can play both a powerful symbolic role and a practical material role in regional economic development by providing direct client representation, workshops, and policy research to and on behalf of historically and economically significant clients and organizations. By training law students in transactional methods, transactional legal clinics can teach students to use the law to impact the industrial identities and economic vitalities of their communities. Finally, this essay provides a model of this transactional law clinical theory as the blueprint for the new Entrepreneurship & Nonprofit Clinic (“E-Clinic”) at the Hugh F. Culverhouse Jr. School of Law at the University of Alabama.

This essay has two parts. Part I provides the historical context for how the Alabama Black Belt came to be what it is today, chronicling the swings through the nadirs and peaks of the region’s economic story. Part I then discusses the impact that the Civil Rights Movement had on the population of the Alabama Black Belt. Part I ends with an overview of the current economic state of the region and a discussion of the continued need for improved access to infrastructure. Part II of this essay introduces the role of symbolism versus materiality in higher education academic programs and discusses how transactional law clinics are particularly situated to bridge the divide between symbolic and material program developments to empower rural communities, especially ones with ties to rich civil rights histories, and develop and contribute to the production of entrepreneurship and economic development in the region. Part II will then discuss the current statistical data on transactional legal clinics, still a novel program and course offering at many U.S. law schools. Finally, Part II provides a model of the E-Clinic at Alabama Law, focusing on the community impact, pedagogical goals, and clinic design. The essay concludes with a discussion of how this clinic design can contribute to the economic development and empowerment of West Alabama by both directly providing transactional legal services in multiple settings and by training law students in the role of transactional lawyers in contributing to the building the industrial regional identities and economic vitalities of their communities.

## I. POVERTY IN THE BLACK BELT

[O]vercoming poverty is not a gesture of charity. It is an act of justice. —Nelson Mandela<sup>34</sup>

Like so many counties included in the Southern Black Belt, the counties considered part of the Alabama Black Belt owe their agricultural, historical, and cultural identities to the area’s geology and to the development of one crop in particular—cotton. During the early to mid-1800s, the vast network of cotton plantations in the region made the area one of the wealthiest and politically influential ones in the nation.<sup>35</sup> After the Civil War, however, emancipation, Reconstruction, and other factors crippled the state’s cotton industry, leading to a period of economic downturn and migration out of the Black Belt counties and into urban centers.<sup>36</sup>

<sup>34</sup> Nelson Mandela, Address for the “Make Poverty History” Campaign (Feb. 3, 2005).

<sup>35</sup> BRIDGES, *supra* note 10, at 70; *Heritage Act*, *supra* note 13.

<sup>36</sup> See generally BRIDGES, *supra* note 10, at 129–39.



The Civil Rights Movement of the 1950s and 1960s also impacted the cultural and historical identity of the state, creating a lasting splinter along racial and socioeconomic lines which continues to influence the now-poverty stricken residents of the Black Belt area.<sup>37</sup> While there are numerous humanitarian efforts and programs focused on developing and improving the quality of life for residents in the Alabama Black Belt,<sup>38</sup> more work remains to assist in the economic development, including infrastructure building, healthcare access, improved education, and economic and employment opportunities.

#### A. “LIFE AFTER COTTON”<sup>39</sup>

With the onset of the Industrial Revolution, no state benefited from the burgeoning textile industry more than Alabama. In 1810, the U.S. Census Office estimated that the cotton gin increased the productivity of cotton seed removal at a rate of 1,000 to one.<sup>40</sup> When Alabama opened for settlement, the rush to claim and cultivate the rich, dark soil led to “Alabama fever,”<sup>41</sup> but the immigration of plantation farmers from Georgia, Virginia, Maryland, and the Carolinas into Alabama brought with it the institution of slavery.<sup>42</sup>

By the 1830s, the positioning of Alabama on the larger international industrial markets made Alabama, and the planters who profited from the international markets, one of the wealthiest and politically powerful groups in the United States.<sup>43</sup> With the slave-owning planters controlling state government, Alabama passed law after law tightening the restrictions on enslaved African-Americans,<sup>44</sup> and slavery in the South became what is historically considered one of the harshest forms, based exclusively on notions of racial superiority and using extreme physical violence to ensure production and the continuance of the institution.<sup>45</sup>

With the establishment of the Confederacy and onset of the Civil War in the 1860s, Montgomery was the first capital of the new Confederacy, and Jefferson Davis was inaugurated as the President of the Confederacy there on February 13, 1861.<sup>46</sup> At the end of the Civil War, Wilson’s Raid swept through central and western Alabama in spring 1865, destroying iron furnaces in Shelby, Jefferson, Tuscaloosa, and Bibb Counties, burning the University of Alabama and the Confederate manufacturing complex in Selma, finally turning to Montgomery, where the capital surrendered without a fight on April 12, 1865,<sup>47</sup> days after Lee had surrendered at Appomattox.<sup>48</sup> Rebuilding the economy, which was agrarian and slave-

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<sup>37</sup> See WILLIAM WARREN RODGERS, ROBERT DAVID WARD, LEAH RAWLS ATKINS & WAYNE FLYNT, *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE* 580-81 (Univ. Ala. Press ed., 1994) [hereinafter RODGERS].

<sup>38</sup> See *infra* Part I.C.1.

<sup>39</sup> *Alabama’s Black Belt: Life after Cotton*, *ECONOMIST* (Aug. 28, 2003), <https://www.economist.com/united-states/2003/08/28/life-after-cotton>.

<sup>40</sup> BRIDGES, *supra* note 10, at 57.

<sup>41</sup> *Id.* at 58.

<sup>42</sup> *Id.* at 60.

<sup>43</sup> *Id.* at 71; *Heritage Act*, *supra* note 13.

<sup>44</sup> BRIDGES, *supra* note 10, at 78.

<sup>45</sup> *Id.* at 80.

<sup>46</sup> RODGERS, *supra* note 37, at 190–91; BRIDGES, *supra* note 10, at 96.

<sup>47</sup> BRIDGES, *supra* note 10, at 111.

<sup>48</sup> *Id.*

based in Alabama and most of the Southern states, was a top priority for both then-Democrats and Republicans in the state.<sup>49</sup>

## 1. RAILROADS, IRON AND STEEL MILLS, AND THE FOUNDING OF BIRMINGHAM

During Reconstruction, Alabama turned to building railroads at the core of its economic development plan. Throughout the 1870s, two railroad companies, The South & North Railroad from Montgomery to Decatur and the Alabama & Chattanooga Railroad from Meridian to Chattanooga, competed for the land where the two rail lines converged.<sup>50</sup> The South & North Railroad line struck first, forming the Elyton Land Company and naming the new town at the junction site Birmingham.<sup>51</sup> Birmingham, in support of railroad building, became home to a burgeoning and successful iron and coal industry, and its coal production supported the Birmingham economy for years to come.<sup>52</sup> Dubbed the “Magic City,” Birmingham grew from a town of 3,086 people in 1880 to a major “New South” city of 132,685 people by 1910.<sup>53</sup> Alabama entrepreneurs hoping to tap into this new economy often sought out of state investors to fund their new businesses, and these outside investors gradually began to control Alabama’s coal mines, furnaces, and railroads.<sup>54</sup>

While the service and administrative jobs stayed within Birmingham, much of the wealth generated from the industry went to the investors and owners who were out of state.<sup>55</sup> All of this industry supported the laying of railroad tracks. By 1880, Alabama had 1,800 miles of tracks and more than 5,000 by 1910, and railroad companies became a powerful economic and political driving force in the state.<sup>56</sup>

## 2. TIMBER AND TEXTILES

When settlers first came to Alabama, over 90% of Alabama was considered forest-land, and the production of timber, specifically long leaf pine, was a major contributor to the monetization of Alabama’s natural resources.<sup>57</sup> Beginning in 1850, the government granted swaths of land to companies as an incentive to develop it, mostly to the railroad companies as they laid more tracks through the state.<sup>58</sup> By 1869, Alabama produced approximately 86

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<sup>49</sup> *Id.* at 112. Historians break down the ten years of Reconstruction in Alabama into three periods: from 1865 to 1867, when President Andrew Johnson set the terms for Reconstruction, which were considered lenient to the former slave-holding states; from 1867 to 1874, when U.S. Congress actively sought to protect the liberties and economic opportunities for former slaves; and 1874 to the end of Reconstruction, during which time the federal government essentially “gave up” on protecting the rights of African-Americans, allowing white Democrats in Alabama to regain their political control in the state.

<sup>50</sup> *Id.* at 129–30.

<sup>51</sup> *Id.* at 130.

<sup>52</sup> *Id.* at 131.

<sup>53</sup> *Id.* at 133.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 135.

<sup>57</sup> *Id.* at 136.

<sup>58</sup> *Id.* at 137.

million board feet of lumber and, by 1899, almost 1 billion.<sup>59</sup> According to the 1910 census, 22,409 of Alabama's 72,148 wage earning workers cut or milled wood.<sup>60</sup> With the invention of the steam engine, Alabamians were able to transport their lumber nationwide and overseas, building structures in Alabama, the northern United States, and Europe.<sup>61</sup> Allegedly, the walls and floors of Prince Albert and Queen Victoria's royal castle in Scotland were built with longleaf pine from Alabama's forests.<sup>62</sup>

Reconstruction also saw the re-emergence of Alabama's textile industry, and producers from the Northeast began building textile mills in the South, which were simply closer to the cotton supply and the waterpower used to pump the machines.<sup>63</sup> Most importantly to textile mill owners, wage rates in the South were much cheaper than in the North, and by 1910, textile manufacturing became Alabama's second largest industry based on employment, where one-third of these workers were women.<sup>64</sup>

### 3. RURAL ALABAMA

While many out-of-state and Alabama residents flocked to Birmingham and other urban centers supporting the coal, steel, timber, and textile industries, most of Alabama and its residents remained in rural areas.<sup>65</sup> According to the 1910 census, 17% of the Alabama population lived in towns or urban centers of 2,500 people or more, and 83% of the 2.1 million Alabama residents lived in considerably bleak rural areas.<sup>66</sup> While sharecropping grew after Reconstruction, in 1910 85% of all Alabama farms operated by African-Americans and 48% operated by whites were considered tenant or rental farming.<sup>67</sup> Sharecroppers paid for the use of their land by pledging a portion of their crops in advance to the landowner; tenant farmers paid cash to rent their farmed tracts, and both groups cultivated crops on land that they did not own.<sup>68</sup> Sharecroppers would often rely on the landowners to advance funds to pay for things they needed for the upcoming year like seed, fertilizer, and a mule, which costs were then deducted from the sharecroppers' profits when the landowner sold the cotton, and sharecroppers often ended up in debt.<sup>69</sup> Despite emancipation, in many ways Reconstruction became a continuation of the institution of slavery as Alabama struggled to rebuild its broken, cotton-based economy.

Additionally, poor farming practices decimated the actual farming land, as sharecroppers had little incentive to protect or restore land that they might not even farm the

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<sup>59</sup> *Id.* at 138.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 137–38.

<sup>62</sup> *Id.* at 138 (quoting BILL FINCH, BETH MAYNOR YOUNG, RHETT JOHNSON & JOHN C. HALL, *LONGLEAF, FAR AS THE EYE CAN SEE: A NEW VISION OF NORTH AMERICA'S RICHEST FOREST* 8 (Univ. N.C. Press ed., 2012)).

<sup>63</sup> *Id.* at 138.

<sup>64</sup> *Id.* at 138–39.

<sup>65</sup> *Id.* at 140.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 141.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 142.

following year.<sup>70</sup> These poor farming practices led to erosion, loss of topsoil, and decreased soil fertility.<sup>71</sup> In 1896, George Washington Carver visited the Tuskegee Institute to head the school's Agricultural Department and noted the "devastated forests, ruined estates, and thoroughly discouraged people, many just eking out a miserable sort of existence from the furrowed and guttered hillsides and neglected valleys called farms."<sup>72</sup> While life in the small towns that served the rural farms was somewhat improved,<sup>73</sup> throughout this entire period after Reconstruction, wages in Alabama remained at about 50% of the national average.<sup>74</sup> Rural industrialization proceeded slowly, and landowners had a vested interest in having a workforce with limited alternative employment opportunities, who were forced to piece together sustenance through farming or any available factory work.<sup>75</sup>

## B. CIVIL RIGHTS IMPACT

The census of 1870 showed approximately 475,000 black residents in Alabama and 521,000 whites.<sup>76</sup> Formerly enslaved freedmen made up almost 48% of the state's population. Most laws used by Alabama officials during the years following Reconstruction were not overtly racist, such as vagrancy laws, even if such laws disproportionately targeted African-Americans.<sup>77</sup> Most state officials were too fearful that the federal government would strike down any such overtly racist laws.<sup>78</sup> However, during the 1870s and 1880s, prompted by a series of Supreme Court decisions which weakened the impact and intended effects of the Fourteenth and Fifteenth Amendments,<sup>79</sup> and the with the pivotal Supreme Court decision of *Plessy vs. Ferguson* in 1896 which upheld Louisiana's "separate, but equal" mandate,<sup>80</sup> Southern whites were emboldened to tighten their control over the growing African-American middle class.<sup>81</sup>

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<sup>70</sup> *Id.* at 145.

<sup>71</sup> *Id.*

<sup>72</sup> MARK D. HERSEY, *MY WORK IS THAT OF CONSERVATION: AN ENVIRONMENTAL BIOGRAPHY OF GEORGE WASHINGTON CARVER* 82 (Univ. Ga. Press ed., 2011) (quoting George Washington Carver, *A Gleam upon the Distant Horizon* (1941) (unpublished typescript) (on file with GWCP, TUA)).

<sup>73</sup> BRIDGES, *supra* note 10, at 146.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 144, 146.

<sup>76</sup> *Id.* at 112.

<sup>77</sup> *Id.* at 153.

<sup>78</sup> *Id.*; JILL NORNGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 46 (3d ed. 2006).

<sup>79</sup> *See* *United States v. Reese*, 92 U.S. 214 (1875) (held that the 15th Amendment did not confer the right to vote, but that right derived from the states, leaving states to determine under what circumstances voting would be allowed); *United States v. Cruikshank*, 92 U.S. 542 (1875) (held that the 14th Amendment only protects against state action); *United States v. Harris*, 106 U.S. 629 (1883) (held that federal laws aimed at preventing the invasion of equal protection did not apply to private persons, essentially allowing white supremacists to attack African Americans seeking to vote).

<sup>80</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>81</sup> In rural areas, segregation laws had little impact on the already existing social and political structure in which wealthy planters and landowners controlled the social and economic culture of the area. BRIDGES, *supra* note 10, at 154. But in cities, where residents were crowded together *en masse*

The New Deal and World War II created new challenges for Alabama's system of racial segregation and oppression.<sup>82</sup> The African-American middle class in towns and cities across the U.S. grew, with African-Americans becoming teachers, preachers, doctors, lawyers, business owners, skilled workers, and public employees.<sup>83</sup> Many had college degrees and understood the systems of inequality and oppression in which they lived.<sup>84</sup> Both urban and rural parts of Alabama were impacted by the Civil Rights Movement that was to come, and Alabama's historical ties to the Civil Rights Movement continue to shape its residents' economic instability, racial tensions, and perceptions of state government.

## 1. ROLE OF SCHOOLS & INSTITUTIONS OF HIGHER LEARNING

Schools and institutions of higher learning became a symbolic and material battleground for segregationists. One Alabama historian points out that the most violent and emotional area of desegregation was in education and public schools.<sup>85</sup> Even in the face of the Supreme Court's decision in *Brown v. Board of Education* in 1954, public institutions resisted integration.<sup>86</sup> Autherine Lucy, the first African American to enroll at the University of Alabama in 1956, was expelled a month later "for her own safety" after rioting occurred on campus.<sup>87</sup> Federal judges, in particular Judge Frank Johnson of Alabama's Middle District, were forced to issue comprehensive and detailed orders for school desegregation in Alabama.<sup>88</sup> White-dominated school boards continued to resist and, in the political struggle, historians

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in public spaces, new laws required segregation in public transportation, restrooms, lodging, theaters, parks, swimming pools, libraries, hospitals, stadiums, prisons, and waiting rooms. Self-appointed individuals and groups acted as enforcement agencies, often in concert with and supported by state and local officials, using fear, violence, and intimidation. These years saw the re-emergence of the Ku Klux Klan, prompted further by the widespread dissemination of the film *The Birth of a Nation*, which painted the Klan as the saviors of white morality and purity. See Eric M. Armstrong, *Revered and Reviled: D.W. Griffith's "The Birth of a Nation"*, MOVING ARTS FILM J., May 29, 2010, <https://web.archive.org/web/20100529224316/http://themovingarts.com/revered-and-reviled-d-w-griffiths-the-birth-of-a-nation/>. A 2015 study by the Equal Justice Initiative in Montgomery identified 363 recorded lynchings of African-American's in Alabama alone between 1877 and 1950. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 16 (2d ed. 2015), <https://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf>.

<sup>82</sup> BRIDGES, *supra* note 10, at 206.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 220.

<sup>86</sup> *Id.* at 221.

<sup>87</sup> Diane McWhorter, *The Day Autherine Lucy Dared to Integrate the University of Alabama*, 32 J. BLACKS HIGHER EDUC. 100–01 (2001); see also The Papers of Martin Luther King, Jr., [https://swap.stanford.edu/20141218232248/http://mlk-kpp01.stanford.edu/kingweb/about\\_king/details/560206.htm](https://swap.stanford.edu/20141218232248/http://mlk-kpp01.stanford.edu/kingweb/about_king/details/560206.htm). When Alabamians saw that Justice Hugo Black, a graduate of the University of Alabama School of Law, sided with the majority in *Brown vs. Board of Education*, he was ostracized so strongly that he did not return to his native soil for over twenty years. DANIEL JOHN MEADOR, THE TRANSFORMATIVE YEARS OF THE UNIVERSITY OF ALABAMA LAW SCHOOL, 1966-1970, at 14 (NEW S. BOOKS 2012).

<sup>88</sup> BRIDGES, *supra* note 10, at 221.

point out that the white reactions to integration shaped Alabama's current public school racial and socioeconomic demographics today.

## 2. ROLE OF STUDENTS

Students also played a crucial role in the Civil Rights Movement. Alabama State College students staged numerous sit-ins in Montgomery in 1960, but officials forced the college to expel or suspend the student leaders and fire the faculty members that supported them.<sup>89</sup> Many of the 1961 Freedom Riders, who organized to test the new anti-segregation laws in public transportation, were organized by students at Tennessee State University and Fisk University in Nashville, including then-student John Lewis, a native of Troy, Alabama.<sup>90</sup> The violence that befell the Freedom Riders in both Birmingham and Montgomery drew national attention to the plight of African-Americans in Alabama. President Kennedy focused more attention on equality and caused moderate whites in Alabama to support the anti-segregation movement.<sup>91</sup>

But state officials in Alabama continued to resist. When George Wallace won the governorship in 1962, in his inaugural address in January 1963 he appealed to his base, declaring "segregation today, segregation tomorrow, segregation forever" to rapturous applause from his constituents.<sup>92</sup> When the University of Alabama was desegregated in 1963, Governor Wallace ceremoniously engaged in his infamous "Stand in the Schoolhouse Door" to protest the admittance of two African-American students, Vivian Malone and James Hood.<sup>93</sup> While Hood left the University after a few months, Vivian Malone became the first black graduate of the University of Alabama in 1965.<sup>94</sup>

In April 1963, Dr. Martin Luther King, Jr. and protest leader Fred Shuttlesworth arranged a series of sit-ins and demonstrations in Birmingham, joined by hundreds of students and young people who were thirsty for equality and change. The police commissioner arrested the students by the hundreds and, in the face of national news TV cameras, turned the fire hoses and dogs on the students in an attempt to punish them for their demonstration.<sup>95</sup> The national outrage in reaction to the violence prompted Birmingham to begin desegregating its public facilities.<sup>96</sup> In retaliation, Klansmen planted a bomb at the Sixteenth Street Baptist Church in Birmingham, then dubbed "Bombingham,"<sup>97</sup> killing four little girls aged 11 to 14 who were attending Sunday School on September 15, 1963.<sup>98</sup> Two months after President Kennedy

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<sup>89</sup> *Id.* at 209.

<sup>90</sup> *Id.* at 210–11.

<sup>91</sup> *Id.* at 211.

<sup>92</sup> *Id.* at 213; Governor George C. Wallace, Inaugural Address (Jan. 14, 1963), <http://media.al.com/spotnews/other/George%20Wallace%201963%20Inauguration%20Speech.pdf>.

<sup>93</sup> Sarah Melton, *A Slight of History: University of Alabama's Foster Auditorium*, SOUTHERN SPACES (Oct. 15, 2009), <https://southernspaces.org/2009/sleight-history-university-alabamas-foster-auditorium>.

<sup>94</sup> *Civil Rights Pioneer Vivian Jones Dies*, USA TODAY (Oct. 13, 2005), [https://usatoday30.usatoday.com/news/nation/2005-10-13-jonesobit\\_x.htm](https://usatoday30.usatoday.com/news/nation/2005-10-13-jonesobit_x.htm).

<sup>95</sup> BRIDGES, *supra* note 10, at 213.

<sup>96</sup> *Id.* at 215.

<sup>97</sup> *See generally* ANTHONY GROOMS, BOMBINGHAM (2002).

<sup>98</sup> RODGERS, *supra* note 37, at 560.

proposed his Civil Rights Bill to end segregation in employment and public facilities, he was assassinated, but his successor Lyndon Johnson was able to secure the passage of the Civil Rights Act of 1964.<sup>99</sup>

### 3. ROLE OF SOCIOECONOMIC STATUS

Socioeconomic status became just as crucial as race in shaping the outcomes of the integration “experiment” in the 1960s.<sup>100</sup> For middle-class African-American students whose lifestyles already resembled those of their white classmates, their chances for success were higher despite the intense discrimination they faced, many moving to more affluent suburbs so their children could attend better schools.<sup>101</sup> However, in parts of Alabama with large numbers of African-American students who lived near or below the poverty line, like in many Alabama Black Belt counties, white families who had the financial capacity abandoned public schools, either by moving or by establishing private schools and charter schools.<sup>102</sup> This resulted in *de facto* segregation in public schools and triggered a “self-reinforcing cycle of public school decline and abandonment.”<sup>103</sup> The lasting impact of the role that schools and public universities played in the Civil Rights Movement is not forgotten. Many who lived through the violence and resistance on university campuses still remember the impact of the events today, and the University of Alabama in particular has actively sought to honor the legacies of those students who fought for equal access to education.<sup>104</sup>

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<sup>99</sup> BRIDGES, *supra* note 10, at 215.

<sup>100</sup> *Id.* at 221.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 221–22.

<sup>103</sup> *Id.* at 222.

<sup>104</sup> In 1988, after Autherine Lucy, now Foster, spoke to a history class at the University of Alabama, a few faculty members asked the University to overturn her 1956 expulsion, and later that year she received a letter inviting her to return as a student. *Lucy Foster, Autherine 1929-*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/historians-and-chronicles/historians-miscellaneous-biographies/autherine-lucy-foster#G>. The next year, she enrolled in a Master’s degree program for elementary education the same year her daughter, Grazia, enrolled at the University as an undergraduate. They both graduated together four years later. In 1992, a \$25,000 endowed scholarship was created in her name, and the University installed a portrait of her, which provides, “Her initiative and courage won the right for students of all races to attend the University.” *James Hood, Who Integrated University of Alabama, Dies at 70*, WASH. POST (Jan. 18, 2013), [https://archive.is/20130217004459/http://articles.washingtonpost.com/2013-01-18/local/36473658\\_1\\_national-guard-black-student-university-of-alabama-campus](https://archive.is/20130217004459/http://articles.washingtonpost.com/2013-01-18/local/36473658_1_national-guard-black-student-university-of-alabama-campus). James Hood also returned to the University in 1995 to begin earning his doctorate. He received his Ph.D. in interdisciplinary studies on May 17, 1997. *Id.* In 2000, the University of Alabama bestowed on Vivian Malone a Doctorate of humane letters. Douglas Martin, *Vivian Malone Jones, 63, Dies; First Black Graduate of University of Alabama*, N.Y. TIMES (Oct. 14, 2005), <https://www.nytimes.com/2005/10/14/us/vivian-malone-jones-63-dies-first-black-graduate-of-university-of.html>; The University of Alabama, *Hooding of Vivian Malone Jones, August 2000*, YOUTUBE, (Nov. 3, 2014), [https://www.youtube.com/watch?v=SmXSvc6S\\_vE](https://www.youtube.com/watch?v=SmXSvc6S_vE).

## A. CURRENT ECONOMIC STATE

While the urban areas may have experienced more resiliency in bouncing back from both racial and economic oppression, rural Alabama, especially the Black Belt counties, struggled to find economic stability. Numerous organizations, both affiliated with government agencies and institutions of higher learning in the state, have designed and implemented development activities and initiatives aimed at increasing economic development and support to residents in the Alabama Black Belt. Because many of these programs were initiated within the last ten to twenty years, the long-term impact of these programs remains to be seen. What is apparent, however, is that current Black Belt residents continue to suffer from the impacts of racial, social, and economic depression, causing what some have referred to as a human rights crisis in Alabama.

### 1. INDUSTRIAL IDENTITIES

Today, Alabama's industries are a reflection of its past and a nod to its potential economic future. These industries include: the aeronautics, space program, and tech industry; the automotive manufacturing industry; chemical manufacturing and metal manufacturing; natural resources industries focused on timber, textiles, and agricultural development;<sup>105</sup> and the University of Alabama university system itself, which supports a medical center hub in Birmingham, for example, and a state-wide football culture that unifies recognition and support of the Crimson Tide football program.<sup>106</sup>

### 2. ECONOMIC DEVELOPMENT PROGRAMS AND INITIATIVES

Building off of the area's economic history and natural resources, programs aimed at improving economic development focus on increasing low-skilled manufacturing jobs in the transportation industries, agriculture and forestry, mining, fishing, and construction. Other initiatives focus on improving health outcomes and overall quality of life for Alabama Black Belt residents.

In 2005, a joint plan was announced between Alabama and Mississippi to create a two-state authority for economic development in the region.<sup>107</sup> The plan was to locate four sites for industrial parks, two of which would be in the Alabama Black Belt, which would bring low-

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<sup>105</sup> Barbara Long, *Top 5 Industries in Alabama: Which Parts of the Economy Are the Strongest?*, NEWSMAX (Feb. 23, 2015), <https://www.newsmax.com/fastfeatures/industries-in-alabama-strongest/2015/02/17/id/625335/>; Jerry Underwood, *Impact of Alabama Agriculture, Forestry Industries Tops \$70 Billion*, MADE IN ALA. (Mar. 1, 2013), <http://www.madeinalabama.com/industries/>; THE UNIV. OF ALA., *UA's Impact on Alabama*, <https://www.ua.edu/outreach/impact/>.

<sup>106</sup> There is also a large contingency of Auburn football fans which supports the East Alabama economic community. Andrew Gribble, *Forbes Study Reveals Alabama is College Football's 3rd-Most Financially Valuable Team; Auburn 11th*, AL (Dec. 18, 2013), [https://www.al.com/sports/index.ssf/2013/12/forbes\\_study\\_reveals\\_alabama\\_i.html](https://www.al.com/sports/index.ssf/2013/12/forbes_study_reveals_alabama_i.html).

<sup>107</sup> Alabama's Black Belt: Life after Cotton, *supra* note 38. See also MISS. CODE ANN. § 57-34-1 (2013) (title creating the Alabama-Mississippi Joint Economic Development Authority).



skilled, assembly-line type jobs to the area.<sup>108</sup> The Black Belt Development Alliance, in conjunction with the University of West Alabama, was created in 2011 and focuses on 11 counties in the Alabama Black Belt, aimed at “assist[ing] companies and site location consultants [to] find available sites and buildings” in the region.<sup>109</sup> In addition to these programs, smaller organizations, such as the Economic Development Partnership of Alabama,<sup>110</sup> the Alabama Forestry Association,<sup>111</sup> and a Pilot Loan Program for Black Belt Farmers seeks to capitalize on the area’s farming and forestry history to bring economic stability to the region.<sup>112</sup>

Other initiatives have stated goals of improving the overall quality of life of Black Belt residents, building upon the area’s historical and cultural history. These initiatives include the Alabama Rural Heritage Foundation,<sup>113</sup> Alabama’s Front Porches,<sup>114</sup> the Alabama Black Belt National Heritage Area Act of 2010,<sup>115</sup> the Alabama Black Belt Adventures Association,<sup>116</sup> Black Belt Treasures Cultural Arts Center,<sup>117</sup> and the Robert Trent Jones Golf Trail,<sup>118</sup> among others.

Additionally, other programs aim at improving educational outcomes or are sponsored by institutions of higher learning in order to immerse college-age students in the problems facing Alabama Black Belt residents. These include Books for the Alabama Black Belt,<sup>119</sup> a Black Belt Community Foundation Head Start Grant for \$1.4 million,<sup>120</sup> the Alabama Coalition for a Healthier Black Belt,<sup>121</sup> Alliance for Economic Inclusion,<sup>122</sup> and Community Grants through the Black Belt Community Foundation.<sup>123</sup> In 2009, the University of Alabama

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<sup>108</sup> *Id.*

<sup>109</sup> *Welcome to the Black Belt Economic Development Alliance (BBEDA)*, BLACK BELT ECON. DEV. ALLIANCE, <http://www.blackbelteda.com/home/> (last visited Sept. 27, 2018).

<sup>110</sup> ECONOMIC DEVELOPMENT PARTNERSHIP OF ALABAMA, <https://www.edpa.org/> (last visited Sept. 27, 2018).

<sup>111</sup> ALABAMA FORESTRY ASSOCIATION, <https://www.alaforestry.org/> (last visited Sept. 27, 2018).

<sup>112</sup> *Pilot Loan Program for Black Belt Farmers*, NCI NEWS (Sept. 1, 2012), <https://www.neighborhoodconcepts.org/nci-news/item/pilot-loan-program-for-black-belt-farmers>.

<sup>113</sup> ALA. RURAL HERITAGE CTR., <http://www.ruralheritagecenter.com/> (last visited Sept. 27, 2018).

<sup>114</sup> ALA.’S FRONT PORCHES, <https://www.alabamafrontporches.org/> (last visited Sept. 27, 2018).

<sup>115</sup> *Heritage Act*, *supra* note 13, at 2–3.

<sup>116</sup> ALA. BLACK BELT ADVENTURES, <http://alabamablackbeltadventures.org/> (last visited Sept. 27, 2018).

<sup>117</sup> BLACK BELT TREASURES CULTURAL ARTS CTR., <http://www.blackbelttreasures.com/> (last visited Sept. 27, 2018).

<sup>118</sup> ROBERT TRENT JONES GOLF TRAIL, <https://www.rtgolf.com/> (last visited Sept. 27, 2018).

<sup>119</sup> *Books for the Alabama Black Belt Launches in February*, U. ALA. NEWS CTR. (Jan. 24, 2018), <https://www.ua.edu/news/2018/01/books-for-the-alabama-black-belt-launches-in-february/>.

<sup>120</sup> Elizabeth Patton, *Black Belt Community Foundation Awarded \$1.4 million Head Start Grant*, ALA. TODAY (June 23, 2017), <http://altoday.com/archives/17431-black-belt-community-foundation-awarded-1-4-million-head-start-grant>.

<sup>121</sup> See Robert M. Savage et al., *The Alabama Coalition for a Healthier Black Belt: A Proof of Concept Project*, 49 COMMUNITY MENTAL HEALTH J. 79, 81–82 (2013).

<sup>122</sup> *Alabama Black Belt Alliance for Economic Inclusion*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/consumers/community/aei/regional/alabama.html> (last visited Sept. 27, 2018).

<sup>123</sup> *Community Grants*, BLACK BELT COMMUNITY FOUND., <http://blackbeltfound.org/grant/community-grants/> (last visited Sept. 27, 2018).

Honors College launched a “Black Belt Experience” for its honors students,<sup>124</sup> and the Culverhouse College of Business at the University of Alabama houses the UA Center for Economic Development, the Alabama Small Business Development Center, the Center for Business and Economic Research, and the Alabama Entrepreneurship Institute.<sup>125</sup>

Overall, government agencies and Black Belt developers are optimistic that such programs, along with many others too numerous to discuss here, will bring increased economic activity, cultural development, improved educational outcomes, and infrastructure development to residents in the Alabama Black Belt.

### 3. CONTINUED NEED FOR ACCESS TO INFRASTRUCTURE

Because many of these Black Belt focused economic development programs are relatively recent, the long-term impact of the influx of capital, resources, and humanitarian aid to the region remains unknown. What is apparent is that, to this day, the poverty in the Alabama Black Belt counties is still starkly clear to the naked eye, and more work remains to alleviate the dire economic instability and poor health outcomes for Black Belt residents.

When United Nations official Philip Alston visited Alabama in December 2017 during a two-week long investigation into poverty in the U.S., he opined that the level of poverty he witnessed in the Black Belt of Alabama was “very uncommon in the first world. This is not a sight that one normally sees.”<sup>126</sup> “The Alabama Department of Public Health estimates that 40 to 90 percent of homes [in the Alabama Black Belt] have either inadequate or no septic system,” and that at least half of the septic systems that are installed do not work correctly.<sup>127</sup> Many residents of the area, including a man named Paul, who was interviewed by journalist Michael Harriot for *The Root*, “straight-pipe” their sewage, which involves digging a hole near the property and then running pipes, above ground, from their homes to the pit, allowing the raw sewage to fill the holes.<sup>128</sup>

Some residents do not even bother to dig a pit and instead simply allow the pipes to flow into their yards a few feet from their homes.<sup>129</sup> Even with installed septic tanks, the humid soil and the heavy Alabama rains often cause the septic tanks to overflow.<sup>130</sup> In either instance, sewage often leaks into the soil, which infects the ground with parasites and diseases.<sup>131</sup> Paul, who jokingly played on President Trump’s “shithole country” remarks, said “You wanna see

<sup>124</sup> *Black Belt Experience*, U. ALA. HONORS C., <https://honors.ua.edu/programs/black-belt-experience/> (last visited Sept. 27, 2018).

<sup>125</sup> *List of Research & Outreach Programs*, U. ALA. CULVERHOUSE C. BUS., <https://culverhouse.ua.edu/#> (last visited Sept. 27, 2018).

<sup>126</sup> Andrew Buncombe, *UN Shocked by Level of Poverty in Alabama: “We Haven’t Seen This in the First World,”* INDEP. (Dec. 12, 2017, 4:20 PM),

<https://www.independent.co.uk/news/world/americas/us-politics/alabama-black-belt-un-poverty-expert-extreme-developed-country-sewage-crisis-roy-moore-philip-alston-a8105886.html>.

<sup>127</sup> Catherine Flowers, *A County Where the Sewer Is Your Lawn*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/opinion/alabama-poverty-sewers.html>.

<sup>128</sup> Harriot, *supra* note 22.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

a shithole? I'm finna show you a shithole," he exclaimed.<sup>132</sup> "That man needs to come down here. He'll see that he's the president of a shithole!"<sup>133</sup>

The infrastructure crisis facing the Alabama Black Belt counties is just one feature of the poverty and lack of access to resources experienced by residents of the area. The infrastructure failures reach further than broken sewerage systems, and impacts other vital resources, such as Wi-Fi and broadband access, which limits economic growth, educational opportunities, and business opportunities. While many of the economic development initiatives are aimed at ameliorating the poor health outcomes and lack of opportunity to Black Belt residents, including those run and operated by institutions of higher learning in the state, to experience economic empowerment, Black Belt residents must see economic development and infrastructure building so that they will feel like they no longer live in the "Place God Forgot."<sup>134</sup>

## II. SYMBOLISM AND MATERIALITY IN ECONOMIC DEVELOPMENT

To get away from poverty, you need several things at the same time: school, health, and infrastructure—those are the public investments. And on the other side, you need market opportunities, information, employment, and human rights. —Hans Rosling<sup>135</sup>

Institutions of higher learning can play both a symbolic and material role in instituting programs and initiatives aimed at improving the economic and social wellbeing of urban and rural populations supported by the institution. College campuses can play a symbolic role within their communities, in both the branding of their university names, flagship programs, and their historical ties to political and social movements that become permanent links in the minds of the community members. However, institutions of higher learning have received criticism for valuing research and symbolic program innovations without impacting on a material or practical level the community that supports the institution.<sup>136</sup>

Legal clinics, in particular transactional legal clinics that support entrepreneurship, community development, and innovation, can overcome the symbolic versus materiality divide and produce measurable positive impacts in the supporting community. While more data is

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The sewerage crisis alone has led to the rise of diseases associated with third world countries—hookworm and E. Coli—and Alabama has seen a resurgence of these diseases in recent years. Hookworm causes iron deficiency, anemia, weight loss, tiredness, and impaired mental function. *Id.* A peer-reviewed research paper, published in the *American Journal of Tropical Medicine and Hygiene*, found that among 24 households tested in Lowndes County, 42.4% reported exposure to raw sewerage within their homes, and from 55 stool samples, 19 (34.5%) tested positive for *N. americanus* (hookworm), four (7.3%) for *Strongyloides stercoralis* (roundworm), and one (1.8%) for *Entamoeba histolytica* (amebic dysentery). Megan L. McKenna, Shannon McAtee, Patricia E. Bryan, Rebecca Jeun, Tabitha Ward, Jacob Kraus, Maria E. Bottazzi, Peter J. Hotez, Catherine C. Flowers & Rojelio Mejia, *Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama*, 97 *AM. J. TROPICAL MED. & HYGIENE* 1623 (2017).

<sup>134</sup> Harriot, *supra* note 22.

<sup>135</sup> Jennifer Barone, *Scientist of the Year Notable: Hans Rosling*, *DISCOVER MAG.*, Dec. 6, 2007, <http://discovermagazine.com/2007/dec/hans-rosling>.

<sup>136</sup> See JOHNSON, *supra* note 32, at 110–11.

needed to measure the qualitative impact of transactional legal clinics,<sup>137</sup> a new Entrepreneurship & Nonprofit Clinic at the University of Alabama School of Law aims to contribute to bridging the symbolism versus materiality divide and to reclaim the branding and symbolism historically tied to institutions of higher learning in Alabama by supporting programs and organizations focused on eradicating poverty and building infrastructure in the Alabama Black Belt.

## A. RECLAIMING THE SYMBOLISM VS. MATERIALITY PARADIGM

*Black's Law Dictionary* simply defines “symbol” as a “sign or word used to indicate or signify an idea, relationship[,] or object.”<sup>138</sup> According to *Merriam-Webster Dictionary*, a “symbol” is “[s]omething that stands for or suggests something else by reason of relationship, association, convention, or accidental resemblance; *especially*: a visible sign of something invisible.”<sup>139</sup> The Greek definition is particularly useful, as a symbol represents “inferences of other phenomenon, perhaps ones of greater permanence and importance.”<sup>140</sup> By viewing a symbol, the viewer can infer larger societal, cultural, or historical significance that the symbol represents or conjures.

### 1. SYMBOLS AND CULTURE

Symbols are intrinsic to the cultural fabric of the United States. According to the Library of Congress, the United States itself has six primary symbols that represent larger concepts underlining an American value system: the Liberty Bell, the U.S. flag, the bald eagle, the national anthem, Uncle Sam, and the Statue of Liberty.<sup>141</sup> According to Murray Jacob Edelman, the author of *The Symbolic Uses of Politics*, “[e]very symbol stands for something other than itself, and it also evokes an attitude, a set of impressions, or a pattern of events associated through time, through space, through logic, or through imagination with the symbol.”<sup>142</sup> Understanding the symbol conveys to the viewer a broader cultural and historical concept or idea and can bestow upon the viewer a “comprehen[sion of] the social fabric within which they are enmeshed, and which therefore expresses the character of the organization,

<sup>137</sup> *But see* Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J. L. & POL'Y 85 (2014); Alina Ball & Manoj Viswanathan, *From Business Tax Theory to Practice*, 24 CLINICAL L. REV. 27, 49–50 (2017); Jennifer Fan, *Institutionalizing the USPTO Law School Clinic Certification Program for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 327, 331–32, n. 14 (2015). A recent study of clinics that serve social entrepreneurs and impact investors, presented at the Transactional Clinical Conference in April 2018, will be published through the Grunin Center for Law and Social Entrepreneurship at NYU School of Law later this year.

<sup>138</sup> *Symbol*, BLACK'S LAW DICTIONARY (2d ed. 1910).

<sup>139</sup> *Symbol*, MERRIAM-WEBSTER DICTIONARY, [https://www.merriam-webster.com/dictionary/symbols?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/symbols?utm_campaign=sd&utm_medium=serp&utm_source=jsonld) (last visited Nov. 1, 2018).

<sup>140</sup> JOHNSON, *supra* note 32, at 8.

<sup>141</sup> LIBR. CONG., SYMBOLS OF THE UNITED STATES 1, [http://www.loc.gov/teachers/classroommaterials/primarysourcesets/symbols-us/pdf/teacher\\_guide.pdf](http://www.loc.gov/teachers/classroommaterials/primarysourcesets/symbols-us/pdf/teacher_guide.pdf).

<sup>142</sup> MURRAY JACOB EDELMAN, *THE SYMBOLIC USES OF POLITICS* 6 (1964).

[and] stimulates an emotional response and conditions action.”<sup>143</sup> “Symbols are a concrete indication of more abstract values, often with some end in view, so that symbols often have some instrumental value.”<sup>144</sup>

In recent years, there has been a culture war over historical symbols in public spaces, particularly those with linkages to the Confederacy and the institution of slavery.<sup>145</sup> For example, New Orleans Mayor Mitch Landrieu recently ordered the removal of a statue from famed “Lee Circle,” a roundabout in New Orleans at the center of which stood a statue in memoriam to the Confederate General Robert E. Lee.<sup>146</sup> This order caused outrage by many members of the New Orleans community and generated strong support from others.<sup>147</sup> Those who opposed the removal argued that it was erasing a part of New Orleans and Southern history, while those who supported the removal tied the statue to its larger symbolic support of the institution of racism-based slavery upon which the Confederacy was built.<sup>148</sup> This one example also demonstrates that symbols can evoke different value sets and cultural references to different groups, depending on the viewer’s larger perception of the symbol’s linkages to history and society.

## 2. SYMBOLS IN HIGHER EDUCATION

Symbols in higher education and college campuses have not escaped the recent political and cultural melee. This past year, Yale University decided to change the name of a residential college named after John C. Calhoun, the valedictorian of his Yale class and a 19th century white supremacist statesman from South Carolina, who later became the seventh U.S. Vice President.<sup>149</sup> Yale renamed the residential college after Grace Murray Hopper, a computer scientist and Navy rear admiral who received her master’s degree and doctorate from Yale and who was once quoted as stating, “Humans are allergic to change. They love to say, ‘We’ve always done it this way.’ I try to fight that.”<sup>150</sup>

Symbolism on college campuses and institutions of higher learning reach further than those touching on the political. Flagship programs can represent and tie the university to the larger community and come to define the culture and history of a university on a national

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<sup>143</sup> Andrew D. Brown, *Politics, Symbolic Action and Myth Making in Pursuit of Legitimacy*, 15 *ORG. STUD.* 861, 862–63 (1994).

<sup>144</sup> JOHNSON, *supra* note 32, at 8.

<sup>145</sup> See David A. Graham, *The Stubborn Persistence of Confederate Monuments*, *ATLANTIC* (Apr. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-stubborn-persistence-of-confederate-monuments/479751/>.

<sup>146</sup> See Richard Gonzales & Amy Held, *New Orleans Takes Down Statue of Gen. Robert E. Lee*, *NPR: THE TWO-WAY* (May 19, 2017, 7:30 PM), <https://www.npr.org/sections/thetwo-way/2017/05/19/529130606/new-orleans-prepares-to-take-down-statue-of-gen-robert-e-lee>.

<sup>147</sup> See *id.* Contractors slated to remove the monument received death threats, forcing the first three of four monuments slated for removal to occur in the middle of the night. *Id.*

<sup>148</sup> See *id.* The author remembers “Lee Circle” as a popular meeting place to watch parades during her youth.

<sup>149</sup> See Noah Remnick, *Yale Will Drop John Calhoun’s Name from Building*, *N.Y. TIMES* (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/yale-protests-john-calhoun-grace-murray-hopper.html>.

<sup>150</sup> *Id.*

level.<sup>151</sup> Athletic programs, such as the football program at the University of Alabama, can come to symbolize the university's intrinsic value in community and culture building for residents close to the institution.<sup>152</sup> When such athletic programs are tarnished, such as the Penn State football program or the Michigan State gymnastics program,<sup>153</sup> it can diminish the overall cultural standing of the university and forever tie its memory to the scandal on a national level. Innovative academic programs and prestigious graduate schools, such as law schools, business schools, and medical schools, can become flagship symbols of a university to the larger community, gaining the university not only increased academic prestige but community and local pride. Especially in the law school context, many future leaders of the bar, state and federal judges, state legislators, and members of Congress will likely have law degrees and will go on to shape the larger social and political fabric of the country.<sup>154</sup>

In that sense, reputation becomes the corollary to the symbol that the institution has in the view of outsiders and community stakeholders. Reputation management of those symbols can become a challenge when different stakeholders measure the value of a symbol based on their individual interaction and understanding of what it represents to them.<sup>155</sup> For institutions of higher learning that have strong historical linkages to the Civil Rights Movement, where public education and integration played such a prominent role in a school's national perceptions, addressing the continued impact of those symbolic linkages must address those symbol's meanings to all constituents involved. Any symbolic action or innovation must embrace the full range of that institution's symbolic value to university officials, educators, alumni, students, and community members. Those responsible for programmatic innovations must therefore contemplate both the symbolic and practical impact of the program. Symbols matter in higher education because they become just one way that a university signals its values to these different stakeholders.

### 3. SYMBOLISM VERSUS MATERIALITY

In his recent book, *Innovations as Symbols in Higher Education*, J. David Johnson examines and critiques higher education in the United States and its embrace of innovative programs as their signaling function.<sup>156</sup> While Western culture, he argues, values progress and is pro-innovation,<sup>157</sup> often the "primary purpose of participating in innovation is purely symbolic—a demonstration that you are forward looking and modern, willing to jump on

<sup>151</sup> See Louella Moore, *Symbolic Interactionism and Moral Hazards in Higher Education*, 2 ADMIN. ISSUES J.: EDUC., PRAC. & RES. 26, 28 (2012).

<sup>152</sup> See RODGERS, *supra* note 37, at 584–85; Jason Margolis, *Is Alabama's Football Glory Helping the University's International Brand?*, PRI'S THE WORLD (Apr. 10, 2018), <https://www.pri.org/stories/2018-04-10/alabamas-football-glory-helping-university-international-brand>.

<sup>153</sup> See Moore, *supra* note 151, at 35–36; Will Hobson & Susan Svrluga, *Settlement with Larry Nassar Victims Will Have Impact on Michigan State*, WASH. POST (May 16, 2018), [https://www.washingtonpost.com/sports/settlement-with-larry-nassar-victims-will-have-impact-on-michigan-state/2018/05/16/1f6eb076-5935-11e8-b656-a5f8c2a9295d\\_story.html?utm\\_term=.03b17ee477a5](https://www.washingtonpost.com/sports/settlement-with-larry-nassar-victims-will-have-impact-on-michigan-state/2018/05/16/1f6eb076-5935-11e8-b656-a5f8c2a9295d_story.html?utm_term=.03b17ee477a5).

<sup>154</sup> See MEADOR, *supra* note 87, at 23.

<sup>155</sup> JOHNSON, *supra* note 32, at 13.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> *Id.*

whatever bandwagon may be rolling by.”<sup>158</sup> Further, he argues, the innovation must “meet certain criteria in terms of its qualities, but it also must be acceptable, in both a social equity and a moral sense,” to the larger community in which the stakeholder engages with it.<sup>159</sup>

Johnson measures academic innovations along two paradigms, the symbolic function and the material function.<sup>160</sup> The first function, symbolism, represents the reputation or representative nature of the innovation, measuring the intrinsic value of the symbol to the university or to the larger community simply by what it represents.<sup>161</sup> The material function, at the opposite end, is how the program innovation impacts the lives of the community stakeholders.<sup>162</sup> When both the symbolic and material importance of a proposed innovation are low, he argues that such an insignificant innovation would be unimportant to a university and would be unlikely to be adopted or implemented.<sup>163</sup> In this condition, he states, “nobody cares, so nothing happens.”<sup>164</sup> On the other side of the spectrum, program innovations that have both salient symbolic and material elements are the mostly likely to be widely implemented, as a diverse array of organizational participants are likely to view the program more favorably.<sup>165</sup> This situation, he posits, is ideal because all parties will work together to adopt and implement the innovations, which will therefore be more likely to succeed.<sup>166</sup> Thus, “for symbolic management to be successful, symbolic expressions must also take material forms that support the meanings they entail.”<sup>167</sup>

A “pragmatic innovation” is one that may be low in symbolic significance but high in materiality.<sup>168</sup> While such innovations are put into place because of their efficiency and intrinsic benefits, they “do not capture the imagination or attention of the managers or stakeholders.”<sup>169</sup> While pragmatic innovations can result in localized and successful improvements, widespread adoption is usually slow because they do not receive outside impetus from other actors.<sup>170</sup> While it is somewhat of a mystery as to why pragmatic program innovations spread so slowly, Johnson suggests that while they may accomplish material ends, they do not serve symbolic purposes.<sup>171</sup>

Conversely to a pragmatic innovation is a “decoupled innovation,” which may have a strong symbolic value that stands for something else but has low real, material impact.<sup>172</sup> These decoupled innovations become the main focus of Johnson’s book, as he critiques institutions of higher learning in the U.S. for valuing research and innovative programming that have little to no actual societal and community impact.<sup>173</sup> Such decoupled innovations are particularly

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 9–10.

<sup>161</sup> *See Id.* at 9–11.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 9.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 10.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1, 10.

dangerous for state universities, as they can often have severe consequences on morale, leading to a sense of being “let down” by the community, and can often waste badly needed resources and attention.<sup>174</sup> State universities have traditionally espoused the mandate of improving their practices and implementing innovations that economically benefit the citizens of the larger community and the state.<sup>175</sup> Universities, he argues, are simply “assumed to be engines for economic development,” but these claims are made without much rigorous specificity, allowing universities to decouple their symbolic programs and innovations from internal operations and services.<sup>176</sup>

Johnson devotes an entire chapter in his book to the innovation of tech centers and R & D parks that have sprung up through the U.S. and abroad over the past few decades.<sup>177</sup> In an attempt to mimic the German model of higher education, which historically created successful linkages between research findings and commercialization that benefits the community, U.S. universities are “jumping on the bandwagon” of creating university tech incubators, entrepreneurship and innovation support programs, and research and development parks.<sup>178</sup> As an example of this phenomenon, Johnson looks at the Research Triangle in North Carolina.<sup>179</sup> While North Carolina is usually considered a prime example of how research developments can contribute to the larger economy, Johnson argues that a closer examination of North Carolina’s model has had only a localized impact, creating instead “two North Carolinas,” describing how North Carolinians overall have one of lowest rates of social mobility.<sup>180</sup>

#### 4. BRIDGING THE DIVIDE

Transactional legal clinics can bridge the symbolic and materiality divide by espousing both high symbolic value to the university and its stakeholders, as well as having high material impact on improving the lives of the community members they serve. Transactional legal clinics are uniquely situated to fall within both symbolic and material lanes. They tap into the larger national movement of supporting technological progress and innovation and providing intrinsic value to the institutional stakeholders involved, while at the same time providing useful and necessary legal services and resources to businesses and organizations specifically focused on increasing economic output in a region or improving and contributing to community development.

For some transactional legal clinics that serve rural clients suffering from high rates of poverty and “economic stagnation,”<sup>181</sup> the benefits of the high symbolic value and high material advantages cannot be ignored. In serving a community so heavily impacted by racial

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<sup>174</sup> *Id.* at 10.

<sup>175</sup> *Id.* at 2, 110; *See generally* JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* (2d ed. 2004).

<sup>176</sup> JOHNSON, *supra* note 32, at 110.

<sup>177</sup> *See id.* at 110–30.

<sup>178</sup> *See id.* at 113–14. Johnson notes that there are approximately 170 university research parks in North America, modeling themselves after Silicon Valley: Silicon Alley—New York City; Silicon Hills—Austin, Texas; Silicon Forest—Portland, Oregon; Silicon Prairie—Metropolitan Dallas; Silicon Holler—Kentucky; and Silicon Slopes—Salt Lake City. *Id.* at 114.

<sup>179</sup> *Id.* at 111.

<sup>180</sup> *Id.*

<sup>181</sup> RODGERS, *supra* note 37, at 566.



oppression and economic stagnation, both symbolic and material functions are paramount to its success. As A.D Meyer points out in his 1984 article, “Mingling Decision Making Metaphors,” while some organizational symbols are so dramatically tied to historical events and “sustain myths perpetuated by environmental actors,” this should not “obscure other symbols that are robust mechanisms generating commitment to future courses of action.”<sup>182</sup> Similarly, a transactional legal clinic attached to a larger state university with a storied historical tie to the Civil Rights Movement can have a dual symbolic purpose.

One symbolic impact of such an innovative program is that it demonstrates the university’s overall commitment to supporting entrepreneurship and innovation, keeping in trend with the overall national movement in support of innovation and keeping the institution relevant.<sup>183</sup> The second symbolic impact of such a program focuses on the types of clients the transactional clinic will serve and how that signal embraces the university’s historical past and the impact such historical actions may have had on alumni and community constituents. Many transactional legal clinics espouse their social and economic justice function and seek to serve diverse, low income clients who have been traditionally underserved business owners and entrepreneurs, such as women and minority business owners.<sup>184</sup> By also focusing directly on serving both urban and rural clients affected by historic disempowerment and economic disenfranchisement, such transactional clinics embrace their community’s larger historical symbolism in attempts to support and assist clients who have been impacted on a long-term basis by those historical events. Urban and rural clients must therefore experience the economic impact of the symbolic innovation and feel supported, not forgotten.<sup>185</sup> The dual symbolism provides legitimacy (renown of the law school and its embrace of the entrepreneurship and innovation movement) and historical significance (attachment to the larger history of the university) to the transactional clinical program.

Entrepreneurship and economic development work are also considered bi-partisan. Operating within the economic development space requires collaboration across professional industries and across political ideologies. Transactional legal clinics that support economic development and industrial identity-building can have a unifying and reparative symbolic impact as well on the clients and communities served.

Transactional legal clinics provide high symbolic value as an institutional program, but they also bridge the institutional divide by providing much needed material services to community stakeholders in a manner that reflects how a law clinic can theoretically impact a community. In fact, transactional legal clinics are prime examples of educational programs and innovations that have direct material and practice effects on the community surrounding the institution. Transactional legal clinics provide direct transactional legal services to clients engaged in entrepreneurship and community economic development aimed at improving the overall social, health-related, and economic wellbeing of community members. Transactional legal clinics can also have long term impacts on their regional communities by choosing to work with clients and communities that have historical and cultural significance or can contribute to the economic development and vitality of the community.

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<sup>182</sup> A.D. Meyers, *Mingling Decision Making Metaphors*, 9 ACAD. MGMT. REV. 6, 16 (1984).

<sup>183</sup> See JOHNSON, *supra* note 32, at 119–23.

<sup>184</sup> See Jones & Lainez, *supra* note 137, at 89.

<sup>185</sup> See generally Harriot, *supra* note 22.

## B. CURRENT STATISTICAL DATA ON IMPACT OF TRANSACTIONAL LEGAL CLINICS

A 2017 survey of publicly available information demonstrated a steep rise in the increase of transactional legal clinics.<sup>186</sup> This survey also showed approximately 200 ABA accredited law schools offer about 1700 clinics in total, of which 240 (14%) are considered transactional in nature.<sup>187</sup> Only about 20% of law schools examined had no transactional clinical offerings.<sup>188</sup> This surge shows a 20% increase in the number of transactional clinics since 2014 and a 60% increase in the last three.<sup>189</sup> A 2014 survey, using information from the Kauffman Foundation's Entrepreneurship website, divided the types of transactional legal clinics into six categories: (1) Small Business and Entrepreneurship, (2) Microenterprise, (3) Nonprofit Organizations, (4) Intellectual Property, (5) Arts and Entertainment, and (6) Community Economic Development.<sup>190</sup>

In many ways, transactional clinics are still considered innovative program offerings at law schools. Most clinical offerings are still litigation based (approximately 86%), while most of the early transactional clinics were community economic development clinics.<sup>191</sup> While some law schools offer multiple transactional clinics to its law students, most who offer transactional clinics typically offer only one transactional, non-litigation based clinic, and such clinics are often forced to handle the full panoply of corporate and transactional law issues.<sup>192</sup>

Transactional clinics are undoubtedly part of the larger U.S. trend toward supporting entrepreneurship and innovation. Professor Steven Hobbs, one of the first champions of the "law and entrepreneurship movement," called upon law schools and lawyers to harness their own entrepreneurial spirits in studying entrepreneurship.<sup>193</sup> Transactional legal clinics also aid in the need to "cultivate an entrepreneurial spirit in law students" by exposing them to entrepreneurs and social entrepreneurs in a market in which clients are demanding efficiency from their lawyers and demonstrated added value.<sup>194</sup> As Professor Susan Jones and Professor Jacqueline Lainez point out in 2014, "today's entrepreneurial emphasis is broad[], ranging from microbusiness to high technology, and requiring myriad lawyering abilities."<sup>195</sup> Transactional legal clinics thus give students the opportunity to familiarize themselves with the entrepreneurial culture in the U.S. while developing transactional legal skills that contribute to the overall economic impact of entrepreneurship and community

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<sup>186</sup> See Ball & Viswanathan, *supra* note 137, at 49.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 49–50.

<sup>189</sup> *Id.*

<sup>190</sup> See Jones & Lainez, *supra* note 137, at 99.

<sup>191</sup> See Ball & Viswanathan, *supra* note 137, at 50.

<sup>192</sup> See *id.*; see also Patience A. Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413, 415 (2015) (noting that law school instruction focuses almost entirely on litigation to the exclusion of business and transactional law).

<sup>193</sup> See Steven Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 298 (1997).

<sup>194</sup> Jones & Lainez, *supra* note 137, at 87, 104.

<sup>195</sup> *Id.* at 88. See also Praveen Kosuri, "Impact" in 3D—Maximizing Impact through Transactional Clinics, 18 CLINICAL L. REV. 1, 5 (2001).

development.<sup>196</sup> Transactional legal clinics thus have strong innovative and symbolic value as well as high material and practical applications and benefits for their university and community constituents.

### C. ENTREPRENEURSHIP & NONPROFIT CLINIC AT ALABAMA LAW: A MODEL

In furtherance of those aims, a new transactional legal clinic at the Hugh F. Culverhouse Jr. School of Law at the University of Alabama School of Law, the Entrepreneurship & Nonprofit Clinic (“E-Clinic”), seeks to provide pro bono transactional legal services to individuals and organizations, with a focus on improving economic development for low income communities in the Alabama Black Belt.<sup>197</sup> While one of many programs aimed at improving the economic fabric of the Alabama Black Belt, this new clinic aims to both teach and prepare law students to serve these constituent groups while also contributing to the development of the economic identity and vitality of their communities.<sup>198</sup>

#### 1. COMMUNITY IMPACT

One main goal of the E-Clinic is to impact the community by providing pro bono transactional services directly to entrepreneurs and organizations, choosing to work with clients whose missions and industries preserve and respect the cultural and historical identity of the respective community, acting as a general legal knowledge provider to the community, and acting as a “think tank” to provide research and implementation strategies to policy makers.<sup>199</sup>

The E-Clinic provides a service area traditionally ignored by pro bono and low bono legal service providers: transactional law and counseling for businesses and organizations. Most providers of legal aid in West Alabama, Birmingham, and the Black Belt counties focus on protecting individual rights: housing, immigration, federal benefits, bankruptcy and credit, veterans aid, healthcare, domestic violence, and wills and end-of-life. Far fewer pro bono legal service providers offer transactional legal services that focus on building up businesses and local economies instead of representing individuals in front of administrative agencies or in court, although some do provide support for community development organizations. By providing free legal services to these businesses and organizations, the entrepreneurs and organizations are able to focus their resources and disposable income on building their businesses and directly impacting their communities. The E-Clinic provides the full suite of transactional legal services to new and existing organizations, including but not limited to:

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<sup>196</sup> Jones & Lainez, *supra* note 137, at 87–88; Anthony Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 160 (2007).

<sup>197</sup> *Entrepreneurship & Nonprofit Clinic Course Information*, U. ALA. SCH. L., <https://www.law.ua.edu/academics/law-clinics/entrepreneurship-nonprofit-clinic/entrepreneurship-nonprofit-clinic-course-information/> (last visited Sept. 27, 2018).

<sup>198</sup> *Id.*

<sup>199</sup> *See generally id.*; *see also* Crowder, *supra* note 192, at 431–32.

- Pre-venture counseling to founders and co-founders;<sup>200</sup>
- Choice of entity counseling and drafting of organizational and operational documents;<sup>201</sup>
- Strategizing, negotiating, and drafting agreements;<sup>202</sup>
- Employee management counseling;<sup>203</sup>
- Intellectual property counseling;<sup>204</sup>
- Regulatory compliance and risk management;<sup>205</sup>
- Nonprofit counseling and board governance training;<sup>206</sup> and
- Counseling to authors, artists, and musicians.<sup>207</sup>

Client selection is how the E-Clinic reflects the historical, cultural, and industrial uniqueness and identity of the state and each respective community and contributes to the economic vitality of an area. The E-Clinic provides pro bono transactional legal services to new and existing small businesses, entrepreneurs and start-ups, social enterprises, community development organizations, nonprofit organizations, and authors, artists, and musicians in both urban and rural counties in Alabama. The E-Clinic is particularly committed to working with clients who seek to preserve and enhance the social fabric, physical infrastructure, and economic health and well-being of urban, working class, rural, and underserved communities in Alabama, as well as supporting businesses and organizations owned and operated by traditionally underrepresented groups. Hypothetical ideal clients include:

- An historic train depot preservation club and model railroad club
- A woodworking club, outdoors club, or agricultural guild
- A textiles threading or quilting organization
- University students starting businesses in a STEM industry, such as aeronautics, or a creative industry, such as textile, paper design, or creative writing
- A muralist transforming blighted and abandoned spaces in partnership with the local community

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<sup>200</sup> Co-founder agreements, pre-formation structuring, and capitalization advice.

<sup>201</sup> Choice of entity counseling (sole proprietorship, partnership, joint venture, corporation, limited liability company, benefit corporation, and nonprofit association or corporation), formation and governance documents (articles of incorporation, partnership agreements, bylaws, and operating agreements).

<sup>202</sup> Project partner agreements or memoranda of understanding, customer agreements, vendor agreements and supplier contracts, commercial leases, financial documents.

<sup>203</sup> Employee manuals and contracts, independent contractor agreements, incentive compensation schemes, labor compliance and reporting issues, non-compete and non-solicitation counseling.

<sup>204</sup> Trademark and logo counseling and registration, copyright counseling and registration, licensing agreements, non-disclosure agreements.

<sup>205</sup> (Excluding tax advice and preparing tax forms), business licenses, if applicable, insurance and liability protection advice, governmental agency and regulatory compliance, such as labeling, FDA, OSHA, and SEC compliance.

<sup>206</sup> Applications for tax-exempt status, board governance training, fiscal sponsorship agreements, and charitable donations registration.

<sup>207</sup> Intellectual property protection, publicity contracts, commission contracts, and licensing agreements.

- For profit stores with cultural and economic value as community meeting places or preservers of local culture, such as barbershops, coffee houses, restaurants, social clubs, and salons
- A tech-based client using online and mobile apps as a service delivery model
- Community development nonprofits and organizations working on empowerment and plight issues in historical civil rights and urban communities
- Student empowerment and educational outreach groups
- Community credit unions and credit circles
- An infrastructural and industrial developer looking to bring new sustainable energy methods to West Alabama
- A farming and agricultural cooperative wanting to create a community land trust.

In addition to providing direct legal services to these ideal constituent clients, the E-Clinic will also serve as a general provider of legal knowledge. By providing one or two-hour start-up workshops or legal cafes to larger groups of individuals or businesses on generally applicable topics such as choice of entity, pre-formation legal issues, intellectual property overviews, or due diligence, the E-Clinic can help groups overcome the knowledge and resource gap facing so many low income or new businesses.

The E-Clinic will also impact the community on a longer-term basis by focusing on improving the administration of justice by researching state and federal initiatives to improve infrastructure development. Such research and data collection issues could focus on initiatives to increase broadband Internet access for public spaces, public places of business, and public schools in rural Alabama counties, or could focus on implementation studies on how to improve sewerage and refuse infrastructure. The E-Clinic will provide its support and research to both state and federal level policymakers working on economic and industry development issues in Alabama.

## 2. CLINIC DESIGN

In crafting the new Entrepreneurship & Nonprofit Clinic with those community impact goals in mind, the E-Clinic will provide these transactional services using three service models: direct Student Attorney client representation, Student Attorney-led legal education workshops, and Student Attorney-supported research on administration of justice policy issues.<sup>208</sup>

As part of the E-Clinic's orientation activities, the Student Attorneys will learn about the economic history of urban and rural areas of Alabama, take a tour of the new EDGE Center for Entrepreneurship and Development in Tuscaloosa, as well as potentially tour downtown Birmingham's Innovation District.<sup>209</sup> The Student Attorneys will also ideally visit a business

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<sup>208</sup> *Entrepreneurship & Nonprofit Clinic Course Information*, U. ALA. SCH. L., <https://www.law.ua.edu/academics/law-clinics/entrepreneurship-nonprofit-clinic/entrepreneurship-nonprofit-clinic-course-information/> (last visited Sept. 27, 2018). *See also* Crowder, *supra* note 192, at 422–23.

<sup>209</sup> *Entrepreneurship & Nonprofit Clinic Course Information*, *supra* note 208. *See* Stephen Dethrage, *Poised for Growth: Business Incubator to Move into New Larger Facility*, TUSCALOOSA NEWS, June 24, 2018, A1-A8, <http://www.tuscaloosanews.com/news/20180624/business-incubator-to-move-into-new-larger-facility>; Michael Tomberlin, “*Innovation District*” in *Birmingham Best Reflects Downtown Section’s Future, Officials Believe*, ALA. NEWSCENTER (Mar. 15, 2016),

located in the Black Belt dedicated to improving quality of life and community engagement, such as the nationally renowned PieLab in Greensboro, Alabama.<sup>210</sup> After orientation, the Student Attorneys will spend the majority of their time providing direct services to clients. The law students will have the opportunity to, ideally, work with a partner on a joint client and as the sole attorney on a client file, representing clients in both urban and rural contexts and for profit and nonprofit contexts. In addition to the rigorous client work, the students attend weekly seminar, where they will review substantive legal topics, engage in simulations and learn practice-oriented skills, and develop an understanding of their ethical obligations to organizational and community development clients.<sup>211</sup> During weekly “firm meetings,” the students will present the week’s new requests for legal services, evaluate the pedagogical potential of a client, and share their experiences, working together to solve client matters.<sup>212</sup> The students will also engage in intense weekly supervision, in which they will advance their client matters and discuss in a reflective manner their experiences working with both urban and rural clients.

In collaboration with another university partner or community group, the Student Attorneys will also have the opportunity to present to entrepreneurs and community development organizations on issues affecting small businesses and nonprofit organizations. The Student Attorneys, as a group, will prepare a one to two-hour interactive topic, which will occur toward the end of the semester. The Student Attorneys might also provide a legal café, where participants submit questions about their business beforehand; the Student Attorneys are each assigned a participant and researches general answers to their questions; and then all participants and Student Attorneys meet at a specified time at a relaxed professional setting to discuss the participant’s transactional legal questions. The legal café would also ideally occur later in the semester.

The E-Clinic will also provide research and data development to improve the administration of justice, especially with respect to needed infrastructure building. The E-Clinic will work on one policy project at a time, over a long-term basis, under the leadership and direction of the E-Clinic director. The Student Attorneys will participate in this policy research by participating in administering empirical research, comparing and contrasting past and current policy initiatives, and conducting implementation best practices studies. The Student Attorneys will be introduced to the policy project during Orientation and will work on the policy project incrementally throughout the semester as time permits. The Student Attorneys will also take a field trip or educational tour relating to the policy project at the end of the semester. Depending on the state of the long-term policy project research, the Student Attorneys will also be involved in presenting the research to state and federal level policy makers.

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<https://alabamane.wscenter.com/2016/03/15/innovation-district-birmingham-best-reflects-downtown-sections-future-officials-believe/>.

<sup>210</sup> See Karim Shamsi-Basha, *Pie Lab Is an Alabama Maker Turning a Slice of the Black Belt into an International Destination*, ALA. NEWSCENTER, Aug. 29, 2016,

<https://alabamane.wscenter.com/2016/08/29/pie-lab-alabama-maker-turning-greensboro-international-destination/>; John T. Edge, *Pie + Design = Change*, N.Y. TIMES (Oct. 8, 2010),

<https://www.nytimes.com/2010/10/10/magazine/10pielab-t.html>.

<sup>211</sup> *Entrepreneurship & Nonprofit Clinic Course Information*, *supra* note 208.

<sup>212</sup> *Id.*

### 3. PEDAGOGICAL GOALS AND LONG-TERM IMPACTS

The E-Clinic's pedagogical goals will not only provide Students Attorneys with tools to serve clients while enrolled in the E-Clinic but will provide them with the tools to make long-term impacts on their regional economies and communities.

The Student Attorneys will learn how to provide direct transactional legal services to clients that are transferrable across different subject matters and client industries, such as client counseling, drafting, research and planning, project management, advocacy, professionalism, conducting presentations and workshops, policy planning, and working with constituent groups.<sup>213</sup> The E-Clinic also teaches students how to use their transactional skills in multiple ways: through direct client representation, community workshops and legal cafes, and conducting policy research. This shows the Student Attorneys at least three different ways that they do not have to be litigators inside of courtrooms to provide impactful work. Not all students will enroll in the E-Clinic because they want to provide direct transactional services; some may skew more toward conducting research and producing policy studies; others might relish the teaching and presentation-heavy workshop model for delivery group legal education. The E-Clinic exposes law students with different interests to a variety of ways in which they can use their transactional skills.

The E-Clinic also provides the Student Attorneys with hands-on, rewarding experience with direct access to clients from different background and with different business goals and missions, encouraging them to pursue lawyering in the public interest. The E-Clinic provides the students with the opportunity to see the contrast in resources and access between a client situated in an urban center in the state and a rural organization aimed at serving Alabama Black Belt communities, which face challenges such as a lack of access to resources, information, and capital. It will also provide the students with an opportunity to grapple with the state's economic history, understanding the impact of their role as future attorneys in serving clients in the public interest. It will further expose the law students to understanding the goals of a business that operates and serves an urban community versus an organization or business dealing with rural development, such as agri-business regulations, farming issues, land trust issues, and specialized funding for rural projects.<sup>214</sup>

The E-Clinic will also teach the Student Attorneys about entrepreneurship and economic development and teach them the role of lawyers in creating a successful regional system, thus cultivating a spirit of entrepreneurship in lawyers. Without access to legal knowledge and resources, low income entrepreneurs and economically stagnant communities have a difficult time taking the next steps to forming a business or organizing to develop the community. It will teach the Student Attorneys how to work collaboratively with other professionals, such as university or community programs and partnerships, to create innovative and tailored non-traditional client services delivery models, like workshops or legal cafes.

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<sup>213</sup> See Crowder, *supra* note 192, at 422–23.

<sup>214</sup> Some legal clinics focus exclusively on serving rural clients and their particular legal issues. See *The Rural Law Initiative*, ALB. L. SCH. (NOV. 3, 2016), <http://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative>; *Albany Law School's Rural Law Initiative to Provide Free Legal Support to Businesses in Four Upstate New York Counties*, ALB. L. SCH. (NOV. 3, 2016), <http://www.albanylaw.edu/about/news/current/Pages/Rural-Law-Initiative-to-Provide-Free-Legal-Support-to-Businesses-in-Four-Upstate-New-York-Counties.aspx>.

The Student Attorneys will also learn about the importance of client selection in choosing businesses or industries to support with their legal assistance. The Student Attorneys will directly participate in the client intake selection process, conducting intake interviews, discussing as a group each potential client, and then voting as a group on which clients the E-Clinic should take and why. Once accepted, the Student Attorneys assigned to the file draft a client profile, which among many things discusses where their client is situated within the ecosystem of its community and what its potential economic impact could be. For Student Attorneys who will engage in this type of work after graduation, it shows them how to build a practice that is historically and symbolically significant and work with clients doing impactful economic work. For Student Attorneys who will graduate and work at a law firm, it provides them with a desire to continue to do pro bono work and gives them tools to select clients for a limited pro bono division who do work in historically and economically identity-shaping industries.

Through pairing both the transactional advocacy skills learning with the pedagogical goals of serving both urban and rural clients who have differing access to resources, the new Entrepreneurship & Nonprofit Clinic directly impacts to the community by providing transactional legal services and aims to prepare future transactional attorneys and community leaders, many of whom are native to Alabama, for positions in which they can use their skills and experiences to improve and increase the economic development of some of Alabama's more rural and poverty-stricken counties, empowering these communities through economic inclusion and improved quality of life.

## CONCLUSION

I speak not for myself, ... but so those without a voice can be heard. Those who have fought for their rights: Their right to live in peace. Their right to be treated with dignity. Their right to equality of opportunity. Their right to be educated. —Malala Yousafzai<sup>215</sup>

Since the December 2017 special election in Alabama, many have exclaimed that the victory was just the beginning in flooding the state with a “blue tide,” as a play on the “Crimson Tide” rhetoric so popularly linked to the University of Alabama and its football team.<sup>216</sup> Perhaps. Time will only tell the overall impact of flipping a U.S. Senate seat in a deep red state, but it certainly caused a renewed vigor for Democrats throughout the country bent on resisting the Trump administration to continue to run for office and for supporters to stomp for votes. While it was a victory for Senator Jones and the Democrats, the victory is only a “contingent” one for the Alabama Black Belt residents who elected him.<sup>217</sup>

While some are skeptical that Senator Jones will fall back into “the old and reliable pattern of Democrats forgetting who put them in office,”<sup>218</sup> others are hopeful that he will

<sup>215</sup> Malala Yousafzai, Speech to the United Nations General Assembly (July 12, 2013).

<sup>216</sup> See Barbara Boxer, *Blue Tide in Alabama*, HUFFPOST (Dec. 15, 2017), [https://www.huffingtonpost.com/entry/blue-tide-in-alabama\\_us\\_5a33f0cfe4b01d429cc84d37](https://www.huffingtonpost.com/entry/blue-tide-in-alabama_us_5a33f0cfe4b01d429cc84d37); Ford Fessenden & K.K. Rebecca Lai, *How the Tide Turned Against Roy Moore in Alabama*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/interactive/2017/12/13/us/politics/alabama-senate-election-roy-moore.html>.

<sup>217</sup> Danielle Purifoy, *The Contingent Victory of the Alabama Black Belt*, HARV. HUM. RTS. J. Blog, <http://harvardhrj.com/the-contingent-victory-of-the-alabama-black-belt/>.

<sup>218</sup> *Id.*



deliver on his promises to address the economic and environmental justice issues facing Black Belt residents.<sup>219</sup> Regardless of the impact of Senator Jones' election on the economic development of rural counties in Alabama, institutions of higher learning, law schools and legal clinics in particular, are uniquely situated to change symbolic perceptions of such institutions, preparing future lawyers and community leaders to address issues of economic justice, and have material and practical impacts on these communities by "bridging the divide" between academic research and practical applications.

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<sup>219</sup> See, e.g., Mark Hand, *Alabama's Newest Senator Isn't Afraid to Take a Strong Stance on Science and Clean Energy: Alabama Environmental Advocates See Great Hope in Election Outcome*, THINK PROGRESS (Dec. 13, 2017), <https://thinkprogress.org/doug-jones-environmental-record-ef0225e4a65c/>.

**Contextualizing the Corporate Rights Movement in Transactional Clinics**

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## PRELUDE

*This year is the 150th anniversary of the Fourteenth Amendment and provides an opportune moment to reflect on the role corporations have played in shaping not merely their own, but also individual constitutional rights. An examination of the “corporate rights movement” reveals the most successful legal battle in American jurisprudence, which was waged by corporations to obtain constitutional protection. From the right to sue in federal court to the right of contract through free speech rights, corporations have enlisted the best legal minds to advance their cause for expanded constitutional rights. As a result of their relentless litigation strategies, corporations have been at the forefront of shaping constitutional interpretation and, thus, have profoundly impacted American notions of democracy, equal protection, and due process. Although impactful, the corporate rights movement is not commonly studied in traditional corporate law, constitutional law, or economic justice courses.*

*This essay reflects on the corporate rights movement as a powerful tool for interrogating the enduring struggle for economic inclusion in this country. Additionally, this article offers thoughts on how transactional clinicians can use Professor Adam Winkler’s new research on the corporate rights movement in their clinic seminars to ground their students’ understanding of not only corporate common law, but also its impact on society.*

## INTRODUCTION

This year marks the 150th anniversary of the Fourteenth Amendment.<sup>1</sup> It is therefore a fitting moment to reflect on the impact of the amendment and more broadly America's commitment to economic justice. The Fourteenth Amendment is arguably the most important constitutional amendment protecting civil rights and economic justice.<sup>2</sup> The average person may not suspect that reflecting on the Fourteenth Amendment would require an examination of corporate rights. Public discourse on equal protection and due process of law does not take into consideration the outsized role of corporations in shaping our constitutional conception of justice.<sup>3</sup>

However, the history of the Fourteenth Amendment, which was adopted to shield formerly enslaved Black people from discrimination,<sup>4</sup> illustrates how Confederate loyalists used corporations to systemically transform the amendment into a sword to overturn unwanted regulations on business and enterprise.<sup>5</sup> In his recent book, *We the Corporations: How American Businesses Won Their Civil Rights*, Professor Adam Winkler meticulously documents how corporations persistently pursued their positions in federal court until they won constitutional protections such as the ones they have under the Fourteenth Amendment.<sup>6</sup> It was only subsequent to landmark, constitutional cases brought by corporations that individuals would have the rights first obtained by corporations.

For most of American history, the Supreme Court refused to protect the marginalized and people of color,<sup>7</sup> repeatedly claiming to be powerless or unwilling to

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<sup>1</sup> AKHIL R. AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 320 (2005).

<sup>2</sup> William J. Brennan, Jr., *The Fourteenth Amendment*, 25 *Trial* 24 (1989) (suggesting more cases were litigated under the Fourteenth Amendment than under any other provision of the Constitution); *see also* *Lochner v. New York*, 198 U.S. 45 (1905) (establishing economic freedom as an unenumerated principle of the due process clause of the Fourteenth Amendment).

<sup>3</sup> *See* Martin Luther King, Jr., *Letter From a Birmingham Jail [King, Jr.]*, THE KING CTR., <http://www.thekingcenter.org/archive/document/letter-birmingham-city-jail-0#> (last visited Sept. 28, 2018); *See generally* Garrett Epps, *The Struggle Over the Meaning of the 14<sup>th</sup> Amendment Continues*, THE ATLANTIC (July 10, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-struggle-over-the-meaning-of-the-14th-amendment-continues/564722/>.

<sup>4</sup> *See generally* Epps, *supra* note 3. Shortly after the end of the Civil War, Black Codes continued to suppress the rights of African Americans; thus, Congress intervened to provide additional protections. *See generally* *The Southern "Black Codes" of 1855-66*, CONST. RTS. FOUND. (Oct. 13, 2018, 3:17 PM), <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>.

<sup>5</sup> R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 247 (2001) ("For the remainder of the nineteenth century, the college decision was a potent legal and ideological weapon for corporations who sought to defeat regulation and establish the ideological primary of laissez-faire capitalism.").

<sup>6</sup> *See generally* ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* xvi (2018).

<sup>7</sup> *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) ("[T]here must necessarily be a large discretion on the part of the legislature."); *see also* Kim Phillips-Fein, *Company Men*, THE NEW REPUBLIC

apply concepts of justice.<sup>8</sup> In contrast, when adjudicating the rights of corporations, the Supreme Court has consistently ignored broad public sentiment favoring business regulations to continuously expand the reach and protections of the Constitution to benefit corporations.<sup>9</sup> Professor Winkler's book demonstrates not only how corporations have pushed with noteworthy success to obtain constitutional protections, but also that their relentless campaign for corporate rights is one of the longest and most successful constitutional legal battles.<sup>10</sup> In his examination of corporate law history, Professor Winkler exposes how intimately the foundation of this country and the innovations of American constitutional rights are connected to the business corporation.<sup>11</sup>

Throughout *We the Corporations*, Professor Winkler uses the term the "corporate rights movement" to describe the evolution of the corporation as an "artificial person"<sup>12</sup> to acquire legally enforceable rights similar to a natural person.<sup>13</sup> With most expansions of constitutional rights there is an accompanying social movement that evolves the public opinion on the issue. Then, the civil rights for the marginalized group are gained through a painstaking litigation process. It was the opposite with corporations. Judicial decisions privileging corporations have been wildly unpopular.<sup>14</sup> But wealthy corporations have consistently had judicial support.<sup>15</sup> What they lacked in the courtroom they overcame with economic influence through the legislature. In this way, corporations moved from rights of property,<sup>16</sup> to limited rights of liberty, to rights similar to those enjoyed by a natural person. An examination of the corporate rights movement also illustrates how the economic interests of the powerful have shaped our constitutional rights and affected the meaning of justice in our legal system. Transactional clinicians do our students a disservice by not explicitly interrogating how corporations have been used as an extension of the wealthy, obtaining constitutional rights often at the expense of marginalized populations. *We the Corporations* provides an accessible opportunity for transactional clinicians to bring critical issues of the corporate rights movement into our classrooms and students' consciousness. Transactional clinicians can advance student learning by connecting how the corporate rights movement continues to affect people's lives and our broader understanding of justice in this country.

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(Mar. 29, 2018), <https://newrepublic.com/article/147374/company-men-legal-struggle-citizens-united-corporations-rights-people>.

<sup>8</sup> *Plessy*, 163 U.S. at 548 (holding that "separate but equal" does not violate the 14th Amendment); *See also* *United States v. Reese*, 92 U.S. 214, 221 (1876) (striking down the Civil Rights Act of 1875); *see also* *United States v. Cruikshank*, 92 U.S. 542, 555–57 (1875).

<sup>9</sup> WINKLER, *supra* note 6, at 64; *see also* Phillips-Fein, *supra* note 7.

<sup>10</sup> *See generally* WINKLER, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> *See* *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497, 558 (1844) (discussing a corporation as "an artificial person . . . capable of being treated as a citizen of that state, as much as a natural person.").

<sup>13</sup> *See* WINKLER, *supra* note 6 at xvi, 47.

<sup>14</sup> *Majority of Americans Support Campaign Finance Reform*, IPSOS.COM, <https://www.ipsos.com/en-us/news-polls/center-for-public-integrity-2017-08-31> (last visited Sept. 28, 2018).

<sup>15</sup> WINKLER, *supra* note 6, at xviii-xix.

<sup>16</sup> *See* *Trs. of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

This essay proceeds by exploring the current state of transactional clinics and how they interact with contemporary economic justice efforts. The second section of this essay highlights lessons that *We the Corporations* illustrates that are essential for understanding the corporate rights movement and how it links to economic justice issues. This essay then offers ideas about how transactional clinicians can use the context of the corporate rights movement to ground our students' client work and develop their understanding of economic justice. As students work with clinic clients to form corporations and expand businesses in marginalized communities, the lenses and perspectives they have about the work will impact their client interactions, counseling, and final work product. Learning about the corporate rights movement invokes both the idealistic and exploitative power of corporations. It is essential that transactional clinicians carry an understanding of and respect for these tensions, so that the business work we conduct within marginalized communities has this critical lens.

### I. TRANSACTIONAL CLINICS & ECONOMIC JUSTICE

The increase of transactional clinics has provided a new venue in legal education for conversations on economic justice.<sup>17</sup> Economic justice generally refers to the efforts of lawyers to advance economic opportunity for low-income or marginalized populations.<sup>18</sup> Litigation and policy advocates have historically dominated the economic justice space as a means to address a need for increased incomes in low-income communities. Lawyers have worked alongside community activists on campaigns to abolish poverty or other anti-poverty initiatives.<sup>19</sup> Because poverty is never merely an issue of financial resources,<sup>20</sup> those initiatives have also included access to health care, education, and affordable housing, among other needs. However, a majority of economic justice lawyering has focused on increasing access to income. As Professor Susan Jones summarizes:

Antipoverty policy makers have traditionally focused on income, spending and consumption. A new vision is emerging that is focused on savings, investment and asset accumulation, but it works with, and not instead of, traditional antipoverty programs. Assets matter because they provide more than just an economic cushion. They provide a psychological orientation that income alone cannot provide.<sup>21</sup>

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<sup>17</sup> See Lynnise E. Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175 (2015).

<sup>18</sup> See *Defining Economic Justice and Social Justice*, CTR. FOR ECON. & SOC. JUST., <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/> (last visited Oct. 14, 2018).

<sup>19</sup> See Stephen Loffredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173 (2001).

<sup>20</sup> Bryan Stevenson, *We Need to Talk About An Injustice*, TED 16:15 (Mar. 2012), [https://www.ted.com/talks/bryan\\_stevenson\\_we\\_need\\_to\\_talk\\_about\\_an\\_injustice/transcript?language=en](https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/transcript?language=en) (“[T]he opposite of poverty is not wealth . . . the opposite of poverty is justice.”).

<sup>21</sup> Susan R. Jones, *Dr. Martin Luther King, Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH. U. J.L. & POL'Y 39, 57 (2005).

The relatively recent shift towards asset accumulation and management has encouraged more corporate and transactional attorneys and clinicians to be mindful of economic justice issues. Corporations are vehicles to accumulate wealth, organize capital, and structure collective enterprise. Thus, transactional lawyers are indispensable in economic justice efforts to make our society more inclusive. While the majority of transactional clinics may not have an explicit social justice mission, there are a growing number of transactional clinics that intentionally connect their representation of businesses to advancing economic justice efforts.<sup>22</sup> Clinical education can have a transformative impact on the professional pursuits of students in those courses. Thus, the increased number of transactional clinics that address economic justice issues means that more corporate lawyers are also likely to intentionally move into the economic justice space. As transactional economic justice lawyers, we do not spend much, if any, time or attention on the constitutional rights of corporations. In distancing ourselves from these conversations, we prevent ourselves from seeing the relevance between the corporate rights movement and our contemporary work with small businesses. To understand the continued struggle for economic justice, transactional lawyers must also understand how it intersects with the corporate rights movement.

If more transactional lawyers are to join in economic justice lawyering, the responsibility falls on legal educators to contemplate what needs and resources these newcomers will need. As clinicians continue to develop and innovate the pedagogy of transactional clinics,<sup>23</sup> they should consider engaging the corporate rights movement in their seminars. Previously, there were few resources transactional clinicians could use as starting points for discussing the corporate rights movement. The remainder of this essay explores how transactional clinicians could use the recent book *We the Corporations* to expand student understanding of corporate constitutional law and the impact of corporations in this country. This background serves as a powerful foundation for thinking critically about corporations as an avenue to address economic marginalization and achieve economic justice. Because history serves as the foundation for understanding the present day, it is important that transactional economic justice lawyers recognize the connections between marginalized groups' search for economic justice and how expanded corporate rights have often opposed them.

## II. LESSONS FROM THE CORPORATE RIGHTS MOVEMENT

Because much of corporate law is largely common law, studying corporate law provides a snapshot of the evolution of this country that goes deeper than a mere doctrinal investigation. In many ways, the American experience cannot be understood without the historical context of corporations and business rights.<sup>24</sup> From chartered

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<sup>22</sup> See Alina Ball & Manoj Viswanathan, *From Business Tax Theory to Practice*, 24 CLINICAL L. REV. 27, 52–53 (2017).

<sup>23</sup> See Patience Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413 (2015).

<sup>24</sup> HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM

colonies, to private institutions with public mission, to early nineteenth-century family owned businesses, to trans-continental railroad companies, to present-day transnational enterprises, the history of American corporations is the history of America. In his recent book, *We the Corporations*, Professor Adam Winkler succinctly describes the evolution of not only the corporate form, but also the corporate rights movement, documenting how corporations waged the legal battle to win constitutional rights and won.

The outsized role corporations have played in shaping constitutional rights is rarely examined in any doctrinal courses in law school. For this reason, reading Professor Winkler's book was an illuminating experience even for someone like me who has studied various aspects of corporate law for years. The corporate form is the genesis of American ideas of democracy, branches of government, and civic engagement. The first colonies in the Americas were corporations chartered under the British crown to earn profits for their shareholders.<sup>25</sup> As a result, numerous distinctive features of the American Constitution can trace their roots to the charter documents of those first colony corporations. In this way, the corporate form has exerted considerable influence on American ideas of government and continues to provide powerful metaphors for contemporary political candidates.<sup>26</sup>

Moreover, corporations have the accumulated wealth to finance the best legal representation to relentlessly litigate the same issues until they have changed the Court's mind.<sup>27</sup> In other words, the legal mechanisms that allow corporations to accumulate wealth gives them multiple "bites at the apple" to change constitutional law, which in turn allows them to garnish more wealth, power, and influence. The first case to address the constitutional rights of corporations was in 1809;<sup>28</sup> that is fifty years before the first case to address the constitutional rights of African Americans<sup>29</sup> and sixty years before the constitutional rights of women reached the Supreme Court.<sup>30</sup> Unlike in the first constitutional cases of women and African Americans, the corporation won its

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31 (1968) ("[This] argument is one of the landmarks in American constitutional history, an important turning point in our social and economic development.").

<sup>25</sup> WINKLER, *supra* note 6, at 6–7 (2018).

<sup>26</sup> See *Donald Trump Says He'll Run America Like His Business*, ASSOC. PRESS: FORTUNE (Oct. 27, 2016), <http://fortune.com/2016/10/27/donald-trump-hillary-clinton-business-management/>; Catherine Rampell, *Trump is Running America Just Like His Businesses — Right Into the Ground*, WASH. POST: OPINION (Apr. 26, 2018), [https://www.washingtonpost.com/opinions/trump-is-running-america-just-like-his-businesses--right-into-the-ground/2018/04/26/91235210-498d-11e8-8b5a-3b1697adcc2a\\_story.html?noredirect=on&utm\\_term=.76715fb6ffb3](https://www.washingtonpost.com/opinions/trump-is-running-america-just-like-his-businesses--right-into-the-ground/2018/04/26/91235210-498d-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.76715fb6ffb3) ("Throughout the 2016 campaign, Donald Trump repeatedly pledged that if elected, he'd run government like a business. 'If we could run our country the way I've run my company, we would have a country that you would be so proud of,' he promised during one debate.").

<sup>27</sup> WINKLER, *supra* note 6, at 73–74. Railroad corporations used civil disobedience and test cases to strategically keep corporate rights in litigation. *Id.* at 120 (citing GRAHAM, *supra* note 24, 31).

<sup>28</sup> *Id.* at 36 (citing *Bank of the United States v. Deveaux*, 9 U.S. 61, 88 (1809)).

<sup>29</sup> *Id.* at 35 (citing *Scott v. Sandford*, 60 U.S. 393 (1857)).

<sup>30</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1873).



constitutional rights.<sup>31</sup> In sum, the context for how we now understand the Constitution was profoundly shaped by the wealthiest corporations of their generation.<sup>32</sup>

In these ways, Professor Winkler describes corporations as both “leveragers,” adapting previously decided cases to promote their business,<sup>33</sup> and as “first-movers,” trailblazing new legal concepts.<sup>34</sup> “As constitutional leveragers, corporations have successfully exploited constitutional reforms originally designed for progressive causes,” and usurped those reforms to increase their capital.<sup>35</sup> “Yet corporations are also constitutional first movers, and historically have often been innovators at the cutting edge of constitutional litigation.”<sup>36</sup> While courses covering the civil rights movements for women, racial minorities, LGBT, and other oppressed groups may be offered in law school, there are rarely any courses that expose students to the centuries-long push for constitutional rights that corporations have waged. In fact, most of the corporate rights movements have been invisible.<sup>37</sup> While individual cases might gain notoriety, the litany of constitutional corporate cases are rarely addressed and acknowledged as a distinct body of law. Professor Winkler’s book is both refreshing and provides long overdue recognition of the corporate rights movement.

Transactional clinicians could incorporate an examination of the corporate rights movement into their seminars not only to expand student understanding of doctrinal corporate law, but also to draw students’ attention to the role corporations have played in economic justice struggles. There are several key takeaways from Professor Winkler’s book about the corporate rights movement that would better contextualize the client representations of transactional clinics. The following sections highlight two such takeaways.

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<sup>31</sup> *Compare Deveau*, 9 U.S. at 88 (holding that corporations have constitutional protections), *with Sandford*, 60 U.S. at 393 (holding that African Americans were not “‘citizens’ within the meaning of the Constitution”), *and Bradwell*, 83 U.S. at 130 (holding that the refusal to grant women professional licenses does not violate the Constitution).

<sup>32</sup> *See* WINKLER, *supra* note 6, at 73 (“Litigation in other rights movements, however, has usually been coupled with broad-based, political mobilization of the masses . . . Corporate rights have largely been won in the courts, not in the streets, and have developed largely without much public scrutiny—even though many of the lawsuits leading to corporate rights were highly publicized in their time.”).

<sup>33</sup> *Id.* at 98.

<sup>34</sup> *Id.* at xxiii.

<sup>35</sup> *Id.* (“In the 1970s, Ralph Nader won a landmark case on behalf of consumers that established a First Amendment right to advertise—a right that corporations, including tobacco and gaming companies, used to overturn laws designed to help consumers.”).

<sup>36</sup> *Id.*

<sup>37</sup> Dave Davies, *How American Corporations Had a ‘Hidden’ Civil Rights Movement*, NPR (Mar. 26, 2018), <https://www.npr.org/2018/03/26/596989664/how-american-corporations-had-a-hidden-civil-rights-movement>.

## A. CORPORATE LAW AS FUNDAMENTAL TO AMERICAN DEMOCRACY

Corporations existed in this country prior to the founding of the United States of America.<sup>38</sup> “[T]he Virginia Company of London was one of the earliest business corporations in England,” and was founded to make money for its stockholders in the new land of America.<sup>39</sup> The corporation “enjoyed exclusive trading rights for the area stretching roughly from modern-day North Carolina to Maine.”<sup>40</sup> When the Virginia Company was hemorrhaging money, it used its real property assets to attract more capital.<sup>41</sup> “Every stockholder [of the company] was offered 100 acres of land” to cultivate.<sup>42</sup> The overwhelming majority of stockholders chose to grow tobacco,<sup>43</sup> which would also have an enormous influence on the course of American history, eventually “fueling the demand for slave labor.”<sup>44</sup> In this way, the Virginia Company “recruited nearly 4,000 new colonists to come to the New World, including the Pilgrims.”<sup>45</sup>

Reflecting on America’s roots as fledgling corporate colonies is fundamentally eye opening in an era where the President brags of running the country like one of his businesses.<sup>46</sup> Moreover, the exploitative beginnings of this country as several scrappy, struggling corporations puts into context why such a rich, first-world country refuses to end poverty and economic marginalization. Corporate greed is what birthed this country. Although not covered in *We the Corporations*, the reader can easily make the connections to see how the first corporations on United States soil succeeded because of their willingness to exploit white privilege by killing and stealing from Native Americans.<sup>47</sup> At the inception of this country, corporations were utilized as functions of wealth, masculinity, and whiteness to exploit and plunder.

Although the Virginia Company failed to turn a profit, it nevertheless provided a template for future English colonies and the construction of the present-day United States. The charter documents for those colony corporations would serve as a blueprint for what would become the U.S. Constitution.<sup>48</sup> The colony charters “heavily influenced [the Founders’] understanding of limited government, individual rights, and constitutionalism.”<sup>49</sup> The corporations that owned the first colonies also functioned as

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<sup>38</sup> Marci Martin, *Founded When? America’s Oldest Companies*, BUS. NEWS DAILY (Sept. 28, 2018), <https://www.businessnewsdaily.com/8122-oldest-companies-in-america.html>.

<sup>39</sup> WINKLER, *supra* note 6, at 6.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (“Tobacco, we will see, would also play a starring role in the history of corporate rights, as tobacco companies and their allies would prove to be among the most ardent proponents of constitutional protections for corporations.”).

<sup>45</sup> *Id.* at 16.

<sup>46</sup> *See supra* text accompanying note 20.

<sup>47</sup> Rebecca Onion, *America’s Other Original Sin*, SLATE (Jan. 18, 2016), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2016/01/native\\_american\\_slavery\\_historians\\_uncover\\_a\\_chilling\\_chapter\\_in\\_u\\_s\\_history.html](http://www.slate.com/articles/news_and_politics/cover_story/2016/01/native_american_slavery_historians_uncover_a_chilling_chapter_in_u_s_history.html).

<sup>48</sup> WINKLER, *supra* note 6, at 5.

<sup>49</sup> *Id.*

governments responsible for overseeing the people who lived there and exerted a considerable influence on American attitudes and understanding about governance.<sup>50</sup> Self-government was a corporate necessity for those early corporations and those corporate charters were regarded as mini constitutions. In the years leading up to the American Revolution, the colonists came to believe that the rights guaranteed to them by their charters were under attack by England. The U.S. Constitution was designed to do what corporate charters had long done in the colonies: establish government offices, outline the procedures for lawmaking, and impose limits on government action. “The similarities between the Constitution and the original 1629 charter of the Massachusetts Bay Company . . . are striking.”<sup>51</sup> The Constitution was America’s charter and founding document, and the Constitution’s shape and scope reflected the Framers’ experience with corporate governance.

Democracy and constitutionalism have, thus, been intimately tied up with the corporate form from the establishment of this country. “[J]udicial review is another of the distinctive features of American constitutionalism that can be traced back to the corporation.”<sup>52</sup> The principle that corporate bylaws must not be “contrary to the laws of the land” or not be “repugnant to the Laws of the Nation” developed as a restriction on the colonial charters.<sup>53</sup> The colonies could legislate to the extent that their laws were not contrary to the laws adopted by Parliament. This view of legislative limits was incorporated when Marshall explained that a “law repugnant to the Constitution is void” thereby expanding the role of the judiciary to review and invalidate laws contrary to the Constitution.<sup>54</sup>

This history not only makes us reflect on the origins of this county, but also the realities of starting a business. For example, I often remind my students that starting a business for one purpose can lead to an unintended positive outcome. While the majority of new businesses may fail,<sup>55</sup> as the Virginia Company demonstrates, a failed business does not mean the business endeavor was not worthwhile. Corporate leadership and business ownership have a long history of serving as a training ground for civic engagement.<sup>56</sup> For better or worse, the electorate in this country has regularly chosen to select its leadership from the business sector pipeline. The history of the United States as a lean start-up desperate for another round of venture capital financing reiterates the lesson transactional clinicians often want their students to learn about connecting corporate leadership to other successful endeavors.

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<sup>50</sup> *Id.* at 19.

<sup>51</sup> *Id.* “[F]undamental liberties functioned similarly to constitutional rights in that they were understood to be limits on the power of those holding office under the charter . . . The legislative power vested in the assembly was just the ordinary power of a corporation to enact bylaws, and the popular assembly was a meeting of the stockholders.” *Id.* at 21.

<sup>52</sup> *Id.* at 63.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

<sup>55</sup> See SBA Office Advocacy, *Frequently Asked Questions*, SMALL BUS. ASS’N 1, 3 (Sept. 2012), [https://www.sba.gov/sites/default/files/FAQ\\_Sept\\_2012.pdf](https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf) (“About half of all new establishments survive five years or more and about one-third survive 10 years or more.”).

<sup>56</sup> See Charles M. Tolbert, II, *Minding Our Own Business: Local Retail Establishments and the Future of Southern Civic Community*, 83 SOC. FORCES 1309 (2005).

The power of democratic participation also resonates in Winkler's retelling of the Virginia Company and other corporate colonies.<sup>57</sup> Transactional clinicians addressing economic justice issues may anecdotally discuss why it is important for marginalized individuals to participate in corporate enterprise. The history of the corporate colonies provides a tactile illustration of how the corporate form engenders democratic participation. The American iteration of democracy originates from stockholder votes.<sup>58</sup> A transactional clinic may represent, for example, a corporate client that is an employee-owned worker cooperative that allows otherwise disenfranchised individuals to vote on the direction of the corporation. The clinician's objective in deciding to represent this cooperative client may be to expose their students to the importance and meaningfulness of these employee votes. The history of the corporate colonies in the U.S. illustrates how participation in a corporate entity can facilitate other forms of democratic participation.

#### B. CORPORATE AND JUDICIARY SCHEME TO CLAIM THE FOURTEENTH AMENDMENT

Despite the fact that corporations have never been subjected to systemic oppression, like groups such as women and racial minorities, they too have pushed to gain constitutional protections since America's earliest days. No legal fight details that better than the corporate rights movement to transform the Fourteenth Amendment. The Amendment had been adopted after the Civil War to guarantee the rights of the newly freed enslaved persons; however, corporations litigated tirelessly to expand their access to such due process and equal protection rights.<sup>59</sup> Professor Winkler tells the story behind this legal strategy and its beginning in former U.S. Senator Roscoe Conkling, the only person living at that time who had been on the committee that wrote the Amendment.<sup>60</sup> During his oral arguments in *Santa Clara County v. Southern Pacific Railroad Co.*, Conkling claimed to the Supreme Court that the drafting committee members specifically selected the word "person" in the amendment because they were concerned about the undue burdens that recent laws were placing on enterprises.<sup>61</sup> Although evidence exists that the Supreme Court may have suspected Conkling's portrayal of events to be a lie, the justices nonetheless embraced Conkling's argument that corporations had rights protected by the Fourteenth Amendment.<sup>62</sup>

This was not a unique circumstance. The Court previously found protections for corporations, where they refused to find them for African Americans.<sup>63</sup> For example, although "there was no evidence the Framers understood Article III to include corporations," the Court had already extended to the corporations the benefit of their legal imagination in a way they would not extend it to African Americans.<sup>64</sup>

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<sup>57</sup> WINKLER, *supra* note 6, at 19.

<sup>58</sup> *See id.* at 14.

<sup>59</sup> *Id.* at 113.

<sup>60</sup> *Id.* at 114.

<sup>61</sup> *Id.* at 115.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 117.

<sup>64</sup> *Id.* at 110.

“[T]he Supreme Court would invoke those corporate rights [under the Fourteenth Amendment] to invalidate numerous laws governing how businesses were to be run, supervised, and taxed.”<sup>65</sup> A study conducted in 1912 found that the court “had heard 604 Fourteenth Amendment cases between 1868 and 1912.”<sup>66</sup> “[T]wenty-eight of those cases (less than 5 percent) involved [the constitutional rights of] African Americans . . . and in nearly all of those cases the racial minorities lost.”<sup>67</sup> Corporations were involved in 312 of those cases and “succeeded in striking down numerous laws regulating business, including minimum wage laws, zoning laws, and child labor laws.”<sup>68</sup> “At the same time the court was upholding Jim Crow laws in infamous cases like *Plessy v. Ferguson* . . . the justices were invalidating minimum-wage laws, curtailing collective bargaining efforts, voiding manufacturing restrictions, and even overturning a law regulating the weight of commercial loaves of bread.”<sup>69</sup> Wealthy corporations, with the endorsement of the Supreme Court, intentionally transformed the Fourteenth Amendment, originally adopted to shield formerly enslaved Black people from discrimination, into a sword to strike at unwanted business regulations.<sup>70</sup>

Converting the Fourteenth Amendment was part of a larger plan to reclaim power after the Reconstruction Era.<sup>71</sup> “Instead of trying to overturn the amendment, [former Confederate leadership] would seek to exploit it in an attempt to defang Reconstruction.”<sup>72</sup> The *Slaughter-House Cases* of 1873 set the persistence of the Confederacy to fight Reconstruction by systematically undermining it.<sup>73</sup> Although the Supreme Court ultimately ruled against corporate interests in the *Slaughter-House Cases*, the cases raised the questions of whether “the Fourteenth Amendment create[d] a barrier to laws regulating economic activity.”<sup>74</sup> In Justice Field’s dissent in the *Slaughter-House Cases*, he advocated for a “liberty of contract” that “protected an individual’s right to practice the trade or profession of one’s choice without undue state interference.”<sup>75</sup> By the time Reconstruction ended in 1877, the Supreme Court had minimized the ability of racial minorities to use the Fourteenth Amendment, opening the door to corporations to continue the pursuit to expand their Constitutional rights under this provision.<sup>76</sup>

Within the next twenty years, the Supreme Court had embraced Justice Field’s reading of the amendment to include his “unenumerated principle of laissez-faire into the due process clause.”<sup>77</sup> Justice Field would go onto take advantage of Chief Justice Waite’s illness “to insert into a Supreme Court majority opinion an affirmation that

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<sup>65</sup> *Id.* at xv.

<sup>66</sup> *Id.* at 157.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 158.

<sup>69</sup> *Id.* at xv.

<sup>70</sup> *Id.* at 117.

<sup>71</sup> *Id.* at 125.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 127.

<sup>74</sup> *Id.* at 128.

<sup>75</sup> *Id.* at 154.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

corporations had Fourteenth Amendment rights.”<sup>78</sup> Constitutional protections for corporations meant that the Court would invalidate regulations that interfered with a pro-business agenda.<sup>79</sup> The landmark case *Lochner v. New York* became a symbol of this new doctrine.<sup>80</sup> The economic liberty read into the transformed Fourteenth Amendment provided much for corporations to celebrate.<sup>81</sup> Although there were plenty of cases litigating business regulations that corporations lost during this *Lochner* era, the drawn-out cases that corporations now had standing to bring could at least delayed implementation of those regulations.<sup>82</sup>

Often, we take for granted the amount of control corporations yield, without putting in context the amount of time and effort that has been contributed to creating this status quo.<sup>83</sup> Corporate constitutional rights, such as those gained under the Fourteenth Amendment, were strategically crafted and plotted through a series of cases.<sup>84</sup> Corporations had to accumulate legal victories with incremental success to acquire their current slate of constitutional rights.<sup>85</sup> “Although there was never a broad-based popular movement for corporate rights, throughout American history the nation’s most powerful corporations have persistently mobilized to use the Constitution to fight off unwanted government regulations.”<sup>86</sup> Professor Winkler goes on to summarize that “what has often united justices across the [ideological] spectrum is a tendency to side with business.”<sup>87</sup> The corporate rights gained in the past have only continued to propel the movement forward today. “In recent years, scholars have increasingly noticed that even in the ideologically divided Roberts court, the justices regularly find common ground in business cases.”<sup>88</sup>

The legacy of the *Lochner* era and the Court identifying unenumerated rights under the Fourteenth Amendment would go onto influence individual rights.<sup>89</sup> Over the years, the due process clause was construed to protect “the right to privacy, the right to

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 155 (citing *Pembina Consol. Silver Mining Co. v. Pa.*, 125 U.S. 181 (1888)).

<sup>80</sup> *Id.* at 154. *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); GRAHAM, *supra* note 24, at 137; E.S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909).

<sup>81</sup> WINKLER, *supra* note 6, at 158.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 159; see Ruth H. Bloch and Naomi Lamoreaux, *Corporations and the Fourteenth Amendment*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 286 (Naomi R. Lamoreaux & William J. Novak eds. 2017).

<sup>84</sup> WINKLER, *supra* note 6, at 159.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at xxi.

<sup>87</sup> *Id.* at xviii-xix.

<sup>88</sup> *Id.* at xix.

<sup>89</sup> *Id.* at 182; see MELVIN UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 351 (2015); See also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 110 (2011).

choose abortion, and the right to same-sex marriage.”<sup>90</sup> As a result, corporations as first-movers have “fundamentally reshaped American constitutional law.”<sup>91</sup>

### III. ADVOCACY WITH HISTORICAL CONTEXT

As the previous Section recounted, corporations’ efforts in shaping constitutional law have not only benefited them financially, but also impacted how individual’s rights have developed under the Constitution.<sup>92</sup> Thus, understanding corporate constitutional law not only reveals much about doctrinal corporate law, but also our current concepts of justice in this country. Understanding this context is meaningful. As Martin Luther King Jr. once warned, economic justice in this country is elusive because we have “power without compassion, might without morality, and strength without sight.”<sup>93</sup> I would add to the list, advocacy without historical context. The corporate rights movement provides context that all economic justice advocates should understand, but especially transactional lawyers working in this space because so much of what we do is attempting to use the corporate form to address economic marginalization. In that effort towards economic justice, transactional lawyers cannot be advocates without historical context.

#### A. CORPORATE LAW AS AN EXTENSION OF POWER

We often discuss the significance of local context in our economic justice advocacy because the efforts that have proven successful in one geographic location may not be effective in another for political, cultural, or structural reasons. Similarly, the historical context of our work is also salient. A deeper understanding of the corporate rights movement may also temper rhetoric about empowerment when working in low-income communities. While the corporate form itself may be helpful to achieve a specific client goal, we should also understand how the wealthy and powerful are contemporaneously using the form to fortify and preserve their own interest.<sup>94</sup> Transactional lawyers working towards economic justice need not only be aware, but also vigilant of how the corporate form is used to marginalize through its acquisition and consolidation of power.

On the other hand, by studying the history of corporate rights, we also see the social purpose origin of the corporate form that can add substance to our claims about how corporations should be engaging in business. Historically, U.S. corporations had a stated public purpose and were not merely mechanisms to drive private profits. In other words, the origin for the corporate form had both private and public functions. For example, Alexander Hamilton noted when writing about the Bank of North America, “public utility is more truly the object of public banks than private profit.”<sup>95</sup> The origin

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<sup>90</sup> WINKLER, *supra* note 6, at 182.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> DONALD T. PHILLIPS, *Preface to MARTIN LUTHER KING, JR., ON LEADERSHIP: INSPIRATION & WISDOM FOR CHALLENGING TIMES 1* (1998).

<sup>94</sup> WINKLER, *supra* note 6, at 5.

<sup>95</sup> *Id.* at 39; see James O. Wettreau, *New Light on the First Bank of the United States*, 61 PA. MAG. HIST. & BIOGRAPHY 272, 284 (1937).

for the corporate form had both private and public functions. Corporations were financed and managed by private parties, but were also inherently public, as the government would not grant a formation charter unless the corporation had a stated public purpose.<sup>96</sup> “Individual investors took home profits, but the ultimate mission of the corporations had to be in the service of the public.”<sup>97</sup> This historical context is an important lens for contemporary, socially conscious entrepreneurs. The current trend of social enterprise laws can be better understood not as a new innovation of law,<sup>98</sup> but rather a return to the origin of corporate law.<sup>99</sup>

Understanding and acknowledging the duality of corporations can give more meaning to our work as transactional clinicians as well. Transactional economic justice clinicians can take a normative stance on the way corporations have used their power to perverse constitutional rights and still use the corporate form to help clients acquire access and justice. This is a familiar paradox other social justice advocates have grappled with, as the law generally has been consistently used to benefit the powerful, wealthy, male, and white.

Transactional clinicians cannot go into low-income communities advancing the corporate form as ways to empower small businesses and community groups, without also recognizing from where the corporate form derives its power. Professor Winkler noted the importance of corporations’ property rights in that “corporations were designed to pull together the property interests of a diverse group of people for consolidated control.”<sup>100</sup> In this manner, corporations have always been used as a legal extension of the wealthy property rights. Though nuanced with ups and downs, twists and turns, reviewing the litany of corporate rights cases illustrates that over the course of our history the law sides with corporate power.

## B. CONTEXTUALIZING TRANSACTIONAL CLINICAL PEDAGOGY

There is real tension for the transactional clinician to cover as much doctrine, theory, and skills training as possible in the confines of an academic semester or even quarter. Thus, while many may agree that exploring the evolution of the corporate rights movement would make an interesting and enlightening conversation, previously there has not been a resource that would make this possible within the confines of the realities of a clinical course. Professor Winkler’s book, *We the Corporations*, now makes that possible because it covers the corporate rights movements within one book.<sup>101</sup> A clinical professor could easily assign one chapter of the book during the course of the semester for class discussion or assign the entire book to be read and revisited during the semester to connect with other themes and topics the clinician is addressing.

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<sup>96</sup> WINKLER, *supra* note 6, at 78; see David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013).

<sup>97</sup> WINKLER, *supra* note 6, at 48.

<sup>98</sup> See J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541 (2016).

<sup>99</sup> See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 Del. J. Corp. L. 767 (2005).

<sup>100</sup> WINKLER, *supra* note 6, at 49.

<sup>101</sup> *Id.* at 73–74.



The transactional clinician could also consider assigning a reflective essay to accompany any selected readings from this book. Reflective essays are a powerful tool in developing students' higher learning and documenting their metacognitive development.<sup>102</sup> Clinical pedagogy incorporates reflective essays to help students process the complex information they learn in the clinic and to provide them a space to document their developing understandings of not only substantive law, but also their professional identity. It can be difficult to compose reflective essay prompts that are significantly connected to the corporate law, but also allow students to use creativity and critical analysis in their written responses. Providing a prompt on *We the Corporations* could fill this gap for transactional clinicians.

For instance, the transactional clinician could assign their class to read the first chapter of the book, *In the Beginning, America Was a Corporation*, for in-class discussion.<sup>103</sup> This is a relatively short chapter in the book that explores the colonial charter history of the establishment of the country.<sup>104</sup> The chapter also covers the development of corporate governance,<sup>105</sup> which is a common doctrinal topic addressed in transactional clinic seminars. In class, the clinician can facilitate a conversation that leads the students not only to summarize the genesis of the country from chartered corporations, but also to identify what structural elements of our present-day government are derived from corporate governance.

Subsequent to the in-class discussion, the clinician could assign the students to complete a reflective essay. The prompt for the reflective essay could be something to the effect of: "Reflecting on the themes of this chapter and our discussions on corporate governance, what are your thoughts on America's past as corporate colonies? How does the country's past as corporate colonies influence present-day conceptions of corporations?" This prompt is broad enough to encourage a variety of responses, but narrow enough for students to begin to internalize how the history of corporations in our society has relevance to their present work. Depending on the other themes of the course and whether or not the course explicitly addresses economic justice topics, the clinician could also include in the prompt: "Why has economic justice been elusive in a country that was established originally for economic gain?"

Surely, there are other exercises and discussions in the seminar that would provide students opportunities to reflect on and implement their understanding of the corporate rights movement into their work. The reflective essay offers one specific example of how the transactional clinician might achieve this.

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<sup>102</sup> See Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1, 29 (2015).

<sup>103</sup> WINKLER, *supra* note 6, at 7.

<sup>104</sup> *Id.* at 7–13.

<sup>105</sup> *Id.*

## CONCLUSION

The legal innovation of the corporate form has allowed for unprecedented concentrations of power and wealth. As transactional clinicians continue to participate in economic justice efforts, part of our goal is to help clients accumulate and leverage power that has been denied to their communities for too long. As proven by over 400 years of corporate constitutional law, the corporate form is an effective vehicle to accomplish this task. However, the study of corporate constitutional jurisprudence also reveals the problematic ways corporations have influenced and altered the concepts of justice. The corporate rights movement demonstrates how corporate law was used throughout the development of this country as a tool to protect and expand the rights and privileges of the wealthy and powerful. Corporations continue to use constitutional litigation to manipulate and distort public policy to increase their own profits. This historical lens provides context for present-day constitutional law cases as well as economic justice efforts in low-income communities.

Today, corporations have practically the same constitutional rights as individuals: freedom of speech, freedom of press, religious liberty, due process, equal protection, freedom from unreasonable searches and seizures, the right to counsel, the right against double jeopardy, and the right to trial by jury, among others. These are not rights that were won because of public support or even knowledge. In fact, many of these corporate rights were gained in spite of vocal public opposition. The public outcry after *Citizens United*<sup>106</sup> did not prevent the Supreme Court's decision in *Hobby Lobby*<sup>107</sup> four years later. Similarly, although public opinion favors same-sex marriage, the Supreme Court still issued its pro-corporate rights ruling in *Masterpiece Cakeshop*.<sup>108</sup>

Given this, transactional clinicians should consider directly addressing the corporate rights movement in their courses because legal education currently lacks a dedicated course that exposes students to the subject. As transactional clinicians expand their place in economic justice scholarship, the historical context of corporate rights is one that we need to continue to grapple with. Transactional clinicians would do their students and clients a benefit to include coverage of the corporate rights movement in their courses. Professor Winkler's book is an excellent resource to effectively address the corporate rights movement in a seminar course, as the book invites transactional clinicians to speak more explicitly about corporate actors' intersections with historical and present-day economic justice efforts.

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<sup>106</sup> See *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>107</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

<sup>108</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).