

# GRACEFUL LOSERS

*Professor John Martinez\**

“Show me a good loser and I’ll show you a loser.”<sup>1</sup>

“Now let the night be dark for all of me.  
Let the night be too dark for me to see  
Into the future. Let what will be, be.”<sup>2</sup>

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\* Professor of Law, S.J. Quinney College of Law at the University of Utah. This article was funded in part by the University of Utah College of Law Excellence in Teaching and Research Fund. I would like to thank my wife Karen Martinez for helping me work through the various iterations of this article. I am also indebted to Paul Horwitz and Richard Delgado for their suggestions.

1. Quote from Vince Lombardi, BRAINYQUOTE.COM, <http://www.brainyquote.com/quotes/quotes/v/vincelomba161268.html> (last visited September 18, 2013).

2. ROBERT FROST, *Acceptance*, in THE POETRY OF ROBERT FROST 249 (Edward Connery Lathem ed., Holt, Rinehart & Winston, Inc. 1969).

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## INTRODUCTION

Vince Lombardi notwithstanding, good losers are indispensable to a civilized society and should be encouraged to lose with grace and equanimity. We can't all be winners all the time. Somebody has to come in second, third, or last. But in order for there to be winners, other people must willingly participate. We need to encourage losers to accept their status and to keep playing the game.

A "loser" may be defined as someone whose obtained outcome is worse than their desired outcome.<sup>3</sup> Examples of loser situations abound:

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3. "Disappointment Theory," first proposed by David Bell, is distinct from "Loser Theory" proposed in this article. See David E. Bell, *Disappointment in Decision Making Under Uncertainty*, 33 OPERATIONS RES. 1, 1 (1985) ("Disappointment . . . is a psychological reaction to an outcome that does not match up to expectations."). See also Carlos E. Laciara & Elke U. Weber, *Correcting Expected Utility for Comparisons Between Alternative Outcomes: A Unified Parameterization of Regret and Disappointment*, 36 J. RISK UNCERTAINTY 1 (2008) (discussing evolution of regret and disappointment theories).

Both disappointment and regret describe circumstances in which the actual outcome is perceived as less desirable than a counterfactual comparison. Regret occurs when the undesirable outcome

former slave owners lost the economic value of their slaves when slavery was abolished in the United States;<sup>4</sup> white South Africans lost their privileged status after the end of apartheid;<sup>5</sup> and European Union countries like Greece that overspent their budgets must deprive their citizens of a lifestyle financed by public overspending.<sup>6</sup> How losers react to disappointment is crucial to the well-being of the systems in which they participate. Three familiar loser responses are illegality, voice and exit.<sup>7</sup> In the slaveowner example, it is arguable that in response to the loss of their slaves, the Southern States first tried to exercise “voice” to influence federal policy, subsequently exercised “exit” by seceding from the Union, and ultimately exercised “illegality” by fighting the Civil War. A fourth possible loser response is “acceptance,” defined as the willing incurrence of loss, a contribution to society through self-sacrifice—or more prosaically—the “lump-it” alternative.<sup>8</sup> In the slaveowner setting, former slaveowners never accepted the abolition of ownership of people.<sup>9</sup> In contrast, in the end-of-apartheid setting, white South Africans have apparently accepted

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was the result of our own choice; disappointment occurs when the undesirable outcome was the result of the world as it is, not as we wish it could be. Since “the world as it is” includes ourselves and the choices we make, “regret” is simply a more specific form of disappointment. See Barbara Mellers et al., *Emotion-Based Choice*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 332, 333 (1999) (discussing distinctions between disappointment and regret).

Unlike disappointment theory, which focuses on the reasons for the disappointment resulting from being a loser, Loser Theory focuses on how a social system ensures that losers accept their lot and that they are treated fairly even though they consent to be losers.

4. See STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 11–13 (2011) (discussing the abolition of slavery as a form of lost property).

5. See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 320 (2006) (suggesting that the South African Constitution embodies a “protective duty theory,” whereby “the ownership right would not confer immunity on the private individual but nest the individual owner in a network of relationships that involve mutual obligations between and among the owner and all other persons significantly affected by her ownership”).

6. See Associated Press, *Greece Economy Continues Under Pressure, Seen to Exit Euro*, BUSINESS TODAY (May 27, 2012), <http://business.today.intoday.in/story/greece-economy-continues-under-pressure-seen-to-exit-euro/1/184887.html>; Dina Kyriakidou & Harry Papachristou, *Angry Greeks Reject Bailout, Risk Euro Exit*, REUTERS (May 6, 2012, 7:42 PM), <http://www.reuters.com/article/2012/05/06/us-greece-idUSBRE8440DG20120506>.

7. The concepts of exit and voice as preventives for illegality were introduced by Albert O. Hirschman in his groundbreaking book. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 3–5 (1970) (explaining concepts of exit and voice).

8. The concept of acceptance differs from the concept of loyalty described by Hirschman. He described loyalty as “postponement of exit in spite of dissatisfaction and qualms.” *Id.* at 104. Thus, loyalty presupposes consideration of exit as an available alternative. In contrast, acceptance entails resignation to the status quo; the actor acknowledges that—perhaps after voice has been unsuccessfully exercised—the alternatives of illegality and exit are not available options. Cf. George P. Fletcher, *The Commonality of Loyalty and Tolerance*, 12 CRIM. JUST. ETHICS 68, 70 (1993) (“Loyalty, like tolerance, clicks in only when things are not going so well.”).

9. See BANNER, *supra* note 5, at 12 (“At the conclusion of the Civil War, this last remnant of property rights in other people came to an end.”).

the loss of their privileged status.<sup>10</sup> It remains to be seen which alternative will be chosen by Greece with regard to the European Union.<sup>11</sup> Will it exercise voice to try to relax EU oversight of fiscal policies? Will it illegally ignore restrictions on bailout funds provided to it by the other EU countries? Will it exit the EU and go its independent way?<sup>12</sup> Or will Greece accept the harsh reality of substantial budgetary and economic restrictions? Albert O. Hirschman emphasized that the exercise of voice by actors is preferable for organizations because it is the essential feedback mechanism whereby the organizations can improve.<sup>13</sup> However, once the alternative of voice is exhausted, and if exit is not viable, (because emigration, for example, may be too arduous), then only the illegality and acceptance choices remain. Except for peaceful civil disobedience,<sup>14</sup> it is in the best interest of organizations to make sure that losers do not resort to illegality.<sup>15</sup> Thus, organizations have a strong interest in encouraging acceptance behavior by losers.

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10. See ALEXANDER, *supra* note 6, at 150 (“While the South African Constitution aspires to effect a fundamental transformation in South African society, based in substantial part on a new regime of property, it is too soon to say whether it will produce genuinely transformative results.”).

11. See generally Andrew C. Snavelly, *Should We Leave the Backdoor Open? Does An Agreement Uniting States Need a Withdrawal Provision: The European Union Draft Constitution*, 73 UMKC L. REV. 213 (2004) (comparing the options available to European Union countries with the position of Southern States just prior to the Civil War).

12. See Patrick Donahue, *Euro Officials Begin to Weigh Greek Exit as Euro Weakens*, BLOOMBERG, (May 14, 2012, 7:40 AM) <http://www.bloomberg.com/news/2012-05-13/euro-officials-begin-to-weigh-greek-exit-from-common-currency.html>.

13. See HIRSCHMAN, *supra* note 8, at 44–45 (arguing that the ready availability of truck and bus transport as an alternative to rail transport in Nigeria meant that people dissatisfied with the rail system “exited” to trucks and buses, rather than exercising “voice” to try to get the rail transport system to improve, thus resulting in the further deterioration of the quality of the rail transport system).

14. *Id.* at 1 (“Each society learns to live with a certain amount of . . . dysfunctional or misbehavior; but lest the misbehavior feed on itself and lead to general decay, society must be able to marshal from within itself forces which will make as many of the faltering actors as possible revert to the behavior required for its proper functioning.”). See also GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 8 (1993) (“Some of the strongest moral epithets in the English language are reserved for the weak who cannot meet the threshold of loyalty: They commit adultery, betrayal, treason.”).

Examples of circumstances in which peaceful civil disobedience is a tolerated and, indeed, an honored tradition in a free society, include official oppression such as slavery, Jim Crow, the Mexican-American War, Official English, Indian removal, and alien land laws for Japanese farmers. The oppressed political minority is deemed justified in engaging in disruptive protests, sit-ins and marches. Such circumstances almost uniformly trigger strict judicial scrutiny under suspect trait or fundamental rights analysis. In contrast, the loser situations that are the focus of this article involve circumstances where only economic rights are affected, and hence only minimal, deferential judicial review is triggered. For a fuller discussion of standards of judicial review, see John Martinez, *Getting Back the Public’s Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 660–62 (2010). It is the latter situations where the losers need more protection, as suggested in this article.

15. Losers also try to avoid becoming losers in the first place by engaging in illegal behavior. Such illegality may take the form of fraud, bribery, terrorism, or other forms of antisocial behavior. See, e.g., *W.S. Kirkpatrick & Co., Inc. v. Env’tl. Tectonics Corp., Int’l*, 493 U.S. 400, 402 (1990) (*W.S. Kirkpatrick & Co., Inc.* and Harry Carpenter, its chairman of the board and CEO, pled guilty to paying a “commission” equal to 20% of the contract price for the construction and equipment of an aeromedical center at Kaduna Air Force Base in Nigeria, in violation of the Foreign Corrupt Practices

Losers' selection of acceptance might occur because losers rationally<sup>16</sup> believe that “over a period of time, the right turns will more than balance the wrong ones.”<sup>17</sup> Although people do not always behave rationally,<sup>18</sup> all social systems should do whatever is necessary to encourage people to rationally accept being losers.

No existing theory addresses both the need to encourage losers to choose acceptance, as well as the concomitant importance of being fair to losers whom we are asking, after all, to shoulder a loss as a civic duty. This article fills that gap by proposing a metatheory whereby the legal system encourages people to accept their losses while also ensuring that losers are treated fairly, according to a principle of justice as equality, whereby all those similarly situated are similarly treated. The article suggests that the proposed metatheory should be implemented by the United States Supreme Court under the Due Process and Equal Protection provisions of the federal constitution.

Part I of this article sets out several illustrative legal theories that create losers in the American legal system. It describes four conceptual categories: the civic duty rule; the emergency doctrine; the concept of “aver-

Act of 1977, 15 U.S.C. §§ 78dd through 78dd-3 (2012)).

16. Rationality may be defined “as the possession of the information necessary to make a decision, ratiocination on that information, and the *self-conscious* evolution of a decision.” Eugene Burdick, *Political Theory and the Voting Studies*, in *AMERICAN VOTING BEHAVIOR* 136, 139 (Eugene Burdick & Arthur J. Brodbeck eds., 1959).

Losers might choose acceptance because they believe that a loss has been imposed—and must be suffered—as an element of religious faith. See FLETCHER, *supra* note 15, at 170 (describing Benthamite utilitarianism as the teaching of altruism which has “desired qualities [which] are unattainable versions of God’s perfection”). See also PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* xxviii–xxix (2011) (arguing for “emphathetic” agnosticism whereby judges should consider the claims of religious claimants, even where those claimants are sure to lose, because society needs such claimants to remain committed to the general social enterprise, not alienated by it); LUCAS SWAINE, *THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM* 94–95 (2006) (suggesting that “theocratic communities” of religious observers might be formed into quasi-sovereign communities in order to respect their beliefs, yet keep them within the broader society). Although it might be said that graceful losers achieve a religious state of grace, religion is beyond the scope of this article.

17. HIRSCHMAN, *supra* note 8, at 78.

18. Indeed, Hirschman acknowledged as a threshold matter that people tend to have “lapses” in rationality: “Under any economic, social, or political system, individuals, business firms, and organizations in general are subject to lapses from efficient, rational, law-abiding, virtuous, or otherwise functional behavior.” *Id.* at 1.

Somewhat more charitably, perhaps people exercise merely “bounded rationality,” whereby they exercise best efforts to cope with increasingly more complex social reality. Cf. HERBERT A. SIMON, *THE SCIENCES OF THE ARTIFICIAL* 166 (3d ed. 1996) (“*Bounded rationality*. The meaning of rationality in situations where the complexity of the environment is immensely greater than the computational powers of the adaptive system.”). See also Manuel A. Utset, Essay, *Back to School with Coase: The Production of Information and Modes of Knowledge Within and Across Academic Disciplines*, 75 B.U. L. REV. 1063, 1075 n.43 (1995) (“Bounded rationality is a product of humans’ limited computational and analytical abilities.”); Steve Fuller, Comment, *Playing Without a Full Deck: Scientific Rationalism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 566 n.38 (1988) (“[B]ounded rationality’ . . . is the only sort of rationality possible, given severe cognitive constraints.”).

age reciprocity of advantage;” and the public trust doctrine. It also describes several common law categories: easements for private necessity; the American rule on non-recoverability of attorney fees by successful litigants; the sovereign acts doctrine; and other common law “no property” approaches.

Part II proposes a “Dynamic Cycle of Legal Change” (DCLC) as a model for understanding how the American legal system creates losers. Part III illustrates the operation of the Dynamic Cycle of Legal Change in several common law, legislative and direct democracy settings. These include settings of gender equality, fame as a property asset, palimony claims, crime victims bills of rights, same-sex marriage statutes, solar acts, and the California coastal protection initiative and subsequent statute.

Using the insights about the structure and operation of the legal system revealed by the Dynamic Cycle of Legal Change, Part IV sets out a proposed metatheory for encouraging and protecting losers in the American legal system. The metatheory includes a utilitarian component, whereby institutions of legal creation and change should be reviewed to ensure that they adopt proactive, all-encompassing approaches for obtaining feedback from losers. The metatheory also includes a fairness component, whereby such institutions should be reviewed to ensure that losers are selected consistent with the principle of justice-as-equality: all persons similarly situated are similarly treated. Part IV suggests that the United States Supreme Court is the proper institution to administer the metatheory pursuant to the Due Process and Equal Protection provisions of the federal constitution. Finally, Part IV demonstrates application of the metatheory using the various loser settings discussed throughout the article, and concludes by considering potential remedies.

## I. EXAMPLES OF LEGAL THEORIES THAT CREATE LOSERS IN THE AMERICAN LEGAL SYSTEM

There are numerous legal theories that create losers in the American legal system. Examples may be organized generally into two separate areas: conceptual categories and common law categories.

### A. *Conceptual Losers Categories*

#### 1. *Civic Duty Rule*

The “civic duty rule” provides that in some circumstances, a person who suffers a loss because of governmental conduct is not entitled to any

relief because the person owes a pre-existing “civic duty” to incur the loss under the circumstances.<sup>19</sup>

Civic duties have included the obligation to perform mandatory labor such as road work or night patrols,<sup>20</sup> to serve in militias or in the military,<sup>21</sup> and to perform jury duty.<sup>22</sup> For example, in the winter of 1984, eighteen Illinois residents were called to serve as jurors in *Kemner v. Monsanto*,<sup>23</sup> the longest jury trial in American history, lasting nearly four years.<sup>24</sup> During each of the more than 2,000 days of trial these jurors were required to report for duty instead of pursuing their careers, generating income, or fulfilling other important obligations.<sup>25</sup> In return for their mandatory service, each juror received \$5 per day—far less than the national minimum wage—plus ten cents per mile for their transportation to and from court.<sup>26</sup>

Similarly, in December of 1957, Elvis Presley, the “undisputed King of Rock and Roll,”<sup>27</sup> received a letter from the National Draft Board ordering him to serve in the military for a period of two years.<sup>28</sup> During the next twenty-four months Elvis was required to sacrifice his \$100,000 per month salary as he drove a truck in the military, and instead received a monthly government check for \$78.<sup>29</sup>

19. See Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 660 N.Y.U. ANN. SURV. AM. L. 97, 124–27 (2004) (considering road construction, military draft, jury service and material witnesses settings). See generally Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property without Moral Justification*, 78 CALIF. L. REV. 53, 131–40 (1990) (general discussion of civic duty rule); JOHN MARTINEZ, GOVERNMENT TAKINGS § 3:10, n.3 (2006).

I would like to thank Mr. Steven J. Joffe, S.J. Quinney Class of 2010, for permitting me to borrow heavily from his outstanding research paper written for my Spring 2010 Takings Seminar in compiling the “civic duty rule” portion of this article.

20. See Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 289, 327–29 (2002).

21. See *id.* at 324–25; William A. Fischel, *The Political Economy of Just Compensation: Lessons From the Military Draft for the Takings Issue*, 20 HARV. J. L. & PUB. POL’Y 23, 27–28 (1996).

22. See *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (noting that jury duty “is a phase of civic responsibility”).

23. 492 N.E. 2d 1327 (Ill. 1988).

24. See Lee Griggs, *In Illinois: The Longest Jury Trial Drones On*, TIME (Mar. 23, 1987), <http://www.time.com/time/magazine/article/0,9171,963829,00.html>; E.R. Shipp, *Marathon Trial on Dioxin Spill Nears End in Illinois After 3 1/2 Years*, N.Y. TIMES (Aug. 19, 1987), <http://www.nytimes.com/1987/08/19/us/marathon-trial-on-dioxin-spill-nears-end-in-illinois-after-3-1-2-years.html?pagewanted=1>.

25. See Griggs, *supra* note 25. See also *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (“Trials are costly, not only for the parties, but also for the jurors performing their civic duty. . . .”); *United States v. Ruggiero*, 846 F.2d 117, 128 (2d Cir. 1988) (Lumbard, J., dissenting) (“Jury service . . . entails many personal sacrifices . . .”).

26. See Griggs, *supra* note 25. See also Seamone, *supra* note 21, at 296 (“[T]hroughout the nation, legislators have set the jurors’ average *per diem* compensation at nearly half the minimum wage and well below the daily equivalent of the poverty threshold.”).

27. *Elvis Presley Biography*, ROCK & ROLL HALL OF FAME, <http://rockhall.com/inductees/elvis-presley/bio/> (last visited May 14, 2012).

28. *Id.*

29. FRED BRONSON, THE BOOK OF NUMBER ONE HITS 33 (2003).

## 2. Emergency

Circumstances of “actual necessity,” such as demolishing a house to prevent the spreading of a fire, also will absolve the government from liability.<sup>30</sup> For example, in *Bowditch v. Boston*,<sup>31</sup> the Court upheld a Boston ordinance that authorized the city fire department to blow up a house in the path of a fire in order to stop the spread of a fire, based on the common law principles of “natural law” and “imperative necessity.”<sup>32</sup> Similarly, in *United States v. Pacific Railroad*,<sup>33</sup> the Court discussed at length the principle that private harm resulting from the Civil War was not compensable.<sup>34</sup> Another example is *YMCA v. United States*,<sup>35</sup> in which damage caused to a building when federal officers seeking to protect the building were attacked by rioters was held not to be a taking.<sup>36</sup> And in *Mouse's Case*,<sup>37</sup> it was held that in a tempest, and to save the lives of the passengers, a passenger could throw valuable goods of another overboard, without making himself liable to an action by the owner of the goods.<sup>38</sup> The actual necessity/emergency principle thus precludes compensation when there is a broad-based, general public need, even if the impact on the property owner is absolute property destruction. Precise definition of when such a dire public necessity exists has proved elusive.<sup>39</sup>

## 3. Average Reciprocity of Advantage

The principle of the Average Reciprocity of Advantage provides that there is no remedy for governmentally-imposed harm which is counterbalanced by governmentally-conferred benefits.<sup>40</sup> For example, in *Plymouth*

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30. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16, (1992) (“The principal ‘otherwise’ that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”). For collected cases, see MARTINEZ, *supra* note 20, at § 2:14 n.3.

31. 101 U.S. 16 (1880).

32. *Id.* at 19.

33. 120 U.S. 227 (1887).

34. *Id.* at 233–35.

35. 395 U.S. 85, 89 (1969).

36. *Id.* at 93.

37. 77 Eng. Rep. 1341 (1608).

38. *Id.* at 1341.

39. *Compare Customer Co. v. Sacramento*, 895 P.2d 900 (Cal. 1995) *cert. denied* 516 U.S. 1116 (1996) (denying recovery to owner whose store was damaged by police looking for a criminal suspect, on grounds that benefit was conferred and that emergency existed) *with Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (holding that owner in circumstances similar to those in *Customer Company* was entitled to compensation).

40. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978), *quoting Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby secure[s] an average reciprocity of advantage.”). *See generally* Raymond R.



*Coal Co. v. Pennsylvania*,<sup>41</sup> the Court held that a state legislature could require a pillar of coal to be left along the line of an adjoining mine because, although such coal could not be mined, it provided a barrier securing the safety of the employees in case either mine flooded, thereby securing an average reciprocity of advantage for the mine owners.<sup>42</sup> However, there is no settled definition of the circumstances in which the concept will apply.<sup>43</sup>

#### 4. The Public Trust Doctrine

In *Lucas v. South Carolina Coastal Council*,<sup>44</sup> the Court held that government conduct that destroys all the economic value of a private asset does not give rise to any remedy if “background principles” of state law already prohibited the regulated activity.<sup>45</sup> The main background principle that has developed under that theory is the Public Trust Doctrine.<sup>46</sup>

The Public Trust Doctrine provides that certain assets, particularly riverbeds and submerged coastal lands, are burdened with a “public trust” for public uses such as fishing, maritime commerce, navigation and related activities, and that such public uses remain even if title to the underlying assets is transferred into private ownership.<sup>47</sup> Thus, in *Illinois Central Railroad Co. v. Illinois*,<sup>48</sup> the Court considered Illinois’ right to convey title to a large portion of submerged land along the Chicago waterfront on Lake Michigan, to be held by the private owner for railroad purposes as well as for the erection of wharves, piers, and docks.<sup>49</sup> The Court concluded that the States’ title to submerged lands differed in character from

Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U.L. REV. 297, 304 (1990) (“[A]n otherwise confiscatory statute is legitimate if reciprocal advantages accrued to the burdened landowners.”).

41. 232 U. S. 531 (1914).

42. *Id.* at 547.

43. See generally William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: “Magic Words” or Economic Reality—Lessons from Palazzolo*, 39 URB. LAW. 319, 319 (2007) (“Average Reciprocity of Advantage (ARA) is a legal term of art without a settled definition.”); Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1452 (1997) (“[T]he Supreme Court has read the average reciprocity of advantage rule so broadly that almost any regulation could be validated under its tenets.”).

44. 505 U.S. 1003 (1992).

45. *Id.* at 1029.

46. See generally John D. Echeverria, *The Public Trust Doctrine As a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931 (2012).

47. See *State v. Cent. Vt. Ry., Inc.*, 571 A.2d 1128 (Vt. 1989); *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987); *Berkeley v. Superior Court of Alameda Cnty.*, 606 P.2d 362 (Cal. 1980); *Bost. Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356 (Mass. 1979). For collected cases, see 3 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 16:60 n.19 and MARTINEZ, *supra* note 20, at § 3:10 n.8.

48. 146 U.S. 387 (1892).

49. *Id.* at 387.

their title to dry land, and that the States held their tidelands and lands beneath navigable waterways within their borders “in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”<sup>50</sup> In *PPL Montana, LLC v. Montana*,<sup>51</sup> the Court held that title to riverbeds within states is determined by the federal constitutional equal-footing doctrine, but that once title in the State is thereby established, public access to waters above those beds for recreational uses is determined by the state common law public trust doctrine, subject to federal power to regulate vessels and navigation under the Commerce Clause and admiralty power.<sup>52</sup> Some states reject the doctrine altogether.<sup>53</sup>

### B. Common Law Losers Categories

#### 1. Easements for Private Necessity

The common law provides in various circumstances that private property owners must convey an easement for private necessity to other private parties free of charge.<sup>54</sup> One type of such easements is “shelter” easements. For example, in *Ploof v. Putnam*,<sup>55</sup> the court held that the owner of a private dock could not prevent a boat owner from tying up at the dock in the middle of a storm that threatened to damage the boat, as well as the safety of the boat owner and his family.<sup>56</sup> Similarly, in *Vincent v. Lake Erie Transportation Co.*,<sup>57</sup> a dock owner could not prevent a ship from mooring at a private dock in order to prevent the ship from being carried away by a storm.<sup>58</sup> The net result in each case was that the boat owners had to pay for any damages to the docks that resulted, but the dock owners were not entitled to the rental value of such dockings nor to injunctions to prevent them.<sup>59</sup>

The second type of uncompensated private necessity easements are strict necessity and reasonable necessity access easements. Thus, in *Hell-*

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50. *Id.* at 452.

51. 132 S.Ct. 1215 (2012).

52. *Id.* at 1234–35.

53. *See, e.g.*, *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52 (Tex. App. 1993) (rejecting public trust doctrine altogether).

54. John Martinez, *No More Free Easements: Judicial Takings for Private Necessity*, 40 REAL EST. L.J. 425 (2012) (suggesting that the law of takings requires payment when a court declares that an easement should be established because of private necessity).

55. 71 A. 188 (Vt. 1908).

56. *Id.* at 189.

57. 124 N.W. 221 (Minn. 1910).

58. *Id.* at 222.

59. *See generally* RESTATEMENT (SECOND) OF TORTS §197 (1965) (Illustration 1 is taken from the *Ploof* case; Illustration 2 is taken from the *Vincent* case).

*berg v. Coffin Sheep Co.*,<sup>60</sup> the Coffin Sheep Company leased a portion of its land to Hellberg, but provided no means of access from Hellberg's land out to a public roadway except by traversing the portion of the land that Coffin had retained. Several years after the ten-year lease was executed, Coffin padlocked the gate, preventing Hellberg from getting to the public road. Hellberg sued Coffin to establish that Hellberg had an easement to cross over Coffin's retained land to get to the public road. The court held that Hellberg had an easement implied in fact by "strict" necessity because there was no other reasonable way Hellberg could get to the public road.<sup>61</sup> The court further held that Hellberg had an easement implied in fact by "reasonable" necessity because Coffin engaged in a "quasi-easement" use prior to the lease in getting from the Hellberg land to the public road, and continuation of such use was "reasonably necessary" for beneficial use and enjoyment by Hellberg of its land.<sup>62</sup>

A third type of uncompensated private necessity easement is "licenses ripening into easements."<sup>63</sup> In *Holbrook v. Taylor*,<sup>64</sup> the Taylors had built a house costing \$25,000 on their tract, using an adjacent roadway with the permission of the road's owner, Holbrook. The roadway became their only reasonable outlet. In 1970, Holbrook demanded that they purchase the roadway for \$500. The Taylors refused to pay, so Holbrook blocked the roadway with a steel cable and the Taylors responded by suing Holbrook to establish their right to use the roadway. The court held that the Taylors had the right to continue to use the road based on a license rendered irrevocable by estoppel.<sup>65</sup> The court noted that estoppel bars revocation of a license when the licensee has invested substantial sums and/or labor in reasonable reliance on the expectation that the license would not be revoked.<sup>66</sup> The concept of "licenses ripening into easements" is well established in the law.<sup>67</sup> Such easements last for as long as it takes for the licensee to amortize its investments made in reliance on the initially revocable permission.<sup>68</sup> The servient owner is thus subjected to an implied easement—albeit one with a limited duration—without payment.

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60. 404 P.2d 770 (Wash. 1965).

61. *Id.* at 666–775.

62. *Id.*

63. See discussion of licenses ripening into easements, *infra*.

64. 532 S.W.2d 763 (Ky. 1976).

65. *Id.* at 766.

66. *Id.* at 765.

67. See, e.g., *Forsyth Cnty. v. Waterscape Servs., LLC*, 694 S.E.2d 102, 112–13 (Ga. Ct. App. 2010) ("An express oral license may ripen into an easement based on equitable estoppel if the license holder expends funds in reliance on the grant.").

68. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.3 cmt. e (2000).

## 2. *American Rule on Attorney Fees*

The American Rule is that a prevailing party may recover attorney's fees only when a statute or an agreement of the parties provides for such fee shifting.<sup>69</sup> Thus, although a litigant may prevail in a lawsuit, she nevertheless is a "loser" insofar as payment of her attorney fees is concerned.

## 3. *Sovereign Acts Doctrine*

The Sovereign Acts Doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."<sup>70</sup> Every government contract implicitly contains the Sovereign Acts Doctrine, which provides an affirmative defense for the government.<sup>71</sup> Thus, for example, the Sovereign Acts Doctrine precluded government liability for delay damages for a contractor performing work for the Army Corps of Engineers after the contractor was denied access to the construction site on a military base for forty-one days following the terrorist attacks of September 11, 2001.<sup>72</sup>

## 4. *Other Common Law "No Property" Approaches*

More generally, there are various approaches whereby a "no property" determination will be made, thus leaving the injured party in the loser situation.<sup>73</sup> The first approach is the "that just isn't an asset we rec-

69. See, e.g., *Santisas v. Goodin*, 951 P.2d 399 (Cal. 1998); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 822 N.E.2d 777, 779 (N.Y. 2004) ("It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule.").

70. *Horowitz v. U.S.*, 267 U.S. 458, 461 (1925).

71. *Hughes Commc'ns Galaxy, Inc. v. U.S.*, 998 F.2d 953, 958 (Fed. Cir. 1993).

72. *Conner Bros. Const. Co., Inc. v. Geren*, 550 F.3d 1368, 1380 (Fed. Cir. 2008).

73. Each of these approaches is described in MARTINEZ, *supra* note 20, at § 3:10. For collected cases in the "no property" area, see MARTINEZ, *supra* note 48, at § 16:60 n.12.

The approaches described in the text are illustrated through federal court decisions, but state courts have followed similar approaches. See, e.g., *Utah Pub. Emps. Ass'n v. State*, 131 P.3d 208 (Utah 2006) (recognizing no property right in unused sick leave prior to retirement); *Adams Outdoor Adver. v. City of East Lansing*, 614 N.W.2d 634 (Mich. 2000) (holding that a sign company has no property interest in continued placement of signs where ordinance had previously established a time for removal of such signs, and the period had expired); *Felts v. Harris Cnty.*, 915 S.W.2d 482 (Tex. 1996) (increased noise from public highway that is no different than that suffered by the community in general is not a taking; no property right to freedom from noise that everyone has to suffer); *Bagford v. Ephraim City*, 904 P.2d 1095 (Utah 1995) (oral agreements to collect garbage are not "property" rights protected from taking by governmental operation of municipal garbage collection company); *In re Condemnation by Del. River Port Auth.*, 667 A.2d 766 (Pa. Commw. Ct. 1995) (obstruction of sign by publicly constructed sound barrier; no property right to have sign viewed by public); *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994) (no property right to remove historical remains, even though remains discovered after purchased property; applying *Lucas*, under exception that no taking even if deprivation of economically viable use, if no property right under background principles).

ognize as protected property” setting. *Perrin v. United States*<sup>74</sup> involved the destruction of private property resulting from the razing of the city of Greytown, Nicaragua by a United States sloop of war sent to secure safe passage for American citizens traveling to the California Gold Rush through Central America. The Perrins, who owned property in Greytown that was destroyed when the city was razed, brought a takings claim against the United States in the federal Court of Claims. The Court of Claims, establishing that “enemy property” is not protected from uncompensated takings, held that “one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chose to reside. . . .”<sup>75</sup>

A second approach is the “the public always owned the property, so you have nothing to protect” setting. In *United States v. Cherokee Nation of Oklahoma*,<sup>76</sup> the question presented was whether the United States had to pay the Cherokee Nation compensation for damage to the riverbed of certain portions of the Arkansas River—to which the Nation held fee simple title—caused by navigational improvements that the United States had made on the river.<sup>77</sup> The Court held that the federal government's navigational servitude was a dominant interest retained by the federal government that authorized the harm to riverbed.<sup>78</sup> The Court emphasized that “[t]he proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.”<sup>79</sup>

A third approach is the “you had it once, but you don't have it now” situation. In *Bennis v. Michigan*,<sup>80</sup> a husband and wife were joint owners of the family car. The husband used the car to solicit a prostitute. The arresting officers impounded the car and it was subsequently forfeited under the state's forfeiture proceeding. Mrs. Bennis appeared and defended against the forfeiture of her interest in the car by arguing that she did not know her husband would use the car to violate state law. The Court held

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74. 4 Ct. Cl. 543 (1868), *aff'd* 79 U.S. 315, 316 (1870).

75. *Id.* at 548–49. *See also* *El-Shifa Pharm. Indus. Co. v. U.S.*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) (U.S. Tomahawk missile destroyed a pharmaceutical plant in Sudan suspected of producing an ingredient essential for nerve gas for Osama bin Ladin's al-Qaeda terrorist organization; however, court decides case on “political question” ground, concluding that whether property indeed was “enemy property” is a non-justiciable political question).

76. 480 U.S. 700 (1987).

77. *Id.* at 701.

78. *Id.* at 706–07.

79. *Id.* at 704 (quoting *U.S. v. Rands*, 389 U.S. 121, 123 (1967)).

80. 516 U.S. 442 (1996).

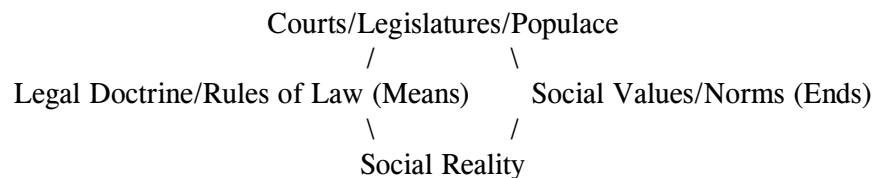
that “an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.”<sup>81</sup> Accordingly, the Court held that, because the forfeiture proceeding properly deprived her of her interest in the car, Mrs. Bennis had no property, and hence no possible claim, under the Just Compensation Clause.<sup>82</sup> A fourth approach is the “highly regulated industries” setting, in which a takings claimant is held to have no property—or at least less protection—where the activity or asset in question is in an industry or an area that is subject to extensive public regulation. In *Ruckelshaus v. Monsanto Co.*,<sup>83</sup> the Court held that a pesticide manufacturing company had a reduced degree of protectable expectations that the Environmental Protection Agency would keep the company's trade secret information confidential during the course of the EPA's review of the company's pesticide registration application.<sup>84</sup>

## II. THE AMERICAN LEGAL SYSTEM AS A “DYNAMIC CYCLE OF LEGAL CHANGE”

The Dynamic Cycle of Legal Change” (“DCLC”)<sup>85</sup> is a design of the American legal system as a whole. The DCLC describes the structure and processes whereby the legal system creates and changes the law.<sup>86</sup>

### A. Creation of Law

The following diagram depicts the Dynamic Cycle of Legal Change:<sup>87</sup>



The DCLC is a graphic representation of how the legal system makes and re-makes the law over time.<sup>88</sup> It is composed of four major interre-

81. *Id.* at 446.

82. *Id.* at 452. The Just Compensation Clause is found in U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

83. 467 U.S. 986 (1984).

84. *Id.* at 1009–10.

85. See John Martinez, *The Dynamic Cycle Legal Change*, 9 TENN. J.L. & POL’Y (SPECIAL ISSUE) 10 (2013).

86. *Id.* at 16.

87. A slightly modified version of this diagram is included in DAVID L. CALLIES ET AL., *CONCISE INTRODUCTION TO PROPERTY LAW* 9 (2011).

88. Graphic representations illustrate the operation of dynamic systems. These representations serve to explain the acquisition, processing, and use of information to achieve meaning. See generally, Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989); Gerald P. López,

lated structures: (1) the Institutions of Law Creation and Change, in the form of courts,<sup>89</sup> legislatures<sup>90</sup> and the populace<sup>91</sup> acting through initiatives or referenda;<sup>92</sup> (2) Social Reality, as perceived by the institutions of legal

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*Lay Lawyering*, 32 UCLA L. REV. 1 (1984); John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290 (1992); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989); Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288 (1984) (applying cognitive principles to explain legal reasoning by means of graphic representations, such as lines, planes, and cubes).

89. Courts “make” law. The now-outdated “declaratory” or “Blackstonian” theory of judicial decisionmaking posited that courts merely “find” the law rather than make it—For discussions of the declaratory theory, see *Linkletter v. Walker*, 381 U.S. 618, 622–29 (1965); *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364–65 (1932); THE NATURE AND SOURCES OF LAW 218–27 (1921). In contrast, the modern Legal Realist position is that courts indeed make law. See Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2, 6 (1960) (judges as much as legislators exercise an “ineluctable law-creating function”). See generally Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); BENJAMIN N. CARDOZO THE NATURE OF THE JUDICIAL PROCESS (1921).

In an earlier article, I suggested that both approaches can be mapped onto an analytical framework which considers judicial decision making as involving three decisions: (1) the substantive decision to change the law; (2) the temporal decision to identify the transactions to which the change applies; and (3) the remedial decision to determine whether a remedy should be provided to those who have reasonably relied on the prior law to their detriment. See John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from “Startling” State Court Overrulings*, 11 HARV. J.L. & PUB. POL’Y 297, 299–300 (1988).

Both theories therefore entail the threshold decision whether to change the substantive law. The difference comes in the second, temporal decision identifying the transactions to which the change will apply, and in the third, remedial decision whether to provide a remedy to those who reasonably relied on the prior law. Under the “declaratory” theory, all substantive changes are by definition retroactive because the change in the law already “existed.” And since it therefore was not a “change” at all—because everyone is presumed to know the law—no remedy is required.

In contrast, as set out in my earlier article, the Legal Realist conception that courts indeed make law requires serious consideration of the second two decisions. See Martinez, *supra* (Suggesting that either compensation, or a reasonable period of time to amortize their investments, should be provided to those who reasonably rely on common law property rules that are subsequently overruled by state courts).

90. “Legislatures” includes Congress at the federal level, state legislatures and local government legislative bodies such as city councils.

91. There is no national “power of initiative.” The only way for the general public to impose a rational legislating requirement on Congress would be through the cumbersome constitutional amendment process. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 42 (1995) (“The United States is one of only five democracies which has never held a national referendum . . .”). However, about half the states do have the initiative mechanism in place, whereby citizens may enact statutory or constitutional amendments through popular vote. See, e.g., CAL. CONST. art. IV, § 1 (“The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.”); OR. CONST. art. IV, § 1 (“The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”). See also, Magleby, *supra*, at 15 (“Only six states west of the Mississippi River do not have some form of initiative . . . while only eight states east of the Mississippi have the process in some form.”); K.K. DuVivier, *By Going Wrong all Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185 (1995) (discussing history of initiatives).

92. Executives, such as the President, governors and mayors also make law, but usually through authority delegated by legislative bodies. When they do have independent authority to make law, the mechanism and constraints applicable to legislatures—the other elected institutions of legal change—apply to executives as well. Accordingly, executives are not treated as separate institutions of legal

change; (3) Social Values (or “norms”), inferred as “should” statements from social reality, as perceived by the institutions of legal creation and change; and (4) Legal Doctrine (or “rules of law”), whereby the institutions of legal creation and change seek to implement the derived social values or norms.<sup>93</sup>

The components and operation of the DCLC confirm “Every legal decision is a moral decision.”<sup>94</sup> The entire DCLC is a design of the legal system. The institutions of law creation and change, (courts, legislatures or the people acting through direct democracy in the form of initiatives and referenda), comprise the “modules” or “subsystems” which are the engines of the DCLC.<sup>95</sup> Social Reality is the object “data” used by the institutions of law creation and change.<sup>96</sup> The norms derived from social reality and the Legal Doctrine to implement those norms are the “output” of the institutions of legal change.<sup>97</sup>

The operation of the DCLC consists of a dynamic process as follows: from a perceived social reality, social values or norms (“should” statements) are inferred by the institutions of law creation and change.<sup>98</sup> Those institutions then transform the inferred “should” into enforceable legal doctrine, which is then applied to society.<sup>99</sup> Legal doctrine is thus the *means* whereby social values or norms, as *ends*, are implemented.<sup>100</sup> The cycle then begins again: the institutions of legal creation and change use

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change in the DCLC.

93. See generally, Martinez *supra* note 86, at 12 (proposing DCLC as a model for “understanding the structure and operation” of systems theory).

94. My good friend and mentor, John J. Flynn, late Hugh B. Brown Professor at the S.J. Quinney College of Law at the University of Utah, used to tell me this all the time. This article is the fruition of my understanding of that phrase and is dedicated to his memory.

Cf. Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1652 (1989) (“The norm is the application of the norm. It is not *prior to* application.”).

95. SIMON, *supra* note 19 (noting that systems may be composed of interrelated subsystems—which in turn may be composed of sub-subsystems, and so on—“until we reach some lowest level of elementary subsystem.”).

96. *Id.* at 146–47.

97. *Id.* (society is the “data” used by institutions in the legal system).

98. See generally Lawrence A. Cunningham, *The Common Law as an Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV. 747 (2006). See also Dr. Guido Westkamp, *Code, Copying, Competition: The Subversive Force of Para-Copyright and the Need for an Unfair Competition Based Reassessment of DRM Laws After INFOPAQ*, 58 J. COPYRIGHT SOC'Y U.S.A., 665, 724–725 (2010–2011) (“Normativity depends on recognising structural changes between the legal and social sub-systems to which the law is to apply . . .”).

99. See Thomas O. Beebee, *Can Law-and-Humanities Survive Systems Theory?*, 22 L. & LITERATURE 244, 263 (2010) (describing this process as “formalization,” which can also be termed “channeling” or “translation,” whereby legal institutions elicit norms from social reality and “formalize,” “channel” or “translate” such norms into legal doctrine).

100. Gunther Teubner similarly describes the operation of the legal system as a “hypercycle”: “Law . . . distinguishes itself from society . . . by constituting components in a self-referential way and linking them together in a hypercycle.” GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 25 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski, ed., 1993).



the feedback from social reality to either infer new norms (“shoulds”), and/or to modify legal doctrine.<sup>101</sup>

### *B. Change of Law*

The operation of the DCLC shows how a change of law may occur at the level of legal doctrine or, more fundamentally, at the level of social values or norms.

#### *1. Change in Legal Doctrine*

Legal doctrine is adjusted from time to time to ensure that the fit between the inferred social values or norms and their implementation is appropriately close. In this form of legal change, the social values or norms are not questioned, but the efficacy with which the legal doctrine implements those social values or norms is examined and, if necessary, modified.

For example, in examining social reality, a legislature may find that vehicle manufacturers have installed additional or more effective safety devices. Accordingly, the legislature may increase speed limits because vehicles have become safer. The underlying norm that people should be protected from driving faster than is safe remains the same.<sup>102</sup>

#### *2. Change in Social Values or Norms*

More fundamentally, legal doctrine may be adjusted because the underlying social norms or values derived from social reality have changed. In this form of legal change, when social reality changes—or at least when the institutions of legal creation and change perceive that reality has changed significantly—the social norms or values inferred by the institutions may be modified as well.<sup>103</sup>

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101. This has been described as a “positive institutional feedback loop.” Daria Roithmayr, *Them That Has, Gets*, 27 *MISS. C. L. REV.* 373, 376–77 (2007–2008). See also Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a “Suicide Pact,”* 20 *WM. & MARY BILL RTS. J.* 287, 332 n. 244 (2011):

A “system” that promotes interplay or interaction is always ongoing and active, never static or inert. A system is a dynamic, continuous process of actions and reflection based on inputs, reactions and feedback to assess the inputs and reactions which, in turn, inspire successive sets of inputs, reactions and feedback. Under systems theory, unlike pure structural-functional analysis, things and events, because they move in time, cannot be understood simply by scrutinizing them at any given moment.

102. Of course, competing norms, such as environmental protection from vehicle pollution or fuel conservation, may make increasing the speed limit inadvisable.

103. Niklas Luhmann describe this as the “temporalization of the validity of norms”. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 469 (Fatima Kastner et al., eds., Klaus A. Ziegert trans., 2009) (“Norms, and the validity that supports them, are no longer based on the constants of religion or nature or an unchallenged social structure, but are now experienced and dealt with as time projections. They

For example, in examining social reality, Congress and the state legislatures perceived that society had changed such that human beings should not be owned as objects of property rights, and implemented that norm through the adoption of the Thirteenth Amendment.<sup>104</sup>

### III. OPERATION OF THE DYNAMIC CYCLE OF LEGAL CHANGE

#### A. Common Law—Courts as Institutions of Legal Change

##### 1. Gender Equality

In *Kirchberg v. Feenstra*,<sup>105</sup> the United States Supreme Court held that a mortgage on the home of a married couple—signed only by the husband without the notice or consent of the wife—violated the federal Equal Protection Clause.<sup>106</sup> The mortgagee had obtained the mortgage pursuant to the Louisiana “Head and Master” statute, which authorized the husband to alienate the property of the marriage without his wife’s prior notice or consent.<sup>107</sup>

In terms of the DCLC, social reality before the Court’s decision viewed women as incapable of managing their own property once married.<sup>108</sup> The norm, (or “should” statement) from that perceived reality was that men should be the “head and master” insofar as property of the marriage was concerned. The Louisiana legislature, as the instrument of implementation of that norm, enacted the Head and Master statute, which embodied the following legal doctrine: if a husband signs a mortgage on marital property without the notice or consent of the wife, such mortgage is enforceable.<sup>109</sup>

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are valid ‘until further notice.’ This not only makes them felt as contingent but also as cognitively sensitized. . . . What is meant is only that norms are equipped with assumptions of reality. . . .”)

104. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). That change, of course, occurred only after the trauma of the Civil War.

105. 450 U.S. 455 (1981).

106. *Id.* at 461–63.

107. LA. CIV. CODE ANN. art. 2404 (repealed Jan. 1, 1980). See LA. CIVIL CODE ANN. arts. 2325–2376 (1979). The Feenstra mortgage was signed in 1974. See *Kirchberg*, 450 U.S. at 456–57.

108. For a discussion of the Napoleonic Code and Spanish law as the sources of the Head and Master statute, see Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. (SUPPLEMENT) 1, 25–29 (2010). Married women “owned” equally with their husbands, but only the husband was empowered to act in regard to assets of the marriage. Nina Nichols Pugh, *The Spanish Community of Gains in 1803: Sociedad De Gananciales*, 30 LA. L. REV. 1, 12 (1969–1970) (“Whereas the wife owned equally with her husband, he, as “business manager” of the partnership, actually administered the community of gains. . . . He was described as ‘in actu’ (in control) as well as ‘in habitu’ (in present interest). The wife was only ‘in habitu’ or ‘in habitu et in creditu’ (in present interest as creditor) in regard to the *bienes gananciales*, but no less a co-owner.”).

109. See *Kirchberg*, 450 U.S. at 456.

Mrs. Feenstra got the Court to acknowledge the existence of a different social reality: married women can manage their own property affairs.<sup>110</sup> The Court derived a new social norm: women should have an equal voice in how marital property is alienated.<sup>111</sup> Accordingly, as the instrument of legal change, the Court modified the legal doctrine: if a husband signs a mortgage on marital property without the notice or consent of the wife, such mortgage is *not* enforceable.<sup>112</sup> Insofar as the loser, Mr. Kirchberg, was concerned however, the Court made no mention.<sup>113</sup>

## 2. Fame

In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>114</sup> the court held that fame was protectable as a property asset called the “right of publicity.”<sup>115</sup> Thus, the court held, a first transferee of the right of publicity of certain baseball players could enforce such right against a subsequent transferee.<sup>116</sup>

In terms of the DCLC, Social Reality before the court's decision did not acknowledge fame as a proper object of property rights. The norm, (or “should” statement) from that perceived reality was that people should not be able to exercise any of the sticks in the bundle of rights—transfer, use or exclusion—against others in regard to fame. Prior courts had not conceived of such a property right. Thus, the operative legal doctrine was: if a person contracts to allow another to use his or her photographs, and also subsequently contracts with a third party to use his or her photographs, then the first contracting party has no claim against the third party.<sup>117</sup> The first contracting party in the *Haelan* case got the court to acknowledge the existence of a different Social Reality: fame has pecuniary value.<sup>118</sup> The court derived a new social norm: people should be able to treat their fame as an object of property rights.<sup>119</sup> Thus, the operative legal doctrine be-

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110. *Cf. id.* at 459.

111. *Id.* at 461.

112. *Id.*

113. *See id.*

114. 202 F.2d 866 (2d Cir. 1953).

115. *Id.* at 868. *See generally* BANNER, *supra* note 5, at 130–61 (discussing the evolution of “owning fame”).

116. *Haelan Laboratories*, 202 F.2d at 869.

117. Indeed, that is what the defendants in the *Haelan* case asserted. *Id.* at 868.

118.

“For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.” *Id.* at 868.

came: if a person contracts to allow another to use his or her photographs, and also subsequently contracts with a third party to also use his or her photographs, then the first contracting party has a property claim against the third party.<sup>120</sup>

The third party loser, who was the second one to contract for the use of the photographs, was left without a property law remedy.<sup>121</sup>

### 3. *Palimony*

In *Marvin v. Marvin*,<sup>122</sup> the California Supreme Court held that unmarried cohabitants could enforce rights against each other to assets acquired during the duration of the cohabitation.<sup>123</sup>

In terms of the DCLC, Social Reality before the court's decision refused to acknowledge the existence of unmarried cohabitation. The norm (or "should" statement) from that perceived reality was that people should not cohabit other than in the status of marriage. The courts, as the instruments of implementation of that norm, followed the legal doctrine that if property had been acquired only in the name of one of the parties to such relationships, (typically the man in a heterosexual relationship), then all such property belonged to that party.<sup>124</sup>

Michelle Marvin convinced the California Supreme Court to acknowledge the existence of a different Social Reality: "The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabited ten years ago."<sup>125</sup> The court derived a new social norm: "[T]he courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly

119. "But plaintiff, in its capacity as exclusive grantee of player's 'right of publicity,' has a valid claim against defendant if defendant used that player's photograph during the term of plaintiff's grant and with knowledge of it. It is no defense to such a claim that defendant is the assignee of a subsequent contract between that player and Russell, purporting to make a grant to Russell or its assignees. For the prior grant to plaintiff renders that subsequent grant invalid during the period of the grant (including an exercised option) to plaintiff, but not thereafter." *Id.* at 869.

120. *Id.*

121. Perhaps a claim could be brought against the famous person under some tort or contract theory, such as fraud, misrepresentation, unjust enrichment, quasi-contract or the like. However, such claims would not have the benefit of the strict liability dimension of a property rule. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

122. 557 P.2d 106 (Cal. 1976).

123. *Id.* at 684-85.

124. This was the ruling of the lower court in *Marvin*:

In the instant case plaintiff and defendant lived together for seven years without marrying; all property acquired during this period was taken in defendant's name. When plaintiff sued to enforce a contract under which she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for defendant, thus leaving him with all property accumulated by the couple during their relationship. *Id.* at 665.

125. *Id.* at 665 n.1.

founded on the consideration of meretricious sexual services.”<sup>126</sup> Accordingly, as the instrument of legal change, the court modified the legal doctrine:

In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.<sup>127</sup>

Lee Marvin, the “loser,” could not have been pleased with the court's decision.

### *B. Legislation—Legislatures as Institutions of Legal Change*

#### *1. Crime Victims Bills of Rights*

In Utah, amendments to the state constitution must first be proposed by the State Legislature and thereafter approved by the voters.<sup>128</sup> In 1994 the Utah Legislature proposed for adoption<sup>129</sup> what subsequently became the Victims' Rights Amendment to the state constitution.<sup>130</sup> The Amendment and the subsequent implementing legislation gave crime victims numerous substantive and procedural rights which they did not have before, including the right to be informed of, be present at, and be heard at important criminal justice proceedings and to have the judge consider victims' statements as relevant information in sentencing.<sup>131</sup>

In terms of the DCLC, Social Reality before the Amendment did not view crime victims as proper participants in criminal justice proceedings involving the crimes committed against them. The derived norm was that crime victims should not be allowed to participate in criminal proceedings. Legislatures and common law courts as well, as the instruments of imple-

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126. *Id.* at 665.

127. *Id.*

128. UTAH CONST. art. 23, § 1.

129. S.J. Res. 6 (1994); 1994 Utah Laws 1610, 1610-11.

130. Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373. Professor Cassell was also instrumental in the subsequent enactment of The Crime Victims' Rights Act (“CVRA”) in 2004. Crime Victims' Rights Act, 18 U.S.C. § 3771 (2012). Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U.L. REV. COLLOQUY 164 (2011).

131. Cassell, *supra* note 131, at 1386–1416.

mentation of that norm, followed criminal procedure rules that excluded evidence from such crime victims.<sup>132</sup>

My colleague, Professor Paul Cassel, was extremely instrumental in the Utah Legislature's acknowledgement of a different Social Reality: victims of crime are deeply affected and are often anxious to participate in subsequent criminal proceedings involving defendants charged with the crimes against them.<sup>133</sup> The new derived norm became: victims should have a right to participate in criminal proceedings involving their victimization.<sup>134</sup> Accordingly, both the Utah legislature and the populace enacted a new legal doctrine: a crime victim has the right to offer evidence in subsequent criminal proceedings involving their victimization.<sup>135</sup> The criminal defendants, as the losers, now are subjected to the introduction of evidence that almost inevitably is intended to increase their punishment.<sup>136</sup>

## 2. Same-Sex Marriage Statutes

Same-sex marriage statutes are proliferating across the United States.<sup>137</sup> In terms of the DCLC, Social Reality before the statutes viewed the status of marriage as reserved for couples comprising a man and a woman. The derived norm was that same-sex couples should not be able to marry. Accordingly, marriage licenses were issued only to heterosexual couples.<sup>138</sup>

The gay and lesbian community and their supporters, in an ongoing struggle, have been able to convince state legislatures to acknowledge a different social reality: same-sex couples are "couples" in the same sense as heterosexual couples.<sup>139</sup> The new derived norm, still in the process of development, is that same-sex couples should be able to acquire the status of marriage. Thus, at least some states have enacted a new legal doctrine: marriage licenses may be issued to same-sex couples.<sup>140</sup> Those who object to same-sex marriage on religious grounds—as well as those who object to gay marriage because it increases the public benefits available to same-sex couples and thereby increases tax burdens—may be viewed as the losers.

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132. See generally *id.* at 1432.

133. *Id.* at 1379.

134. *Id.* at 1389.

135. See *id.* at 1396–97.

136. *Id.*

137. See generally Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-sex Marriage*, 71 MD. L. REV. 471 (2012); Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).

138. See, e.g., ALA. CODE § 30-1-19 (2014); ARK. CODE ANN. § 9-11-208 (2014).

139. See Tribe & Matz, *supra* note 138, at 472–73.

140. *Id.*

### 3. *Solar Acts*

Rejection of the “right to light” doctrine at common law meant that landowners with solar collectors could not prevent their neighbors from shading the collectors.<sup>141</sup> In terms of the DCLC, this reflected a Social Reality whereby access to sunlight was viewed as merely for aesthetic purposes. The derived norm was that solar collectors, whether in the form of trees, swimming pools, or solar arrays, should not be allowed to prevent development of adjacent lands. Thus, landowners could develop their land regardless of whether the development shaded adjacent parcels.<sup>142</sup>

Environmentalists have persuaded state legislatures to acknowledge a different Social Reality: solar collectors aid in reducing dependency on other forms of energy.<sup>143</sup> The new derived norm is that solar collectors—variously defined among the different statutes—should be protected against shading by neighboring landowners.<sup>144</sup> Solar acts now embody a new legal doctrine: landowners with solar collectors have rights against neighboring landowners who would shade the solar collectors.<sup>145</sup> The “losers” in this context are landowners who are prevented from developing their land without regard to the shade imposed on their neighbors’ parcels.

#### *C. Direct Democracy—The Populace as the Institution of Legal Change*

California voters passed Proposition 20 in 1972 because of concerns that cities and counties along California’s coastline were allowing overdevelopment of coastal lands.<sup>146</sup> The initiative measure enacted substantive and procedural constraints on such development, and provided that those restrictions would be administered by a State coastal commission and regional coastal commissions.<sup>147</sup> In terms of the DCLC, land use regulation

141. See *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982) (discussing evolution of “right to light” doctrine at common law).

142. See, e.g., *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 360 (Fla. Dist. Ct. App. 1959) (holding that a hotel owner may shade adjacent hotel’s swimming pool), *cert. denied*, 117 So. 2d 842 (Fla. 1960).

143. See generally Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 *ECOLOGY L.Q.* 1041 (2010).

144. For an analysis of the different definitions of solar collectors in solar acts, see Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 *U. ILL. L. REV.* 851 (2010). See also Sara C. Bronin, *Modern Lights*, 80 *U. COLO. L. REV.* 881 (2009).

145. Rule, *supra* note 145; Bronin, *supra* note 145.

146. CAL. PUB. RES. CODE § 27000 (West, Westlaw through Ch. 16 of 2014 Reg. Sess.) (original codification, passed as a temporary measure); Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000–30900 (West, Westlaw through Ch. 16 of 2014 Reg. Sess.) (replacing the original, temporary codification); see Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Development*, 34 *ECOLOGY L.Q.* 1, 50–51 (2007) (popular concern about overdevelopment of the coast led to passing of California Coastal Initiative).

147. See *Avco Cmty Developers, Inc. v. S. Coast Reg’l Comm’n*, 553 P.2d 546 (Cal. 1976) (discussing coastal initiative and subsequent statute).

along California's coastline prior to the coastal initiative reflected a social reality where city and county governments were responsible for such regulation.<sup>148</sup> The derived norm was that coastal landowners should only be concerned about what such local governments demanded—or did not demand—with regard to coastal land development. Thus, the operative land-use regulations were contained only in the land-use codes of the coastal cities and counties.<sup>149</sup>

Environmentalists seeking to prevent over-development of coastal lands, as well as inland residents who could not influence the land-use codes enacted by coastal cities and counties, mobilized on a statewide basis and passed the coastal initiative. The initiative reflected a different social reality: development of the coastline was a concern not only of coastal landowners and coastal cities and counties but of California's population as a whole. The new derived norm was that coastal landowners should be accountable to a statewide agency, not just to local cities and counties. The initiative thus enacted a new legal doctrine: coastal landowners became subject to the statewide initiative and the regulations promulgated by the state coastal commission pursuant to the initiative and subsequent statute. The losers were coastal landowners who became subject to a whole new layer of land-use control.<sup>150</sup>

#### IV. A METATHEORY FOR PROTECTING LOSERS IN THE AMERICAN LEGAL SYSTEM

Because loser settings are pervasive throughout the American legal system, the system should ensure both that losers choose acceptance and that individual losers are treated according to the principle of equality.<sup>151</sup> The existence of a well-structured metatheory that ensures that individual losers are treated equally will accomplish the latter, and therefore, if generally accepted, would help accomplish the former as well.

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148. *Id.* at 792–94 (discussing the county and city permit requirements).

149. *See, e.g.*, CAL. GOV'T CODE § 66600 (West, Westlaw through Ch. 16 of 2014 Reg. Sess.).

150. *See Avco*, 553 P.2d 546 (landowner who had not acquired a vested right to develop according to local regulations prior to the enactment of the coastal initiative was held subject to the additional regulations under the subsequently-enacted coastal initiative and statute).

151. Analogously, the Just Compensation Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). The Just Compensation Clause thus addresses circumstances in which the government imposes burdens, regardless whether those burdens are accepted or not. In contrast, Loser Theory addresses circumstances in which an individual accepts burdens imposed. The metatheory developed in this article—almost paternalistically perhaps—is designed to save individuals from their own choices, by assuring that the burdens such individuals accept are imposed according to the principle of equality.



### A. Loser Metatheory

#### 1. Utilitarian and Fairness Objectives of Loser Metatheory

A loser metatheory for a system—whether that system is a business firm, social organization, a state, or a legal system—should seek to accomplish two major objectives. The first is a utilitarian, system-maintaining objective. A well-structured loser metatheory should seek to ensure that once individual losers have exercised voice and have rejected exit and illegality as viable options, such losers choose to accept their losses.<sup>152</sup> The second objective is one of fairness. A well-structured loser metatheory should seek to ensure that individual losers are treated according to the principle of equality, whereby similarly situated people are similarly treated.<sup>153</sup>

##### a. Utilitarian Objective

The DCLC shows that the American legal system is comprised of information-processing subsystems. Thus, the institutions of legal change—whether the courts, the legislatures or the populace—gather information about social reality, formulate derived norms and implement those norms through legal doctrine, which is then applied to society to guide behavior.

The application of legal doctrine to society can be viewed as “feed-forward” of information.<sup>154</sup> A successful system, however, must also include the critical feature of information feedback.<sup>155</sup> Feedback is particu-

152. Utilitarianism seeks to maximize net social utility, in this case, in the form of system maintenance. See Jeremy Bentham, *On the Principle of Utility*, in LOUIS P. POJMAN, *THE MORAL LIFE* 227, 227–32 (2000) (describing how net social utility is to be measured). See also STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 193 (1990) (“The principle of utility holds that right actions are those that maximize utility for all. Different utilitarians understand ‘utility’ differently—for example, as pleasure, happiness, welfare, preference-satisfaction, and so on”).

153. This is John Rawls’ notion of equality, part of his conception of justice as fairness: “[E]quality is essentially justice as regularity. It implies the impartial application and consistent interpretation of rules according to such precepts as to treat similar cases similarly.” JOHN RAWLS, *A THEORY OF JUSTICE* 504 (1971); John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958), reprinted in *JUSTICE AND SOCIAL POLICY* 80 (Frederick A. Olafson ed., 1961). See also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 181 (1977) (each member of the community if the person of equal and independent moral worth); IMMANUEL KANT, *PRACTICAL PHILOSOPHY: THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT* 37, 78 (Mary J. Gregor ed. & trans., 1996) (arguing for individual humanity, or human dignity, as the single, objective moral value).

154. See Julia Glencer et al., *The Fruits of Hope: Student Evaluations*, 48 *DUQ. L. REV.* 233, 254–55 (2010) (showing examples of documents to students before the students undertake to draft their own is a “feed-forward” mechanism).

155. The importance of feedback to the legal system was noted in Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 *AM. J. COMP. L.* 769, 791–92 (2008):

[According to reflexive law theorists,] although the law [is] placed at a unique place from which it [will] constantly receive manifold communications, influences and pressures from different parts of society, its evolution depend[s] on its ability to maintain this intricate rela-

larly important in the legal system because it is the way in which institutions of legal creation and change can determine whether and how the resulting legal doctrine is affecting society.

Such feedback can be in the form of the exercise of voice by members of society. However, if the legal system adopts merely a passive approach to obtaining feedback, then only the “squeaky wheel” will be heard. And typically, the squeaky wheel is the person or organization of means. Well-financed special interests would dominate the content of feedback. Each of the institutions of legal change is subject to this “aural myopia.”<sup>156</sup> Thus, courts obtain information only according to the strict guidelines of rules of evidence, and only from litigants who can afford the litigation process.<sup>157</sup> Similarly, legislatures are captured by lobbyists, or even worse, resort to anecdotal, unstructured, and often self-serving information.<sup>158</sup> And the populace—when considering initiatives or referenda—are free to base their decisions on information limited to that provided by well-financed political or economic actors who can afford access to media outlets, or even worse, to resort to decision-making based on no information at all.<sup>159</sup>

A loser metatheory therefore should review the information gathering procedures used by the institutions of legal change to ensure that they adopt a proactive, all-encompassing approach for obtaining feedback.<sup>160</sup>

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tionship to its environment. Its self-reproduction depend[s] on its constant exposure to the forces of society, while reconstructing these signals in its own language or code. Instead of promoting the idea of an a-political law, the concept of reflexive law radicalize[s] and expand[s] the older critique of legal formalism and [makes] law receptive to the full spectrum of societal rationalities.

See generally Glencer, *supra* note 155 (describing critique of law students' projects is a “feedback” mechanism).

156. See, e.g., EDWIN L. BATISTELLA, *BAD LANGUAGE: ARE SOME WORDS BETTER THAN OTHERS?* 138 (2005).

157. For an excellent discussion of the particular susceptibility of courts to fail to address the impact of controversial decisions on “constitutional losers” in society who disagree with the outcomes of such cases, see EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* 4–5 (2011). She suggests four rules judges should use in crafting their opinions in order to ameliorate the harms inherent in losing: “[D]o not rely on dissenting opinions to discharge obligations to constitutional losers, do not use ideological justifications to excuse harms inflicted on losers, display humility suited to the proper relationship between justices and citizens, and use language carefully and with a proper ethical orientation. . . .” *Id.* at 72–73.

158. See John Martinez, *Rational Legislating*, 34 *STETSON L. REV.* 547, 577 n.104 (2005) (discussing Utah Legislature’s use of anecdotes as evidence to support concealed weapons legislation).

159. For an excellent discussion of the pitfalls of lawmaking by the populace, see Hans A. Linde, *When Initiative Lawmaking is not “Republican Government”*: *The Campaign Against Homosexuality*, 72 *OR. L. REV.* 19 (1993).

160. The operation of the courts, legislatures and the populace are independent subsystems whose characteristics make them “nearly decomposable”: they are homeostatic mechanisms relatively insensitive to their environment (operationally closed), while at the same time they are sensitive to feedback from their environment (cognitively open). The first characteristic ensures that each of these subsystems maintains its autonomy and self-contained integrity from the other two; the second characteristic ensures that each of the subsystems is capable of adaptive change. SIMON, *supra* note 19, at 197 (describing characteristics of subsystems that make them “nearly decomposable,” whereby they operate nearly independently of each other). See also TEUBNER, *supra* note 101, at 84 (suggesting the legal

The existence of such oversight would in turn assure losers that even if their individual voices were not heard or were ineffective, “over a period of time, the right turns will . . . balance the wrong ones.”<sup>161</sup> Thus, awareness of the existence of such oversight would encourage losers to choose acceptance, and would thereby help accomplish the first, utilitarian, objective of effective loser metatheory.

*b. Fairness Objective*

If a legal metatheory for losers accomplished only the objective of requiring institutions of legal creation and change to proactively seek information from losers in society, then such a metatheory would amount to little more than a recipe for meaningless polling. Losers would be encouraged to accept their lot, but there would be no assurance that they had been treated fairly. Thus, a legal system satisfying only the first objective simply would be going through the motions.<sup>162</sup>

The substantive punch of an effective legal metatheory lies in the second objective, which seeks to ensure that individual losers are treated fairly. Thus, even if losers have accepted their lot, an effective legal metatheory seeks to ensure that such burdens are imposed according to the principle of equality, whereby similar circumstances are treated consistently.<sup>163</sup>

Since antiquity this principle has been part of the fundamental reasoning of every legal culture. It is accepted as if it were self-evident. Equality is the most abstract preference of the system, the final criterion for the attribution of conflict as legal and illegal. With this function the legal system adopts the name of “justice.”<sup>164</sup>

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system is “operatively closed” but “cognitively open”). Teubner describes this characteristic as “reflexivity.” *Id.* at 65–66.

A legal metatheory therefore must examine the operations of each of these subsystems independently. For example, courts obtain and process information differently than legislatures, and both differ in information gathering and processing from the general populace.

161. HIRSCHMAN, *supra* note 8, at 78.

162. See Martinez, *supra* note 159 (proposing modest procedures for legislatures to at least keep a record of the evidence which they considered).

163. LUHMANN, *supra* note 104, at 23 (“[Justice as equality] . . . is a form of equality peculiar to the law, as it consists not of equal wealth or opportunity (communications about justice that might be expected in the systems of ethics or politics) but of the equal (consistent) treatment of legal cases.”).

164. *Id.* at 131–32. See generally George P. Fletcher, *In God's Image: The Religious Imperative of Equality under Law*, 99 COLUM. L. REV. 1608 (1999) (noting that the principle of equality is a norm under the Equal Protection provisions of the federal constitution and also draws from the Declaration of Independence and Gettysburg Address, which require consistency in decisionmaking in order to secure human dignity).

2. *The United States Supreme Court as the Proper Institution to Administer Loser Metatheory*

The DCLC shows that the institutions of legal change are courts, legislatures and the populace.<sup>165</sup> Among these, the courts are the proper bodies to administer loser metatheory, and among courts, the United States Supreme Court is the ultimate arbiter of principled justice.<sup>166</sup>

The populace cannot be trusted to administer a metatheory whose very purpose is to limit the ability of electoral majorities from oppressing electoral minorities.<sup>167</sup> In *Romer v. Evans*,<sup>168</sup> the Court held that Amendment 2 to the Colorado state constitution—adopted through a statewide referendum precluding all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”<sup>169</sup>—violated the federal Equal Protection rights of gays and lesbians.<sup>170</sup> Applying rational relationship scrutiny, the Court held that there was no legitimate governmental objective, because Amendment 2 raised the inevitable inference that it was born solely out of animosity toward gays and lesbians.<sup>171</sup> The Court emphasized that the disadvantage imposed on homosexuals by Amendment 2 involved the right to petition government, because it singled out gays and lesbians as a class and required them to amend the state constitution, (by modifying or repealing Amendment 2), in order to obtain state or local legislative or executive action, or judicial action protective of their status as homosexuals.<sup>172</sup>

165. Martinez, *supra* note 85.

166. Claimants asserting violation of the metatheory—as with any other claims under the Due Process or Equal Protection provisions of the federal constitution—would commence adjudication of their claims in either state or federal courts, with ultimate review by the United States Supreme Court.

167. Scholars have criticized popular democracy as lacking substantive or procedural standards to guide its decision-making. See, e.g., Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395 (2003) (urging judicial recognition that initiatives involve lawmaking by initiative proponents and should be limited in the same fashion as action by legislatures). See generally Linde, *supra* note 160 (criticisms of popular voting).

168. 517 U.S. 620 (1996).

169. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

170. *Id.* at 635.

171. *Id.* at 634–35.

172. *Id.* at 630–31. The “Guaranty Clause” of the Federal Constitution, which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government,” does not significantly limit popular democracy. U.S. CONST. art. IV, § 4. Federal courts have no power to enforce the clause because the United States Supreme Court has held that the issue is a nonjusticiable political question. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (holding that women may be denied the vote; subsequently reversed by U.S. Const. amend. XIX). State courts, in contrast, can enforce the Guaranty Clause. See *Kadderly v. City of Portland*, 74 P. 710, 720 (Or. 1903) (lawmaking by voters through initiative is compatible with Guaranty Clause requirement of republican form of government because initiated laws “may be amended or repealed by the Legislature at will” and “are subject to the same constitutional limitations as other statutes.” See also *In re Pfahler*, 88 P. 270, 273 (Cal. 1906) (initiative power in city charter for strictly

Similarly, legislative bodies cannot be trusted to administer a metatheory intended to ensure that individuals accept socially-imposed burdens, while simultaneously saving individuals from accepting such burdens when they are not imposed equally across society as a whole. Legislative bodies are simply not that sophisticated. If no fundamental rights or suspect traits are involved, courts leave legislatures to decide the allocation of social burdens on their own. Under that default setting, whereby legislative action is subject only to “rational relationship” review, legislatures routinely impose burdens without any great concern about whether such burdens are accepted by those upon whom they fall, much less with any concern about whether the acceptance of such burdens by the losers involved is proper.<sup>173</sup>

Both objectives of the legal metatheory have textual references in the federal Constitution. The first objective can be viewed as contained in the federal Due Process provisions, one of whose purposes is to ensure that governmental action follows proper procedures.<sup>174</sup> The second objective has a textual reference in the federal Equal Protection provisions.<sup>175</sup> The Due Process and Equal Protection provisions apply to both the state and

local affairs is consistent with Guaranty Clause); Ex parte Wagner, 95 P. 435 (Okla. 1908).

The problem, however, is that there is no consensus about what the Clause means. See, e.g., Linde, *supra* note 160 (concluding that if a state permits lawmaking by statewide initiatives, their legitimate use must exclude measures for motives that the designers of republican government most feared); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1759–60 (1998) (“In principle, subject to other constraints, it allows initiatives for laws consistent with republican government as long as the legislature is free to change or repeal them like any other law, but not for entrenching laws directed at private persons into the constitution; it also allows giving voters access to the ballot to change the structures of their governing institutions in ways that remain compatible with republican government. Without the need to win amendments of state constitutions, the forgotten law suffices to invalidate existing and future measures that prevent the effective functioning of representative institutions.”). See also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (rethinking the “counter-majoritarian difficulty” entailed in judicial review of popular legislation); David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and “The Oregon System,”* 67 TEMP. L. REV. 947 (1994).

173. See generally John Martinez, *Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619 (2010) (suggesting that legislatures not only single out individuals to bear burdens, but also single out individuals for favorable treatment, and proposing a framework for implementing an “anti-favoritism norm” to address the latter situations); Martinez, *supra* note 159 (describing pervasive legislative misbehavior, and suggesting that it is best curbed through *rational legislating* requirements, whereby legislators must include in the legislative record an explicit elaboration of the path of lawmaking—from evidence, through findings, to ultimate conclusions—that clearly sets out the analytic connection between the problems legislators seek to address and the enactments passed to address them).

174. U.S. CONST.. Amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”) (prohibiting the *federal government* from denying due process); U.S. CONST. amend. XIV, Sec. 1 (“[N]or shall any State deprive any person of . . . property, without due process of law . . .”) (prohibiting *States* from denying due process). These provisions are henceforth referred to collectively as the Due Process provisions.

175. U.S. CONST.. Amend. V; U.S. CONST. amend. XIV (“[N]or shall any State . . . deny to any person . . . the equal protection of the laws.”); *Davis v. Passman*, 422 U.S. 228, 234 (1979) (the Fifth Amendment's Due Process Clause also forbids the federal government from denying equal protection).

These prohibitions are henceforth referred to collectively as the Equal Protection provisions.

the federal governments.<sup>176</sup> Accordingly, a legal metatheory premised on such provisions encompasses all of the institutions of legal change in the DCLC. Judicial review of the legislative action of legislatures or of the populace invites criticism that courts are undemocratic. Alexander Bickel coined the phrase “the counter-majoritarian difficulty” to describe that argument.<sup>177</sup> The premise of the counter-majoritarian argument is that legislatures are popularly elected and reflect majority will.<sup>178</sup> Legislative action through popular democracy similarly reflects the majority will.<sup>179</sup> The “counter-majoritarian difficulty” therefore posits that judicial oversight thus could be said to intrude improperly into the democratic process.<sup>180</sup> That criticism is particularly potent when courts use open-ended constitutional provisions such as the Due Process or Equal Protection provisions to exercise such review.<sup>181</sup> The text of those provisions provide little guidance about whether any particular instance of legislative action “crosses the line.” In spite of the “counter majoritarian” difficulty, however, courts routinely protect individuals from legislative action or inaction. For example, in *Brown v. Board of Education*,<sup>182</sup> the United States Supreme Court protected individuals from officially-sanctioned racial discrimination.<sup>183</sup> Similarly, courts protected tenants from landlords through adoption of the implied warranty of habitability when legislatures refused to act.<sup>184</sup> Accordingly, both because of institutional competence and as a matter of system necessity, the United States Supreme Court is the best societal institution for administering loser metatheory.

### *B. Application of Loser Metatheory*

To achieve its utilitarian, system-maintaining objective, an effective loser metatheory would review the information gathering procedures used by the institutions to ensure that they adopt a proactive, all-encompassing approach for obtaining feedback. To achieve the fairness, individual-

176. See U.S. CONST. amends. V, XIV.

177. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1986).

178. *Id.*

179. For criticisms of this underlying assumption of the counter-majoritarian difficulty argument, Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 75 (1989) (arguing that majoritarianism is not necessarily the paramount value in American constitutional law). See also MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* 149 (1988).

180. BICKEL, *supra* note 178.

181. For classic explorations of the counter-majoritarian difficulty in judicial review, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

182. 347 U.S. 483 (1954).

183. See generally Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 L. & SOC'Y REV. 515 (2010) (discussing whether *Brown v. Board of Education* has altered in any fundamental way the role of social science evidence in constitutional litigation).

184. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (leading case establishing an implied warranty of habitability in residential leases).

oriented objective, such a metatheory would seek to ensure that such burdens are imposed according to the principle of equality, whereby similar circumstances are treated consistently. The application of the proposed loser metatheory is next reviewed briefly in the situations mentioned in this article.

### *1. General Loser Situations*

The Dynamic Cycle of Legal Change does not apply to “general loser situations,” because those settings are not part of the American legal system.<sup>185</sup> Thus, the institutions of rule creation and change in general loser situations may not directly parallel American courts, legislatures and the populace, which are institutions of rule creation and change that comprise the DCLC as it pertains to the American legal system.<sup>186</sup> Nevertheless, loser metatheory can inform analysis of losers in those general loser situations as well. In the post-apartheid white South African setting, the new government would proactively inquire of white South Africans whether they were making the transition to a non-privileged status, and whether they needed any assistance in doing so. Such feedback would encourage such whites to accept the loss of the privileged status they had held under apartheid. To ensure fairness, the new government would make sure that all South Africans, whether black or white, were treated equally.<sup>187</sup>

With regard to Greece and the European Union, the EU would inquire whether Greece required technical assistance in transitioning from profligate budgets to a more balanced economy. Such feedback might encourage the country to accept stringent financial controls. To ensure fairness, the EU would make certain that all similarly situated countries within the European Union were subjected to the same financial standards.

### *2. Loser Situations in the American Legal System*

In the loser situations in the American legal system, the proposed loser metatheory would take the form of claims under the Due Process and Equal Protection provisions of the federal Constitution. A person disappointed through the application of any of the loser categories could assert a claim seeking the protections afforded by the loser metatheory. Thus, the United States Supreme Court ultimately would be responsible for developing a legal “meta-doctrine” implementing the legal metatheory. In each of the loser situations in the American legal system, the Court would direct

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185. See, e.g., Martinez, *supra* note 85.

186. See *id.*

187. South Africa's experience with the post-apartheid transition of the status of whites is ongoing. See ALEXANDER, *supra* note 6, at 197 (2006) (“South Africa's experiment with the constitution, especially constitutional property, as an engine for fundamental social transformation remains ongoing.”).

its inquiry at the particular institution of legal creation and change identified by the Dynamic Cycle of Legal Change. Thus, the Court would direct its inquiry at the courts if the particular legal rule arose from common law, at the legislature if the rule arose from statute, or at the populace if the rule was the result of direct democracy.

*a. Conceptual Losers Categories*

In the various “civic duty rule” settings, the United States Supreme Court would inquire whether the governmental entity imposing the civic duties involved had well-developed information gathering-procedures for obtaining feedback from those subjected to those civic duties. For example, the Court would inquire whether governments ascertain the real costs that are incurred by people forced to serve on juries and whether governments seek input from jurors about how those costs might be minimized. That would encourage people to accept—or perhaps even embrace—compulsory jury duty. To ensure fairness, the Court would determine whether all similarly situated persons are subjected to such civic duties on an equal basis. Thus, the Court could inquire whether people are exempted from jury duty on an unequal basis.

In the emergency/actual necessity setting, the Court would inquire whether the government had properly determined that the circumstances involved a situation of imminent and drastic public harm. For example, in the setting involving destruction of a house in the path of a fire, the court would require the fire department to conduct post-incident investigations to make sure that the blowing up of an innocent homeowner's house was justified by an imminent danger. Individuals thus would be more accepting—if still not happy—about bearing the loss of their homes. To ensure fairness, the Court would determine whether homeowners whose houses were destroyed were singled out for such treatment, while similarly situated houses were spared.

In the Average Reciprocity of Advantage setting, the Court would inquire whether the government had properly ascertained the costs imposed on any individual as a result of the purported benefits involved. Thus, in the *Plymouth Coal Co. v. Pennsylvania* setting,<sup>188</sup> where the state required a pillar of coal to be left along the line of an adjoining mine, the Court would inquire whether the government had properly consulted the mine owner to ascertain the cost of leaving such a pillar of coal. With an understanding of the benefits—as well as the costs—of the requirement, mine owners would be more accepting of the losses involved. To ensure fair-

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188. 232 U. S. 531 (1914).



ness, the Court would determine whether all similarly situated mine owners were subjected to the requirement on an equal basis.

In the Public Trust Doctrine setting, the Court would inquire whether the government had obtained feedback from landowners about the precise nature of their lands. Such a program would serve to educate landowners about the origins and significance of the public trust doctrine, encouraging them to accept their losses. To ensure fairness, the Court would determine whether any individual landowner was subjected to the public trust doctrine while other similarly situated landowners were not.

*b. Common Law Categories*

In the private necessity easement setting, the Court would require courts to obtain feedback from burdened landowners about the nature and extent of the costs imposed. If such costs amounted to only the technical deprivation of the conceptual right to exclude, the burdened landowners would have a better understanding—and would be more likely to accept—the imposition of the burden. To ensure fairness, the Court would ascertain whether the government imposed such private necessity easements uniformly upon all those similarly situated.

In the American Rule setting denying attorney's fees to prevailing parties, the Court would require courts to obtain feedback from prevailing litigants about the impact of having to pay their own attorney fees, as well as the gains from having prevailed in the lawsuits. With such a balanced appreciation of the outcome of the lawsuit, prevailing parties might be more willing to accept that they would have to pay their own attorney fees. To ensure fairness, the Court would ascertain whether all similarly situated prevailing parties were denied recovery of attorney fees.

In the Sovereign Acts Doctrine setting, the Court would require courts to obtain feedback from government contractors about the extent of their losses resulting from the government's exercise of sovereign functions which obstructed performance of the contract and caused the contractor's losses. Appreciation of the connection between the non-performance of the contract and the government's public and general acts as a sovereign might encourage contractors to accept the losses incurred. To ensure fairness, the Court would ascertain whether all similarly situated contractors were similarly subjected to the Sovereign Acts Doctrine.

In circumstances of the other common law “no property” settings, the Court similarly would require courts to obtain feedback from people subjected to the no property determinations in order to inform such persons about why their expectations under the circumstances were not protectable. Understanding of the nature and extent of the countervailing public or private interests preventing legal recognition of such expectations might encourage such persons to accept their losses. To ensure fairness, the

Court would ascertain whether all persons in similar circumstances were subjected to no property determinations.

*c. Legal Transition Categories*

In the *Kirchberg v. Feenstra*<sup>189</sup> setting, in which the United States Supreme Court held a mortgage unenforceable in order to implement the norm of gender equality, the Court, (as itself the institution of legal change in the circumstances), would have inquired further about the nature and extent of the non-enforceability of the mortgage on Mr. Kirchberg. Perhaps alternative avenues for enforcing the underlying obligation against Mr. Feenstra, who had executed the mortgage and obligation, might have been explored. Armed with that information, Mr. Kirchberg might have been resigned to the unenforceability of the mortgage. In addition, however, to ensure fairness, the Court would have made sure that all similarly situated mortgagees were treated the same. Significantly, after the Kirchberg case was decided, Louisiana courts continued to enforce mortgages and other real estate transfers executed only by husbands pursuant to “Head and Master” statute under which Mr. Kirchberg had obtained his mortgage.<sup>190</sup> Thus, Mr. Kirchberg was unfairly treated. The proposed legal metatheory would have prevented that result.

In the *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>191</sup> in which fame was held protectable as a property asset under the “right of publicity,” the Court would require courts (if the publicity right had common law origins) or legislatures (if the right was statutorily created) to

inquire whether the third party “loser,” who was the second one to contract for the use of the photographs, had dealt with the players in good faith, and whether such loser had any possible alternative bases for obtaining relief. Such losers thereby might have been encouraged to accept their losses. To ensure fairness, the Court would determine whether all similarly situated losers were treated the same.

In the *Marvin v. Marvin*,<sup>192</sup> setting, in which the California Supreme Court held that unmarried cohabitants could enforce rights against each other to assets acquired during the duration of the cohabitation, the United States Supreme Court would inquire whether the California Supreme Court had ascertained whether Mr. Marvin had acted reasonably under the circumstances to protect his interests against having to share his wealth

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189. 450 U.S. 455 (1981).

190. See, e.g., *Pertuit v. Am. Bank*, 503 So. 2d 154, 155 (La. App. 1987), *cert. denied*, 484 U.S. 923 (1987). See also *Ailstock v. Hamiter*, 420 So. 2d 500, 502–03 (La. Ct. App. 1982) (enforcing option to buy executed only by husband pursuant to article 2404); *Crook v. White*, 393 So. 2d 782, 784–85 (La. Ct. App. 1981) (enforcing deed executed only by husband pursuant to article 2404).

191. 202 F.2d 866 (2d Cir. 1953).

192. 557 P.2d 106 (Cal. 1976).

with his unmarried cohabitant. Mr. Marvin thereby might have been encouraged to accept his loss. To ensure fairness, the Court would ascertain whether the California Supreme Court considered whether all similarly situated unmarried cohabitants were treated equally.

In the Crime Victims Bills of Rights setting, which gave crime victims new substantive and procedural rights, the Court would inquire whether the state legislatures that passed such statutes conducted significant studies to ascertain the manner in which such new rights would affect criminal defendants. Recognition that the additional information from victims simply completed the context in which such defendants' crimes had occurred might have at least explained to such defendants why they had to accept such evidence. To ensure fairness, the Court would ascertain whether all similarly situated criminal defendants were treated equally.

In the same-sex marriage statutes setting, the Court would inquire whether state legislatures conducted significant studies to ascertain the impact of such legislation on those who opposed the statutes on religious or economic grounds. Those affected might thereby be more likely to accept the legality of same-sex marriage. To ensure fairness, the Court would ascertain whether all similarly situated parties who opposed such legislation were treated equally.

In the solar acts setting, the Court would inquire whether state legislatures conducted significant studies to ascertain the impact on the neighbors of protecting landowners with solar collectors. Landowners subjected to the additional restrictions might thereby be more likely to accept such constraints. To ensure fairness, the Court would ascertain whether all similarly situated neighbors were treated equally.

In the coastal preservation initiative and subsequent statute setting, the Court would inquire whether significant studies were conducted to ascertain the impact of such legislation resulting from imposition of greater restrictions on landowners of coastal lands. Those affected would be the coastal landowners, as well as local governments and residents of cities and counties located along the coastline. Landowners and local governments thereby might be more likely to accept the additional regulatory structure. To ensure fairness, the Court would ascertain whether all similarly situated coastal landowners, governments and residents were treated equally.

### *C. Remedies*

The remedies available under the proposed metatheory would depend on whether the utilitarian or the fairness objective was violated. If the utilitarian, system-maintaining, objective were violated, the United States Supreme Court could award injunctive relief requiring that the relevant institution of legal creation and change adopt proper proactive, all-

encompassing information gathering procedures for obtaining feedback. Enforcement of the challenged legal rule also could be enjoined until such procedures were implemented. If the fairness, individual-oriented, objective were violated, the Court could enjoin application of the legal rule to the plaintiff and to others similarly situated. Damages to the plaintiff also could be awarded to compensate for the unequal treatment.

Significantly, the plaintiff's consent to becoming a loser would not prohibit the award of either type of relief. By definition, such a plaintiff would have chosen to accept the loser status, but the metatheory would have revealed that such status had been imposed unfairly or without proper information gathering procedures for obtaining feedback in place.

#### CONCLUSION

This article has shown that we need losers and that losers need us. The proposed metatheory encourages people to become losers and also protects them from unfairly becoming losers. The article focuses on the American legal system, but perhaps it will stimulate the development of similar metatheories for other systems that produce losers.