A Civic Critique of Democracy: Civic Organizing as the Generating Force of a Civic Concept of Law

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ABSTRACT
Judge Sonia Sotomayor’s controversial “wise Latina” comment embodies the view that law is socially constructed—that “we” make it and that it thus may vary according to who “we” are. Current theories of “popular constitutionalism,” “democratic constitutionalism,” and “demosprudence” take this several steps further and begin to explore the idea that the “we” that makes constitutional law is not just judges but society more broadly. These theories matter because they envision an active role for citizens in law creation, but they are constrained by their grounding in “democracy”—which looks to government as the primary locus of law—rather than the “civic”—which looks to citizens.

Missing from the conversation is an understanding of how law emerges from society—from citizens. In a recent article, Law as Story: A Civic Concept of Law (With Constitutional Illustrations), 18 S. CAL. INTERDISC. L. J. 603 (2009), I articulated a citizen-based concept of law that grows from my experiences as a community activist and civic organizer over almost two decades, which fills this gap.

This concept of law raises the question of what citizen actions and interactions create the kind of society we think of when we use the word “democracy.” In the current article, I address this question with a description of civic relationships, civic engagement, civic networks, civic webs, and—most important of all—civic organizing.

Using two current examples of constitutional law, I then illustrate how civic organizing provides a role for citizens in law and how its absence can stunt legal progress. With gay rights and same-sex marriage, enormous shifts have occurred in recent decades through the civic organizing known as “coming out.” With abortion, in contrast, the law is stuck because privacy and secrecy taboos inhibit story-telling by pro-choice citizens and because a posture of certainty inhibits story-listening by pro-life citizens.
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Palma Joy Strand*


You’re better than no one and no one is better than you.¹
Bob Dylan

The struggle is eternal.²
Ella Baker

“Democratic” and “democracy” are words that get thrown around a lot. Generally, the connotations that accompany these words are positive. The presence of democracy is understood to be good; its absence is problematic. The normative import is clear.

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¹ To Ramona, on “Another Side of Bob Dylan” (Columbia Records 1964)
² DOROTHEE E. KOCKS, DREAM A LITTLE: LAND AND SOCIAL JUSTICE IN MODERN AMERICA 175 (Univ. of Calif. Press 2000).
Democracy is, in fact, one of our most powerful cultural stories. This story speaks of those with lesser power confronting those with more power. It speaks of successive expansion of the sphere of control and influence—of the definition and reality of who matters. It speaks of a continuous pressure for equality. Defining moments in our collective history are the highlights of this democratic story: “No Taxation Without Representation,” the Boston Tea Party, and the Declaration of Independence; the Civil War and Reconstruction; the suffrage movement that obtained the vote for women; the Civil Rights Movement and the end of Jim Crow; the counterculture youth and antiwar movement of the 1960’s. These defining moments—and democracy in the United States—are inextricably bound up with law, especially the Constitution but also other defining law. The American Revolution led to the Constitution, the “supreme law” of the land. The Civil War led to the Thirteenth, Fourteenth, and Fifteenth Amendments, which abolished slavery, guaranteed citizenship to former slaves, and granted them the vote. The suffragists gained the Nineteenth Amendment. The Civil Rights Movement resulted in both judicial and legislative acts that made more tangible previously articulated but unrealized rights. A lasting legacy of youth opposition to the Vietnam War was the Twenty-sixth Amendment and the franchise for 18-year-olds.

In an earlier article, I characterized doctrinal law (especially constitutional law) as a story—a social construction that both arises from and is reflected back to the community it governs. Seen this way, law is comprised of explicit norms that are grounded in the society as a whole and articulated by bodies with the authority to do so. Law embodies our stories and the actions from which they arise and in turn affects and shapes our individual stories and the actions that grow from them. Over time—and the
time frame for systems may be quite a bit longer than for the individuals within them—law forges divergent stories into a unitary, public story. That articulated story is then offered back to us for affirmation, reworking, or outright rejection. The process is dynamic and messy, yet within it lies order.\textsuperscript{3}

This concept of law—the understanding of law as story—explains the sociology of the juxtaposed evolution of social norms of democracy and the law of democracy. Specifically, the sociological process of law can be understood as a complex social system operating through human modes of communication but with the characteristics of complex adaptive systems more generally. In such a system, often referred to as self-organizing, the system-level patterns are not authoritatively dictated from the “top” or by an “outsider” or even from the “masses.” Rather, the system-level patterns emerge from interactions of the individuals who comprise the system. Order, in this way, emerges from disorder, and these systems are sometimes described as existing on the border between order and chaos.\textsuperscript{4}

In the communicative complex social system that is law, stories told by individual people are the essential interactions of the system. Stories told by individuals lead to emergent stories that frame relationships between small groups and then groups of increasing size. Doctrinal law is an observable result. Such law, taking the form of immergent stories, is offered to large groups and responded to by groups of decreasing size to the level of individuals. Through this cyclical process, norms are created, and culture—behavior and beliefs, action and stories—takes root and evolves.

\textsuperscript{4} Id., at 606-607 (general description of complex adaptive systems); 619-626 (description of law as a complex social system).
Within this concept of law, when communication flows, voice and resonance occur. Voice describes how the experiences of myriad individuals weave together into a unified legal story, and it is present when individual stories are told and heard in ways that affirm people’s relationships and identities. Resonance evokes the process through which articulated formal law is offered back to the group, and it is present when the law-story is relevant, consistent with the hearer’s values, and capable of being enacted, rejected, or changed. Voice and resonance denote a **civic** system of law.

The grounding of law in the community that is governed and a widespread ability of community members to participate in law are also touchstones of the democracy story, which raises the questions: Is a law-as-story complex social system civic concept of law the same as democracy? If they are not the same, what are the similarities and differences? And, most importantly, what new perspectives and practices might a civic concept of law-as-story indicate? These questions are the subject of this Article.

In Part I, I undertake an “eagle’s eye” survey of the landscape of democracy, which leads me to identify two essential democratic principles or values: (1) control of those in power by the people and (2) equality among citizens. Examining these values, I suggest that they reflect democracy’s historical derivation as a defense against centralized authority. In Part II, I turn to a civic view—a law-as-story complex social system concept of law—which has as its starting point the interactions among individuals, among ordinary people. In this Part, I pull together both actual civic experiences and reflections, my own and others, and academic perspectives to create a preliminary description of civic engagement in the form of civic relationships between individuals and civic webs joining the various “clumps” in a society into a differentiated but linked
network. In Part III, I consider some implications of a civic view and in particular the active role it describes for ordinary people in the creation of law-stories, a role that creates an opening for civic organizing—the intentional creation of the civic relationships and civic webs that support a civic society and ground both voice and resonance, the two essential attributes of a civic law-as-story cycle. In Part IV, I use two current social and legal issues, gay rights and abortion, to illuminate some of the distinct ways in which a civic lens focuses our attention. Finally, in Part V, I offer some parting reflections on civic organizing and its interaction with democracy and law.

I. Mapping the Democratic Landscape

_The life of the law is not a vision of the future but a vision of the past._
David Luban

Though the positive valence of the terms “democratic” and “democracy” may be clear, their exact meaning is not. The dictionary definitions of “democracy,” which are just the beginning, range from “government by the people” to “a state of society characterized by formal equality of rights and privileges” to “political or social equality; democratic spirit.” Democracy may thus invoke government, social structure, or spirit—as well as either rule by the people or equality.

Echoing these varied definitions are myriad discussions of democratic political life extending from quite specific descriptive institutional analyses to looser and more impressionistic evocations. As one example of the former, the International Institute for

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5 _Difference Made Legal: The Court and Dr. King_, 87 MICH. L. REV. 2152, 2154 (1989).
6 More specifically, “a form of government in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2nd ed. 1999).
7 _Id._ (definitions (1), (3) and (4)).
Democracy and Electoral Assistance (IDEA) has promulgated an elaborate set of criteria to be used by individual nation-states interested in self-assessment or self-comparison with others.\(^8\) IDEA offers an international articulation of the characteristics of democracy that focuses on both formal political, legal structures and the degree to which the structures achieve their asserted goals. IDEA asserts that democracy is “not an all-or-nothing affair but a matter of degree”\(^9\) with multiple dimensions, and in this light IDEA offers its criteria for use by nation–states desirous of assessing and improving themselves.\(^10\)

An example of the latter focuses hardly at all on formal institutions and legal structures and instead on cultural practices, norms, and attitudes. Theologian and social observer Cornel West celebrates the historical role of “artists, activists, and intellectuals in American life” in expressing a “democratic vigilance” that “highlight[s] the possibilities and difficulties of democratic individuality, democratic community, and democratic society in America.”\(^11\) According to West,

Democracy is always a movement of an energized public to make elites responsible—it is at its core and most basic foundation the taking back of one’s power in the face of the misuse of elite power. In this sense, democracy is more a verb than a noun—it is more a dynamic striving and collective movement than a static order or stationary status quo.

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9 \textit{Id.} at 11. \textit{See also id.} at 8 (Foreword by Bengt Save-Soderbergh) (“There can be no perfect democracy: countries are more or less democratic, and often more democratic in some aspects of political life, less so in others.”) Note, in this vein, that the democracy assessment is intended not just for use by developing or transitional democracies but by long-established democracies as well. \textit{Id.} at 9. Indeed, an exercise that my Civic Organizing and Democracy seminar students participate in is to perform a mini-assessment of our own democracy here in the United States according to the IDEA criteria and framework—an exercise that unfailingly results in interesting insights.

10 \textit{Id.} at 10 (“[T]he idea of democracy assessment...involves a systematic assessment by its own citizens of a country’s political life in order to answer the questions: how democratic is it in practice? Where is it satisfactory from a democratic point of view, and what features should be a cause for concern? How far have we progressed, and what remains still to be done? How can we improve on what we have already achieved?”).

Democracy is not just a system of governance, as we tend to think of it, but a cultural way of being. This is where the voices of our great democratic truth tellers come in.\(^\text{12}\) Widely divergent though the IDEA and West invocations of democracy may be, they share two core themes: (1) the control of those in power by the populace at large; and (2) equality among the members of the populace. The IDEA assessment framework rests explicitly on two bedrock principles or values: “popular control over public decision-making and decision-makers; and equality between citizens in the exercise of that control.”\(^\text{13}\) Similarly, though West views democracy as “not only about the workings of the political system,”\(^\text{14}\) he describes it as “profoundly about individuals being empowered and enlightened (and suspicious of authorities) in order to help create and sustain a genuine democratic community, a type of society that was unprecedented in human history.”\(^\text{15}\) This “deep democratic tradition” is joined by another: “the excoriating critique of America’s imperialist and racist impediments to [democracy. This other tradition] explicitly makes race and empire the two major limits of the American democratic experiment.”\(^\text{16}\) West thus echoes the two basic IDEA values: Democracy is about empowering ordinary people to control those with power and about countering practices—historically race and empire—that exclude groups of people from that role.

A. Democracy, the Nation-State, and Law

What is generally unremarked about these two themes is that they rest on a certain understanding of the context from which democracy arises and within which practices

\(^{12}\) Id. at 68. West’s in-depth discussion of the “deep democratic tradition” focuses on Ralph Waldo Emerson and James Baldwin, Herman Melville and Toni Morrison. Id. at 64-105.

\(^{13}\) IDEA DEMOCRACY ASSESSMENT, supra note 8, at 11 (emphasis in original).

\(^{14}\) WEST, supra note 11, at 67.

\(^{15}\) Id. at 69 (Emerson). Thus the “great democratic task is to awaken the sleepwalkers in order to take back their powers and take control or their country.” Id. at 76.

\(^{16}\) Id. at 86.
and institutions are seen to be democratic. Specifically, the historical and institutional backdrop for democracy is the nation-state and monarchy in particular. The Magna Carta, Parliament, the Framers and our Constitution, and successive enactments and events each expanded outward the circle of control over governance—to nobility, then to white men of property, then to ever-widening but still delimited groups of people.

Though the definition of citizenship has expanded over time and is now broader than it has ever been, it is still a status that must be affirmatively declared. Citizenship and its attributes can be stripped;¹⁷ it is generally viewed as unitary and is tied exclusively to domicile even when individuals have connections to multiple jurisdictions, the most obvious being residence and work;¹⁸ and it does not even automatically flow from residence.¹⁹ All of these characteristics of citizenship seem natural to most of us, but that is because we are accustomed to exclusion as the default mode.

Comporting with this historical “membership” approach to citizenship and the traditional concentration of power in the state, the focus of parity among the members of the polity is often equal treatment by the government rather than formulation of affirmative rights and privileges on their part. In the U.S., for example, the evenhandedness shield of the Equal Protection Clause far outstrips in potency and reach any substantive guarantees provided by the Privileges and Immunities Clause.


¹⁸ Traditional proscriptions on dual nationality have eased, see, e.g., T. ALEXANDER ALENIKOFF & DOUGLAS LUSMEYER, CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION 22-41 (Carnegie Endowment for Peace 2002), but dual citizenship at the subnational level that would acknowledge “genuine links,” id. at 38, to two or more jurisdictions has not followed suit.

¹⁹ Compare the historical practice of allowing resident aliens to vote, at least in local elections. See Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage, 141 U. PA. L. REV. 1391 (1993). Raskin refers to this as a “politics of presence.” Id. at 1392.
Anthropologist Stanley Diamond connects the origin of the nation-state to the desire for a mechanism to impose a tax and conscription system on a population, a system that requires also an underlying census. Diamond emphasizes that the authority seeking this mechanism was generally based outside of local communities and needed to extract these contributions rather than them arising naturally. The law, a system of rules that allowed “officials” control over the acts and resources of “subjects,” provided such a mechanism.  

The authority of law, moreover, can take the form of a manipulation of the social practice of inclusion and exclusion. As political scientists Matthew Crenson and Benjamin Ginsberg observe, “[s]tates offer ‘prizes’ for citizenship because they have need of citizens…At the beginning of this century, Otto Hintze noted … [a] connection [in modern states] between dependence on citizen soldiers and the extension of suffrage… Armies, of course, had to be equipped, provisioned, paid, and pensioned—all of which enlarged the state’s need for taxpayers.”

Another emolument of citizenship is equality. Equality can be seen as a prize that members who buy in get for participating in the exclusion from membership of those who belong to groups deemed “other.” Whites got equality by excluding blacks; men got equality by excluding women.

As to the first, historian Edmund Morgan makes this observation regarding the political dynamics in colonial Virginia, in many ways the most influential of the colonies:

[B]y the second quarter of the eighteenth century Virginians had established the conditions for the mixture of slavery and freedom that was

to prevail for at least another century: a slave labor force isolated from the rest of society by race and racism; a body of large planters, firmly committed to the country, who had become practiced in politics and political maneuvering; and a larger body of small planters who had been persuaded that their interests were well served by the leadership of their big neighbors.22

It was this “vital combination,” writes Morgan, that “enabled Virginians large and small to join with other Americans to devotion to freedom and equality, in abhorrence of slavery—and in the preservation of slaveholding.”23 The ensured base of slave labor created an economically exploited and eventually “subhuman” “other” against whom white landowners of varying degrees of wealth could compare themselves and so come to see themselves as having a common interest and as being “equal” with each other—politically if not economically.24

Similarly, political theorist Carole Pateman identifies the exclusion of women as inherent in the social contract “story, or conjectural history” that provides an “explanation for the binding authority of the state and civic law, and for the legitimacy of modern civil government.”25 Pateman asserts that the rarely-told story of the sexual contract, which underlies the familiar social contract story, creates a fraternal agreement among men from which women are excluded. In this story, women cannot be discrete

23 Id.
24 This history resulted centuries later in a social dynamic of groups seeking to gain citizenship by becoming “white.” See, e.g., Noel Ignatiev, How the Irish Became White (Routledge 1995); David R. Roediger, Working Toward Whiteness: How America’s Immigrants Became White; The Strange Journey from Ellis Island to the Suburbs (Basic Books 2006); Karen Brodkin, How Jews Became White Folks: And What That Says About Race in America (Rutgers Univ. Press 1998). A similar “otherness” toward American Indians grounded the doctrine of Manifest Destiny, which provided the philosophical underpinning (or “law-story”) for the westward expansion of the United States. See Peter Fitzpatrick, Modernism and the Grounds of Law 161-175 (Cambridge Univ. Press 2001). To the extent that there is a truth in contemporary reverse discrimination claims brought by Whites, it may be that there is beginning to emerge a cross-racial “in-group” that marginalizes Whites who for economic or other reasons feel or are excluded. See Carlyn Sylvester, “The Power of the Joke, The Joke of Power: A Study of Humor and Marginality in the United States” (honors thesis 2009) (on file with author); Brant Lee, conversation with author at the Law and Society Conference (Denver, CO, May 2009).
individuals who may act as political agents by their very “nature,” the lack of corporeal autonomy that is the essence of motherhood, and so are inherently marginalized political actors. Women’s “other”hood leaves us “subhuman” in a different way, though economic exploitation is also present. Our exclusion leaves men free to bond as equal political “brothers.”

Overall, the nation-state is a sovereign, a ruler, an external authority, and its mode is to impose, to dictate, to disturb. Law is the vehicle by which the nation-state enforces the essential conditions of governing, including the definition of and application of citizenship. Law is not the natural self-ordering of a community but regimentation or control imposed from without, which in fact disturbs or prevents internal order or custom from emerging. According to Diamond, law “arises in the breach of a prior customary order and increases in force with the conflicts that divide political societies internally and among themselves. Law and order is the historical illusion; law versus order is the historical reality.”

The concept of law that is consistent with these themes, context, and history is not law-as-story but law-as-not-story. Part of the authority of the ruling power is the myth that law is “objective” or “natural,” while other stories that might undermine, challenge, or transform law are “subjective” or “contingent.” This law-as-not-story myth maintains

26 Sociologist Orlando Patterson draws a connection between slavery and the exclusion of women in the context of ancient Greek democracy. FREEDOM IN THE MAKING OF WESTERN CULTURE (Basic Books 1992). Patterson’s detailed account of the dynamics of the relationships between slavery and democracy, a relationship that gave free men political status in place of economic parity with elites and in doing so fortified the alliance of free against slave, is chillingly similar to Morgan’s discussion of colonial Virginia. Patterson also describes in depth the exclusion of women from public or civic life and illuminates two distinct notions of freedom that grew from the power that men exercised over women: men’s sense of freedom as the ability to control, to dominate others, and women’s sense of freedom as the personal ability to act independently of such control.

27 Diamond, supra note 20, at 140.
its “uber-story” status by pointing out the “story-ness” of other stories while denying its own.\(^{28}\)

Though this phenomenon has been noted primarily by socially marginalized groups—Blacks, women, other “minorities”\(^{29}\)—the effects of a not-story view of law go deeper. Though certain groups may be especially affected, the overarching message of law-as-not-story is one of silence, of passivity, of learned helplessness\(^{30}\) for everyone who is not a member of the legal fraternity—and even for many of us. This view, that is, is imperialistic with respect to formal outsiders \textit{and} to outsiders within \textit{and} to most of the rest of us as well.

In a law-as-not-story view, the law acts upon us. We are its objects, its subjects in the subservient sense. The relationship is static, wooden, unwieldy, and it exists bilaterally between the law (or the government) and us as isolated individuals. Little is seen as happening among us, and we have little sense of ourselves as active, creative, and generative and only an embryonic sense of the relationships amongst ourselves—both those that exist and those that are possible.

The tendencies of a law-as-not-story approach are privilege and oppression rather than voice and resonance. Privilege and oppression are often defined as special or unjust—as applying to specific groups or individuals within the populace as a whole. But I see privilege and oppression as general attitudes associated with the law-as-not-story story. When law is understood as a story emerging from a human social complex adaptive system, that story’s origins are seen as lying in the exercise of voice and its

\(^{28}\) Strand, \textit{supra} note 3, at 628-630. \textit{See also} \textsc{Elizabeth Mertz}, \textsc{The Language of Law School: Learning to “Think Like a Lawyer”}, 214 (Oxford Univ. Press 2007).

\(^{29}\) These groups were historically excluded \textit{entirely} from citizenship, from membership in the nation-state. Formal inclusion has now occurred, but marginalization still exists.

\(^{30}\) \textit{See, e.g.}, \url{www.youtube.com/watch?v=gFmFomprTt0} (discussion in context of girls).
continued existence as depending on the affirmation of resonance. But when law is understood as a not-story grounded apart from the people it governs, its fundamental posture is the burden of obedience rather than the invitation to enact, and the ability to influence it is granted rather than being inherent in the articulation of the story.

We are accustomed to thinking of our political culture, our system of getting along and making decisions together as fundamentally egalitarian and inclusive. Acknowledging the not-story nature of our legal culture, however, prompts a critical review of this easy assumption. To the extent that our concept of law—and our story of democracy—still rest on an essentially law-as-not-story view, they contain within them the very strains of oppression and privilege to which they assert opposition.

**B. Legal and Political Perspectives**

Robert Post and Reva Siegel have proposed a model of “how courts actually function in our democracy” that they have named “democratic constitutionalism”: “Constitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional legal reason is rooted in popular values and ideals.” The task of constitutional law, in this view, is best performed when courts are “politically responsive at the same time [that they] affirm[ ] a commitment to the law/politics distinction” and “fashion[ ] a constitutional law in which each side can find recognition.”

As to the first point, Post’s earlier work makes the case for a dialogic relationship of trust between “constitutional culture” and “constitutional law” through which judges...
and nonjudicial actors dialectically develop both legal and social mores and norms. As to the second, Siegel’s earlier work suggests that constitutional law may be a direct derivative of extra-legal social movements, incorporating positions from such movements in developing legal constitutional reasoning. The essence of these views together appears to be a conviction that constitutional law most effectively “shap[es] the social meaning of competing claims” under conditions of interaction between judicial and nonjudicial actors.

The two key assumptions about constitutional law creation that are embedded in this conviction are both consistent with a law-as-story concept of law. The first is that, though formulated in legal terms and through a legal process, adjudicated constitutional law waxes strongest when it reflects what is happening in society more broadly—even though its language and process are legal rather than political. Though not framed as such, this evokes the value of voice: Law emerges from “our” stories. The second assumption is that adjudicated constitutional law will be most persuasive when as a story it weaves together in a recognizable way the stories of those who care enough about the situation to bring it forward to the court—when judicial opinions seem to at least speak to familiar themes or concerns within the ambit of those to whom the opinions are addressed. Though not framed as such, this bespeaks the value of resonance: Law’s audience’s stories matter.

37 Post & Siegel, supra note 31, at 430.
38 I note a shift between Siegel’s discussion of Equal Protection jurisprudence regarding women in 2006, which focuses on causation in the direction of social movement toward judicial decision-making, and Post and Siegel’s discussion of democratic constitutionalism in 2007, which seems to contemplate more of an exchange, which is consistent with Post’s more dialogic approach. See also Bruce Ackerman, Interpreting the Women’s Movement, 94 CAL. L. REV. 1421 (2006) (noting that the causation pattern described for the de facto ERA by Siegel does not appear to be universal).
Moreover, as with a law-as-story complex social system concept of law, “democratic constitutionalism suggests that in the end our constitutional law will be made by those willing to run ‘the long race of politics.’”  

This acknowledges the importance of what happens in the associative realm of interactions among those who care about a particular issue or practice. If adjudicated constitutional law is an emergent story, it is decentralized communications that create the improvised and then increasingly permanent frames that enable that story to be articulated and then adopted.

Complementary offerings from other legal scholars can be woven together with democratic constitutionalism to bring it even closer to a law-as-story complex social system concept of law. Larry Kramer, a “popular constitutionalist,” notes the importance of the story about the law-story—what he calls the “public views as to the proper locus of authority.” His point is that acceptance of the idea of the legitimacy of judicial supremacy may skew the public’s own view of the degree to which it should accept or engage with constitutional interpretations or law-stories—with more or less deference. To the extent that popular constitutionalism is a story that law is a story (rather than a not-story), it invigorates rather than enervates citizens.

Martha Minow points out that the process Siegel describes by which social movements influence judicial decision-making also applies to legislative decision-making and manifests itself at the state as well as the federal level. She notes, in fact, that this process is not even inherently legal or constitutional: What, she wonders, “makes this

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41 Strand, supra note 3, at 620-621; R. Keith Sawyer, Social Emergence: Societies as Complex Systems 210-211 (Cambridge Univ. Press 2005).
constitutionalism rather than out and out politics.” In this regard, she observes that the struggles that eventually come to be constitutional law occur in “settings beyond the formal and federal state duality … including religious communities, civil society, and nonprofit organizations.” Minow may be understood as saying that adjudicated constitutional law is only one thread of our collective story and that the overall story is created in multiple venues and through multiple kinds of interactions and processes. Minow’s observation looks at law as only one part of our communicative system, though it is an important one.

Building on Minow, Robin West cautions us to preserve ordinary politics as a way “to reach out, to establish community, to improve our collective lives [other] than by a continual construction of constitutional meaning. Without popular constitutionalism we could speak to each other, not to create and recreate meaning or assert and challenge definitions of self-identity, but instead to express and respond to manifest need.” If we privilege constitutional law as our exclusive story about who we are and how we are to be with each other, more spontaneous or genuine stories may be edited out or never spoken to begin with. Do we really want constitutional law to be our only collective story—not just a floor but a ceiling? West’s warning exposes the danger of a narrow focus on law rather than on our story-making system as a whole.

[45] Id. at 1462.
[47] Cf. Cover, supra note 40, at 53 (describing law creation as the destruction of potential alternatives).
[48] West, supra note 46, at 1485. In posing this question, West may be assuming the posture of a constitutional skeptic: one who believes “that we have overly constitutionalized our discourse.” See Robin West, Katrina, the Constitution, and the Legal Question Doctrine, 81 CHI.-KENT L. REV. 1127, 1154 (2006). I may well fall into this category myself.
Lani Guinier’s comment on the Supreme Court decisions in *Grutter v. Bollinger*\(^{49}\) and *Gratz v. Bollinger*\(^{50}\) illuminates how these various perspectives manifest themselves in a specific context and brings in the other core democratic value of equality.\(^{51}\) Her analysis of the opinions by Justices O’Connor, Thomas, and Ginsburg focuses on how each Justice contributes a different “story” perspective to the overall law-story of the Court’s decisions.\(^{52}\) And she observes how Justice O’Connor’s famous statement to the effect that “she expects the need for considerations of race in admissions decisions to expire after twenty-five years” is a “‘warning to do something about the underlying problem.’”\(^{53}\) In this regard, she sees the decisions as inviting a “larger public conversation”\(^{54}\) that offers opportunities for “racial literacy,” which allows race to be “engaged directly … [to] shed light on the confluence of forces that are truly responsible for current public dissatisfaction and that adversely affect people of all colors.”\(^{55}\)

Guinier appears to contemplate that the initiative for this larger public conversation must come not from the courts but from the rest of us who care about education in a democracy\(^{56}\) and that the discussion will occur in a variety of contexts (local governments, universities, businesses\(^{57}\)). She also appears to envision a conversation that is both practical and value-driven and that may ultimately lead to

\(^{50}\) 539 U.S. 244 (2003).
\(^{52}\) Id. at 172-198.
\(^{53}\) Id. at 118 (quoting former Harvard University President Derek Bok).
\(^{54}\) Id. at 223. Guinier’s most recent work on “demosprudence” attends even more closely to the possibilities of such invitations, characterizing judicial actions and law as “teachable moments through which to reach new lawmakers.” See Demosprudence Through Dissent, 122 HARV. L. REV. 4, 115 (2008). See also Lani Guinier, Beyond Legislatures” Social Movements, Social Change, and the Possibilities of Demosprudence, 89 B.U. L. REV. 539 (2009).
\(^{56}\) Guinier, HARV. L. REV, supra note 51, at 212-213.
\(^{57}\) Id. at 213-221.
reconceptualizations of nonlegal as well as legal collective stories.\textsuperscript{58} In this vein, Guinier offers the idea of “democratic merit,” which “combin[es] a commitment to construe educational opportunity broadly with an obligation to educate individuals who then serve their communities and the larger society.”\textsuperscript{59}

Most profoundly, Guinier, as in her more extended body of work, links the dual democratic ideals of public control and equality.\textsuperscript{60} \textit{Grutter} and \textit{Gratz}, she observes, provide “an occasion to align educational opportunity with its cousin, democratic participation.”\textsuperscript{61} Toward this end, “university leaders need to consider the long-term needs of the institution, the concerns of local, regional, and national constituencies, and the stability of the larger society, in a manner that is consistent with the expectation that the university will produce a new generation of citizens capable of assuming a broad range of leadership roles.”\textsuperscript{62}

These (and other) legal perspectives gesture toward a law-as-story complex social system concept of law. They acknowledge and begin to describe how doctrinal law is connected to social interactions, the importance of the “story” we tell ourselves about law,\textsuperscript{63} and how the law-story fits with other important stories in our culture. Their primary focus, however, is still formal law and the nation-state.

\textsuperscript{58} Id. at 206.
\textsuperscript{59} Id.
\textsuperscript{60} See also, e.g., \textit{Parents Involved in Community Schools v. Seattle School District #1}, 127 S. Ct. 2738, 2821 (Breyer, J., dissenting) (asserting pluralism in education as a key element in democracy).
\textsuperscript{61} Guinier, \textit{HARV. L. REV.}, \textit{supra} note 51, at 223.
\textsuperscript{62} Id. See also id. at 122-124 (asserting value of diverse views to law creation).
\textsuperscript{63} Note how this issue arose in the recent Senate hearings on the nomination to the U.S. Supreme Court of Judge Sonia Sotomayor. While explaining a prior and highly criticized statement, that a “wise Latina woman” might reach a better conclusion than a white man, Sotomayor stated, “Life experiences have to influence you. We’re not robots who listen to evidence and don’t have feelings. We have to recognize those feelings, and put them aside.” She added that “there are situations in which some experiences are important in the process of judging, because the law asks us to use those experiences.” Confirmation Hearing on the Nomination of Sonia Sotomayor to be Associate Justice of the United States Before the S. Comm. on the Judiciary, 111\textsuperscript{th} Cong. 1 (July 14, 2009) (statement of nominee).
But one of the key insights of a complex social system approach is that it is the individual interactions that drive the system and from which the system-level patterns—in this case stories, and law-stories in particular—emerge. Which poses the question: What kind of individual interactions make for what we might call a “democratic” system or a “democracy”? What might “democratic” values look like when these interactions are the starting point? And how do responses to these questions mesh with current views of “democratic,” “democratic constitutionalism,” and the legal perspectives I have identified as complementing democratic constitutionalism?

In the following Part, I offer some initial thoughts on these questions under the rubrics of civic experience and civic engagement as well as civic relationships and civic networks. I use the word “civic” in contrast to “democratic” to draw attention to *citizens*, to the individual people whose interactions comprise the system. This is, admittedly, an imperfect match, but I believe overall “civic” emphasizes what people do while “democratic” emphasizes formal structures of government and how people relate to them.64

In this regard, I use the word “citizen” generously. In my usage, “citizen” encompasses anyone who participates in the life of a social group whether or not they are a member of the group as it is—usually more parsimoniously—defined legally. So

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64 The definitions of democracy center around formal governmental, institutional structures. “Civic,” in contrast, focuses on citizens: “2. Of or pertaining to citizenship.” To the extent that “democracy” applies to people, it refers to them as a mass in relation to an elite rather than as a group of individuals: “5. The common people of a community as distinguished from any privileged class; the common people with respect to their political power.” RANDOM HOUSE DICTIONARY, *supra* note 6.
people who work in a jurisdiction but don’t live there are citizens. Similarly, immigrants who have legal citizenship elsewhere are citizens of their place of residence. “Citizen” here is *de facto* rather than *de jure*.

II. Describing a Civic Landscape

*Every human being, of whatever origin, of whatever station, deserves respect. We must each respect others even as we respect ourselves.*

U Thant

In a complex social system view, the system-level patterns emerge from the interactions between individuals. So the story that is law emerges from communicative interactions, first among individuals and then among groups of increasing size. As this process progresses, the story becomes less fluid and less textured. Once a law-story is articulated, it is offered back to individuals for endorsement and enactment or rejection and reworking. In this Part, I explore what kind of individual interactions should be considered “civic.” I undertake this exploration in two ways. The first is empirical and focuses on concrete experiences of civic life, my own and others. The second is more theoretical, though still often grounded in observation. The two are aligned to a suprising degree.

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A. Civic Experience and Civic Engagement

Thomas Jefferson once said, "State a moral case to a ploughman and a professor. The former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules." To bring Thomas Jefferson into contemporary life, I substitute “PTA member” for “ploughman.” Being a PTA member is an every-woman or every-man experience, and it provides raw material for looking at how rules (law) interact with the perceptions of ordinary people. It also happens that, as with many people, being a member of the PTA at my children’s schools was my own entry point into civic life.

Beginning when the oldest of my three children went to kindergarten, for approximately 15 years I had one or more child in the Arlington Public Schools, a system that encompasses a broad range of households, families, and students. In addition to standard PTA participation, I served on various committees charged with considering a number of thorny issues—boundary changes, educational program design, the gap in academic achievement between White students and Black and Latino students, real estate development near schools, school uniforms, strategic planning, and cultural competence. I worked on School Board campaigns and was a candidate myself. I became familiar

68 As of October 2008, the Arlington Public Schools, Arlington, Virginia, had a total enrollment of 18,605 students. Of these, 48.1% were White; 26.7% were Hispanic; 12.9% were Black; 10.7% were Asian/Pacific Islander; and 0.1% were American Indian/Alaskan Native.
Approximately one-third of the students were eligible for the free-and-reduced-lunch subsidy.
with the people and the processes of the system. Three personal stories from that time illustrate and highlight themes from these experiences.

One of my first experiences involved the “Veitch Street” development project. I was one of a small group of PTA members at Key School, an elementary school located near Arlington’s urban METRO corridor, that sought to affect the placement and orientation of a proposed high-rise building immediately adjacent to the school building. Following a process that provided ample opportunities for public input as well as personal meetings with members of the Arlington County Board (the ultimate decision-makers on the project) and their staff, our PTA working group achieved a large measure of success in terms of the configuration of the project that was eventually approved. The final design, that is, responded in key ways to concerns that we had articulated.

Yet, to my surprise, the overall experience felt much like an assault. This was an open process, with multiple opportunities for us to participate in public forums—and even to communicate personally with decision-makers. But in spite of and in fact within this structure of openness and in a county that prides itself on citizen participation, when push came to shove, we were nonetheless treated personally as interlopers, as peripheral, as troublesome children who had gotten in the way.

Throughout the process in which the design was considered, the School Board had encouraged our group to proceed, assuring us that our assertions were in line with their interests (the School Board, after all, was ultimately responsible for the school) and that it was to their benefit for us to actively participate (it was easier for them for us to take the political heat of being a fly in the ointment in a development process). Less than an hour before the final County Board meeting, however, as we were preparing final
testimony, the word came that the School Board’s assistant superintendent, acting on behalf of the Board, had come to an agreement with the County on the final details of the project. Those details were, by and large, the details that we had fought for and extracted from the developer and the County Board staff, but we were neither in the proverbial room when the final deal was cut nor even apprised of what was happening. We were encouraged to carry the School Board’s political water so long as it was convenient and then excluded when the moment of truth arrived. The process was formally open but personally disrespectful. And so it was alienating in spite of our substantive success.69

A second experience occurred while I was the co-chair of the parent-teacher association at Drew Model School, another elementary school in the County located in a traditionally Black neighborhood, which had been desegregated in the early 1970’s in response to an NAACP lawsuit.70 A countywide magnet program had been created and placed at the school to attract White families by choice while neighborhood children had been separated and dispersed through busing to schools in traditionally White neighborhoods throughout the county.71 “Integration” had forced neighborhood families to send their children elsewhere, and even when limits on neighborhood attendance were

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69 Cf. John Hibbing & Elizabeth Theiss-Morse, Stealth Democracy: Americans’ Beliefs About How Government Should Work 61-83 (Cambridge Univ. Press 2002) (observing how in politics ordinary Americans ascribe value to “process space”—how decisions are made—as well as to “policy space”—what decisions are made). An opportunity for not just a good decision on the merits but for building trust with the community had been lost.


71 Id. The desegregation remedy provided by the district was resisted by the Drew neighborhood. Drew was closed as a neighborhood school, only Black children were bused, and the former Drew students were scattered throughout the rest of the system. Black parents argued, unsuccessfully, that the plan placed “all of the burdens and inconveniences of the desegregation process” on Black families. Id. at 954, 956. The scars of that series of events were not yet fully healed at the time of the events I describe, nor are they fully healed today. See Sheryll Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream 68 (Public Affairs 2004).
removed (as they had been by the time my daughter attended), the magnet program was more welcoming to White than to Black students and families.

Almost thirty years after desegregation, the school building was in extreme disrepair, the program was faltering, and there was pressure from families living nearby to better integrate the school with the neighborhood. The school system had initiated a planning process to reassess the academic program as well as a building renovation process. There were regular meetings on both fronts, and I had accepted responsibility for being the PTA liaison to both.

Somewhere around the winter holiday of my first year in the leadership position, I found myself frustrated because I was spending what seemed to me an inordinate amount of time on the phone. In particular, I was attempting to address the fact that both the program and building committees were comprised of the “usual suspects”—White middle class parents and teachers appointed by the principal. My first task was making the case that a broader range of participation was necessary for the legitimacy and thus efficacy of the process. My second was finding not-the-usual-suspects parents who were willing to commit. My third was staying in touch with them and others as the processes unfolded.

And then I had an epiphany. A large part of the cause of the problems at Drew was that people didn’t consistently talk to each other—White and Black, White and Latino, and Black and Latino parents, but also parents and teachers and school administrators as well as neighborhood leaders and school parents and personnel. So nurturing those lines of communication was a vitally important part of the overall task of helping the school move forward.\(^\text{72}\) Developing sustainable solutions for the school

\(^{72}\) This can be particularly difficult when these lines are cross-racial or cross-ethnic. See CASHIN, supra note 71, at 71-72.
required creating lines of communication and trust so that the various people involved would be invested in the process and resulting solutions.\textsuperscript{73}

A third set of experiences arose from my participation at a systemwide level in initiatives to narrow and/or close the gap in academic achievement between White students on the one hand and Black and Latino students on the other. I had two main roles in this effort: the first as a member of a committee of citizens and staff charged with advising the Superintendent on issues related to the gap and the second as part of a team working with the Supervisor for Minority Achievement to develop and implement a “cultural competence” initiative within the school system.

Both of these efforts reflected an awareness that articulating a goal with respect to eliminating the gap in the form of a School Board policy, strategic plan objective, or Superintendent mandate was only one part of the larger project of changing the system to achieve that goal. Such a policy, objective, or mandate would articulate a goal for the school system as an institution but have only limited effect on the concrete actions and interactions of teachers, students, administrators, and parents through which the “system” actually operates.

For example, one important role of the Superintendent’s committee was to ask uncomfortable questions and push for answers. An early manifestation of this concerned a previously unquestioned explanation for the underperformance of students of color: the idea that they had not been students in the system since kindergarten but rather had transferred into the system. It turned out that, in fact, the large majority of

\textsuperscript{73} Though I didn’t have a vocabulary or context for this conviction at the time, the evolving fields of deliberative democracy and civic engagement articulate precisely this understanding. \textit{See, e.g.,} Lars Hasselblad Torres, “Deliberative Democracy FAQ.” at \url{www.deliberative-democracy.net} and sources cited there.
underperforming students had been in the Arlington Public Schools for their entire academic careers. Responsibility for their lack of success could thus not be assigned to other school districts or to their families for moving them. The question, now posed squarely, was why what the school system was providing for these students was not working.

Considering this and similar questions was entirely consistent with the stances of the School Board, strategic plan, and the Superintendent. The committee simply provided an internal and continuing vehicle for turning the spotlight on assumptions and practices that could inhibit progress toward official goals. The committee’s questions were sometimes resisted, answers were not always forthcoming, and its recommendations were not always followed. But it continues in operation to date, and its persistence has had results in important arenas. Charging people to work for change from within the system, especially when supported by official policy, was an invaluable way to keep the ball rolling and the pressure on.74

These and similar experiences directed my attention toward the experiential aspects of civic life. Politics, in this view, is not so much local75 as it is personal. People’s interactions matter. Moreover, this phenomenon appears in several different types of civic interactions. It appears when “ordinary citizens” interact with public officials, as when my experience of the Veitch Street decision and of County and School decision-making was shaped by personal interactions with the members of the County and School Boards. It appears in interactions among parties with various roles in

74 See also Lani Guinier & Martha Minow, Dynamism, Not Just Diversity, 30 Harv. J. L. & Gender 269, 272 (2007) (“organizational catalysts work best if they exist within and are already tied to the institution rather than superimposed from the outside”).
75 THOMAS P. (“TIP”) O’NEIL & GARY HYMEL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME (Bob Adams, Inc. 1994)
decision-making processes, as when the success or failure of the Drew Model School planning rested on personal communication and relationships among those affected by the issues to be resolved. And it appears in the context of the interactions among people operating within an institution, as when the progress of the school system vis-à-vis closing the achievement gap would be accelerated or slowed by the existence of individuals within the system pushing for specific multiple measures designed to further officially stated policies and mandates.

My experiences in the Arlington Public Schools led to my working with Melinda Patrician, a fellow parent, to improve civic engagement in the county overall. As we moved beyond the context of the schools, we conducted a research project for the county government in which we investigated how people engage with and are engaged in public life in the county.\textsuperscript{76} In the course of this study, we conducted conversations\textsuperscript{77} with well over a hundred members of the community—those who were active in public affairs as well as those who were not, residents and business people, county employees, youth, young adults, and minorities.\textsuperscript{78}

These conversations resoundingly echoed the theme that \textit{relationships matter}. The quality of specific interactions with individual people shapes people’s perceptions of their civic experiences. “Citizens,” we concluded, “take [their civic engagement] experiences personally.”\textsuperscript{79}

\textsuperscript{76} See \textsc{Patrician} & \textsc{Strand}, supra note 65.
\textsuperscript{77} Conversations is a better word than interview because there was no set line-up of questions or specific protocol. We had some general prompts, but the questions were open-ended and this allowed us to concentrate in the varying meetings on the different aspects of people’s experiences and how they perceived them. \textit{See id.}, at 61-62.
\textsuperscript{78} See note 65 \textit{supra} and accompanying text (defining “citizen” broadly).
\textsuperscript{79} \textit{Id.} at 22.
This conclusion has all kinds of practical implications. If you are an elected official who wants constituents to walk away from an interaction with someone at City Hall or the County Courthouse or the State Capitol feeling positive about the government, make sure that service folks are courteous and helpful and that people feel that they were listened to when decisions are made, even if the final decision does not go their way.

**Relationships matter.** If you are a civic group or PTA or trade association who cares about “diversity” in your community, call up a leader of a group that crosses your path that in some way manifests that diversity, invite him or her to talk over coffee, and listen to how the world looks from where they stand. **Relationships matter.** If you are a organizing an event and you want people—even members of your own organization—to come to an event or meeting, don’t just send out a written or e-mail flyer. Pick up the phone, call a few key people, and get them to commit to coming and to themselves calling some additional folks. **Relationships matter.**

Three themes or “touchstones” as to what people are seeking in civic or public life emerged from our study:\(^{80}\)

1. Civic governance;\(^ {81}\)

2. Civic conversation; and

3. Inreach.\(^ {82}\)

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\(^{80}\) These touchstones resonated with my own experiences described above; and they were reinforced by additional interviews that we conducted a few years later with members of other communities in other parts of the country for a different but related project. *See Strand, Patrician & Hynes*, note 65 supra.

\(^{81}\) We originally used the term “democratic governance” but changed it to civic governance to reflect emphasis on interactions among citizens (*including* public officials) rather than on formalities. *Compare* 2003 and 2006 reports, note 65 supra.

\(^{82}\) For a definition of “inreach,” see Strand, *supra* note 3, at 635 n. 164.
Civic governance reflects a conviction that “civic engagement is ... about real power in public decision-making.” As one citizen put it, people want to be more than “window dressing.” Civic governance entails a shift “away from a conception of power as being tightly held by public officials and toward a conception of power involving shared initiative and responsibility.” An unwillingness to share decision-making power was what I experienced in the Veitch Street process.

Civic conversation “highlights the importance of broad-based discussions and connections among diverse groups and organizations” to “articulate core community values [and] develop a shared story about the community.” Citizens envisioned building personal relationships with other community members to develop a sense of connection and an overarching community well-being and direction. Building such cross-cutting relationships explained the importance of my phone time while co-chair at Drew.

Inreach recognizes that “meaningful civic engagement happens in many different contexts and institutions.” What happens inside governmental organizations such as schools is critical in terms of whether their overall work furthers or dampens civic goals. Moreover, most citizens enter and contribute to public life through community institutions and organizations such as PTAs, neighborhood groups, sports leagues, dance

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83 PATRICIAN & STRAND, supra note 65, at 36 (emphasis in original).
84 Also, the civic sphere and civic engagement—the participation of citizens in social life relevant to the group and law-as-story—gather in not just the traditional sphere of politics and government but other organizations and institutions as well. Schooled though we are in the public-private demarcation, this broader reach of “civic” recognizes that how we interact in all the contexts of our lives spills over one to another. In this view, “civic” extends to businesses, families, other contexts we don’t traditionally conceive of in this way. Compare GABRIEL ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS (Princeton Univ. Press 1963).
85 STRAND, PATRICIAN, & HYNES, supra note 65, at 7 (emphasis in original)
86 Id. at 5 (emphasis in original).
87 STRAND, PATRICIAN, & HYNES, supra note 65, at 35 (emphasis in original).
groups, faith communities and the like. Inreach happens when all the various organizations and institutions of a community—public and private, formal and informal—see themselves as part of the civic fabric and actively embrace that role. My work on the Superintendent’s committee regarding the achievement gap constituted inreach, an enterprise that was not just educational but civic in that it sought to create and develop respectful and productive working relationships within the school system.

One of the revelations of the Arlington civic engagement study was the importance of stories and story. My partner and I found stories to be at the core of people’s experiences and perspectives. It was through listening to individual stories of Arlington that the civic engagement touchstones emerged.\(^{88}\) A packaged question-and-answer interview would not have allowed in the same way or to the same degree for the emergence of the unexpected and for the spiraling of different people’s stories into a new but coherent pattern over time. As we talked to people, the story grew and our questions matured.

In fact, though I have defined the touchstones in conventional terms above, their true mode may be story. \textit{Civic governance happens when decisions for the group reflect the stories of all those who are involved. Civic conversation occurs when people tell their own stories and listen to those of others throughout the community. Inreach ensures the connection between the story of a group, organization, or institution and the stories of those within it.} Stories, my partner and I came to realize, are the lifeblood of civic work, the DNA of a civic body.

\(^{88}\) In the months that we were conducting the conversations, my partner and I experienced first-hand the story-building and emergence process Sawyer calls collaborative emergence. \textit{See Sawyer, supra note 41, at 210-211.}
B. Civic Relationships and Civic Webs

My work in Arlington led me to civic organizing, an approach to politics that combines a conviction of the importance of the role of citizen with the active, relationship-creating approaches of community organizing. In civic organizing, techniques such as the one-on-one form the basis for forging relationships to strengthen the civic fabric of and civic work within a community. One key aspect of these relationships is their parity: Both participants, as fellow citizens, are acknowledged as having something to offer, to contribute to each other and to the whole. These relationships also cross institutional and other lines of social difference and may overlay or even be in tension with more hierarchical relationships that already exist.

The civic organizing emphasis on relationship-building led me to the enterprise of describing a civic relationship. Here, the word that kept popping up was “respect.” “Respect” in its original, etymological sense referred to “seeing” another person, and relationships of respect may thus be understood as interactions between people in which each person “sees” the other. This is seeing not simply in the physical sense but in the deeper sense of giving credence to that person’s story or life experience as that of a fellow human being.

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89 Civic organizing, the creation of Peg Michels and Tony Massengale, combines a belief in active citizenship with the one-on-one, relationship-based techniques of community organizing.

90 “A one-on-one is a personal conversation with an individual community member to learn about his/her concerns, level of interest and commitment for an issue, and the resources the person has to offer. At the same time, the organizer can introduce the issues of the project/organization, and increase the level of awareness of the issue or problem. One-on-ones should take place in a quiet setting and last 30 minutes to an hour, during which time the organizer and the community member should develop a level of trust with one another. The community member will do most of the talking in a one-on-one, while the organizer asks questions to clarify points and learn more detail.”


A civic organizing one-on-one focuses more on the creation of the relationship and on learning another’s story rather than on fostering awareness of a predetermined issue.

91 From the Latin “specere”—to look; “respecere”—to look back.
A remarkable account of relationships of respect can be found in sociologist Sara Lawrence-Lightfoot’s book of verbal portraits of people who occupy positions in which power is traditionally exercised over others but who instead offer those others respect.\(^{92}\) In these portraits—of South Bronx nurse-midwife Jennifer Dohrn, Boston South End pediatrician Johnnye Ballenger, high school teacher Kay Cottle, photographer Dawoud Bey, Harvard law professor David Wilkins, and Episcopal priest Bill Wallace—Lawrence-Lightfoot offers everyday grounding and details of stories that breathe life into the idea of relationships of respect. These relationships of respect, she observes, are built through “listening to stories and engaging in conversation”\(^{93}\) and have at their core a deep understanding of shared humanity. “Good practice,” writes Lawrence-Lightfoot regarding pediatrician Johnnye Ballenger, “requires that doctors enter into ‘relationships’ with their patients, that they actually ‘see’ them.”\(^{94}\)

Lawrence-Lightfoot designates these stories as illuminating six aspects of respect: empowerment, self-esteem, curiosity, attention, dialogue, and healing. Each of these facets of respect speaks volumes. Curiosity is the attitude of one person being genuinely interested in another and in the world. Attention follows and is the companion of curiosity. Empowerment, particularly of a traditionally deferential party, invokes parity and a celebration of strength. Self-esteem speaks to the internal regard that grounds externally directed respect. Dialogue characterizes a relationship of mutual communication from which understanding may emerge. Healing transforms hurt and division into wholeness. Together these strands of respect form multi-dimensional relationships that engage the whole person.

\(^{92}\) RESPECT (Perseus Books 2000).

\(^{93}\) Id., at 12.

\(^{94}\) Id., at 89.
The relationships that these portraits bring to life have the ring of authenticity. Reading them, we know they describe real people, but they also feel like real life. They are textured, messy, dynamic, complex, and contextual. They allow for self-expression that isn’t automatically selfish and connection that resists conflation. They do not envision self-expression as in inevitable opposition to connection. They embody the contradictions of actual experience.

Lawrence-Lightfoot’s focus on people who occupy positions that traditionally privilege them vis-à-vis others (health professional over patient, teacher over student, clergy over laity, artist over subject) is intentional. She is explicit about her goal of generating a conception of respect that departs from traditional views of respect as “involving some sort of debt due people because of their attained or inherent position…. [r]espect [that] implies required expressions of esteem, approbation, or submission.” Her interest is instead in how “respect creates symmetry, empathy, and connection in all kinds of relationships, even those, such as teacher and student, doctor and patient, commonly seen as unequal.”

This insight into relationships of respect is compelling. Respect extends not only from subordinates to superiors but between peers. And it runs from people who are commonly understood as superiors to those beneath them in the social hierarchy. One can still teach and respect one’s students, have medical training and knowledge and respect one’s patients, all in the deep sense of seeing and listening described by Lawrence-Lightfoot. Respect can transcend role expectations and transform even potentially or partially hierarchical relationships.

95 See Strand, supra note 3 at 624, 626.
96 LAWRENCE-LIGHTFOOT, supra note 92, at 9.
97 Id., at 9-10.
Respect thus invokes a different view of power than its traditional meaning of an ability to coerce another person to do one’s will or to surrender resources. Foremother of the modern conflict resolution movement Mary Parker Follett captured this distinct idea almost a century ago with a vision of “power-with”—as distinct from “power-over.” Lawrence-Lightfoot’s respect describes “power-with” relationships, even when the “power-with” dimension overlays a more hierarchical one.

Three human propensities identified by biologist-turned-conflict-resolution-theorist Mary Clark’s work mesh to a remarkable degree with the six attributes of respect identified and explored by Lawrence-Lightfoot. Clark begins with the simple yet transformative idea that while the essential quality of human nature is its flexibility, that flexibility is grounded in and bounded by three universal tendencies or propensities in addition to the biological imperatives for water, food, shelter, and sex: A propensity for connection with or bonding to others; a propensity for individual autonomy; and a propensity to find or create meaning. The first two propensities may initially seem to be in conflict with each other, but if we accept that human nature calls for both autonomy and bonding, that conflict is transformed into a creative tension. For the group to thrive, individuals must have sufficient autonomy to contribute. For the individual to thrive,

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99 IN SEARCH OF HUMAN NATURE (Routledge 2002). Specifically, Clark contends that it is human flexibility and the ability to adapt that are the hallmarks of our species. Moreover, the innovations that enables and enable such adaptation were and are primarily cultural and social rather than genetic and individual. Id. At 120-125.

100 Id., at 57-59.
there must be sufficient bonding with the group to support its individual members. Both group and individual, bonding and autonomy, are essential.

Added to the dynamic push-and-pull of autonomy and connection is the search for meaning. Clark describes this third human propensity as characterizing our species alone (in comparison to the first two, which she describes as applying to other primates as well\textsuperscript{101}). We seek to understand and to create a reason for our lives, a point to our being, an answer to the questions of whether and why our existence matters.\textsuperscript{102} This search for meaning can be a metaphysical one, an effort to understand one’s place in the cosmos. Or it can be bound up with our experienced existence as individual members of a group. People thus experience a desire to make a contribution, to be acknowledged as a valuable member, to offer a unique gift.

Clark’s propensities line up readily with Lawrence-Lightfoot’s attributes of respect. Lawrence-Lightfoot’s curiosity and attention are essential aspects of a healthy connection with others. Self-esteem and empowerment ground healthy individual autonomy. And dialogue and healing lead to creative interaction, wholeness and purpose, contribution to a larger whole—to meaning. *Relationships of respect may thus be understood as relationships within which all three human propensities are supported,* and these relationships are “power with” rather than “power over” in nature. Overall, “power-with” relationships of respect that address all three propensities meet deep human needs, are experienced as positive, and are thus sought out by individuals. I define these relationships as “civic” in the sense that they are what ordinary people are seeking—not

\textsuperscript{101} *Id.*, at 58.
\textsuperscript{102} *Id.*, at 233-237.
only from government (or other citizens acting with the imprimatur of government) but from each other.  

The relationships between ordinary people are the individual interactions in a complex social system. Different relationships lead to different social structures with different characteristics. Relationships of respect or civic relationships in particular go hand in hand with social networks in the form of webs that are associated with horizontality ("power-with"), trust, and cooperation. Alternatively, "power-over" relationships go hand in hand with vertical hierarchies associated with fear and insecurity.

Anti-globalization organizer Starhawk highlights the essential difference between webs and hierarchies. In the context of improvisational organizing, she observes that “power-with,” “power-to,” or “power-among” relationships “could also be called ‘influence,’ ‘prestige,’ or ‘moral authority.’ It’s based on respect…” Such relationships create webs of multiple overlapping relationships in which resources and initiative are shared. Hierarchies, in contrast, “run on power-over: the entitlement and

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103 Without endorsing a particular theological tradition, I note that there may be revealing parallels between these civic relationships and other normative work. The thinking within the Jewish tradition of theologian Martin Buber and psychotherapist and Holocaust survivor Viktor Frankl, is one example. Buber celebrated human-to-human connections that are “I-Thou,” which consist of authentic encounter and interchange between two actualized human beings who each recognize the other as such. I AND THOU (English translation) (1970) “I-Thou” emphasizes rewarding relationships—the experience of a person relating to another as a fellow human being rather than as a satellite or mask or puppet (Buber’s “I-It” mode of interaction)—that nourish both bonding and autonomy. Frankl characterized people as intrinsically searching for meaning. MAN’S SEARCH FOR MEANING (1956). This search for meaning may be a metaphysical one, an effort to understand one’s place in the cosmos. Or it can be bound up with our experienced existence as individual members of a group.

104 Cf. ROBERT AXELROD, THE EVOLUTION OF COOPERATION (Basic Books 1984) (describing computer simulations in which the optimal system-level result, cooperation, emerges from individual “TIT FOR TAT” interactions even without assuming a human propensity for connection and bonding).

ability of some groups to control others, extract their labor or resources, and impose sanctions or punishment.\textsuperscript{106} In hierarchies, relationships run one-way; in webs, there is an almost M.C. Escher dynamic in which one person’s hand creates the hand that creates it.\textsuperscript{107}

In his study of regional governments in different parts of Italy, sociologist Robert Putnam concludes that governments with the same formal structure are more effective when they operate in the context of “civic networks.”\textsuperscript{108} Specifically, he describes how cross-cutting horizontal networks that are “web-like” rather than “maypole-like” (hierarchical) enhance a community’s chances “that its citizens will be able to cooperate for mutual benefit.”\textsuperscript{109} Web-like networks join individuals in multiple institutions at multiple levels and in roughly horizontal ways. These contrast to networks that join individuals in vertical hierarchies and through prescribed and regular channels. The resultant communication and trust lead to norms of mutual cooperation that operate through Putnam’s webs or civic networks.\textsuperscript{110}

Mary Clark’s work explains Putnam’s observations. When people are joined in webs, in multiple ways that defy ordering and are valued in and of themselves rather than for their positions, their propensities for autonomy, connection, and meaning can all be addressed. Interactions are not seen as zero-sum, and trust can begin to develop and reign as the dominant emotion. Cooperation ensues, which enhances the capacity of the group as a whole. Hierarchies, in contrast, prevent those below from exercising

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\textsuperscript{106} \textit{Webs of Power, supra note} at 170.


\textsuperscript{108} \textit{Making Democracy Work: Civic Traditions in Modern Italy} 163-185 (Princeton Univ. Press 1993).

\textsuperscript{109} \textit{Id.}, at 173.

\textsuperscript{110} \textit{Id.} at 171-174.
\end{flushleft}
autonomy and inhibit meaningful connections by those above. Everyone’s ability to fully
develop meaning is stunted due to distrust and fear, and the capacity of the group is
diminished.111

These observations of social networks fit into a larger body of work on networks
generally. Networks always consist of both nodes and links, though what the nodes and
the links consist of and the structure of the network can vary.112 In social networks,
people are the nodes and relationships are the links. The very fact of considering people
as a social network says something important: Because both links and nodes are
components of the network, relationships as well as individuals comprise it. It cannot be
defined by the individuals within it alone. This awareness of the importance of
relationships squares with the observations in the previous section.

In networks across the board, the location as well as the nature of the links
determine the character of the network and how it functions.113 The two types of social
systems that Starhawk, Putnam, and Clark highlight are webs and hierarchies. As
described above, webs are relatively egalitarian networks comprised of horizontal

111 CLARK, supra note 99, at 250-262.
112 MARK BUCHANAN, NEXUS: SMALL WORLDS AND THE GROUNDBREAKING SCIENCE OF NETWORKS
(Norton & Co. 2002), ALBERT-LASZLO BARABASI, LINKED: THE NEW SCIENCE OF NETWORKS (Perseus
2002). For example, a network can be computer terminals (nodes) and electronic connections (links)—the
Internet. A network can be electric producers and consumers (nodes) and power transmission lines
(links)—the electric power grid. A network can be cities and towns (nodes) and paved roadbeds between
them (links)—highway system.
113 In a transportation network, for example, it matters whether one has to travel through a hub of some sort
to reach other locations or whether there are multiple routes to one’s destination. The former structure is
susceptible to disruptions and gives the hubs a lot of control. The latter structure gives travelers more
options and is less susceptible to disruptions because there are more alternatives. Our air travel system is
generally based on hubs; our interstate highway system on alternatives. Hub systems are hierarchical in
that people flow to and from centralized points; systems in which people flow here and there in a more
decentralized manners are webs. Further, the nature of the links in a hub system will differ from the nature
of the links in a web system. Hub-system links will vary considerably in the volume of traffic they can
accommodate. Web-system links will be less disparate.
relationships; hierarchies are composed of vertical relationships and power and resources tend to flow unevenly to individuals at the top of the “maypole” or “pyramid.” The important point here is that the relationships between the individuals in the social network create the network. The nodes (people) create the links (relationships). In this human social complex adaptive system, the network is the system-level pattern, and the relationships are the localized actions and interactions.

The type of network that is created emerges from the type of relationships that predominate. Civic relationships—relationships of respect, which are inherently power-with—join people horizontally. Myriad horizontal relationships form webs—networks in which people are connected organically to a miscellany of others whom they encounter in the various arenas of their lives. Power-over relationships, in contrast, join people vertically in hierarchies—networks in which people are connected to provide one-way conduits for resources and authority.

Putnam’s later work highlights an important additional dimension of these social system characteristics as he shifts from descriptions of individual-level interactions to system-level effects. In this work, he again distinguishes different types of relationships but now his focus is less the horizontal or vertical nature (which is more germane at the individual level) and more the location of the relationship and its role in creating a certain kind of network configuration. In this regard, he distinguishes bonding

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114 His later work focuses on “social capital,” which is an amalgam of all kinds of social connections. Essentially, he makes the statistical case in the context of the United States that social connections generally lead to better system-level outcomes in areas such as education, health and happiness, economic prosperity, safe neighborhoods, and democracy. BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (Simon & Schuster 2000).
and bridging relationships. Bonding relationships he defines as those that hold like people together. Bridging relationships are those that join people who are different.

In this regard, Putnam’s focus has shifted from the qualities of individual interactions within a social network to whether differentiated multiple networks are, so to speak, “talking to” and “hearing” each other. And, combined with general social network insights, Putnam’s work provides concrete criteria for civic societies. In fact, Putnam’s bonding and bridging relationships describe pragmatically how small civic webs become larger ones—how civic can be taken to scale.

Self-organizing networks are nested, which means that smaller networks themselves become elements or nodes in larger networks. Small communities of people, that is, become nodes of a larger social network. Using Putnam’s terms, individuals clump together in bonded groups through proximity or common identity or interest. In down-to-earth terms, most of us interact most of the time with the people in our close-at-hand communities or networks—our families, our neighborhoods, our schools, our workplaces, our faith communities—the places, institutions, and organizations where we “belong.” And many of the people within those local groups and communities also interact with each other. Our family members know each other. So too do our neighbors, colleagues, and so forth. These networks are “close-knit” by virtue of the interwoven relationships within them, and “bonding” relationships create these clumps.

These bonded sub-networks then become nodes in higher-level networks through relationships that bridge across the clumps and bring them together. These larger

115 Id. at 22-24.
116 PETER CSERMELY, WEAK TIES: STABILIZERS OF COMPLEX SYSTEMS FROM PROTEINS TO SOCIAL NETWORKS 32-33 (Springer 2006).
networks then are joined into still larger networks through further bridging relationships and so on and so on up the scale. While most individuals interact most of the time with a few other individuals close at hand (within the clumps or bonded groups), there are also in most local communities at least some individuals who have “long-distance” relationships with individuals in other bonded communities elsewhere. Sociologists describe social networks comprised of intensely bonded groups linked by more sporadic bridging relationships as small-world networks.\(^{117}\)

Such web-like networks bind a society together in a non-assimilationist mode. These webs do not require uniformity; in fact they contemplate “clumps” of different kinds that are joined together via civic relationships. Not everyone needs to belong to the same racial or ethnic group, join the same bowling league, embrace the same faith, subscribe to the same political party, speak the same language. This view celebrates the “bonded” clumps as safe havens, places of nurturance and identity-building, and incubators of the difference that enables the health of the system overall so long as the bridging relationships are also civic, horizontal relationships of respect, for it is only when these bridges exist that the web structure of the network is preserved at ever greater scales.\(^{118}\)

This view is consistent with that of political scientist and philosopher Iris Marion Young, who maintains the importance of groups in society and in terms of people’s

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\(^{117}\) Small world networks are networks that consist primarily of bonded groups or clumps of people that are connected by a few bridging relationships between individuals in different clumps. BUCHANAN, supra note 112, at 48-60.

\(^{118}\) Bridging relationships are almost always formed from weak ties. Id. at 42-44. Bridging relationships, though “weak,” dramatically decrease the degrees of separation between various individuals in the overall population, id. at 55, and stabilize a society by creating a single, albeit loose, network from many. CSEMELY, supra note 116, at 195-196. Without the bridging relationships or “weak ties,” balkanization occurs and the overall network breaks apart into sub-networks. This weakens the system by diminishing its diversity, a characteristic that enables it to adapt to changing conditions. Cf. AXELROD, supra note 104, at 146-150 (status hierarchies prevent the optimal social outcome of cooperation).
identities and who asserts “that the ideal of the just society as eliminating group differences is both unrealistic and undesirable. Instead justice in a group-differentiated society demands social equality of groups, and mutual recognition and affirmation of group differences.”

Her focus is on the relationships between groups and, in fact, on politics as the “relationship of strangers who do not understand one another in a subjective and immediate sense, relating across time and culture.”

Webs of relationships thus are a concrete depiction of a society in which individuals are members of multiple groups, in which their identities are multidimensional, in which clumps are loosely joined into a sprawling but functionally and equitably interconnected whole. And they are comprised of individuals interacting through civic relationships of respect within and between clumps.

This description of civic life comports with the empirically- and experientially-derived description developed above. The civic engagement touchstones—which reflect what people are seeking in public life at a local, small-group scale—are thematically consistent with the attributes of respect articulated by Lawrence-Lightfoot, Follett’s “power-with” dynamic, and Clark’s propensities and with the idea of social webs described by Starhawk, Putnam, and Clark. With civic governance, community members seek to ensure that their role in public life has meaning in the sense of contributing to group action. Dialogue and healing allow this to happen. In civic conversation, community members and small groups pursue their propensity for bridging relationships to and connection with disparate groups and act on that need with genuine curiosity and attention. With inreach, citizens respond to their propensity for protecting the autonomy

119 YOUNG, supra note 98, at 191.
120 Id. at 234.
of separate organizations and groups by working internally to strengthen their mission, cohesiveness, and vitality, the group equivalents of self-esteem and empowerment.

Moreover, these characteristics of civic relationships and civic webs map onto the three essential components that, in a civic concept of law, describe law that emerges from and then immerses back into the society it purports to govern so that law and norms evolve together.\textsuperscript{121} \textit{Relevance} acknowledges the need for a meaningful conversation between citizens and those who speak with authority for the group. \textit{Relationship} reflects the importance of engaging, communicative, and reciprocal interactions with others. And \textit{identity} recognizes the ability to celebrate a multifaceted sense of self as defined by being situated within multiple social groups that are not locked into unequal power dynamics.

\section*{III. Civic Organizing}

\begin{quote}
\textit{I just don’t see anything to be substituted for having people understand their position and understand their potential power and how to use it. This can only be done, as I see it, through the long route, almost, of actually organizing people in small groups and parlaying those groups into larger groups.}

\textit{Ella Baker} \textsuperscript{122}
\end{quote}

Lawrence-Lightfoot’s attributes of respect, Clark’s human propensities, the civic engagement touchstones, civic webs, and the three elements of voice and resonance are like similar triangles. Between individuals, in intimate settings, and in groups at a larger level, people seek to develop themselves as individuals, to bond with others in mutually rewarding ways, and to contribute to the whole of which they are a part. The scales differ, but the sides and angles look much the same.

\footnotesize{\textsuperscript{121} \textit{Strand, supra} note 3, at 632-634, 639-642. \textsuperscript{122} \textit{Kocks, supra} note 2, at 169 (quoting John Britton, “Interview with Ella Baker: June 19, 1968,” Moorland-Spingarn Collection, Howard University, Washington, DC).}
There is, of course, no perfect balance or equilibrium for this triad. Individuals differ within cultures. Cultures represent different adjustments to different conditions. Any mix of behaviors, moreover, will shift over time.

The civic—which consists of the experiences, relationships, engagement, and social webs that constitute the individual interactions of the complex social system from which law-stories emerge—is thus not susceptible of precise description. It does not collapse into a specific set of formal institutional arrangements. Because it describes individual interactions and relationships, there is always improvisation, creativity, and variability. Nonetheless, there are prescriptive themes that emerge from the multiple perspectives in the previous sections on the question of what ordinary people are looking for from public life. Four themes stand out.

First, the civic is about us, it is within our grasp, and enhancing it is something that only we can do. Our interactions, our relationships are what do or do not give rise to a civic sense, a civic fabric, a civic society. If we act as citizens toward each other, a civic system emerges. As Lawrence-Lightfoot observes, “Respect breeds respect…One loaf becomes many.” If we act otherwise, a different kind of system results. This acting-as-citizens business, moreover, has some pretty clear guidelines: respectful relationships within our own groups; bridging civic relationships with people in other groups; and power-with relationships between those with governing authority and everyone else.

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123 See, e.g., CLARK, supra note 99, at . Clark characterizes modern western culture as a “mobile hierarchy”—hierarchical but with the capacity for individuals to move up or down, which Clark suggests creates a particularly stressful environment of competition and insecurity. Id. at 256-276.
124 In fact, local adaptation in a complex adaptive system occurs continuously, though the emergent global pattern may change only periodically. www.globalcomplexity.org/NonlinearSystems.htm
126 LAWRENCE-LIGHTFOOT, supra note 92, at 10.
127 Cf. AXELROD, supra note 104 (computer simulations); PUTNAM, supra note 114 (social indicators).
But this raises the million-dollar question of why we might choose to act one way or another—to be civic or no. Culture is the generic answer: We act according to the template our culture provides us. More specifically, we play the roles for which we have been socialized, and the stories or “tapes” playing in our heads form the basis for our beliefs and thus our actions. These stories are not completely determinative: We are not ants or birds or fish, and so we may accept the stories we are familiar with or seek out new ones. Free will is not a chimera, but our collective stories wield the power of socialization and play to our desire to conform. And so a civic story that speaks to us of respect, of reaching out, of mutuality between those with authority and the rest of the group is at the core of us acting as citizens, which is at the core of civic interactions and a civic system.

In our society, law is a key component of this story. Even though its original posture is that of external authority, there are enough pathways of communication that over time law changes with our story about who we are as a society, which tells us how to be. By fits and starts, law emerges and immerses. We create it, and it creates us.

This reaffirms the absolutely foundational importance of our story about the story that is law. In a civic view of law, we are the ones to create a civic story about law and then bring it to life, which in turn leads to its re-creation. Though each individual is only one individual within a system of millions, it is the individual acts that give the system its character. Pointing fingers at people in authority or at others doesn’t get us off the hook. As Pogo says, “We have Met the Enemy, and He is Us.”

128 See notes 42-43 supra and accompanying text.
129 Walt Kelly. This famous admonition was first used on an Earth Day poster in 1970. The parallels between the civic approach I present here and sustainability in the environmental context are manifest, given that they both turn on myriad small actions by millions of individuals.
I wonder, in this regard, if the most damaging effect of our story of democracy is its emphasis on the successive institutional innovations that have made the nation-state more civic and on the individual “leaders” associated with those innovations. Compare this to the civic counter-story that those innovations resulted from ordinary people taking it upon themselves to change the story. In this counter-story, our attention shifts to citizen interactions, which prompts ordinary citizens to forgo passivity and initiate civic change. Our attention shifts to civic organizing, the process of intentionally building civic relationships to create a civic system.130

A civic counter-story of the events that led to an independent United States, for example, might highlight the role of Benjamin Franklin as an organizer. As biographer Walter Isaacson sums him up: “[T]he essence of Franklin is that he was a civic-minded man.”131 In the 1730’s, long before the events of the founding of the U.S., he was active on the local level, helping “to launch a variety of community organizations, including a lending library, a fire brigade, and night watchmen corps, and later a hospital, militia, and college.”132 Decades later, he was the only person to contribute to all of the key founding transformations: The Albany Plan of Union, the Declaration of Independence, the treaty of alliance with France, the peace treaty with England, and the Constitution.133 Franklin got things done by helping others to get things done. He was, in fact, an organizer: He organized groups, he brought people together, he prevailed upon George Washington to lend his credibility to the endeavor of the Constitutional Convention in Philadelphia. And yet the story of his political work fades into the background with wordsmith Thomas

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130 Any kind of social organizing is the intentional creation of relationships and social structure; civic organizing is the intentional creation of civic relationships and civic society.
131 BENJAMIN FRANKLIN: AN AMERICAN LIFE 102 (Simon & Schuster 2003).
132 Id., at 102-106.
133 Id. at 158-162, 310-311, 344-349, 397-398, 444-460.
Jefferson, military leader George Washington, and even legal draftsman James Madison in the foreground.

This phenomenon is typical of organizers. As Robert Moses, one of the key organizers of the Civil Rights Movement observes, “one of the characteristics of organizers is that their work emerges, and they themselves subside.”\(^{134}\) But if our story is a civic one, we begin to look not only to the role of ordinary people but to the role of the organizers who help bring them into relationship with themselves, with others, with those who are in positions of authority.

Another example, one that I use with my students, is the role of Ella Baker in the Civil Rights Movement. Most of my students, in their mid-20’s, know of the visionary speeches of Dr. Martin Luther King, Jr., and of the brilliant law-craft for the NAACP of later-Justice Thurgood Marshall. But they do not know of the decades-long organizing career of Ella Baker, who played a key role in the Civil Rights Movement in successive organizations: from the NAACP in the 1940’s to the Southern Christian Leadership Conference (SCLC) in the 1950’s to the Student Nonviolent Coordinating Committee (SNCC) and the Mississippi Freedom Democratic Party in the 1960’s.\(^{135}\) When we map her network in class, moreover, we see how her work connected to the labor movement,\(^ {136}\) the student movement of the 1960’s,\(^ {137}\) the gay rights movement,\(^ {138}\) the


\(^{136}\) For example, E.D. Nixon, one of the leaders of the Montgomery Bus Boycott, had been a leader in the Montgomery branch of the Brotherhood of Sleeping Car Porters. Another connection is by way of Baker’s time at the Highlander Folk Center, which also served as a base of training and support for participants in the labor movement.
women’s movement, to name a few. If our story is one of leaders in the traditional sense, we overlook the work of Ella Baker, just as we minimize the role of Benjamin Franklin—which leads to discounting our own role.

So what do we do? Most of us aren’t lawyers, so most of us aren’t familiar with constitutional doctrine or the conventions of legal argument or legislative protocols. But we do know what it means to treat others and be treated with respect. We do know civic. We can listen and try to understand people’s stories and treat them as people rather than as stepping stones. We do know what it means to reach out, even though it’s not always easy to do so. We do know how to tell when communication between ordinary citizens and those in positions of authority is happening, and we know when it’s lacking. And we can act intentionally to make our relationships and interactions as civic as possible.

My second point, then, is that most of us can focus on bringing to life the aspects of civic that we do know. This “civic organizing”—intentionally creating civic stories and relationships with others—is something that any and all of us can do. We aren’t all meant to be Benjamin Franklin or Ella Baker, but we can all do the kind of work they did in the contexts of our own lives—not just in “public” life but at work, at home, and

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137 Casey Hayden, wife of Tom Hayden, was a member of SNCC. Tom Hayden, along with Robert Alan Haber, was the author of the Port Huron Statement of 1962, the founding document of Students for a Democratic Society.

138 Bayard Rustin, who worked closely with Baker to support the Montgomery Bus Boycott and later organized the March on Washington in 1963 (and who was Martin Luther King, Jr.,’s primary advisor on nonviolence), was himself gay and a link to the later gay rights movement.

139 Casey Hayden and Mary King raised issues of sex and gender equity within SNCC and authored a paper that affected early feminism. Jo Freeman, a participant in Freedom Summer, brought civil rights ideas to feminism as well as to the Free Speech Movement in Berkeley.

140 Delegate Eleanor Holmes Norton and former mayor and current City Council Member Marion Barry in Washington DC were both early SNCC members.
elsewhere. In this view, citizens’ work is the work of creating the civic relationships of respect, bonding and bridging, that create the civic web.

Most importantly, this citizens’ work is not something that we do once. Existing relationships can always be sustained, deepened. New relationships must be created. People who move into positions of authority become distanced and need to be reclaimed. Civic work is continual. It is a struggle—not in a pejorative sense of something that we do not care to do or are not strong enough for but in a celebratory sense of something that we care deeply about and are able to do.

Formal institutions—deeply entrenched and explicit stories and ways of acting—can facilitate this struggle, but they cannot reach into the interstices of our lives. Democracy in the legal sense can thus only go so far. Putting democratic institutions into place without weaving a civic fabric around them will not create a vibrant “democracy.”

This civic approach highlights two aspects of a law-as-story system: (1) It is accessible; and (2) it accepts the contribution of multiple stories. These characteristics are intrinsic to a law-as-story view: Stories are by their nature accessible and imminently capable of being woven together into a common story in which individual threads remain visible. These characteristics sound a theme similar to the principles of democracy—popular control and equality—but transposed to a different key. Whereas democracy starts with the external power of a nation-state and asserts popular control over that authority, the civic focuses on individuals participating in and contributing to the story


142 Strand, supra note 3, at 626.
that is created.\textsuperscript{143} The civic posture is positive rather than negative. And, whereas democracy’s call for equality emphasizes impartial treatment of individuals by an external governing power, the civic speaks to the value of everyone’s story—the articulation, the telling to others, the sharing with the group. The starting point is inclusion rather than exclusion.

Accessibility and the importance of multiple stories are, moreover, interwoven aspects of the civic: One cannot truly exist without the other. Without multiple stories, there is no accessibility; accessibility by its nature encompasses multiple stories. With democracy, in contrast, there is often an awkward separation between popular control and equality. Popular control is seen as the foundational value, and equality as successive enhancement of it. Too often this leads to conversations about “democracy” and about “equity” proceeding along separate tracks.\textsuperscript{144}

The emphasis on what is actually happening within the civic sphere—what citizens do and the social simmer from which law emerges—leads to the third theme: The civic bubbles of interaction take place in every conceivable social and institutional context, and the civic stories that lead to law are not necessarily constitutional or even legal. The law-story is shaped into law as it emerges and immerges. The stories and experiences in which it is grounded may be understood in terms of law, but they may not.\textsuperscript{145}

\textsuperscript{143} Using Jonathan Swift’s fictional characters Gulliver and the Lilliputians, democracy is the Lilliputians anchoring Gulliver with hundreds of ropes to control his strength. The civic, in contrast, is the Lilliputians working together to organize a fair, a parade, or simply a peaceful village.

\textsuperscript{144} See, e.g., notes 31-45 supra and accompanying text (focus on “democracy” in isolation from “equity”). Note that this is not universal. Guinier addresses racial equity and Robin West addresses economic equity in addition to issues of popular control. \textit{See} Guinier, \textit{Harv. L. Rev.} supra note 51; West, \textit{supra} note 48. But the “democracy” paradigm makes addressing the two principles separately plausible.

\textsuperscript{145} In the film \textit{Vera Drake} (2004), for example, the main character performs abortions for women who need them. She views this as “helping them out.” The law, however, views it as a violation of the penal code.
The term “civil society” generally denotes those institutions that are neither government nor business. Mostly, then, it encompasses non-profit organizations—sometimes including faith communities and more informal institutions such as families, but frequently not. From a civic point of view, however, the legal form of an organization is important only insofar as it affects the relationship of actual people. Democratic governmental institutions can have alarmingly one-dimensional relationships with their constituents. Public schools, for all the rap about them being necessary to a democracy, tend to be highly hierarchical. Businesses can, counter to expectation, be surprisingly civic. Social institutions of all types, even families, run the gamut.

All of these contexts offer potential sites for civic interactions in the sense of the creation of civic relationships and civic webs. Cities can work toward collaborative governance in which public officials work in partnership with ordinary citizens.

School districts can be reorganized to build working relationships that empower

The film makes clear that Vera has never thought of her work in legal terms—and that the law does not accommodate her story or the stories of the women she has helped.

146 See, e.g., Iris J. Goodwin, Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment, 58 VAND. L. REV. 1093, 1102 (2005) (civil society includes activities such as “attending church, attending synagogue, contributing to a charity, volunteering at a hospital or in a tutoring service, serving in the parent-teacher association, or taking part in a volunteer fire department…activities that neither involve the government or commerce”).

147 Id.


150 See, e.g., ROGER LEWIN & BRUTE REGINE, WEAVING COMPLEXITY AND BUSINESS: ENGAGING THE SOUL AT WORK (Texare 2000, 2001)

151 A particularly thought-provoking exploration of how family structure “fits” the larger social structure can be found in ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE (Farrar, Straus & Giroux, 3rd. ed. 1990).

152 See LEIGHNINGER, supra note 148.
individual schools as well as teachers, students, and parents within those schools. Businesses may realize that the relationships among their employees and between their employees and customers are the soil in which success flourishes. Parents may view their role as offering unconditional love and support that draws the best from their children rather than an expectation of wrongdoing that draws the worst.

Where civic relationships are nurtured, in whatever context, they give rise to citizens who expect a meaningful role for all constituencies; teachers, students, and parents who resist top-down edicts or balkanization within schools; employees and managers who experience the rewards of mutual contribution; members of society who have something to offer instead of something to prove.

Because of the historical theoretical construct (story) that divides the public from the private, we are unused to envisioning interactions in the economic or domestic spheres as potentially civic. But one of the insights that results from a civic perspective focusing on individual interactions among ordinary people is the essential importance of the nature of relationships to a sense of fulfillment and well-being. This leads naturally to several questions. Are people looking for different kinds of relationships in different contexts (hierarchical in the economic and domestic spheres but respectful in the public sphere), and if so why? How much is the traditional construct of

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153 See, e.g., Cleveland, supra note 149, and sources cited therein. While school choice is not a universal solution to the problem of families that are alienated from and within schools, many schools that are organized as choices seek to build the relationships that support academic achievement.


156 Even at a recent conference on deliberative democracy, for example, there was a divergence of views as to whether deliberative democracy was appropriate only in “public” decision-making or also in venues such as institutions of higher education. “No Better Time” Conference Plenary Discussion, Durham NH (July 11, 2009).
different spheres, which corresponds to certain institutional and legal stories and practices, simply another way to limit democracy—one that excludes types of activities rather than groups of people?\textsuperscript{157}

If, in fact, a civic approach is applicable across these various institutional and other lines, then the forums and ways in which a civic story can emerge are essentially infinite. The law-story, in this view, will be only one of many, though a potent one. All of these forums and stories can be part of a decentralized and variegated process of story-making for the system as a whole. Films, magazines, church services, participatory budgeting by cities, themed schools, business practices that encourage team-building, and soccer leagues all provide opportunities for story-building because they all provide venues for relationship creation and communication. And the principles and values that guide people are hardly ever related explicitly to law or to the Constitution but instead to a sense of what it means to be a good neighbor, parent, public official, or employer.

Which brings me to the fourth and final theme. Law-stories that emerge from a civic system will not snap into focus in an instant. Systems operate not only on a different scale but at a different pace than individuals. Especially when law-stories go to questions on which people’s stories differ greatly, emergence and immergence will take time—time for the stories of many, many individuals to be articulated and shared; time for these stories to be told, heard, and acted upon in many different contexts; and time for multiple cycles of emergence and immergence to occur.

\textsuperscript{157} For example, isn’t the private economic sphere simply a social construct or story that allows non-civic, hierarchical relationships in economic interactions? Similarly, isn’t the private domestic sphere simply a social construct or story that allows non-civic, hierarchical relationships in domestic interactions? And don’t both of these historically track power-over relationships with respect to groups excluded from full citizenship—slaves and women? \textit{See} notes 22-26 \textit{supra} and accompanying text.
What I think this means is that more opportunities for people to share stories and build relationships in a civic mode and more opportunities for people to process any law-story that emerges will lead to better “flow” in the system. Lawyers do traditionally concern ourselves with ensuring that such opportunities exist. We protect access to the judicial process by representing people as litigants. We also participate in providing citizen access to public officials through lobbying, voter protection, and the design of public involvement processes.

We do not, however, generally acknowledge the importance of or take measures to nurture meaningful dialogue and civic relationships among citizens, even vis-à-vis law-stories of societal significance. We leave civic organizing to others—generally those who care about the content of a particular law-story or the practice with which it is associated. Our commitment to establishing, maintaining, and deepening the civic, unlike our commitment to democratic principles and practices, is tentative and flickering.

A commitment to the civic dimension of law begins with the recognition that civic law-stories emerge from civic systems and that creating civic systems takes time and an understanding of what a civic system is: civic relationships and webs. Civic governance, which ensures the relevance of ordinary people to people with authority, is essential. Civic conversation, which facilitates bridging relationships of respect between distinct social groups, is key. Inreach, both individual and institutional, which allows for the establishment of civic identity, is foundational. Civic governance, civic conversation, and inreach—the civic engagement touchstones— are the practical

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158 See notes 80-88 supra and accompanying text.
markers of a civic system, its legal qualities of voice and resonance, and their components of relevance, relationship, and identity.\textsuperscript{159}

Awareness of the importance of all three of these aspects and an understanding of how any particular law-story is situated with respect to them is a starting place for lawyers who care not only about protecting against authoritarian infringement but creating the conditions for affirmative citizen contribution and creativity—about civic as well as democratic. Lawyers can help to create civic relationships and civic webs, and we can nurture the stories that emerge. We are, after all, storytellers ourselves. We can help to design institutions that facilitate expression—expression and multiple stories—and help shepherd stories through those institutions until they find legal expression. In this role, lawyers may be seen as midwives assisting in a birth—itself a power-with rather than power-over posture.

Focusing on this civic role for lawyers leads to a shift in attitude toward divergent stories and conflict. While specific conflicts must be resolved, cases decided, an underlying value should always be the creation and preservation of the civic relationships and web that will sustain the society in the long term. For example, in the context of local real estate development decisions (such as the Veitch Street project I described above), decision-makers too often ask only whether they should approve the project—not also how to make the decision so that the community itself is strengthened. These longer-term concerns are the business of lawyers just as much as the immediate and concrete parameters of zoning codes, setbacks, linkages, public hearings, and the like. In

\textsuperscript{159} See Strand, \textit{supra} note 3, at 631-647.
the next Part, I consider two current law-stories—abortion and gay rights—from this perspective.

IV. Gay Rights and Abortion

*Gays have come out of the closet, and women who’ve had abortions have gone back into the closet.*

Pamela Karlan¹⁶⁰

Gay rights and abortion as major social issues in their current form both come out of the crucible of the 1960’s and 1970’s, though both have roots that extend much further back.¹⁶¹ Both are also intertwined with law, not just Supreme Court and other federal judicial decisions, but Acts of Congress and executive orders and state legislative, judicial, and executive actions as well. In this Part, I briefly suggest how the legal trajectory of each of these highly sensitive social issues appears when viewed from a civic perspective. This perspective calls us to consider civic work that we have or have not accomplished and whether legal pronouncements and prescriptions foster or dampen that work.


¹⁶¹ “The first “right-to-life” movement in the United States took place approximately between 1850 and 1890. This movement, composed primarily of physicians, made what was in the context a novel claim: that abortion at all periods of pregnancy was murder.” But “when we look closely at the circumstances and behavior of these nineteenth-century physicians, we find that even most of them were not certain that abortion was really murder and that their opposition to abortion was based on more complicated motives than a desire to protect embryonic life.” KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 14 (Univ. of Calif. Press 1984).

A. Gay Rights and Coming Out

With gay rights, the idea of coming out of the closet was first articulated by German intellectual Karl Heinrich Ulrichs in 1869; and a checkered history of gay and lesbian efforts to become both more organized and more visible characterizes the first two-thirds of the 20th century. But it wasn’t until the Stonewall riots in New York City in 1969 and the political campaigns, election, and ultimate assassination of Supervisor Harvey Milk in San Francisco in the late 1970’s that gay life and gay rights really moved to the national political stage.

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162 Claiming that invisibility was a major obstacle toward changing public opinion, Ulrichs urged homosexual people to come out. [http://www.ilglaw.org/cnfaward.htm](http://www.ilglaw.org/cnfaward.htm)

163 The Mattachine Society (from “masks”), founded in 1950–1951, and the lesbian society the Daughters of Bilitis, founded in 1955, were the first sustained organizations of their kind, sought to unite homosexuals around social and political goals, and by the late 1950s emphasized accommodation to heterosexual society while seeking support from the legal and medical professions. These groups focused on normalizing homosexuality, and their publications discussed, among other issues, proper roles and dress for gay men and lesbian women. Vicki L. Eaklor, *Gay and Lesbian Movement*, DICTIONARY OF AMERICAN HISTORY (2003) [www.encyclopedia.com/doc/1G2-3401801662.html](http://www.encyclopedia.com/doc/1G2-3401801662.html).

164 “On Friday evening, June 27, 1969, the New York City tactical police force raided a popular Greenwich Village gay bar, the Stonewall Inn. Raids were not unusual in 1969; in fact, they were conducted regularly without much resistance. However, that night the street erupted into violent protest as the crowds in the bar fought back. The backlash and several nights of protest that followed have come to be known as the Stonewall Riots.” [www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html](http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html). See also Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-1990* (New York: HarperCollins 1992).

165 Harvey Milk was an American politician and the first openly gay man to be elected to public office in California, as a member of the San Francisco Board of Supervisors. After Milk’s assassination, “Congressman Phillip Burton, Assemblyman Willie Brown, and other California politicians recognized the growing clout and organization of homosexuals in the city, and courted their votes by attending meetings of gay and lesbian organizations. Brown pushed for legalization of sex between consenting adults in 1969 but failed.” Clendinen, Dudley, and Nagourney, Adam, *Out for Good: The Struggle to Build a Gay Rights Movement in America* 150-151 (Simon & Schuster 1999).
This occurred in part through reactions against Milk and the San Francisco antidiscrimination ordinance he successfully spearheaded. David Briggs with Proposition 6 in California and Anita Bryant with Save Our Children in Florida are both early examples of backlash reactions to the ascendant issue of gay rights. Other antidiscrimination measures in other states elicited initiatives aimed at overturning them, and the issue eventually made its way to the Supreme Court in two forms. Directly, in Bowers v. Hardwick, the Court considered the question of whether there was a constitutional protection for homosexual behavior; the Court held that there was not. Indirectly, in Romer v. Evans, the Court faced the question whether a state could amend its constitution to prohibit the possibility of gay and lesbian citizens winning legal protection through political organizing; the Court held that such avenues of political influence were core to democracy and could not be foreclosed to specified groups.

Less than two decades after Bowers, the Supreme Court reconsidered that holding and reversed it in Lawrence v. Texas. Lawrence’s holding of a right to homosexual

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166 Milk began his tenure by sponsoring a civil rights bill that outlawed discrimination based on sexual orientation. The ordinance was called the "most stringent and encompassing in the nation", and its passing demonstrated "the growing political power of homosexuals." Les Ledbetter, Bill on Homosexual Rights Advances in San Francisco, N.Y. TIMES, March 22, 1978 at A21. Only Supervisor Dan White, the man who would later assassinate Milk, voted against it; Mayor Moscone enthusiastically signed it into law with a light blue pen that Milk had given him for the occasion. RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK 199 (St. Martin’s Press 1988).

167 Proposition 6, a California statewide initiative defeated in 1978, would have prohibited gays from teaching in the state’s schools.

168 In 1977, Dade County, Florida, passed an ordinance sponsored by Bryant's former good friend Ruth Shack, that prohibited discrimination on the basis of sexual orientation. Bryant led a highly publicized campaign to repeal the ordinance as the leader of a coalition named Save Our Children. The campaign was based on conservative Christian beliefs regarding the sinfulness of homosexuality and the perceived threat of homosexual recruitment of children and child molestation.

relationships has been largely accepted,\(^\text{172}\) and the political and social controversy has moved on to the question of same-sex marriage. Congress enacted the Defense of Marriage Act in 1996, which defined marriage heterosexually and in effect declared that the Full Faith and Credit Clause of the Constitution does not apply in this context—that states need not recognize same-sex marriages performed in other states.\(^\text{173}\) The majority of states enacted provisions barring same-sex marriage as a statutory or state constitutional matter.\(^\text{174}\) A few provided for same-sex partnerships legislatively;\(^\text{175}\) some have gone further and guaranteed same-sex marriage—judicially,\(^\text{176}\) legislatively,\(^\text{177}\) or by executive action.\(^\text{178}\)

Though the legal status of same-sex marriage is far from settled as a national matter, this political and legal history is truly astonishing. A mere four decades after the

\(^{172}\) 56 percent of Americans believe that gay relations between consenting adults should be "legal." 40 percent of Americans, however, still think that they should not be legal. Robert Schlesinger, New Poll, California Proposition 8 Show We’ve Got a Ways to Go on Gay Marriage, U.S. NEWS & WORLD REPORT, May 27 (2009) (citing Gallup poll).


\(^{174}\) Forty-one states passed statutory Defense of Marriage Acts, and thirty states have defined marriage in their constitutions (Hawaii passed a constitutional amendment authorizing the state legislature to reserve marriage to opposite-sex couples, and it did so). National Conference of State Legislatures (2009) www.ncsl.org/default.aspx?tabid=16430

\(^{175}\) Vermont, Connecticut, New Jersey, and New Hampshire have provided for civil unions; California, Nevada, Colorado, Washington, D.C., Hawaii, Maine, Maryland, New Jersey, Oregon, Wisconsin, and Washington have provided for domestic partnerships.

\(^{176}\) Varnum v. Brien, 763 N.W. 2d 862 (Iowa 2009); Kerrigan and Mock v. Connecticut Dept. of Public Health, 957 A.2d 407 (Conn. 2008); Goodrich v. Dept. of Public Health, 798 N.E. 2d 941 (Mass. 2003). Additionally, the California Supreme Court ruled on May 15, 2008 that same sex couples have the right to marry in California. In re Marriage Cases, 43 Cal. 4th 757. Proposition 8, which amended the state constitution to limit marriage to one man and one woman, was passed on November 4, 2008. The decision was appealed, and the Proposition 8 amendment was upheld. Strauss v. Horton (S.Ct. of Ca., filed 5/26/09). Same-sex marriages performed before Proposition 8 was passed will remain valid, but same sex marriages are no longer performed in California.

\(^{177}\) Maine, New Hampshire, and Vermont. In addition, the Washington DC City Council passed a resolution to recognize same-sex marriages performed in other states.

\(^{178}\) In 2008, New York Governor David Paterson issued an executive order directing New York state agencies to recognize same-sex marriages performed in other states on equal terms with heterosexual marriages. In 2004, the Rhode Island Attorney General had issued an opinion to the same effect.
Stonewall riots, the nation has accepted the fact of gay and lesbian sexuality to such a degree that the controversy has moved on to marriage. The question of marriage, after all, only arises when the existence of the underlying relationships is acknowledged. The precondition for this is a degree of “outness” that was inconceivable not only forty but even twenty years ago.

The story about gays and lesbians in our society has undergone a sea change. Gays and lesbians (and bisexual, transgendered, intersexed, and queer individuals [“GLBTIQ”]) have gone from marginal to mainstream. The shift from Bowers to Lawrence embodies this. So do movies like Brokeback Mountain, TV shows such as Will and Grace, songs such as “I Kissed a Girl.” Many if not most high schools and colleges now have a Gay and Lesbian Student Association or a Gay-Straight Alliance. The Boy Scouts have been criticized for their anti-gay position. Many faith communities now openly welcome GLBTIQ individuals.

I suggest that our collective story has changed because so many of our individual stories have changed, and our individual stories have changed because of the transformation of relationships between gays and lesbians and the larger, generally straight society. At the core of this lies the process of “coming out.” “Coming out,” in this view, is not simply a personal therapeutic revelation but a civic organizing act with profound social consequences.179

In Harvey Milk’s political will, which he prepared for the eventuality of his assassination, he writes:

I cannot prevent some people from feeling angry and frustrated and mad, but I hope they will take that frustration and that madness instead of

179 This insight came originally from my friend—and athlete, writer, and speaker—Mariah Burton Nelson.
demonstrating or anything of that type, I would hope that they would take the power and I would hope that five, ten, one hundred, a thousand would rise. I would like to see every gay lawyer, every gay architect come out, stand up and let the world know. That would do more to end prejudice overnight than anybody could imagine. I urge them to do that, urge them to come out. Only that way will we start to achieve our rights.  

This admonition echoed statements he had consistently made in speeches prior to his death. Harvey Milk was “out” and living in the most “out” neighborhood in the most “out” city in the nation. But he was also keenly aware that the majority of gays and lesbians do not live in and are not going to move to San Francisco. And even if they do, they are still irrevocably connected to family and friends at home. Gays and lesbians, even those in San Francisco, won’t be truly accepted until they are known for who they are.

And so “coming out” envisions gays and lesbians creating bridging relationships one by one as each person tells his or her parents, siblings, friends, and loved ones of his or her sexual orientation. Easy it is not. Powerful it is. When our neighbors, sons and daughters, nieces and nephews, sisters and brothers, even mothers and fathers “come out,” it becomes much more difficult to regard gays and lesbians as “them,” as some set of “others.”

In a complex social system law-as-story view, the law-story of gays and lesbians as accepted emerged from the civic webs created by “coming out” civic organizing and supplanted the law-story of gays and lesbians as intolerable. Lawrence replaced Bowers, in the Supreme Court and in the nation.

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180 SHILTS, supra note 166, at 374.
181 As it happened, the AIDS epidemic accelerated this process by “outing” gays, particularly gay men, involuntarily. See WARREN JOHANSSON & WILLIAM A. PERCY, OUTING: SHATTERING THE CONSPIRACY OF SILENCE (Routledge 1994); LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING (Univ. of Minn. Press 1993).
But *Lawrence* is not, as we know, the end of the cycle. What does a complex social system law-as-story view suggest about the current simmering issue of same-sex marriage? Surprisingly, it suggests that the Defense of Marriage Act may have had the salutary effect of encouraging voice by ensuring—at least for a time—50 conversations on the issue.\(^{182}\) These conversations are not consistent. In many states, as mentioned above, state constitutional amendments have put pause to the political possibilities for the time being, though *Romer* ensures that the potential for reopening those conversations remains. But every time one state acts, the reverberations are felt in the others. Massachusetts’s groundbreaking judicial decision to provide same-sex marriage, California’s Proposition 8, New York’s executive order requiring state agencies to honor same-sex marriages from other states, and the passage by state legislatures of same-sex marriage laws all serve as reminders that the story overall is unsettled.

More important, the “coming out” civic organizing process that once applied simply to gays and lesbians revealing their own sexual orientation now often extends to their domestic arrangements. Gays and lesbians, like their heterosexual counterparts, often form bonded pairs. Some do not last, but many do. And with the advent of gay and lesbian couples having or adopting children and building legal protections for each other such as those enjoyed by married couples,\(^ {183}\) “coming out” increasingly encompasses same-sex relationships.

There has, of course, been a backlash against the idea of same-sex marriage—perhaps a bigger backlash than against more basic tolerance of homosexuality *per se*. I wonder if this is because the story of same-sex marriage is more threatening to many

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\(^{182}\) This is the case, at least, so long as the Supreme Court does not rule on the issue on Full Faith and Credit Clause grounds.

\(^{183}\) Estate planning and mutual parenthood of children, for example, can be intentionally provided for.
straight people’s own stories. People who are themselves married and whose stories about their own marriages are bound up with a particular view of that relationship may see same-sex marriage as somehow challenging their own identities. The correlation of views on same-sex marriage with religious beliefs\textsuperscript{184} supports this insight.

To summarize, civic organizing in the form of “coming out” has led to the creation of civic relationships and civic webs joining gays and lesbians with the broader society. Once the initial silence and stigma of coming out of the closet is overcome, the system-level effects of these myriad local interactions are immense—in large part because gays and lesbians permeate society as a whole. Though there are still gay and lesbian “clumps,” they are inevitably connected to non-gay and lesbian “clumps” in relationships of respect (not to mention affection and love). These civic relationships and civic webs have facilitated the emergence of law-stories—first of acceptance of gay and lesbian relationships and now of acceptance of same-sex relationships and marriage. The first of these has progressed to the point of a single public law-story; the second is still in process, and the current legal posture in general supports the conversations that must take place for that process to move forward.

\textbf{B. Abortion and Privacy}

Compare the trajectory of abortion rights and abortion law. First regulated by being medicalized in the mid-19\textsuperscript{th} century, the political issue around removing

\textsuperscript{184} In a 2003 poll, for example, 76% of people with a high degree of religious commitment agreed that homosexual behavior was a sin compared to 55% of others. \textit{Religious Beliefs Underpin Opposition to Homosexuality}, The Pew Research Center for the People and the Press (Nov. 18, 2003). (Note that the level of acceptance has shifted overall in the 6 years since this poll. \textit{See} note 181 \textit{supra} and accompanying text.)
restrictions gained traction with the thalidomide debacle and the highly publicized pregnancy of Sherri Finkbine in 1962.\textsuperscript{185} From the mid-1960’s, reformers were pushing—with some success—to make abortion safer and more available. In response to these efforts, several states loosened their restrictive laws, though these states were the exception rather than the rule.\textsuperscript{186}

But in 1973 the Supreme Court in \textit{Roe v. Wade} declared a constitutional right to abortion under a privacy rubric, creating a trimester approach to abortion rights and regulation.\textsuperscript{187} This decision fueled a backlash\textsuperscript{188} that energized abortion foes and catapulted them into the public arena. The result, in a saga that continues to the present day, has been continual efforts to chip away at \textit{Roe}, primarily in the legislative arena.\textsuperscript{189} Congress has prohibited Medicaid funds being used for abortions\textsuperscript{190} and declared illegal late-term abortions performed by intact dilation and extraction.\textsuperscript{191} And states, especially certain states,\textsuperscript{192} have enacted all kinds of restrictions and regulations, many of which have been reviewed by the Supreme Court. Some have been endorsed as consistent with

\begin{itemize}
    \item \textsuperscript{185} See CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 49-51 (Simon & Schuster 1988).
    \item \textsuperscript{186} \textit{Id.} at 38-94.
    \item \textsuperscript{187} 410 U.S. 113 (1973).
    \item \textsuperscript{188} \textit{But see} Post & Siegel, supra note 31, at 412 (backlash against the liberalizing state statutes was already underway when \textit{Roe} was decided).
    \item \textsuperscript{189} The primary executive action relates to the Mexico City Policy, also known as the Global Gag Rule, an intermittent United States government policy that requires all non-governmental organizations (NGOs) that receive federal funding to refrain from performing or promoting abortion services, as a method of family planning, in other countries. The policy is a political flashpoint in the abortion debate, with Republican administrations adopting it and Democratic administrations rescinding it. The policy was in place from 1984 through January 1993 (President Bill Clinton ended it); reimposed by President George W. Bush on January 22, 2001, his first business day in office - and, not coincidentally, the 28th anniversary of the \textit{Roe v. Wade} decision; and rescinded January 23, 2009, shortly after Democratic President Barack Obama took office.
    \item \textsuperscript{192} GORNEY, supra note 185, at 438-440 (discussing Missouri and Pennsylvania as examples).
\end{itemize}
The basic holding of Roe itself, however, has held, though the Court has shifted from a privacy-based trimester analysis to a liberty-based viability approach.

The overall legal effect of Roe and the anti-abortion backlash has thus been a steady stream of abortion cases decided by the Court. The overall social effect is harder to gauge. On the one hand, the statistics on abortion indicate a broad-based exercise of the right to an abortion: Though estimates vary, at least one study concludes that 43% of American women have had an abortion. Even among those who are opposed to an abortion, a substantial percentage of women have exercised their Roe rights. These numbers are significantly higher than the estimated 10% of the population that is GLBTIQ.

Yet the story about abortion in our society does not reflect this reality. While there are documentaries and collections of personal stories about abortion, they tend to be

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195 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). In addition, several states have enacted so-called trigger laws that would take effect if Roe were overturned. Those states include Illinois, Kentucky, Louisiana, Mississippi, North Dakota and South Dakota. Additionally, many states did not repeal pre-1973 statutes that criminalized abortion, and some of those statutes could automatically spring back to life in the event of a reversal of Roe. Other states have passed laws to maintain the legality of abortion if Roe is overturned. Those states include California, Connecticut, Hawaii, Maine, Maryland, Nevada and Washington. Vestal, Christine. States Probe Limits of Abortion Policy, Stateline.org (2007-06-11).

196 The Alan Guttmacher Institute, www.agi-usa.org; see also Goodman, supra note 160 (quoting Pamela Karlan: “Look to your right. Look to your left. One of you has had an abortion.”)

197 Note polls focus on positional stances but not on personal scenarios or choices for self, family, etc.

198 In comparison to the 43% of women who are estimated to have had an abortion, research shows that approximately 10% of the population is predominantly same sex attracted. Approximately one in every four families has a member who is predominantly same sex attracted.

informative rather than entertaining—documentaries instead of feature films (even the feature film *Vera Drake* is historical)—and to center on the weightiness of the decision rather than to simply tell human stories.\(^{199}\) Consider, in contrast, the lightness of the recent comedy *Juno* about a teenaged girl who gets pregnant and has the baby or Madonna’s song “Papa Don’t Preach” in a similar vein.\(^{200}\) Consider also the situation comedies focused on families with an abundance of children and even polygamous relationships.\(^{201}\) The idea of a high school or even college group centered around not positions on abortion but personal experiences with abortion boggles the mind; instead there are websites in which women can anonymously share their stories.\(^{202}\)

From a civic point of view, the primary feature of the story about abortion is that it is shrouded in silence, secrecy, and privacy. The 43% of U.S. women who have had abortions do not generally talk about their experiences or share their stories beyond their spouse or significant other, a close friend or two, or perhaps a sister. Women who have had abortions—and the parents, friends, partners, and spouses who took them to get those abortions—do not tend to be “out” of the closet. The case name in *Roe* itself is evidence of this.\(^{203}\) Contrary to the Karlan quote at the beginning of this Part, women who have had abortions never really have come out of the closet. For a multitude of reasons—the traditional taboos on matters of sexuality, the professional curtain that has been drawn over abortion consultations and procedures, the desire of women to make their own

\(^{199}\) There are some exceptions. See, e.g., *Party of Five: Before and After* (Fox television broadcast Feb. 21, 1996); *Sex and the City: Coulda, Woulda, Shoulda* (HBO television broadcast Aug. 5, 2001).

\(^{200}\) Even the recent brouhaha about a *Family Guy* episode that the network declined to screen (it was characterized as “hilarious” and “pretty rough”) concerned an episode with an antiabortion message. Lisa de Moraes, “Family Guy’s” Look at the Lighter Side of Abortion, WASH. POST C7 (Aug. 12 2009).

\(^{201}\) See, e.g., *Cheaper by the Dozen* (Twentieth Century-Fox Film Corporation 2003); *Big Love* (HBO television series 2006 – 2009).

\(^{202}\) See, e.g., Sharing Stories and Information, [www.afterabortion.com/abortion.html](http://www.afterabortion.com/abortion.html).

\(^{203}\) Norma McCorvey, the *Roe* plaintiff, did not reveal her identity until 1984.
choices, and a lingering stigma associated with having an abortion in any case—this is something we don’t generally know about people. It is not a known aspect of relationships in the civic as opposed to the intimate sphere.

Unlike relationships with GLBTIQ people who are “out,” then, our relationships with women who have had abortions and others, both men and women, who have supported them, neither join together those who have had that experience nor link those who have with those who have not. It is thus easy to “other”ize such individuals, and not so easy to forge civic relationships of respect with them that encompass this key aspect of their life experience, of their story. And, as these stories are silenced, the stigma, the taboo, the secrecy remain. In this regard, Roe’s privacy approach may have been unhelpful, and Casey’s shift to a liberty analysis a step toward honesty and the kind of free flow of storytelling and relationship from which a truly grounded story can emerge. The dearth of ordinary abortion stories is a debilitating blow from a civic perspective.204

As Columnist Ellen Goodman observes,

> [a]bortion was legalized on the grounds of the right to privacy. And so it remains private. But the more private it is, the more we think it only happens to someone else, someone "unlike us." The more unlike us she is, the less public support there is for the right. Abortion rights slip away as the woman slips out of sight.

> Here is the conundrum in the closet. For all the lingering opposition to same-sex marriage, being gay is losing its stigma. Having an abortion is being more deeply stigmatized.205

> Not surprisingly, then, the public story about abortion is highly impersonal. It is about positions: Are you pro-life or pro-choice? The standard opinion poll questions distance the person polled from the issue. People are asked if they think abortion should

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204 In comparison to gay “coming out,” abortion “coming out” can be more difficult in that people are unlikely to self-identify and congregate on the basis of abortion. But once people come out on abortion, the greater number of people with direct experience would seem to expedite change.

205 Goodman, supra note 160.
be available in various hypothetical circumstances\textsuperscript{206} rather than if \textit{they or their daughter, sister, mother, or other female friend or relative} were raped, a teenager, a child victim of incest, or carrying a fetus with certain disabilities. Because real abortion stories are so underground, the public story vacuum is filled in other ways, with positional posturing and polling data and legal enactments that are remote from people’s actual life experiences.

Yet there is evidence that people’s different views of abortion are closely tied to people’s life experiences and world views more generally, specifically their views of women and motherhood. Sociologist Kristin Luker’s interviews with pro-life and pro-choice activists describe two distinct views of the world. Specifically, she concludes that “the abortion debate is so passionate and hard-fought because it is a referendum on the place and meaning of motherhood…[T]wo opposing visions of motherhood are at war.”\textsuperscript{207}

In the pro-life view, men and women are “intrinsically different,” “have different roles to play,” and “motherhood—the raising of children and families—is the most fulfilling role that women can have.”\textsuperscript{208} From this view, abortion looks wrong three times over. First, it is intrinsically wrong because it takes a human life and what makes women special is their ability to nourish life. Second, it is wrong because by \textit{giving women control over their fertility}, it breaks up an intricate set of social relationships between men and women that has traditionally surrounded (and in the ideal case protected) women and children. Third and finally, abortion is wrong because it fosters and supports a world view that deemphasizes (and therefore \textit{downgrades}) the

\textsuperscript{207} LUKER, supra note 161, at 193 (emphasis in original). “[A]ll the previous rounds of the abortion debate in American were merely echoes of the issue as the nineteenth century defined it: a debate about the medical profession’s right to make life-and-death decisions. In contrast, the most recent round of the debate is about something new…the abortion debate has become a debate about women’s contrasting obligations to themselves and others.” \textit{Id.}
\textsuperscript{208} \textit{Id.}, at 159-160
traditional roles of men and women. Because these roles have been satisfying ones for pro-life people and because they believe this emotional and social division of labor is both “appropriate and natural,” the act of abortion is wrong because it plays havoc with this arrangement of the world.\textsuperscript{209} Moreover, “[p]ro-life people as a group subscribe to explicit and well-articulated moral codes,” and “abortion offends the[ir] deepest moral convictions.”\textsuperscript{210}

In the pro-choice view, in contrast, “men and women are substantially similar,” “women’s reproductive and family roles [are not] a ‘natural’ niche but [ ] potential barriers to full equality,” and while “women (and men) find children and families a satisfying part of life, [ ] they also think it is foolhardy for women to believe that this is the only life role they will ever have.”\textsuperscript{211} In this view, abortion morality is situational and contextual.

First, there is a distinction between an embryo and a child, which all pro-choice people take for granted. Second, there is the idea that the embryo, though not a baby or a full human being, is nonetheless ‘alive’ and therefore has some implicit moral rights. Finally, there is a pluralist bias: if a person has a different moral view of abortion, she should follow her own conscience, ‘even if it means some other sacrifice.’ Morality thus consists of weighing a number of competing situations and rights and trying to reconcile them under general moral principles rather than specific moral rules.\textsuperscript{212} Overall, unlike pro-life activists, pro-choice activists, “when trying to decide what is the moral thing to do,…ask what is the loving thing to do. The choice of the word loving emphasizes the fact that moral judgment relies upon a subjectively reasoned application of moral principles rather than upon an externally existing moral code.”\textsuperscript{213}

Further, the profiles of pro-life and pro-choice activists that Luker interviewed demonstrate that the world views reflect concrete life experiences. As compared to the

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{209}] Id. at 161-162 (emphasis in original).
\item[\textsuperscript{210}] Id. at 174.
\item[\textsuperscript{211}] Id. at 176.
\item[\textsuperscript{212}] Id. at 184.
\item[\textsuperscript{213}] Id. at 185 (emphasis in original).
\end{enumerate}
\end{footnotesize}
pro-choice activists, the pro-life activists in Luker’s study were less likely to work, had less personal income, were less educated, were more likely to be married and less likely to be divorced, had more children, and tended to have married and had their first child earlier.\textsuperscript{214}

Perhaps the single most dramatic difference between the two groups, however, is in the role that religion plays in their lives. Almost three-quarters of the pro-choice people interviewed said that formal religion was either unimportant or completely irrelevant to them, and their attitudes are correlated with their behavior…Among pro-life people, by contrast, 69 percent said religion was important in their lives, and an additional 22 percent said that it was very important. For pro-life women, too, these attitudes are correlated with behavior.\textsuperscript{215}

This correlation of abortion views with religion is echoed by other, more recent and widespread polling data.\textsuperscript{216}

Luker’s study suggest three further civic insights on the abortion quagmire. First, perhaps it is not just more abortion stories we need but more motherhood stories. The pro-life and pro-choice activists may fall reasonably comfortably into the two loose groups of “housewives” and “feminists,”\textsuperscript{217} but I venture to suggest that most American women have a foot in each camp and our weight shifts over time—hour to hour, day to day.

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\textsuperscript{214} Id. at 194-196. “When the social background data are looked at carefully, two profiles emerge. The average pro-choice activist is a forty-four-year-old married woman who grew up in a large metropolitan area and whose father was a college graduate. She was married at age twenty-two, has one or two children, and has had some graduate or professional training beyond the B.A. degree. She is married to a professional man, is herself employed in a regular job, and her family income is more than $50,000 a year. She is not religiously active, feels that religion is not important to her, and attends church very rarely if at all…The average pro-life woman is also a forth-four-year-old married woman who grew up in a large metropolitan area. She married at age seventeen and has three children or more. Her father was a high school graduate, and she has some college education or may have a B.A. degree. She is not employed in the paid labor force and is married to a small businessman or a lower-level white-collar worker; her family income is $30,000 a year. She is Catholic (and may have converted), and her religion is one of the most important aspects of her life: she attends church at least once a week and occasionally more often.” Id. at 197.

\textsuperscript{215} Id. at 196-197.


\textsuperscript{217} Id. at 193
day, year to year. It’s a truism to say that the U.S. has not yet come to terms with the role of women, but that doesn’t mean it isn’t true. If abortion is actually a particularly sensitive facet of this larger societal question, as the larger story evolves so will the abortion story.\textsuperscript{218}

Second, civic webs cannot grow when “housewives” and “feminists” communicate primarily through positional debate and rarely through dialogue aimed at actual interpersonal understanding. It is unclear that these two groups have many occasions to interact even in child-related spheres where an overlap of interest would seem likely. Luker’s research, for example, suggests that pro-life women activists tend to focus on informal activities and bow out of participation in even such organizations as PTAs, Scouts, and church activities.\textsuperscript{219} The lack of bridges—civic relationships of respect created through personal stories that rest on understanding without requiring agreement—makes the civic emergence of an abortion story that contains threads from both “clumps” well-nigh impossible.

Third, there may be an anti-civic attitude inherent in pro-life morality. For pro-life activists, Luker concludes,

\begin{quote}
[m]orality…is a straightforward and unambiguous set of rules that specify what is moral behavior. Since [these activists] believe that these rules originate in a Divine Plan, they see them as transcendant principles, eternally valid regardless of time, cultural setting, and individual belief…[These] traditional, ancient codes…have stood the test of time and exist as external standards against which behavior should be judged.\textsuperscript{220}
\end{quote}

In other words, morality and the secular laws that enforce it constitute a not-story: It is not socially constructed, it is not negotiable, and it trumps all other stories by virtue of its

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\item[218] Cf. Lisa Belkin, \textit{The Senator Track}, NY TIMES MAGAZINE 9 (Jan. 4, 2009) (discussing why women’s unpaid work does not “count” as valuable experience in the working world—using Caroline Kennedy’s potential Senate run as an example).
\item[219] \textsc{Luker supra} note 161, at 204-205 (footnote).
\item[220] \textit{Id.} at 174.
\end{footnotes}
Such an understanding, even if a minority view, is a serious impediment to the kind of civic society from which civic law-stories can emerge.

From this perspective, the problem is not so much that pro-life legislation constitutes a violation of the First Amendment, the Establishment Clause, and freedom of religion by enshrining one set of religious beliefs (the core belief in the personhood of the fetus beginning at conception) over others. Rather (and perhaps more fundamentally), the problem is that attitudes and practices that preclude or interfere with accessibility and openness to the stories of others are intrinsically anti-civic. The democratic protection of freedom of religion from government interference is related to a civic openness to multiple stories and their contribution to an emergent story, but its focus is different. The civic focus is on the attitudes of citizens themselves and whether those attitudes enhance the civic.

The lack of communicative interactions at the person-to-person level is reinforced in more formal story- or law-making contexts. Whereas the Defense of Marriage Act pushes discussion of same-sex marriage into the states, Roe has had a quite different effect. Roe has provided “cover” for state legislators for the past generation. Pro-choice legislators can meet “litmus tests” to get pro-life votes knowing that Roe is there to limit the effects of any state law that is actually passed. Pro-life activists and legislators thus get a free pass with respect to laws restricting abortion. This dynamic skews the process by which a law-story that reflects the various viewpoints might emerge.

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221 Strand, supra note 3, at 628-630.
223 See, e.g., Gorney, supra note 185, at 438-440
To summarize, civic relationships and civic webs may be seen as seriously lacking vis-à-vis an abortion story. Pro-choice citizens are silenced; pro-life citizens are disinclined to listen. *Roe* constrains communicative interactions: The primary conversation on the issue since *Roe* has been between pro-life activists via receptive state legislatures and the Supreme Court. The actual life experiences of both give way to polarizing positional debate that destroys rather than builds bridges. Not only does this exclude most citizens, it focuses on abortion in isolation rather than on abortion as part of a constellation of issues and world views relating to motherhood and the role of women in our society. And it suppresses an awareness of the key underlying issue of a “not-story” attitude as fundamentally anti-civic. Not only have civic relationships and webs not been created, attention and energy has been deflected from the need to create them.

If pro-choice citizens seek to move beyond this cramped exchange, it may behoove them to break their silence and tell their stories. *Roe* has obviated the perceived necessity for this, which has in essence allowed the pro-choice “clumps” to have their cake (abortion rights) and eat it too (not have to put themselves on the line in their relationships with others). Once stories of all kinds start flowing, it may be more difficult for pro-life activists to refuse to listen and to maintain a not-story posture, just as the stories of gay and lesbian couples have spotlighted the role of not listening with same-sex marriage. From the civic relationships and webs that follow, a more civic law-story of abortion could emerge. This civic organizing is not an easy path, but it may be a more sustainable one.\(^{224}\)

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\(^{224}\) With racial equality, for example, while *Brown* led the way, the Civil Rights Movement and the Civil Rights and Voting Rights Acts represented a more resounding emergence of national views. *See* Strand, *supra* note 3, at 615-618.
V. Civic Organizing, Democracy, and Law

From a civic perspective, democracy is an institutional structure that through its emphasis on popular control and equality reveals an original and essential not-story, anti-civic posture. Onto the original trunk of this tree, however, have been grafted some civic branches: A democratic government does not interfere with and even to a certain extent nurtures civic interactions. The First Amendment protections of freedom of association and of religion, for example, protect citizen interactions and relationships. The separation of power and federalism provisions of the Constitution and the basics of law creation, for example, ensure a minimum level of conversation in the creation of the nation’s law-stories.

But the civic relationships and civic webs that give a social system a civic character—that make it what we often think of as “democratic” in actuality—arise not just from a lack of interference and the presence of some basic supportive structures. Instead, they are the result of civic organizing, of affirmative cultural stories and consequent actions of active citizenship vis-à-vis our institutions and each other. A law-as-story complex social system civic concept of law is such a story. We as citizens are responsible for civic interactions; we as citizens create the bridging relationships that build civic webs.

An important aspect of the civic story is that it encompasses but need not be limited to the Constitution. The Constitution is a part—a key part—of the democratic regime that limits the nation-state and to a certain degree protects and ensures the civic. But it is not inherently aspirational: It does not serve as a springboard for imagining, for envisioning who we as a civic people might become.
In fact, an undue focus on the Constitution and its defensive democratic posture might discourage us, though perhaps not explicitly, from civic enterprises based on the affirmative goals of enhancing the conditions for relationships of respect (e.g. economic and social protections as human rights) or building the weak-link bridges that will give our society resilience (e.g. not just eliminating overt racial discrimination but facilitating the growth of cross-racial relationships). And so civic organizing points us toward a certain kind of constitutional skepticism, a skepticism that the Constitution is or should be our only story. This constitutional skepticism prompts us to be active, to work as individuals with each other, to reach out to those who are not like us, to see and to listen. In this way, our civic stories will grow.

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