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CHANGE IS NOTHING NEW TEACHING PUBLIC POLICY[†]

NICHOLAS W. ALLARD*

ABSTRACT

This Article addresses the paradox that change is nothing new for those who teach aspiring lawyers how to effectively engage in the reality of the complex public policy arena. It rejects the notion that money buys results, and success is merely a matter of quick-fix influence peddling and personal relationships. Instead, to teach students how to provide public policy analysis, advice, and advocacy, teachers must help them understand and be prepared for a relentlessly dynamic, continuously evolving professional ecosystem where the very object of the work is to either advance or forestall legal change, often involving issues contested on multiple fronts and levels of government, over the long term where outcomes are constantly challenged and rarely, if ever, permanent. The players, institutions, venues, techniques, procedural rules, and compliance requirements are in a perpetual state of flux, usually operating under the light of public scrutiny and often in headlines. Pursuing the question of what the law or rule should be is challenging work at the intersection of law, government administration and regulation, politics, business, science,

[†] The views in this essay are those of the writer's alone and do not necessarily represent, nor should they be attributed to, the views of anyone else. This Article contains ideas, themes, and arguments adumbrated in previous articles, commentaries, speeches, presentations, and other writings and developed in my "Government Advocacy by Lawyers" course taught at Brooklyn Law School. I acknowledge the outstanding, generous assistance and encouragement over many years by Professor James A. Thurber, Distinguished University Professor of Government, Founder of the Center for Congressional and Presidential Studies, School of Public Affairs, American University. Professor Thurber is a giant in the field of public policy, a prolific author of books, articles, and syllabi that are useful in teaching a policy course to any student audience. In 2021, his career-long excellence, mentoring, and service as a great teacher, mentor, and colleague were recognized by receiving American University's Outstanding Teacher Award.

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technology, and the public interest. For lawyers who have an appetite for change and who can tolerate a degree of fluidity, uncertainty, and the need to adapt to new circumstances, public policy is an exciting, honorable, and meaningful way to put the investment of time, effort, and money in one's legal education to good use in a worthwhile career of making a difference. The need to rethink and adapt how to teach public policy to law students after Trump or any administration change is not in itself new. However, the fundamental nature and degree of the recent tectonic shifts in the landscape of rules and norms governing the public policy process are unprecedented, and profoundly so.

This Article identifies the need for teachers to bridge the gap between conventional wisdom and contemporary academic literature about the nature of the public policy process in the United States. It refers to an impressive amount of academic work available for course reading lists, which can be instructive and worked into a policy course syllabus. The role that lawyers and the public can and should play to sustain democracy, justice, and equality also can be studied by examining contemporary controversies concerning structural issues about our constitutional form of government. Teaching what is needed for good and better government can help students learn a great deal about public policy while involving them in thinking about theoretically and practically how to go about resolving very difficult policy issues. The Article highlights five possible topics and case studies about the future of democracy arising from the harrowing 2020 political slugfest. Four involve structural issues in the field of election law. The fifth is the latest iteration of a perpetual concern about inequity in the access to communications technology that is essential for participating in governance and access to economic opportunity. Each of these five examples are among the many possible topics a teacher might choose from to provide fertile, new ground for critical intellectual analysis and creative approaches teaching public policy. The Article also reviews various techniques for teaching policy, this author's view of the most significant external changes on the horizon for the policy process, and what law schools can and should do to teach students and to educate the public about how our government is supposed to work. The Article concludes that public policy is an integral part of teaching and studying subjects across the law school curriculum. It is also a substantial part of what lawyers do in private practice, government, public service, and public interest work. That is because the public policy process touches everything that matters to us as individuals and members of a diverse community living under the same constitutional rulebook. So, teaching public policy is a worthwhile calling whether as part of another doctrinal subject, experiential educational training, or as the central theme in its own course.

I. THE CHALLENGING PARADOX OF TEACHING PUBLIC POLICY

Public policy inherently concerns change. So, paradoxically, change is nothing new for those who study and teach aspiring lawyers how to effectively engage in the reality of the complex public policy arena. Admittedly, this insight is in conflict with the popular, simplistic, and incorrect notion that money buys results, and success is merely a matter of quick-fix influence peddling and personal relationships.¹ For students to learn how to provide public policy analysis, advice, and advocacy, they must understand and be prepared for a relentlessly dynamic, continuously evolving professional ecosystem where the very object of the work is to either perpetuate or forestall legal change, often involving issues contested on multiple fronts and levels of government, over the long term where outcomes are constantly challenged and rarely, if ever, permanent. The players, institutions, venues, techniques, procedural rules, and compliance requirements are in a perpetual state of flux and regularly change, usually operating under the light of public scrutiny and often in headlines.² It is challenging work at the intersection of law, government administration and regulation, politics, business, science, technology, and public interest. It is not work that suits everyone. As the incomparable Ira Schuman aptly quipped about his real estate business based in New York City, “It’s not rocket science, it’s harder than rocket science.”³ But for the right kind of lawyers who have an

1. An excellent new book for teaching the complex dynamism of the public policy process is SEAN J. KEALY, *AMERICAN LEGISLATIVE PRACTICE* (2021). *See also, e.g.*, FRANK BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* (2009); LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* (2015); ALLAN CIGLAR ET AL., *INTEREST GROUP POLITICS* (9th ed. 2016); MARK FAGAN, *LOBBYING: BUSINESS, LAW AND PUBLIC POLICY, WHY AND HOW 12,000 PEOPLE SPEND \$3+ BILLION IMPACTING OUR GOVERNMENT* (2015); JOHN C. SCOTT, *LOBBYING AND SOCIETY: A POLITICAL SOCIOLOGY OF INTEREST GROUPS* (2018); AMERICAN BAR ASSOCIATION, *THE LOBBYING MANUAL* (William V. Luneburg et al. eds., 4th ed. Supp. 2011) [hereinafter *THE LOBBYING MANUAL*]; FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016); AMERICAN GRIDLOCK: *THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION* (James A. Thurber & Antoine Yoshinaka eds., 2015) [hereinafter *AMERICAN GRIDLOCK*]; OBAMA IN OFFICE (James A. Thurber ed., 2011).

2. *See* KEALY, *supra* note 1, at ch.7. For a history of changes in public policy and the continuous evolution of lobbying regulation, see Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & P. REV. 23 (2008); *THE LOBBYING MANUAL*, *supra* note 1, at ch.40; Nicholas W. Allard, *Money and Speech: Practical Perspectives*, 25 J.L. & POL’Y 255 (2016).

3. Ira Schuman, Vice Chairman, Director, Co-Branch Manager, Savills, United States. In a meeting in his Park Avenue office with a leading British educator hoping to collaborate with the professional development and educational needs of companies in the real estate sector, Ira explained: “Rocket scientists work with the laws of nature and immutable facts. If you ignite fuel, you know what, when, and where the result will happen. You know how much fuel and speed you need to get a rocket out of gravity’s pull and through atmospheric resistance. You can predict results, and through trial-and-error, correct mistakes to get the result you want.” In contrast, Ira

appetite for shaping society's legal framework and who can tolerate a degree of fluidity, uncertainty, and the need to adapt to new circumstances, public policy is an exciting, honorable, and meaningful way to put the investment of time, effort, and money in one's legal education to good use in a worthwhile career of making a difference.

In no way do I minimize the scope or impact of the changes caused during the Trump Presidency and its aftermath. The aberrant, unprecedented assault on the Constitution, the rule of law, and democracy by Donald J. Trump and his followers is described in these pages by Professor Joel Goldstein's clear, compelling, and typically insightful article.⁴ His article is recommended, if not essential, reading for anyone interested in a comprehensive analysis of the serious different ways that Trump's authoritarian proclivities and disregard for law and ideals shook the foundation of our democratic form of government. Professor Goldstein's observations about the abandonment of American ideals and principles justified by the higher purpose of enabling Trump's power and autonomy depict radical changes in every aspect of governance, including the assumptions about the beliefs and behavioral norms expected of people in the public policy process.⁵ Professor Goldstein warns about serious new, and even

described the nature of real estate business based in the global epicenter of the industry in New York as being much more fluid and unpredictable, requiring constant creative adaptation and change to unpredictable circumstances, most of which cannot be controlled. As a public policy lawyer teaching the subject, I can relate.

4. Joel Goldstein, *Teaching Constitutional Law After the Trump Presidency*, 66 ST. LOUIS U. L.J. (forthcoming 2022).

5. A chilling reminder of the danger of justifying illegal, unethical, and immoral behavior for higher purposes is portrayed in the film *JUDGMENT AT NUREMBERG* (1961), especially the presiding Judge's concluding speech delivered by actor Spencer Tracy. This courtroom drama set in 1948 Nuremberg, Germany, depicts a fictionalized version of the so-called "Judge's Trial," one of the twelve U.S. Nuremberg Military Tribunals conducted after World War II. Another poignant, timeless, and timely example of the difficulty of overcoming societal complacency to those unspeakable acts even in the direst circumstances is Polish Diplomat Jan Karski's heroic efforts in World War II to inform Western governments, including the United States, about the atrocities suffered by Jews during the Holocaust. This story is told powerfully and unforgettably in *REMEMBER THIS: THE LESSON OF JAN KARSKI* (2021), written by Clark Young and Derek Goldman, directed by Derek Goldman. The one-actor, one-act play was recently performed in Washington D.C. at the Shakespeare Theatre by David Strathairn. Thomas Floyd, *David Strathairn, Now Playing a Holocaust Witness at the Shakespeare Theatre, Reflects on the Lessons of the Past*, WASH. POST (Oct. 5, 2020, 12:00 PM), https://www.washingtonpost.com/goingoutguide/theater-dance/david-strathairn-qanda-shakespeare-theatre/2021/10/05/ec97e4dc-21f5-11ec-b3d6-8cdebe60d3e2_story.html [<https://perma.cc/5H74-CM33>]. The simple, trenchant words of the play's Prologue, words that were written eight years ago about events that occurred over eighty years earlier, could have been ripped from today's headlines: "We see what goes on in the world, don't we?" Star David Strathairn asks, while channeling Karski, the real-life resistance fighter who traveled from Poland to Franklin D. Roosevelt's Oval Office in 1943 to bring word of the Holocaust's horrors. "Our world is in peril. Every day, it becomes more and more fractured, toxic, out of our control. We are being torn apart by immense gulfs of selfishness, distrust, fear, greed,

existential, constitutional problems and offers suggestions for addressing them in the classroom. In addition, he adds his voice to those who call for law schools to do more to educate the public about how and what is necessary for our system of government to work. This imperative certainly applies to the field of teaching public policy. The need to rethink and adapt how to teach public policy to law students after Trump is not in itself new. However, the fundamental nature and degree of the tectonic shifts in the landscape of rules and norms governing the public policy process are unprecedented, and profoundly so.

II. LEARNING ABOUT & STUDYING THE NATURE OF THE CONSTANTLY EVOLVING PUBLIC POLICY PROCESS

The traditional practice of law pursues the question: “What is the law?” So, typically, private corporate law practice involves determining how to advise clients, draft a contract, or structure a transaction and then “paper the deal” according to the applicable existing law. Similarly, private litigation and dispute resolution usually involves determining who wins or loses given the facts under the existing law. In contrast, the public policy process involves pursuing the question: “What should the law or rule be?” Conceptually, answering this question involves fact-based discourse, development of consensus, and compromise leading to outcomes determined by governmental bodies and officials who make and implement laws and rules. Without a doubt, developing generally applicable answers—that is, policy solutions—is work that lawyers can do especially well, while also following the procedural and ethical rule books. The distinguishing critical thinking, rigor, and professional responsibility expected of lawyers is increasingly advantageous because policy work has become exceedingly difficult given the contemporary complexity of issues, partisan discord, and government malfunction. The truth, which many lawyers disclaim or seem not to recognize, is that most lawyers engage in policy work in some form or another at various points of their careers, even if public policy analysis, advice, and advocacy are not a core part of their practice.

The policy process unfolds in a complex, dynamic, continuous, and unpredictable environment in multiple arenas. It often is impacted by external events, frequently unexpected, and shaped by circumstances which the participants and interested constituencies cannot control. Policy change, if it happens, often occurs only over considerable time with sustained effort.⁶ Outcomes are never completely secure from further change or even reversal. The experience leading up to and following the enactment of the landmark

indifference, denial.” *Id.* Karski’s reports to President Franklin D. Roosevelt, Justice Felix Frankfurter, and other leaders went unheeded and failed to prompt government intervention in the genocide of Jews by the Nazi regime, which continued unabated until the end of the war. *Id.*

6. *See generally* books authored by BAUMGARTNER ET AL., DRUTMAN, & LEE cited *supra* note 1.

Telecommunications Act of 1996⁷ and the Affordable Care Act of 2010⁸ are examples of this phenomenon. Efforts to change, limit, update, or reverse these well-known measures continue unabated to this day. Public policy develops in an ongoing, ever-evolving, organic process, which, of course, often involves contentious multiyear back-and-forth legislative and regulatory processes and litigation about major issues. Over time, this robust democratic system determines when and how society progresses and how far it can be moved toward justice, freedom, economic opportunity, equal rights, peace, and the well-being of people and the very planet we share. If only public policy was rocket science, or as relatively manageable as space tourism.

III. LAW ITSELF IS MORE THAN A LINEAR RHYMING BALLAD & POLICY WORK IS JAZZY

“History does not repeat itself, it rhymes.”⁹ That pithy observation often attributed to Mark Twain wonderfully describes the dynamic ever evolving essence of law.

Yet, legal history has always been more than a linear ballad in rhyming verse. After all, law is written in the past, stretched to fit the present, and already late for the future. It is rarely, if ever, exactly the same. The tension between continuity and change is inherent in law. That means that every generation of lawyers must resonate with the past and harmonize precedents, listen and respond, collaborate with other players, adjust to different procedural rhythms, and improvise off the cadence of the beat of established rules to best serve people in the fresh and novel world where humanity always exists. Performing as a good lawyer involves more than following written notes on a page. It can be downright jazzy. The best public policy lawyers are the jazz artists of law.

Throughout the history of civilization, prophets, philosophers, missionaries, forced migrants, refugees, researchers, adventurers, sailors, soldiers, pilots, and astronauts have led explorations of the unknown. In the 21st Century, lawyers, and especially those engaged in public policy work, have the exciting opportunity—in truth, duty—to help society navigate through a perfect storm of transformational forces testing the limits of our established values, norms, practices, and rules. Lawyers will be called on to make us all better than our differences. For some time, our honorable profession has been serving as guides for people to cope with constantly accelerating change, certain uncertainty, and risk. These forces are all driven by an enormous confluence of megatrends: technological disruption, increasing competition, consumer-centric demands,

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

8. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

9. Brian Adams, *History Doesn't Repeat, But It Often Rhymes*, HUFFPOST (Jan. 18, 2017, 6:47 PM), https://www.huffpost.com/entry/history-doesnt-repeat-but-it-often-rhymes_b_61087610e4b0999d2084fb15.

and the transborder, polycentric, interdependent reality of our world. The Covid-19 pandemic is a vivid example of our global interconnection and interdependence, as well as the public policy challenges of our time.¹⁰

IV. STUDYING & TEACHING PUBLIC POLICY MATTERS BECAUSE OF WHAT IS AT STAKE

In the United States and around the world, we are at an inflection point. Lawyers will play as important a role as ever in the history of the profession. They will be necessary to chart a course for people, organizations, and communities toward greater economic growth and opportunity, equality, social and racial justice, peace, and well-being as well as sustaining the health of the earth, which is our home. What lawyers do will matter, whether in firms, big or small, or as solo practitioners and in-house counsel. They can contribute through their work in the private sector, for nonprofits, government, or other forms of public service, including providing legal aid for the poor and underrepresented. They can be excellent entrepreneurs and make a difference in any of the wide variety of fields in which the study and intellectual rigor of law gives one an edge, such as business, diplomacy, and politics. Without question, given the stakes, lawyers can make a difference through understanding and helping reach solutions to the issues of our day in the public policy process. They can do so as teachers, practitioners in the private or public sectors, and lawmakers.

Good public policy lawyers are crucial because in this moment we all are involved in struggles where critical outcomes are in the balance. They will prove to be instrumental in determining whether we continue to enjoy the benefits of the rule of law in democracies governed by, and for, the people, with the consent of the governed. Public policy lawyers can help make sure that this remains so, and that departures from legal order are exceptions that highlight what is right. The democratic process never has been easy or perfect. As always, patience and

10. For a crisp and informative history of the similarities and differences throughout U.S. legal, political, and public health policy responses to epidemics, see JOHN FABIAN WITT, *AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19* (2020). Mrs. Allard, my mother, did not bring up naïve Pollyannaish children. We can stipulate that there always have been and are lawyers who do not operate with their professional ethical obligations and the public interest uppermost in mind. A particularly concerning contemporary issue that warrants attention is how legal process can be used, if not abused, to delay timely completion of important public investigations and the resolution of legal challenges, often verging on, if not actually, frivolous, that impede efforts to hold public figures accountable for unconstitutional and illegal behavior, disregard sworn duties and the rule of law, and attack our constitutional democracy. The slow grind of justice and equity is not a modern phenomenon, nor is it beyond the capacity and imagination of courts and legislators to remedy fairly and justly. *Cf.* CHARLES DICKENS, *BLEAK HOUSE* (1853) (famous satire of the legal profession and slow grind of judicious process in England credited with legal reforms in the 1870s).

persistence will be essential. Paraphrasing Winston Churchill's quip about democracy, it is the worst system, until you consider the others.

Our free, democratic, civilized way of life based on law and justice faces severe threats on many fronts. Across America, and throughout the world, people are fighting over nothing less than the future of democracy, the future of humanity. We are involved, for example, in historic battles over justice, freedom, equality, globalism, and whether people and the natural world can continue to co-exist. The outcomes of these struggles will determine whether the fundamental values, norms, and imperfect institutions—which have been vital for empowering people, promoting cooperation, caring generously for others, and improving the human condition since the founding of the United States—will continue to evolve and endure, or instead, whether we will fall into a dark, dystopian world dominated by power, violence, privilege, immorality, and serendipitous happenstance, not to mention cataclysmic events of biblical proportions. Also at stake is whether, when responding to emergencies and existential crises, we can maintain our best ideals or resort to our worst qualities: deception, brutality, arrogance, ignorance, delusion, excess, selfishness, and indifferent incompetence.¹¹ Today, the cautions long ago to Americans about avoiding these demons from Justice Brandeis¹² and Ambassador George Kennan¹³ seem disturbingly timely.

11. This author chooses to be optimistic. For example, there are inspiring reminders of America's eventual success overcoming the Great Depression and World War II powerfully depicted in the Ken Burns documentary series, *The Roosevelts: An Inspiring History*, *The Rising Road (1933–1939)* & *The Common Cause (1939–1944)* (Ken Burns PBS television broadcast Sept. 14, 2014). Additionally, Spikes Lee's timely, moving, and cautionary new Brooklyn-centric series about New York surviving and overcoming the initial horrific attacks and a generation of other corrosive challenges on the twentieth anniversary of the 9/11 attacks is another example, NYC EPICENTERS 9/11 → 2021½ (HBO 2021). In one of hundreds of interviews by Lee, longtime WNBC New York News Anchorman Chuck Scarborough trenchantly observed that in the aftermath of 9/11, people came together instantly, selflessly, heroically, and creatively, such as the little-known story of the massive impromptu Maritime rescue of half a million people trapped in lower Manhattan, far exceeding the miracle of Dunkirk. Scarborough then contrasted the many ways the Covid-19 pandemic drove us apart—many people retreated to isolation, selfishness, cynicism, and materialism. For a comprehensive essay review of less optimism in books of the last generation about the abandonment of values in the face of crisis, see Carlos Lozada, *9/11 Was a Test. The Books of the Last Two Decades Show How America Failed.*, WASH. POST, Sept. 5, 2021, at B1.

12. *Olmstead v. U.S.*, 48 S. Ct. 564, 572–73, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”).

13. George Kennan concluded his famous “Long Telegram” from Moscow to the Secretary of State analyzing Soviet expansionism with the poignant warning, that in opposing foes who seek to destroy us and who abhor our way of life, we must take care not to become like them. Telegram from George Kennan, Ambassador, to Secretary of State, Washington (Feb. 22, 1946), <https://digitalarchive.wilsoncenter.org/document/116178.pdf>. See also George F. Kennan, *The*

Complicating matters, it is also a time when people everywhere are grappling with problems amidst governmental dysfunction at every level. The dominant, and often siloed, scientific, economic, political, sociological, philosophical, and legal approaches of the late 20th Century and our post-World War II institutional mechanisms have failed to adequately address growing disparities in wealth, health, food security, personal safety, social, gender, and racial injustice, threats to sustaining both democracy and the very world in which we live, and how to adhere to ethical values in a free and civil pluralistic society.

So, there is much daunting work to be done. Although it is the conceit of every generation to believe its collective experience is unprecedented, in the 21st Century there are “new things under the sun.”¹⁴ Society faces issues and problems that are different in degree and scope than in the past. For example, because of the speed, power, and capacity for data storage of networked digital devices, for the first time in the history of humanity it is easy to remember and almost impossible to forget.¹⁵ Another example is that throughout the history of civilization, political theory and governance always depended on society’s evolving understanding of the nature of human beings.¹⁶ That is, the essence of humanity was a given for artists, philosophers, and political theorists to attempt to understand and depict, and for laws to guide and govern. Now, due to scientific breakthroughs relating to the “code of life,” we have the capacity to determine, predict, change, and shape the nature of humankind.¹⁷ This does not merely shake the underpinnings of political theory and philosophy. It turns them inside-out in a revolutionary way. That is science, plausibly, rapidly, and not too subtly, is shifting the age-old question of “what to do about the proclivities of people” to the uncomfortable question of “what would you want the proclivities of people to be?”¹⁸ And consider that advances in artificial intelligence synergistically coupled with biotechnology raise novel questions about the role

Sources of Soviet Containment, FOREIGN AFFS., July 1947 (originally signed Mr. X, but authored by Kennan).

14. Cf. *Ecclesiastes* 1:9 (King James).

15. This is the profound insight of preeminent privacy expert, Viktor Mayer-Schonberger, Professor of Internet Governance and Regulation, Oxford Internet Institute, Oxford University. See VIKTOR MAYER-SCHONBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009).

16. I have discussed this observation previously, see, e.g., Nicholas W. Allard, *Sweet Are the Uses of Adversity*, 52 U. TOL. L. REV. 197, 224–25 nn.68–70 (2021).

17. WALTER ISAACSON, *THE CODE BREAKER: JENNIFER DOUDNA, GENE EDITING, AND THE FUTURE OF THE HUMAN RACE* (2021).

18. In China, a scientist created a child in his laboratory. See Katherine J. Wu et al., *Nobel Prize in Chemistry Awarded to 2 Scientists for Work on Genome Editing*, N.Y. TIMES, Oct. 7, 2020, at A13. The promise and risks of the new gene editing technology is discussed by Nobel laureate and her coauthor, JENNIFER A. DOUDNA & SAMUEL H. STERNBERG, *A CRACK IN CREATION: GENE EDITING AND THE UNTHINKABLE POWER TO CONTROL EVOLUTION* (2017); ISAACSON, *supra* note 17.

of machines in place of humans, even in the learned professions, whether robots deserve civil rights, and the fundamental distinction between machines and humans.¹⁹ Turning to the fraught relationships of humans and the natural world, experts warn that we must completely change how we eat, move, work, and live in the next fifty years, or it will be too late to save the planet from environmental destruction.²⁰

Indeed, completely new systemic policy and behavioral approaches are vital in at least three other areas, in addition to mitigating climate change: (1) reinvigorating the infrastructure, legitimacy, and security of democracy; (2) charting societal rules for applications of breathtaking advances in biomedical codes of life and digital technology; and (3) as is painfully obvious, reversing growing disparities in economic opportunity, public health—including food security and safety—social mobility, and the enduring consequences of racial, ethnic, cultural, religious, gender-based, and all forms of discrimination based on personal identity and sexual preference.

Yet complicating the development of public policy to meet these needs are extreme ideas, partisan strife, and disputes over basic facts, truth, and lies, not to mention the meaning of complex data. These trends thwart evaluating, communicating, implementing, and cooperating to uphold solutions in the public interest. There are indeed compelling reasons and big challenges facing those choosing the lifelong, open book, continuous learning experience that public policy law entails. For teachers of law students aspiring to do this work, two key

19. In some sense, that time already is upon us. With increasing numbers of people having artificial mechanical components and biological engineered parts to various degrees in their bodies, along with other developments, such as the advances of AI and the prospect of machines gaining self-awareness, the line between human and robot becomes harder to draw. Note that there is considerable and growing literature discussing whether and when robots will have enforceable civil rights. *See, e.g.*, ACLU President and BLS Professor of Robots and Rights, Susan N. Herman, *The ACLU of the Future May Protect Robot Rights*, TIME, Sept. 11, 2015 (complete text of Professor Herman's statement on file with author and Journal Staff); DAVID J. GUNKEL, *ROBOT RIGHTS* (2018); David Hanson, *2020: The Year of Robot Rights*, MIT PRESS (Jan. 27, 2020), <https://thereader.mitpress.mit.edu/2020-the-year-of-robot-rights/>; Anthony Cuthbertson, *Robots Will Have Civil Right by 2045, Claims Creator of 'I Will Destroy Humans' Android*, INDEP. (May 25, 2018), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/robots-civil-rights-android-artificial-intelligence-2045-destroy-humans-sophia-singularity-a8367331.html>; Lauren Sigfusson, *Do Robots Deserve Human Rights?*, DISCOVER (Dec. 5, 2017), <https://www.discovermagazine.com/technology/do-robots-deserve-human-rights>.

20. *See, e.g.*, Catherine Clifford, *Bill Gates: These 5 Concepts Will Help You Understand the Urgency of the Climate Crisis*, CNBC (Feb. 14, 2021), <https://www.cnbc.com/2021/02/14/bill-gates-concepts-to-understand-the-climate-crisis.html>; Caitlin Ylek, *Bill Gates Thinks Americans' Lives Have to Change to Save the World. Here's Where to Start.*, CBS NEWS (Feb. 16, 2021), <https://www.cbsnews.com/news/bill-gates-climate-change-norah-odonnell-watch-live-stream-to-day-02-16-2021/>; Anderson Cooper, *Bill Gates: How the World Can Avoid a Climate Disaster*, CBS NEWS (Feb. 15, 2021, 7:41AM), <https://www.cbsnews.com/news/bill-gates-climate-change-disaster-60-minutes-2021-02-14/>.

questions are: (1) “What qualities and skills will future public policy lawyers need?” and (2) “How best do you teach and prepare students with the necessary values, characteristics and tools for public policy work in the future, which, as usual, will be much different?”

V. WHAT IS NEW THAT PUBLIC POLICY STUDENTS NEED TO LEARN

In the present climate, public policy lawyers need to gain the critically important knowledge about how the public policy system is supposed to work and acquire the skills essential to operate in policy arenas. As Professor Goldstein concludes, teachers cannot take for granted and must educate students about the fundamental ideals and norms that are essential for our constitutional policy process to function.²¹ These principles happen to be completely consistent with the obligations of all lawyers to be ethical, honest, civil, open to vigorous debate and disagreement, committed to the rule of law, and willing to accept and follow outcomes fairly determined that are contrary to a lawyer’s preferences or of those they represent. As Professor Goldstein suggests, a good place to begin to refresh and strengthen the public policy curriculum is to discuss with students and teach them about principles that many of us have taken as given, widely understood, and accepted. These were not threshold subjects that professors previously felt demanded the same degree of emphasis as is now warranted. Similarly, students will benefit by learning about the virtue and advantages of patience, determination, creativity, and a long-term perspective about the nature of the policy process.²² These qualities are much easier to describe than to teach and learn.

Of course, it remains essential for students to learn about, for lack of a better word, the “mechanics” of the public policy process. More than ever, that entails learning about the continuing and increasing need for adaptability. It requires learning how to deal with risk, make prudent decisions, and act based on the best available, but imperfect and incomplete, information. Often, it also is necessary to nimbly work around procedural impasses and change tactics or shift to a different public forum.²³ These abilities are essential in business, for example,

21. Goldstein, *supra* note 4.

22. These qualities are easy to identify, but much harder to teach and learn. There is no substitute for learning by doing, and it helps to pick your mentors well. Observing and learning the right way and the wrong way to do things from people who are long established and respected is invaluable. *See* Part VII, *infra*; *see also* KEALY, *supra* note 2.

23. An example may be drawn from the efforts in the late 1980s and early 1990s on behalf of new wireless and satellite multichannel video subscription television providers and consumer advocates to challenge the market dominance of the powerfully established Cable television multisystem operators. After finding it difficult to get traction before the Congressional Commerce Committees and the Federal Communications Commission, which conventionally had jurisdiction of communications industry regulation, the new entrants and consumer groups shifted their focus, framed their issues in antitrust terms, and found champions elsewhere among State Attorneys

and always have been useful in law practice, yet in the past, they have not been a prominent part of earning a Juris Doctor. There are many ways to coach these adaptive skills, as some can be borrowed from business and health professional schools. In addition, it always seemed curious that, even though businesses and financial institutions are so often clients of lawyers, law schools traditionally spent little time making sure that students were able to gain an indispensable basic literacy in commerce and finance. That knowledge gap has been rapidly closing with interesting new programs offered by law schools across the country. At Brooklyn Law School, such initiatives include the Business Boot Camp, co-taught with Deloitte during the winter recess, and the launch of the Center for Urban Business Entrepreneurship. The point is that law schools need not reinvent the wheel. As law schools have in other areas that faculties conclude deserve more attention, they can look to other fields to borrow and customize for legal education ways to teach the advantages of adaptability to law students throughout the curriculum.²⁴ In the public policy field, it is also useful to know how to learn from mistakes and failure. Increasingly we are learning that it helps, indeed it is imperative, to rely on teamwork with truly diverse colleagues.²⁵ These are learning experiences that law schools have increasingly been prioritizing more than ever and delivering better.

Law schools traditionally never focused much on adaptation which is a process of continuous self-invention and reinvention. We lawyers tend to be not as used to change and adaptation as we will need to be.²⁶ It should be no surprise

General and in Congressional Judiciary committees who had jurisdiction for dealing with monopoly, competition, and consumer protection. This in turn not only led to a multistate master settlement agreement between existing cable companies and new cable companies that helped to open local markets, but also prompted the Commerce Committees interested in retaining their involvement in the industries to take up the issues as well, leading to enactment of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992).

24. See generally HEATHER MCGOWAN & CHRIS SHIPLEY, *THE ADAPTATION ADVANTAGE: LET GO, LEARN FAST, AND THRIVE IN THE FUTURE OF WORK* (2020).

25. Learning in a diverse community prepares students for the world as it really exists. In the words of Saint Paul to the Corinthians, “As it is, there are many parts but one body. The eye cannot say to the hand, ‘I do not have need of thee’, nor again, the head cannot say unto the feet, ‘I have no need of you.’” 1 *Corinthians* 12:20. As Dame Madeline Atkins, President of Lucy Cavendish College at Cambridge University, explains that College’s commitment to diversity, “We want students because of, not despite of, their diverse backgrounds.” In the words of Howard University President Dr. Wayne Frederick, “Diversity amplifies our humanity.”

26. Lawyers and legal educators are notoriously late adapters, perhaps more so than any other learned profession. There are many good reasons why this is so. Among other things, those schooled in the law give credence to evidence and value the probative value of give-and-take argument, both which take time to develop. Lawyers are comfortable with precedent and understand that departure from generally established principles and practices can be disruptive, have unintended consequences, and be unintentionally unfair, especially to those who may have relied on *stare decisis*. The status quo is also anchored by many factors contributing to institutional

that law schools and employers of legal talent now are developing techniques for cultivating and honing these skills. They are tools relied on by history's pioneers, and now they will serve lawyers well for clearing legal and policy paths forward through tumultuous times.

VI. HOW TO TEACH STUDENTS ABOUT THE PROCEDURE, SUBSTANCE, & ART OF PUBLIC POLICY

At the outset, it should be acknowledged that everything required to study and practice in the public policy field cannot be learned entirely in a classroom, much less in one classroom. However, academic rigor, guidance, supervision, and assessment are critical, if not completely sufficient, for public policy education in law school and are also preferable and useful for valuable practical training experiences offered inside classrooms and outside school. So is learning how best to take advantage of learning experiences and choose role models in the field after graduation.

VII. HEROES, CHAMPIONS, & PRACTICING EXPERTS: MORE THAN CHESTNUTS & WAR STORIES

One approach to consider for imbuing students with an understanding of the foundational ideals and norms is to offer stories about heroes and champions. Their virtues can become our lodestar and their narratives can be used to present interesting and compelling information to students that they may not know.²⁷

inertia and the weight given to conventional wisdom that what is tried and true is best. It is not an inventive ethos, but a preference to avoid experimentation and innovation. However, in an age of accelerating disruptive change, lawyers and legal educators should and must push to consider improvements that need to be made and how to do things ever better. For a learned profession like law to refrain from adapting teaching and to fail to teach students how to adapt is analogous to only teaching 21st Century photography students how to develop film negatives in a darkroom. Business as usual and rigid resistance to adapting to new technological, economic, political, climactic, and other societal circumstances is not a viable option. Rather, it is a formula for failure. Nicholas W. Allard, *Love's Labors Found*, 50 U. TOL. L. REV. 199, 213 (2019).

27. Here, I am referring to more than the eternal divide of cultural relevance and references between generations of teachers and students—such as now when a fictional legal icon of my generation, Perry Mason, is mentioned in class, and most students have never heard of him, and they think that Della Street is an address. See Adam Bernstein, *Barbara Hale, Who Played Della Street on 'Perry Mason,' Dies at 94*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/entertainment/tv/barbara-hale-who-played-della-street-on-perry-mason-dies-at-94/2017/01/27/a18c6b20-e4d3-11e6-a547-5fb9411d332c_story.html. Recently, at our dinner table we were gobsmacked that not one of the three television *Jeopardy!* contestants, including the amazing mega-champion, Amy Schneider, could name the boat that President Kennedy commanded as a Navy lieutenant in WWII: P.T. 109. JEOPARDY! (episode carried January 11, 2022). Of course, those who know that fact are likely to be viewing programs on stations that feature walk-in tubs, reverse mortgages, and emergency signaling devices. So, it takes effort to avoid seeming too hopelessly outdated and irrelevant or preachy when I see my children rolling their eyes as if I am giving them the “Lincoln walked miles barefoot in the snow to return two pennies of change” talk.

During the limited time afforded in a semester, a teacher can find ways for students to learn about studying remarkable people who are worth emulating. As noted, the need for highlighting this curricular component in teaching public policy is a change of emphasis that seems called-for, considering recent events.

For example, observing the recent 100th anniversary of the Nineteenth Amendment suggests highlighting the difficult slow progress of women's rights in the United States. It is worth celebrating all the women who were not even able to be lawyers at the time, but who made such an indelible mark on improving equal rights under our Constitution, statutes, and cases. Consider Harriet Tubman bravely and selflessly fighting slavery. Admire the abolitionists turned leaders of the women's suffrage movement, Susan B. Anthony and Elizabeth Cady Stanton. They worked long and tirelessly, propelling progress toward equality, which was not fully realized during their lifetimes and to this day remains unfinished business for future lawyers. Other examples to choose abound.

In America, sports are about more than physical achievement and entertainment. They are a window into the soul of our nation. Even a small sample list of names of the many athletes who championed breakthroughs and causes beyond themselves drive home the point: Jim Thorpe, Babe Didrickson Zacharias, Jesse Owen, Wilma Rudolf, Muhammad Ali, Billie Jean King, Arthur Ashe, Serena and Venus Williams, Jackie Joyner-Kersey, Simone Biles, Willie Shoemaker, Wilt Chamberlain, John Thompson, Magic Johnson, Greg Louganis, Caitlyn Jenner, Sandy Koufax, Hank Greenberg, Hank Aaron, Roberto Clemente, Tony Oliva, and Mariano Rivera, to mention a few.²⁸ Indeed, baseball, our national pastime, like our brand of law and jazz, enjoys elements borrowed from other cultures but is quintessentially uniquely American. It mirrors our character. We all should know and respect the progressive connected legacies, such as those of Jackie Robinson, breaking the color barrier; Hall of Famer Lou Brock, a young sharecropper's son in Louisiana who never thought about baseball until he heard a radio broadcast from St. Louis about Robinson and Roy Campanella playing for the Brooklyn Dodgers; and Curt Flood, who refused to let Major League Baseball treat him like property to sell without his consent. Flood lost his own Supreme Court challenge to the so-called baseball reserve clause,²⁹ but he won in the game of life. Eventually, other players of all races benefitted from the freedom he fought for but could not gain for himself. There are many more women and men, who no doubt might be added to the list, who are models of the best human qualities and causes for future lawyers.

28. See Paul Feinstein, *Athletes Who Stood up for a Cause*, STACKER (Mar. 27, 2019), <https://stacker.com/stories/2741/athletes-who-stood-cause>.

29. See *Flood v. Kuhn*, 407 U.S. 258 (1972); see also BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (2007).

Then there is the late Representative John Lewis, a heroic nonlawyer champion of civil rights and racial justice, who became a great lawmaker in Congress. His life demonstrates that courage and fortitude can come to people and motivate others in unexpected ways. Although he had been a rather shy young man, in the 1960s, Lewis chaired the Student Nonviolent Coordinating Committee as a leader on the forefront of the civil rights movement. He faced and overcame unspeakable indignities, hardships, violence, and physical harm. To the very end of his extraordinary life, Lewis tirelessly carried on the cause of equal justice and freedom for all.

While inspiration may come from all walks of life and points of the compass, there is no shortage of heroic lawyer role models. Abraham Lincoln, a legendary American lawyer in both private practice and government service, learned about law by reading and through practical experience. He never went to law school or took a sit-down bar exam and lost his only argument before the Supreme Court. Mahatma Gandhi and Nelson Mandela were lawyers who became iconic statesmen for their people and beacons for all people. Closer to home in the United States, we can think about lawyers in the nation's service and in the service of all people, such as Alexander Hamilton and Presidents John Adams, Thomas Jefferson, Gerald Ford, and more recently, Barack Obama. Groundbreaking Justices of the Supreme Court include William Brandeis, Thurgood Marshall, Sandra Day O'Connor, Antonin Scalia, Ruth Bader Ginsberg, Sonia Sotomayor, and Elena Kagan.

The case studies and role models that a policy teacher chooses to discuss need not be legends of American history. It can be powerfully instructive highlighting more relatable contemporary people effectively working on important—but in comparison to epic historic struggles—more quotidian issues. Useful reading materials are widely available.³⁰

Another effective teaching technique to convey both ideals and nuts-and-bolts practical tips in class is the judicious use of guest speakers. As teachers well know, the selection and preparation of a guest speaker are essential for them to make a useful contribution to the class that is more than a pleasant diversion or distraction. However, taking time to provide guest presenters with advance guidance, and by focusing the guest stars on specific topics, they can make a valuable and often unforgettable inspiring contribution that adds to, rather than subtracts from, the course syllabus. In my own experience, it can be very useful introducing students to presentations by such leaders in the field, even though admittedly it sometimes is a challenge to keep them on a pedagogical leash.

30. From ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973) in a much different era, to BETH LEECH, *LOBBYISTS AT WORK* (2013), BERTRAM LEVINE, *THE ART OF LOBBYING* (2009), and MICHAEL WATERS, *GOVERNOR FOB JAMES OF ALABAMA: MAKING HEADWAY ON CONSTITUTIONAL RIGHTS, 1979–80, A LEGAL ADVISOR'S PERSPECTIVE* (2021). *See also* KEALY, *supra* note 2.

Given their personalities, leading practitioners in the policy field often are tempted to go off a pedagogical script in front of an audience. Simply for illustrative purposes, those who have shared their experience and insights with my students have included the late Thomas H. Boggs Jr., who discussed the changes in lobbying since the late 1960s when he launched his eponymous firm;³¹ the incomparable late Judge Robert Katzmann, former Chief Judge of the Second Circuit, who was as knowledgeable about politics, policy, and law as he was generous with his time educating students and the public;³² Thomas M.

31. Before joining me in class, my mentor, friend, and former partner, Thomas Hale Boggs, Jr., legendary chairman of his eponymous firm, wrapped his big arm around me and said, "It's a good time to return to private practice before everyone realizes all the crazy things you are doing in Brooklyn won't work." Boggs died suddenly in September 2014, while I was in Moscow speaking to Russian undergraduates about why they should consider becoming lawyers. In hearing the unexpected news about Tom, this is what I shared with the students,

Think of this: If you study law, you will be equipped to be a mentor and role model who will teach upcoming generations. This morning I was stunned to learn of the sudden, unexpected death of my friend and mentor Thomas Hale Boggs, Jr., who each and every year for more than a quarter century, was listed as one of the 100 best lawyers in America. Tom was quintessentially a most public man who, it seemed, everyone thought they knew. I wonder how many knew that this legal icon and seeming gregarious extrovert was incredibly shy, modest as can be, and indifferent to what others thought about him. He was, in a quiet way, a man who observed his faith, who typically had grace said before dinner, and was comfortable in the company of clergy, many who he knew well, especially if they would join him to fish, hunt, or shoot ducks. Civil and courteous in every respect, I cannot remember him ever swearing. He was grounded in family and friends, and, if you counted as either, you had a patron and companion for life, for he was loyal and caring to a fault. Tom Boggs was, in a word, brilliant, and no one ever missed that he was invariably the most intelligent man in the room though he always was the most self-effacing. He was a workaholic who enjoyed playing. He loved his country and what he did, and he loved solving tough problems and cared deeply about access to justice and equality, a son of the Deep South who especially sought racial justice and equality. He was totally committed to doing good while doing well. When I say that law and lobbying is an honorable profession, it is Tom Boggs I am thinking about. He is an American original without rival and there will never be another like him. Those who love him are shaken deeply and miss him already. I thank you for indulging me and listening to me speak of my friend's passing. I know that each of you have your own Tom Boggs who has influenced you, and just think about how valuable it will be to others when you yourselves become such mentors.

Many may agree with my friend Tom's playful opinion that a lot of things we were doing at Brooklyn Law School were crazy. Believe me, I've heard worse. After Patton Boggs merged and became Squire Patton Boggs, I reported to Tom Boggs that the Squire legacy partners seemed to like me as much, if not more, than my Patton Boggs partners. He replied, "They don't know you yet." See Adam Bernstein, *Lobbyist, Lawyer Thomas H. Boggs Jr. Dead at 73*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/local/obituaries/lobbyist-lawyer-thomas-boggs-dead-73/2014/09/15/f3117e48-3ce9-11e4-b0ea-8141703bbf6f_story.html.

32. BOB KATZMANN, *JUDGING STATUTES 5* (2014). This remarkable book is, for good reason, one of the required readings in my Government Advocacy course. In a concise 112 pages, Katzmann not only clearly explains what judges do interpreting statutes, but masterfully illuminates the dynamic interplay between legislatures, agencies, and courts when writing, implementing, and

Susman, former ABA Director of Government Affairs, author, and one of the most respected experts, if not the leading authority on lobbying compliance;³³ Elizabeth Holtzman, former Congresswoman from Brooklyn;³⁴ Gerry Kremer, former New York State Assembly Chair of its Ways and Means Committee, lawyer, journalist, and author;³⁵ and also in order to discuss the uniquely important, and often less-studied, role in our federal system of State Attorneys General, Brooklyn Law School's own Bernard "Bernie" Nash, who chairs Cozen O'Connor's State Attorneys General Practice;³⁶ and the late Andrew

trying to understand the words of laws. Since statutory and regulatory words are the flesh and blood of public policy and, in fact, to use Guido Calabresi's phrase, our "Age of Statutes," this book is an invaluable teaching tool. Katzmann frequently met with Brooklyn Law School students in class and programs and helped welcome them for several years at the opening convocation. His untimely, recent death leaves a big void which the country, this profession, and his family and friends will find, if not impossible, difficult to fill.

33. Prior to joining the ABA staff, Susman served as Partner at Ropes & Gray, where he led the regulatory practice for twenty-seven years and chaired the Ethics Committee of the American League of Lobbyists. He is a member of the American Law Institute. Susman was Chief Counsel to the U.S. Senate Subcommittee on Administrative Practice and Procedure and General Counsel to the Senate Antitrust Subcommittee and the Senate Judiciary Committee. His publications include *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE* (Thomas M. Susman & Rebecca H. Gordon eds., 5th ed. 2016). Susman organized the ABA Task Force on improving lobbying regulation and the driving force behind its report, cited *infra* note 54.

34. Hon. Elizabeth Holtzman served in the House of Representatives for New York's Sixteenth District for four terms (1973–81). Her impactful Congressional work began after she upset the fifty-year incumbent in a Democratic primary, House Judiciary Committee Chairman Emmanuel Celler, at the time the longest serving House member in history. At thirty-one years old, Rep. Holtzman was then the youngest woman ever elected to Congress. Highlights of her career include her recommendation of three articles of impeachment for President Nixon arising from the Watergate scandal and her opposition to the U.S. bombings in Cambodia, the hearings into the pardon of Nixon by President Ford, and the introduction of the legislation authorizing Independent Counsel to seek justice for the war Crimes of Nazi war criminals. Holtzman later became the first woman to serve as Comptroller of New York City and first woman District Attorney of Kings County (Brooklyn). She remains an active and influential legal authority and has in recent years been a frequent media commenter on the legal issues arising from the Trump Administration.

35. JERRY KREMER, *WINNING ALBANY* (2013). This memoir, written by a distinguished alumnus of Brooklyn Law School, describes his remarkable career as a newspaper reporter, lawyer, politician, leading legislator in Albany, New York, and continuing public servant.

36. Bernie Nash is known as a legal pioneer and often referred to as the "Godfather of State Attorneys General" in private practice work. He served on the staff of the Securities and Exchange Commission and later the U.S. Senate Judiciary Committee before launching the country's first State Attorneys General practice over four decades ago. Throughout the course of his career, Nash litigated and settled multibillion-dollar cases, represented clients in all fifty states, argued before the U.S. Supreme Court, and worked on multibillion-dollar mergers. Perhaps his proudest achievement is being the drafter and architect of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which, among other provisions, gave State Attorneys General the authority to file federal antitrust lawsuits and the Department of Justice Antitrust Division authority to issue subpoenas in civil antitrust investigations.

Miller, former Attorney General of Virginia.³⁷ As I hope this short list demonstrates, effective experts with wisdom, values, and experience that is interesting and worth learning about are available and often eager to share their knowledge with students. Teachers of policy courses anywhere in the country can no doubt make good use of alumni, practice, government, and civic leaders from their own communities to help teach the subject matter.

VIII. TEACHING THE DIFFERENCE BETWEEN STUBBORN MYTHS V. CHANGING THE REALITY OF PUBLIC POLICY

There is a great divide between conventional wisdom and contemporary academic literature about the nature of the public policy process in the United States and how it works in the 21st Century digitally interconnected world. Fortunately, there is an impressive amount of academic work available for course reading lists that can be instructive and worked into a policy course syllabus. There is ample reading material that rebuts popular notions about our government and the policy system, such as: (1) that money buys results and/or that outcomes are readily determined and predictable depending on resources, power, and influence;³⁸ (2) the persistent erroneous belief that corruption and illegality are rampant and are the prevalent drivers of results, rather than being relatively rare and dealt with, albeit episodically and imperfectly;³⁹ and (3) that the legislative gridlock and failure to govern is caused by partisan divides over ideology, as opposed to the new reality of constant partisan competition to maintain or gain institutional control.⁴⁰ It would be worth building on this

37. The late Andrew P. Miller was the quintessential Virginia gentleman with family ties tracing to the Revolutionary war, an undergraduate degree from Princeton, an artillery officer in the U.S. Army, and a graduate from the University of Virginia School of Law. In 1969, he was elected as a Democrat to serve as his home state's Attorney General and re-elected in 1973 in a landslide. In 1976, Miller, credited for modernizing and diversifying the Virginia Attorneys General's office, received the Wyman Memorial Award as the "Outstanding American Attorney General." He ran unsuccessfully and narrowly lost elections to serve as Governor of Virginia. Over decades of private law practice, Miller was active in and was elected President of the National Association of State Attorneys General. He also served in the Conference of Western Attorneys General, the Democratic Attorneys General Association, and the Republican Attorneys General Association.

38. See, e.g., BAUMGARTNER ET AL., *supra* note 1, at 32; DRUTMAN, *supra* note 1, at 219; CIGLAR, *supra* note 1, at 5; FAGAN, *supra* note 1, at 24; SCOTT, *supra* note 1, at 5; and THE LOBBYING MANUAL, *supra* note 1, at 471.

39. See, e.g., PATRICK GRIFFIN & JAMES A. THURBER, TEACHING PUBLIC POLICY ADVOCACY BY COMBINING ACADEMIC KNOWLEDGE AND PROFESSIONAL WISDOM (2015); LEECH, *supra* note 30, at 37; LEVINE, *supra* note 30; AM. BAR ASS'N, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS, REPORT OF THE TASK FORCE ON FEDERAL LOBBYING LAWS SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE vi (2011) [hereinafter ABA LOBBYING LAW IN THE SPOTLIGHT].

40. See, e.g., LEE, *supra* note 1, at 69 (Frances Lee is a professor at Princeton); AMERICAN GRIDLOCK, *supra* note 1, at xxiii; OBAMA IN OFFICE, *supra* note 1, at 100.

scholarship to analyze not only why, at present, the federal government often fails to adequately deal with the pressing issues, but also how to go about making progress on such problems, like climate change, equal justice, gun violence, immigration and refugee crises, enduring discrimination based on race, gender, identity and disability, and more recent recognition in our digital age of threats to privacy and data security. There also is a vast amount of recent literature that identifies major institutional breakdowns and attempts to evaluate the various proposals that have been made for institutional and structural reforms.⁴¹

It also is worth studying and gaining a better understanding about public policy advocacy and citizen activism in the American constitutional democracy and throughout its history. The starting point can be to demonstrate how public advocacy and activism of an informed, concerned, and engaged citizenry was assumed and expected by the founders as an integral part of the constitutional system of limited self-government in the United States.⁴² This is reflected in the debates during the Constitutional Convention and the Federalist Papers. It can be instructive assessing how these expectations have or have not been met and how advocacy and activism evolved and made a difference in major movements throughout the 19th and 20th centuries, such as, for example, advocacy for abolition and equal rights, labor, antimonopoly-competition-consumer protection, women's suffrage, civil rights, environmental protection, and curtailing cigarette smoking.

The role that lawyers and the public can and should play to sustain democracy, justice, and equality can be studied by examining contemporary controversies concerning structural issues about our constitutional form of government. Explaining what is necessary for good government can help students learn a great deal about public policy while involving them in the

41. See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICAN AND HOW TO GET IT BACK ON TRACK* xii (2006); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* xiii-xiv (2012); E. J. DIONNE ET AL., *ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE, AND NOT-YET DEPARTED* 4 (2017); KATZMANN, *supra* note 32, at 9; K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 3 (2017); LAWRENCE LESSIG, *REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* 4 (1st rev. ed. 2015). And, as usual, one column speaks volumes: George F. Will, *Congress Needs to Curb Presidential Power. Here's How it Can Start to*, WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/opinions/congress-needs-to-curb-presidential-power-heres-how-it-can-start-to/2020/12/15/ffde4c32-3f12-11eb-9453-fc36ba051781_story.html.

42. THE FEDERALIST NO. 39 (James Madison). The legitimacy and viability of government and the legal system depends on the informed consent and active participation of the public. There are impressive existing efforts to advance civic education about government that have been initiated by Congress, the ABA, and courts, such as the admirable work led by the late Hon. Robert Katzmann, former Chief Judge of the Second Circuit, who was the only political scientist on the federal bench.

thought process about how to go about resolving very difficult policy issues. For larger audiences, this academic inquiry also can help evaluate, bring attention to, and generate ideas essential to repair what is broken in all three of America's federal branches of government at a time of government institutional disfunction (i.e., lack of function), dysfunction (i.e., abnormal function), and constitutional stress.

Five examples of possible topics and case studies about the future of democracy come to mind in the wake of the harrowing 2020 political slugfest. Four involve structural issues in the field of election law. The fifth is the latest iteration of a perpetual concern about inequity of access to communications technology essential for participating in governance and to economic opportunity. First, with the 2020 election receding in the rear-view mirror (except for those souls who hang onto the lie that the election outcome was fraudulently obtained), it is now back to the difficult, demanding, distracting business of governance. It is imperative, however, that whether due to a false sense of relief, fatigue, or old-fashioned distraction, or whether because of the emergent politics of the perpetual, never-ending campaign, we do not lose interest in fixing our outdated, terribly clunky election machinery, the voting infrastructure.⁴³ It is held together like one of those submarines in old war movies forced to go to depths they were never built to withstand. Our election infrastructure withstood the pressure of a record-breaking turnout of voters without any major known rupture only because of the dedicated work of tens of thousands of workers and state officials across the country and the quiet, determined exercise of the right to vote by tens of millions of voters for both candidates.⁴⁴ Despite unprecedented obstacles and safety issues, people cast

43. If a reminder is needed of potential election breakdowns that were averted, see Alex Stamos & Renee DiResta, *'It's 8 P.M. on Election Day.'* *Experts Share Nightmare Scenarios: The Disinformation From Our Own Backyard*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/opinion/sunday/election-security-trump.html>; Benjamin L. Ginsberg, *Opinion, America May Not be so Lucky Next Time*, WASH. POST (Dec. 4, 2020), https://www.washingtonpost.com/opinions/america-may-not-be-so-lucky-next-time/2020/12/04/044e0c58-365d-11eb-b59c-adb7153d10c2_story.html; Fareed Zakaria, *Opinion, Trump Shows That We Need to Reform U.S. Democracy*, WASH. POST (Dec. 3, 2020), https://www.washingtonpost.com/opinions/global-opinions/trump-shows-that-we-need-to-reform-us-democracy/2020/12/03/437b5da2-35ab-11eb-8d38-6aea1adb3839_story.html; James K. Glassman & Nicholas W. Allard, *Biden Democracy Challenge: Fix Voting and the Electoral College to Head off a 2024 Crisis*, USA TODAY (Dec. 7, 2020), <https://www.usatoday.com/story/opinion/2020/12/04/joe-biden-repair-voting-electoral-college-by-2024-start-now-column/3792167001/>; Editorial Board, *Opinion, The U.S. Needs a Democracy Overhaul. Here's What Biden's First Step Should be.*, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/opinions/the-us-needs-a-democracy-overhaul-heres-what-bidens-first-step-should-be/2021/01/01/48c92cba-498a-11eb-a9f4-0e668b9772ba_story.html.

44. Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, AM. CHRON. (Apr. 29, 2021), <https://americanchronicle.com/?p=318>.

their ballots and made sure they counted. There should be a major nonpartisan effort, perhaps led by a national commission, to study and recommend changes before the 2024 presidential election.

Second, in addition to archaic election mechanisms, new restrictions on voter registration and exercising votes, including new laws and rules alleged to be techniques to suppress and discount votes lacking any credible evidence or justification, concern the fundamental requirement for democracy: that of open and free elections, which make the government accountable to the people it serves.

Third, in recent years, America witnessed the emergence of “pop up” demonstrations, mass social movements and huge public protests on a variety of issues, a painfully contentious and contested 2020 election among a sharply divided electorate, and vociferous fierce disagreement and resistance to government-imposed requirements and advisories for protecting public health during the pandemic. Throughout it all, the enormous impact of new social media on shaping social, political, and economic debates and the vast influence of powerful media platforms present both unprecedented challenges and opportunities in the public policy arena. More should be understood about these electronic phenomena and their impact on policy.

Fourth, addressing the undemocratic consequences of the anachronistic Electoral College could also be a useful exercise for teaching students about the policy process. Usefully, it would offer a platform for better understanding that it is a state’s decision under Article II whether to use a “winner-take-all” system for choosing electors, a choice that is the root cause of the possibility of losing the national popular vote but winning the electoral vote.⁴⁵ The “winner-take-all” method of assigning electors state by state is not in the Constitution, much less a constitutional requirement.⁴⁶ Consequently, the prevalent state-determined “all-or-nothing” method for awarding electors can be changed by individual states without amending the Constitution. Doing so would remove the cause of

45. U.S. CONST. art II, § 1. Each state determines how the electors are allocated to candidates. As of the 2020 election, forty-eight states and the District of Columbia used a “winner-takes-all” rule to determine how many of a state’s electoral votes are allocated for candidates in presidential elections. MAKING EVERY VOTE COUNT FOUND., <https://www.makeeveryvotecount.com/> (last visited Oct. 28, 2021). That is, in almost every state, the candidate that wins the popular vote in that state, no matter what the margin, gets all the state’s electoral votes. *See id.* Only two states, Maine and Nebraska, do not follow a “winner-takes-all” rule, and instead rely on a system of proportional allocation for electoral votes that split the allocation of electors according to the ratio of the total votes each candidate receives. *See Maine & Nebraska*, FAIRVOTE, https://www.fairvote.org/maine_nebraska [<https://perma.cc/N9NP-Q5QY>] (last visited Mar. 6, 2022). Nothing in the Constitution prevents a state from using something other than a “winner-takes-all” system based on the popular vote in the state. A succinct discussion and analysis of the issues, problems, and options for addressing the inequities in the Electoral College may be found on the Making Every Vote Count Foundation website, cited *supra*.

46. *Id.* *See* U.S. CONST. art. II, § 1.

the anomalous undemocratic possibility that a presidential candidate, once again, could win a majority of the national popular vote and lose in the Electoral College. The correctable “winner-take-all” approach is also the reason why most states—and the views of most voters—are largely ignored during campaigns and why the ballots of voters in a few key “swing” states count more than those in other states because the outcomes in states in choosing the Republican or Democratic candidate are considered unlikely to change. Candidates focus their resources and efforts on a relatively few numbers of voters in a small number of “toss up” states. In the perennial yet episodic debate about the future of the Electoral College, statistical analysis and polling are increasingly being used, often the bread and butter of public policy.⁴⁷ If facts matter, the case for individual states to change the winner take all system is compelling.⁴⁸

The fifth critical issue area for study and teaching concerns the persistent inequity of the so-called “Digital Divide.”⁴⁹ The First Amendment gives people

47. Not only used, but currently delivering interesting results. Mark Bohnhorst, Reed Hundt, Kate E. Morrow, & Aviam Soifer, *Presidential Election Reform: A National Imperative*, ASS’N AM. L. SCH. (2021), <https://www.aals.org/wp-content/uploads/2021/06/Presidential-Election-Reform-.pdf> [<https://perma.cc/6W6E-G49U>]. This author is indebted to Mark Bohnhorst, who long served as Associate General Counsel for the University of Minnesota, for his deep-dive research and writings on voting rights and electoral college reform. Also acknowledged with gratitude are the insights and work of Reed Hundt, who among his many attributes is co-founder, President, and CEO of Making Every Vote Count; Professor Elizabeth Cavanagh of American University’s Washington College of Law (“WCL”); and Kate Morrow, J.D. 2021, WCL, currently clerking for Hon. Christopher Garrett, Supreme Court of Oregon.

48. *Id.*

49. This was a term popularized, formally measured, and tracked during the Clinton-Gore Administration. See FED. COMM’NS COMM’N, UNIVERSAL SERVICE, <https://www.fcc.gov/general/universal-service> [<https://perma.cc/3CGG-JURT>] (last visited Oct. 28, 2021). Universal service refers to the policy of striving to provide a baseline of communications services that guided the provision in the United States postal service and the telephone service. See *id.* It was formally adopted as national policy in the Communications Act of 1934 and embodied in the preamble of that Act. 47 U.S.C. § 151. The “Digital Divide” is a term that came into use in the 1990s to describe the gap between those who had and those who lacked access and knowledge to use affordable digital services and to measure the results of public and private efforts to close that gap. See, e.g., Songphan Choemprayong, *Closing Digital Divides: The United States’ Policies*, 56 LIBRI 201 (2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.136.9121&rep=rep1&type=pdf> [<https://perma.cc/2VLX-XSR2>]. For numerous reports and data about the Digital Divide, see NAT’L TELECOMMS. & INFO. ADMIN., U.S. DEP’T COM., <https://www.ntia.doc.gov/> [<https://perma.cc/ZB78-2KGW>] (last visited Mar. 6, 2022). See *The Clinton-Gore Administration: From Digital Divide to Digital Opportunity*, CLINTON WHITE HOUSE ARCHIVES (Feb. 2, 2000), <https://clintonwhitehouse4.archives.gov/textonly/WH/New/digitaldivide/digital1.html> [<https://perma.cc/UVY7-D9DA>]. Note that it became an international concept and policy issue. The Bush Administration discontinued the annual reports and references to the Digital Divide. The Obama Administration resumed them. See Joyce Winslow, *America’s Digital Divide*, PEWTRUSTS (July 26, 2019), <https://www.pewtrusts.org/en/trust/archive/summer-2019/americas-digital-divide> [<https://perma.cc/GE5D-PEPR>]; Katrina vanden Heuvel, Opinion, *America’s Digital Divide Is an*

the right but not the means for their voices to be heard. Cheerleaders used to, and some still do, use old-fashioned megaphones to be heard over noisy crowds.⁵⁰ The impetus behind the original 20th Century idea of universal communications service and the later evolving government efforts to close the Digital Divide was to assure that as many people as possible had a reasonable chance to use the latest technological version of the megaphone, i.e., that efforts were made to provide universal access to the public for certain minimal or basic levels of affordable communications technology along with the knowledge of how to use it. As technology evolves and advances, this is, and with electronic communications in America, has always been, a moving target of what is sufficient to keep up with the Joneses; from early days of telephone service affording access to a telephone party operator monitored line, then to a rotary dial automatic telephone, eventually a touchstone dial device, and so on. The Clinton-Gore Administration took the universal service concept to a new level by focusing on bridging what it called the “Digital Divide” in the Internet era. Since then, there has been less focus on this cause, and frankly, there has been less public interest as prices have fallen and access to computer technology and mobile handheld devices exploded. But people are still left behind, unconnected and without the means to operate and function in the digital realm, much less fully exercise their First Amendment rights.⁵¹ With the unceasing acceleration of technological innovation, the challenge of helping the less advantaged or left out keep up with what is considered the latest minimal level of technology and know-how to function fully in society may seem as futile as the hounds sprinting to catch the electronic rabbits at race tracks. What can, should, and must be done to address digital inequity continues to be an important area of study.

Each of these five subject areas, which are by no means the only possible topics a teacher might choose from, provide fertile, fresh ground for critical intellectual analysis and creative approaches teaching public policy. Public policy classes, if they can find time and space in the curriculum, as well as writing seminars, workshops, clinics, symposia, and all sorts of academic programs might take on topics in any of these areas. Obviously, they often cross

Emergency, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/opinions/2020/06/23/americas-digital-divide-is-an-emergency/> [<https://perma.cc/97MN-ZBVS>].

50. But not the cheerleader in recent Supreme Court decision *Mahanoy Area School District v. B.L.*, 594 U.S. 1 (2021).

51. JASON M. LAMB, *THE DIGITAL DIVIDE: FREE EXPRESSION, TECHNOLOGY AND A FAIR DEMOCRACY 1* (2013). To grasp the lingering consequences of the Digital Divide, one may consider the disparate effects that the population experienced during the pandemic relating to education: remote schooling for elementary and secondary students, the challenges that all higher education has been grappling with to continue operations for undergraduates and graduates, and the controversies involving law graduates over bar exam requirements during the pandemic. Constitutional underpinnings for prioritizing closing the Digital Divide are suggested in the discussion of information access rights by Professor Brian Murchison. See Brian C. Murchison, *The Visibility Value of the First Amendment*, 26 WM. & MARY BILL RTS. J. 995 (2018).

and even arise from other disciplines. Faculty might creatively design any number of exercises and simulations to identify problems and develop a strategic model for solving them. Law schools can lend their talent and efforts to public task forces, advisory commissions, and hearings. This is hardly a newsworthy as this is work law school faculty frequently do, and do well. These academic contributions prepare students for work in the policy field and can inform and advance public debate. Law schools and faculties, in these ways, can bring the issues of our day alive for their students and play a constructive role in efforts to address them in the outside world.

Care must be taken, perhaps teaching public policy as much as any subject, to avoid the temptation of teaching what seems like a course about current events. That lively and seductively superficial approach is considerably less useful for preparing law students for future success than rigorous doctrinal and experiential teaching. It also does not provide the lifelong learning skills desired to find solutions to new problems never experienced before, which is what public policy work is often about. But a balance can be struck. In the most recent years, it sometimes seems like the run of the news ripped from the headline's topics provide us with an unpaid for and unsolicited bar exam cram course on all manner of constitutional, legal, and political topics about matters that everyone has an opinion and something heartfelt to say.⁵² It would be both odd and a missed opportunity to completely ignore public policy headlines in class. One approach I experimented with in recent years is to frequently distribute a news clipping to the class that relates to the subject matter of our course in advance of a class. I ask for a volunteer to present and comment on the news story by relating it to our readings and class discussions. The presentations are limited to no more than three minutes, with two minutes maximum allowed for questions. Usually this worked well, nicely jump-started, and energized the class, and, admittedly, afforded me an extra few minutes to find my misplaced notes before formally starting the planned lesson.

IX. WHAT'S NEW: THE MOST LIKELY FUTURE CHANGES TEACHING PUBLIC POLICY

It is a cliché to say the world is increasingly a global community. Due to advanced digital networks and the virtually borderless interconnected world we live in, skills are essential to address the multinational nature of public policy issues more than ever before. First, and most obviously, there are more multinational interests: overseas firms, for example, that wish to expand and invest in the United States, and domestic-based concerns that have interests

52. A silver lining in these troubled times has been that my wife's outspoken, intense preoccupation with the Trump Administration diverted her attention from my shortcomings.

abroad.⁵³ These global players require sophisticated multinational government relations, in-house expertise, and outside representation. They also require expert compliance advice and risk assessment among other necessary government relations and regulatory services, especially those relating to financial services, privacy and security, tax, consumer protection, competition and antitrust policy, immigration and human resources of a cross border workforce, and not to mention, the movement guiding business decisions by Environmental, Social, and Governance (“ESG”) considerations.⁵⁴ The needs of people that arise from myriad threats and harms they face and crises they endure, including severe circumstances causing forced migration and people to become refugees, public health concerns, food insecurity, the denial of fundamental human rights, and the future coexistence of humanity and the natural world are inherently the responsibilities of governments and cannot be adequately addressed unilaterally.

Second, on many large issues, such as financial regulatory reform, climate change, and energy policy for example, the policy process has become a three- or four-dimensional chess game. For instance, the core reason that the G7 became the G20, and sometimes G27, was because it was understood that it is not possible to effect financial regulatory changes unilaterally. Washington, for example, is constrained from acting alone. It is preferable for London, Brussels, and Asia to be moving in roughly parallel directions as the United States and vice versa because of the impact of capital flows, economic activity, and the incentive to leverage arbitrage opportunities created by differences in regulation. The same can be said for spectrum policy, Internet privacy and security, climate change, energy, public health as we painfully know from the Covid-19 pandemic, and a host of other issues of global cross border scope. On many issues the BRIC countries, Russia, Brazil, India, and China, must be considered and involved. Consequently, if you want to influence the U.S. government on policy rules, it helps, if possible, to persuade other governments, including the so-called BRIC countries, and vice versa.

New technology and broadband interconnectivity are increasingly bringing other changes that should not be ignored in the public policy classroom. Increasingly the public interacts with the government electronically, often directly, without a “middleman” or the more gender-neutral “go between.” The

53. For a vivid description of the demands for and growth of these services, see Eric Lipton & Danny Hakim, *Lobbying Bonanza as Firms Try to Influence European Union*, N.Y. TIMES (Oct. 18, 2013), <https://www.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html>.

54. While the problem with predictions is they involve the future—and given the continuing cycling of the Covid-19 pandemic, there is considerable uncertainty—many respected analysts forecast steady growth of the demand for international legal services over the next decade, especially demand from large multinational organizations that frequently rely on large law firms. In turn, these entities are the ones generally responding to how to address ESG.

“face-to-face meeting” by a lawyer representing a client in consultation with a government official, or simply providing raw information to clients, such as texts of bills and summaries of hearings, are of diminishing value and use. This puts a premium on expert analysis of ever increasingly available information in the public domain, as well as professional advice and advocacy. There are also powerful new advocacy techniques that are only beginning to fully appreciate. Witness, for example, how Google and others stopped the proposed anti-piracy legislation that the powerful Motion Picture Association of America backed, the Stop Online Piracy Act (“SOPA”).⁵⁵ In 2012, this legislation was a train on a fast track, supported by powerful Hollywood studio interests, but it was killed essentially overnight by new media techniques. Internet users also managed to block the Cybersecurity Act of 2012 with online grassroots techniques. It was like watching the Old School Redcoats marching in traditional battle formation getting picked off by unconventional online minutemen guerilla fighters. Such new lobbying techniques are increasingly applied to, developed from, or combined with political candidate and issue campaigns that use new social media practices to raise money and build public support. Similar techniques can be and are used in lobbying and government relations advocacy campaigns.

Another big question on the horizon for public policy is, “Do we run the government like an ‘American Idol’ type contest where policy outcomes are directly determined largely, if not completely, by polling the public? Why not?” Lawmakers essentially have the technological capability to run a virtual referendum about the innumerable issues before them. But should they? The issue of whether government officials are mere delegates or representatives is hardly new. Hopefully, we will remember the wisdom of Edmund Burke, who told the electors of Bristol in 1774, “your representative owes you, not his industry only, but his judgment, and he betrays, instead of serving you, if he sacrifices it to your opinion.”⁵⁶ (Of course, Sir Edmund did, in fact, lose his next election, so lawmakers ignore public opinion at their peril.)

Still another technology driven issue that has been understandably receiving attention is whether lawmakers and regulators treat all blogs, tweets, and other social messages and electronic comments alike. Those with money and new media savvy can flood the media with their messages and drown out others who

55. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Beth Marlowe, *SOPA (Stop Online Piracy Act) Debate: Why are Google and Facebook Against it?*, WASH. POST: BUS., https://www.washingtonpost.com/business/sopa-stop-online-piracy-act-%E2%80%A6-are-google-and-facebook-against-it/2011/11/17/gIQAvLubVN_story.html (last visited Nov. 28, 2021).

56. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 6 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE: WORKS 1:446-48, 7 (Henry G. Bohn ed., 1854-56); Edmund Burke, Substance of the Speech in the Debate on the Army Estimates, in the House of Commons (Feb. 9, 1790), in 3 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE (1891). See generally CONOR CRUISE O'BRIEN, THE GREAT MELODY: A THEMATIC BIOGRAPHY AND ANTHOLOGY OF EDMUND BURKE 77-78 (1992).

lack the technological means to join Burke's "great melody" of public discourse.⁵⁷ The answer is that the government is wrestling with how best to weigh and evaluate all the input it now seeks and receives electronically outside the time-worn contours of the traditional legislative and administrative process.⁵⁸ At the federal level, congressional offices and agencies are adopting various practices for accepting and reviewing digital messages. Conversely, interactions with government officials and staff have been increasingly moving away from in person and voice toward greater reliance on virtual written electronic communications, a trend that has accelerated for obvious reasons during the pandemic and reinforced by the post-January 6, 2021, insurrection security measures.

Some courses may be able to do justice to the changing world of lobbying at the state level, which is not possible to do in this space other than to acknowledge the importance of the subject. When one thinks about it, there are similarities between developments in the field of public policy at the international level, noted previously,⁵⁹ and at the state level in this country. The historical and continuing responsibilities for the public policy of states is a complex topic that could be the subject of entire courses and should not be completely ignored in any policy course because of the nature of our federal system, the importance of preemption and other issues, and the various synergistic and adversarial two-way relationships between Washington D.C. and state capitals. Governors, State Attorneys General, State Legislators, and State Courts have a tremendous impact initiating, changing, and experimenting with policy.⁶⁰ This is often through the collective tandem action of different states

57. O'BRIEN, *supra* note 56, at xxiii.

58. Law journals, lawmakers, and others are beginning to feature articles and reports discussing whether and how electronic comments and blogs should be analyzed and weighed within the framework of the Administrative Procedure Act and other considerations. Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 897-98 (2011); Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 84 (2013); see PERMANENT SUBCOMM. INVESTIGATIONS, STAFF OF S. COMM. HOMELAND SEC. & GOV'T AFF., 116TH CONG., REP. ON ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS (2019); LETITIA JAMES, N.Y. STATE OFF. ATT'Y GEN., *FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE* (2021); Admin. Conf. of the U.S., Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36,075 (July 8, 2021).

59. *Supra* Part IX.

60. Justice Brandeis copied the often-cited phrase "laboratories of democracy" in which he described how "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Co v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting). The late, great Chief Judge of New York State, Judith Kaye's final article was published posthumously in the *Brooklyn Law Review*, *Reflections on Opportunity in Life and Law*, 81 BROOK. L. REV. 1383 (2016). Not only is her essay a compendium of lessons framed around her own autobiography, but it also addresses a subject that

involving issues common to all, but it might also arise in individual states acting independently on an item within their policy agenda. Whether an issue involves multi-state action by Governors, Legislatures, State Attorneys General, Judges, or more local activity in a particular state, students should be made aware of the importance of local expertise, understanding established norms and the players, and compliance rules for disclosure and regulation of lobbying, which vary from state to state. One cannot assume without peril that what works and is acceptable inside the Washington D.C. beltway additionally passes muster elsewhere in states, and that what was a compliance rule in the past still governs. Students must learn to trust their experience and knowledge but always to verify by checking the current rules.

In the future, we should expect to pay much more attention to learning about the connections, meaning the interplay between elections and lobbying. Much is assumed, but not enough is well understood, about the subject. For example, how should we measure the impact of lobbyists on elections? A great deal is written about lobbyists as political donors, fundraisers, and “bundlers.”⁶¹ Undeniably, the political system and elections are obscenely awash with money as Professor Larry Lessig and others document.⁶² And it corrodes our democratic system. The significance of money from lobbyists is not fully understood and is debatable. Is it a drop in an ocean of money? Or does it somehow have outsized impact, and if so, how best to address that? Can legislators decline to take money from registered lobbyists during the election cycle or during a two-year Congress when a lobbyist appears before them?⁶³ How does the dependence on political fundraising relate to the role of lobbyists and governing, or the failure to govern between, elections? Is it not the case that the impact of money in shaping policy outcomes is overstated, and the real scandal is that nonstop fundraising leaves elected officials little, if any, time to do their jobs? Does the resulting need for staff assistance to govern perversely make elected officials more dependent on lobbyists—not for money, but to get the work of legislators done? In brief, the links between professional lobbying and elections should be

had been for a very long time of great importance to Judge Kaye: the significance of state constitutions in general, and the New York State Constitution in particular. See Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 ALB. L. REV. 1977 (2012); Susan N. Herman, *For Judith S. Kaye*, 81 BROOK. L. REV. 1361 (2016). This author discussed Kaye’s pioneering work on states as laboratories of democracy in the introduction of the review issue celebrating her life and work. Nicholas W. Allard, *A Tribute to Judge Kaye*, 81 BROOK. L. REV. 1351 (2016). For a lively description of the work of individual public policy lobbyists, many of whom are leading experts at the state level, see LEECH, *supra* note 30, at 37.

61. LEECH, *supra* note 30; BERTRAM LEVINE, *supra* note 30, at 21.

62. SEE LESSIG, *supra* note 41, at 7. The ABA Lobbying Task Force proposed limits on accepting contributions from lobbyists. ABA LOBBYING LAW IN THE SPOTLIGHT, *supra* note 39, at 20.

63. ABA LOBBYING LAW IN THE SPOTLIGHT, *supra* note 39, at 20.

better understood, and the topic is rich and worthy of considerable further open-minded and data-driven study.⁶⁴

X. TEACHING PUBLIC POLICY PUBLICLY: WHAT MORE LAW SCHOOLS, POLICY TEACHERS, & LAWYERS CAN DO

Universities and colleges across America are deemphasizing teaching the founding history of our country.⁶⁵ At the same time, there is ample evidence of widespread and profound ignorance among the American public about how our government and system of justice are supposed to work.⁶⁶ Law schools and law professors are uniquely equipped to step into the breach and supplement the offerings for undergraduate and graduate students at their own and neighboring universities and colleges, including community colleges. They might also develop programs for people of all ages and backgrounds at high schools and post-secondary schools offering associate degrees, certificates, and continuing education to adults. At Brooklyn Law School, our students and faculty, as I am sure is commonly the case in law schools throughout the country, often enjoyed, were gratified, and learned by teaching local high school students about law and justice. The need is great. More can be done and should be encouraged. Similarly, the civic legal education initiatives impressively underway and led by courts, bar authorities, and others need to expand and be encouraged. Law

64. See Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying* (Columbia L. Sch. Pub. L. Working Paper, Paper No. 14-367, 2014), <http://ssrn.com/abstract=2384645>.

65. The American Council of Trustees and Alumni (“ACTA”) is one source of data about the decline in teaching founding history nationwide. For example, its annual Core Curricular Report from November 2020, found that eighty-two percent of U.S. universities do not require students to take a foundational course in U.S. government or history. Press Release, Am. Council of Trs. & Alumni, ACTA Launches 12th Edition of Core Curriculum Report (Sept. 28, 2020), <https://www.goacta.org/2020/09/acta-launches-12th-edition-of-core-curriculum-report/> [hereinafter ACTA Core Curriculum Report].

66. Goldstein, *supra* note 4. For example, a survey conducted in 2018 by the Woodrow Wilson Fellowship Foundation found that only thirty-six percent of Americans would pass the standard citizen test given to immigrants. This test only requires applicants to get sixty percent of the questions right. Fewer than one quarter knew why the colonists fought the British, and more than half do not know how many justices serve on the Supreme Court. Sixty percent do not know which countries the United States fought in World War II. Younger people performed the worst. Only nineteen percent of those younger than forty-five passed the test. In fact, there are many recent studies showing that ignorance of basic civic information about American history, government, and law is a growing problem. See, e.g., Memorandum, Angela E. Kamrath, *Americans’ Increasing Ignorance of American History & Government Can No Longer Be Ignored*, AM. HERITAGE FOUND., <http://americanheritage.org/wp-content/uploads/docs/America’s%20Increasing%20Ignorance%20-%20Civic%20Studies%20Summaries.pdf>. Justice Sandra Day O’Connor described the situation as a national crisis on the basis that this knowledge is fundamental to maintaining a democratic society based on the informed consent of the people to the rule of law. See ACTA Core Curriculum Report, *supra* note 65.

faculties can be an outstanding source of scholarship, teaching and learning about the origins, current state, and future of our system of limited government under the law, but also for the public, not only their academic colleagues, lawyers, and law students. Law schools can benefit their own university communities and contribute to local institutions by prioritizing civic education and developing pilot programs that others might emulate. As beacons to follow, they can expand their own positive impact on the rule of law and justice beyond their own walls. Indeed, it is what many law schools are doing.⁶⁷

CONCLUSION

Whether realized and acknowledged or not, public policy is an integral part of teaching and studying subjects across the law school curriculum. It is also a substantial part of what lawyers do in private practice, government, public service, and public interest work. It is bemusing to hear, as I often do, lawyers who say they are not involved in policy work even though they are or have been involved in writing laws and public policy work. On the flipside, frequently members of Congress, State Legislators and Staff, and those fully working in executive branches with law degrees, who all are lawmakers, say they are not practicing law. Their meaning is understandable, but it seems that they are technically incorrect.

The more significant truth is that the public policy process touches everything that matters to us as individuals and members of a diverse community living under the same constitutional rulebook. So, teaching public policy is a worthwhile calling whether as part of another doctrinal subject, experiential educational training, or as the central theme in its own course. It is both challenging and fascinating to teach because of its constantly changing nature. This feature of the subject matter calls for constant adjustment, adaptation, reexamining assumptions, and questioning what passes for conventional wisdom. Again, it's not rocket science, it's harder than rocket science.⁶⁸ It also involves teaching a subject of considerable and growing interest to law students. My dear friend, Professor Jesse Choper, former Law Dean at the University of California Berkeley School of Law, once told me that the subject interests students because it opens their eyes to the possibility of exciting careers that are also meaningful. That matches my observation that no matter what characteristics and quirks we fairly or unfairly attribute to the digital natives who are in the most recent cohorts of students, they deserve credit for their genuine interest in contributing to others and to make a positive difference in the world, as well as their impatience to do so. Teaching students about public policy can

67. Again, receiving information about new civic education initiatives would be most welcome.

68. With thanks for this insight to Ira Schuman, *supra* note 3.

show them a path toward their higher aspirations that they can begin to follow before they graduate.

These are among the many reasons that law schools and teachers have an important opportunity, indeed a responsibility, to keep clearing new paths in the field of public policy. To do this well requires mastering and navigating the inherently changing subject matter. It is a tall order, but one that is exceptionally gratifying to try to fill.

The modest effort in these pages to illustrate changes in teaching public policy has been a much appreciated and humbling opportunity to join the other distinguished authors featured in this annual Teaching Issue, and to contribute to the talented, dedicated students and faculty who made it possible. Thank you.
— N.W.A.

