

Course Correction: Abolition, Grand Strategy, and the Case Against Golf

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I. INTRODUCTION

America has a golf course problem. Roughly 3,500 square miles of land in the United States is tied up in golf courses; an area larger than the land mass of the states of Delaware and Rhode Island combined.¹ Historically, golf courses have been locations of exclusion—along racial, gender and class lines.² The adverse environmental impact of maintaining a typical golf course is profound.³ The opportunity costs associated with tying up so much land in this way are dramatic, as the acreage used for golf courses could be used as public parks,

¹ Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land*, BLOOMBERG (July 31, 2018), <https://www.bloomberg.com/graphics/2018-us-land-use/> [<https://perma.cc/8LME-6AGS>] (noting that golf courses occupy roughly 2,000,000 acres of land in the United States). There are 640 acres in a square mile. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, LAND DESCRIPTION DIAGRAM, <https://www.blm.gov/or/landrecords/files/land-descript-diag.pdf> [<https://perma.cc/L8WW-KE4M>]. Thus, in the United States, roughly 3,500 square miles of land is dedicated to golf courses. The total land mass of the states of Delaware (1,949 square miles) and Rhode Island (1,034) (excluding waterways) combined is 2,983 square miles. *United States by Area*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/states-by-area> [<https://perma.cc/5E5T-M2VM>].

² See generally George B. Kirsch, *Municipal Golf and Civil Rights in the United States, 1910–1965*, 92 J. AFR. AM. HIST. 371 (2007) (describing the history of discriminatory practices of golf courses in the United States). See, e.g., Karen Crouse, *Augusta National Adds First Two Female Members*, N.Y. TIMES (Aug. 20, 2012), <https://www.nytimes.com/2012/08/21/sports/golf/augusta-national-golf-club-to-add-first-two-female-members.html> [<https://perma.cc/7UE5-LD6U>] (describing the history of exclusion of women golfers at Augusta National golf course); Darrell E. Napton & Christopher R. Laingen, *Expansion of Golf Courses in the United States*, 98 GEOGRAPHICAL REV. 24, 26–27 (2008); see MARCIA CHAMBERS, *THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF* 5 (1995).

³ See *infra* Part IV.A.

sites for affordable housing, or farmland.⁴ Many golf courses are also subsidized by the public in the form of special tax treatment for private courses⁵ or simply through the construction and ongoing maintenance of municipal golf courses at the expense of taxpayers, many of whom have never set foot on a golf course.⁶ The cost to play—not just for a round of golf on private and even heavily subsidized municipal courses, but also for the equipment needed to play—is prohibitive for many.⁷ Thus, between the environmental damage, the opportunity costs, the heavy subsidies, the barriers to entry, the fact that they serve as a locus of exclusion that perpetuates inequality, the negative externalities created by the operation and ongoing maintenance of golf courses are considerable.⁸ Nevertheless, throughout the United States, golf courses are still woven into the cultural fabric of life.⁹ In fact, they have become institutionalized: they exist in both a material form and as a system of behavior and beliefs.¹⁰

When a pattern of behavior or a system becomes institutionalized, it takes on a particular cultural weight and becomes difficult to change, often serving in ways that preserves and maintains the status quo, however favorable or unfavorable that institution may be for the good of society as a whole.¹¹ In the United States, slavery was an institution,¹² as was Jim Crow.¹³ Changing embedded institutions demands more than a vague strategy or a loose and uncoordinated array of tactics. It requires what is sometimes referred to as *grand strategy*, the alignment of values, tactics, and resources in the service of a long-time goal.¹⁴

⁴ See *infra* Part IV.B.

⁵ See *infra* Part IV.E.

⁶ See *infra* Part IV.E.

⁷ See *infra* Part IV.C.

⁸ See *infra* Part IV; FRANCESCO PARISI, *THE LANGUAGE AND LAW OF ECONOMICS: A DICTIONARY* 115 (2013) (defining negative externalities).

⁹ See generally Napton & Laingen, *supra* note 2 (describing development of golf in the United States and its relationship to different economic, social, cultural, and political trends).

¹⁰ For a discussion of the symbolic and material aspects of institutions, see discussion *infra* Part II.A.

¹¹ For a discussion on the process of cultural institutionalization, see Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOC. REV. 726, 726, 728 (1977).

¹² See, e.g., Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 978–79 (2002) (describing the institutionalization of slavery).

¹³ See, e.g., James M. Durant III, *Equal Protection: Access to Justice and Fairness in the American Criminal Justice System?*, 8 DEPAUL J. FOR SOC. JUST. 175, 178 n.6 (2015) (describing the institutionalization of the Jim Crow system). By referencing these two horrific institutions, I want to make clear that these are not the only institutions that have shaped or continue to shape life in the United States, nor am I equating them with my classification of golf as an institution.

¹⁴ JOHN LEWIS GADDIS, *ON GRAND STRATEGY* 21 (2018).

Over the years, social movements have sought to change embedded institutions and deployed different strategies in the pursuit of that change, sometimes achieving success, sometimes failing.¹⁵ Choosing the right grand strategy to change a culturally, economically, and politically institutionalized system can often mean the difference between such success and failure.¹⁶ This Article is an attempt to develop an understanding of the appropriate time to use one grand strategy over another to reform institutions. It uses the case study of what I call the golf course problem to explore the considerations that should go into the choice between grand strategies.

While the use of the golf course problem as a way to examine grand strategy may seem trivial, the history of efforts to change the golf course as an institution in American life is long and deep.¹⁷ Since its emergence on the scene in American culture in the late nineteenth century, first as a sport, then as an institution, the need to change golf emerged immediately.¹⁸ African-American golfers were prohibited from playing on many courses, mostly in the Jim Crow South, but also in other parts of the nation.¹⁹ At first, the African-American community responded by creating their own courses, clubs, and an integrated national golfing association.²⁰ In the 1950s, a strategy disagreement occurred within the NAACP Legal Defense Fund (LDF) over whether to push for integration of golf courses or to pursue efforts to promote civil rights in other areas that would presumably affect a larger portion of the community.²¹ Nevertheless, the effort proceeded and, in one of the first of the Supreme Court's integration decisions after the landmark case of *Brown v. Board of Education*, the Court ruled that municipal golf courses in Atlanta, Georgia, had to allow African-American golfers to use those facilities.²² Unlike in other areas, where the response of white elites was to close down settings like swimming pools

¹⁵For a critical assessment of the different strategies deployed by the civil rights movement of the 1950s and 1960s and their relative success, see GERALD R. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 134–50 (1991).

¹⁶See TAMI DAVIS BIDDLE, *STRATEGY AND GRAND STRATEGY: WHAT STUDENTS AND PRACTITIONERS NEED TO KNOW* 13 (2015) (describing the importance of choosing the correct strategy in a military context).

¹⁷See *infra* Part III.B.

¹⁸See *infra* Part III.A–B.

¹⁹See Kirsch, *supra* note 2, at 373–74.

²⁰On the relationship between African-Americans and the development of golf in the United States, including the history of segregation of golf courses until the mid-1950s, see generally LANE DEMAS, *GAME OF PRIVILEGE: AN AFRICAN AMERICAN HISTORY OF GOLF* 1–39, 163–69 (2017).

²¹See *infra* Part III.B.

²²*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation*, 62 ARIZ. L. REV. 637, 640 n.11 (2020); *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955); see *infra* Part III.B.

once required to integrate them,²³ those golf courses remained open and their operators proceeded, for the most part, to integrate them.²⁴

Today, golf courses have a significant impact on the environment, large swaths of land are tied up in their use, and the cost to play in both time and money excludes many from taking part in golf-related activities.²⁵ Perhaps it is time to take stock to ask whether golf as an institution in its current manifestation continues to bring value to society? A thorough accounting of all the costs and benefits associated with maintaining golf as an institution in the United States might lead one to the conclusion that the institution needs to change, perhaps in a significant way. If so, then such change would require a choice among different potential grand strategies. This Article uses the case study of the problems posed by golf courses to explore questions of institutional change. My goal is to theorize the concept of grand strategy and embed it in our understanding of, research around, and theories of social change in ways not previously examined in this field of scholarship.

With these goals in mind, this Article proceeds as follows. In Part II, I will describe the scholarly treatment of institutions across the disciplines of economics, social movement theory, and legal scholarship, and introduce the concept of grand strategy as it relates to institutional change, including setting forth what I describe as a taxonomy of grand strategy approaches. I will then use the case study of the effort to bring about marriage equality in the United States for the LGBTQIA+ community to help explore this taxonomy. In Part III, I will trace the history of efforts to integrate golf in the United States in the middle part of the twentieth century and show how such efforts reflected different approaches from within the grand strategy taxonomy. In Part IV, I outline the various costs of golf courses to society at large and the ways they are actively subsidized by taxpayers irrespective of their actual use of such institutions. With such significant burdens on the taxbase and the environment, golf courses are the ideal use case for a present institution ready for application of the principles discussed in Part II. In Part V, I will discuss the negative externalities caused by golf and golf courses and then offer another case study related to a particular golf course: one located in the Ferry Point section of the Bronx, in New York City.²⁶ It is, by far, the most expensive municipal golf course ever built in the United States, costing over \$127 million to construct; a typical round of golf there is far too costly for the average resident of New York City to afford; and occupies nearly two hundred acres of land in the South

²³ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (holding that Jackson, Mississippi's choice to close a swimming pool rather than integrate it did not deny African-Americans equal protection); see also HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 23–28 (2021) (describing the practice of closing public swimming pools when ordered to integrate them).

²⁴ DEMAS, *supra* note 20, at 149–59.

²⁵ See *infra* Part IV.A–C.

²⁶ See *infra* Part V.

Bronx,²⁷ a community starved for park space and affordable housing.²⁸ This case study will inform the discussion in Part VI, where I will identify the institutional characteristics of golfing and golf courses, the tactics a group or groups might use to change the institution of golf, and attempt to assess the optimal grand strategy for addressing what I have called the golf course problem.

II. INSTITUTIONS, GRAND STRATEGY, AND SOCIAL CHANGE

A. *Institutions and Their Economic, Political, and Cultural Significance*

Webster's Dictionary defines the term "institution" as "an established organization or corporation (such as a bank or university) especially of a public character."²⁹ In a range of disciplines, the meaning of institution goes beyond its dictionary definition to mean much more.³⁰ Leading institutional scholar and economist Douglass North of the New Institutional Economics (NIE) school³¹ viewed institutions as laws, norms, and customs.³² But that narrow definition is not universal, even among economic theorists from within the NIE school.³³ Geoffrey Hodgson accepts institutions are "socially embedded systems of rules," but argues also that "organizations are a special kind of institution, with additional features"³⁴ including that they "involve (a) criteria to establish their boundaries and to distinguish their members from nonmembers, (b) principles of sovereignty concerning who is in charge, and (c) chains of command delineating responsibilities within the organization."³⁵

Social movement scholars who mine institutional theory also take a broad view of institutions and consider that institutions exist in material and symbolic form.³⁶ Roger Friedland and Robert Alford argue that they are "symbolic

²⁷ *Trump Golf Links Ferry Point*, NICKLAUS DESIGN, <https://www.nicklausdesign.com/course/ferrypoint/> [https://perma.cc/QMG8-9496].

²⁸ See *infra* Part V.

²⁹ *Institution*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/institution> [https://perma.cc/K6WB-5PCX].

³⁰ See generally, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3–4 (1990); Geoffrey M. Hodgson, *What Are Institutions?*, 40 J. ECON. ISSUES 1, 1 (2006).

³¹ See generally Douglass C. North, *The New Institutional Economics*, 142 J. INSTITUTIONAL & THEORETICAL ECON. 230 (1986).

³² NORTH, *supra* note 30, at 3–4.

³³ See, e.g., Hodgson, *supra* note 30, at 1, 8.

³⁴ *Id.* at 8.

³⁵ *Id.*

³⁶ Roger Friedland & Robert A. Alford, *Bringing Society Back in: Symbols, Practices, and Institutional Contradictions*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232, 249 (Walter W. Powell & Paul J. DiMaggio eds., 1991) ("The central institutions of contemporary Western societies—capitalism, family, bureaucratic state,

systems which have non-observable, absolute, transrational referents and observable social relations which concretize them.”³⁷ In addition, they are the “concrete social relations,”³⁸ through which “individuals and organizations strive to achieve their ends, but they also make life meaningful and reproduce those symbolic systems.”³⁹

Other social movement scholars favor this “dualist” approach to defining institutions: i.e., that they are both symbolic manifestations of norms and also instantiated representations of those symbols that are often embedded in human networks and organizations.⁴⁰ Elizabeth Armstrong and Mary Bernstein describe institutions as “mutually constituted by classificatory systems and practices that concretize these systems.”⁴¹ For William Sewell, institutions serve as both the normative structure and structured relations they create because they “are constituted by mutually sustaining cultural schemas and sets of resources that empower and constrain social action and tend to be reproduced by that action.”⁴² Even North, who embraced the more narrow definition of institutions, believed there was a relationship between the material (organizations) and the immaterial (norms): “Organizations are created to take advantage of opportunities” that arise from the rules-as-institutions, “and, as the organizations evolve, they alter the institutions.”⁴³

B. *Institutions and Social Change*

Over the course of the last half-century or more, legal scholars have sought to explain the influence social movements have on not just legislation, but the collective understanding of the Constitution itself.⁴⁴ Less has been done to connect this research explicitly to an understanding of the role that institutions,

democracy, and Christianity—are simultaneously symbolic systems and material practices” (footnote omitted)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ My use of dualism here is similar to Giddens’s view of “structure” in society: that it is “both the medium and outcome of the practices which constitute social systems.” ANTHONY GIDDENS, *A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM: POWER, PROPERTY AND THE STATE* 27 (Stanford Univ. Press 2d ed. 1995) (1981).

⁴¹ Elizabeth A. Armstrong & Mary Bernstein, *Culture, Power, and Institutions: A Multi-Institutional Politics Approach to Social Movements*, 26 SOCIO. THEORY 74, 83 (2008).

⁴² William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOCIO. 1, 4–5, 41 (1992) (describing what the author calls “the duality of structures” and the relationship between structures and institutions).

⁴³ NORTH, *supra* note 30, at 7.

⁴⁴ Representative scholarship includes Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006), and William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002).

in their broad, dualist form, play in social change efforts. A deeper understanding of this relationship reveals that institutions as organizations advocate for social change that, in turn, shapes institutions in their immaterial form: laws and norms.⁴⁵

What is more, institutions can be designed in ways that are inclusive and promote democratic practices and community engagement, particularly for otherwise marginalized groups.⁴⁶ As Daron Acemoglu and James Robinson argue, political and economic institutions can be either inclusive⁴⁷ or extractive.⁴⁸ Inclusive economic institutions “are those that allow and encourage participation by the great mass of people in economic activities that make best use of their talents and skills and that enable individuals to make the choices they wish.”⁴⁹ In contrast, extractive economic institutions “are designed to extract incomes and wealth from one subset of society to benefit a different subset.”⁵⁰ Once embedded, a degree of path dependency sets the society down a particular road—one that is more open, inclusive, and free, or one that is constrained and limits members’ liberty.⁵¹ Whether institutions are extractive or inclusive, as Timothy Snyder points out, will depend upon the broader impacts they can have on social practices: “Virtues arise from the institutions that make them desirable and possible.”⁵² Given the importance of embedded institutions, and the impacts they can have on society and its members, are there strategies—or, as is likely necessary given this embeddedness, grand strategies—that can help shape those institutions?

There are a range of views about how institutions change.⁵³ When it comes to institutional change in particular, Douglass North, taking a strictly economic view, argued that institutions change based on reactions of actors affected by the costs associated with existing rules and those that might arise under a

⁴⁵ See, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2755 (2014) (describing grassroots organizing efforts designed to realize democratic ideals while bringing about not just legal change but deeper, and more lasting, cultural change).

⁴⁶ For an argument that effective and inclusive institutional design can create more democratic institutions, see K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 721–30 (2020).

⁴⁷ DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 73–79 (2012) [hereinafter ACEMOGLU & ROBINSON, WHY NATIONS FAIL].

⁴⁸ *Id.* at 76.

⁴⁹ *Id.* at 74.

⁵⁰ *Id.* at 76.

⁵¹ See, e.g., DARON ACEMOGLU & JAMES A. ROBINSON, THE NARROW CORRIDOR: STATES, SOCIETIES, AND THE FATE OF LIBERTY 63–66 (2019) (describing different approaches a society can take that can lead to either less or more inequality and liberty).

⁵² TIMOTHY SNYDER, THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA 277 (2018).

⁵³ See, e.g., NORTH, *supra* note 30, at 86.

potential normative change.⁵⁴ North articulated a view of organizations as “purposive entities” that maximize not only wealth or income but also “other objectives defined by the opportunities afforded by the institutional structure of society.”⁵⁵ If we take a less constrained view of “price” and consider it “cost,” those who want change and those who oppose it will calculate the costs—broadly defined—of preserving the status quo, changing it or defending it, and the benefits and costs that might accompany such change.⁵⁶

Social movement theory has long considered the costs associated with bringing about change.⁵⁷ The resource mobilization school argued that leaders of such movements use cost–benefit analysis to try to convince constituents that it is more beneficial to undertake the effort to make change than it is to do nothing.⁵⁸ At the same time, such efforts can be plagued by the challenges of collective action, where constituents may “free ride” on efforts of others.⁵⁹ Critics of resource mobilization theory would argue that the decision to engage in or not engage in social change efforts is not always rational and calculative and people have different thresholds for when they will take part in collective action and will identify with different movements in different ways.⁶⁰

What is more, many of the most powerful movements over the last fifty years have been focused on different types of identities,⁶¹ something that is not always considered through a narrowly and economically focused cost–benefit

⁵⁴ *Id.*

⁵⁵ *Id.* at 73.

⁵⁶ See, e.g., Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 766–69 (2003) (using just war theory to assess the costs associated with trying to combat discrimination in the criminal justice system).

⁵⁷ See generally, e.g., John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOCIO. 1212 (1977). Sometimes resources are financial resources. For example, farm laborers in California considered costs. MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT* 23–25 (2009) (describing the history California farm labor strikes beginning in 1900). Another example of this is the residents of Montgomery, Alabama who boycotted the busing system and thus withheld their bus fares. See generally Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 L. & SOC. INQUIRY 663 (2005).

⁵⁸ McCarthy & Zald, *supra* note 57, at 1216 (describing incentive-based organizing).

⁵⁹ MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 57–63 (1965) (describing the free-rider problem).

⁶⁰ Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420, 1427–28 (1978). These thresholds can also change based on the extent to which a movement constituent may identify with, and see their identities within, the movement itself. Hank Johnston, Enrique Laraña & Joseph R. Gusfield, *Identities, Grievances, and New Social Movements*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 3, 10 (Enrique Laraña, Hank Johnston & Joseph R. Gusfield eds., 1994).

⁶¹ See ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 35–38 (paperback ed. 1986); Eskridge, *supra* note 44, at 2353–407 (discussing role of identity in social movements).

analysis.⁶² The participant in a movement may want to be seen as someone who wants to identify with a movement and is willing to work for change as opposed to someone who is satisfied with the current institutional arrangements.⁶³ There may be a sort of psychic cost associated with this type of decision, and it is difficult to quantify, but it is still a type of cost. Looking at costs broadly defined then can be a helpful way to consider the subtle balancing act of recruiting, mobilizing, and sustaining social movement organization members.⁶⁴

There is, of course, a literal financial cost to maintaining that status quo (or giving it up), and the ability to manipulate those costs can serve as a critical resource in a group's social change arsenal.⁶⁵ Boycotts of businesses⁶⁶ or nations engaged in disfavored practices⁶⁷ can impose a tax on the preservation of the status quo. Tactics designed to impose a kind of psychological penalty can cause those who would defend the status to feel moral shame.⁶⁸ In the next sections, I will examine the interplay between institutions (broadly defined), social movements, organizations, costs (again, broadly defined), and how institutional entrepreneurs⁶⁹ can operate within an institutional matrix to either maintain the status quo or effect social change.⁷⁰

⁶² See Pamela E. Oliver & Gerald Marwell, *Mobilizing Technologies for Collective Action*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 251, 252 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (discussing the role of identity in social movements).

⁶³ Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 636–37 (1980).

⁶⁴ See Alberto Melucci, *Getting Involved: Identity and Mobilization in Social Movements*, in 1 *INTERNATIONAL SOCIAL MOVEMENT RESEARCH* 329, 343 (Bert Klandermans, Hanspeter Kriesi & Sidney Tarrow eds., 1988).

⁶⁵ See, e.g., Michael Livingston, *Q&A: Here's When Boycotts Have Worked—and When They Haven't*, *L.A. TIMES* (Mar. 1, 2018), <https://www.latimes.com/nation/la-na-boycotts-history-20180228-htmstory.html> [<https://perma.cc/7VMP-UUVE>].

⁶⁶ Boycotts have long been a tool of progressive social change. See generally Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 *L. & HIST. REV.* 59 (1991) (describing the Montgomery, Alabama bus boycott).

⁶⁷ Livingston, *supra* note 65 (describing the boycott of the apartheid regime in South Africa).

⁶⁸ ERICA CHENOWETH, *CIVIL RESISTANCE: WHAT EVERYONE NEEDS TO KNOW* 3 (2021) (describing the tactics of ostracism and shaming to exact a cost on opponents).

⁶⁹ Cass Sunstein uses the term “norm entrepreneur” to describe change agents who work for changes in norms and values. Cass R. Sunstein, *Social Norms and Social Roles*, 96 *COLUM. L. REV.* 903, 909 (1996). Since I am looking at institutions as encompassing norms and the organizations in which those norms are embedded, I will use the term institutional entrepreneur.

⁷⁰ See Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *HARV. L. REV.* 1393, 1437 (1996) (describing the assessment of norms and their operation on institutions).

C. Grand Strategy and Institutional Change

When seeking institutional change, one must adopt a strategy and deploy tactics to achieve the desired objective related to that change. Generally speaking, “strategy concerns the manner in which we achieve and eventually fulfil our long term aims or objectives, whereas tactics concerns the methods through which we achieve our shorter term aims or objectives.”⁷¹ In the social change space, a group or movement may wish to engage in a range of activities—boycotts, civil disobedience, litigation, lobbying, protests, policy advocacy⁷²—in service of a particular goal.⁷³ “Strategy,” as Marshall Ganz argues, “is how we turn what we have into what we need to get what we want.”⁷⁴ It is “intentional—a pathway that we shape by making a series of choices about how to use resources in the present to achieve goals in the future.”⁷⁵ It also “requires the courage to venture into the unknown, risk failure, say no to current demands, and commit to a course of action that we can only hypothesize will yield the desired outcome.”⁷⁶

But grand strategy represents something more. Tactics, strategy, and then *grand strategy* are often “nested like a set of Russian dolls, with each one referring to a particular band of action and responsibility.”⁷⁷ At the pinnacle of the hierarchy among these concepts is “grand strategy” which “identifies and articulates a given political actor’s . . . objectives at a particular point in time and describes how they will be achieved using a *combination* of instruments of power.”⁷⁸ Grand strategy “is concerned with integrating the application of . . . diverse means with their creation and allocation into a coherent, cohesive whole.”⁷⁹ At its essence “is its integrative nature.”⁸⁰ It is a system that “can only be understood in its totality, not as a set of disaggregated elements or units.”⁸¹ The deployment of a grand strategy is an effort to “impose a preferred state of

⁷¹ Robert Knox, *Strategy and Tactics*, 21 FINNISH Y.B. INT’L L. 193, 197 (2010).

⁷² The range of tactics available to a social movement to bring about change are what Charles Tilly described as “repertoires of contention.” Charles Tilly, *Repertoires of Contention in America and Britain, 1750–1830*, in *THE DYNAMICS OF SOCIAL MOVEMENTS: RESOURCE MOBILIZATION, SOCIAL CONTROL, AND TACTICS* 126, 131 (Mayer N. Zald & John D. McCarthy eds., 1979).

⁷³ This broader spectrum approach to advocacy, one that is not limited to litigation alone as a tool for advancing institutional change, reflects a departure from the test case model of litigation adopted in the 1950s through the 1980s by many groups on the left. JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 2–3 (1978) (describing test-case model of law reform).

⁷⁴ GANZ, *supra* note 57, at 8.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ BIDDLE, *supra* note 16, at 4.

⁷⁸ *Id.* at 5.

⁷⁹ Peter Layton, *The Idea of Grand Strategy*, *RUSI J.*, Aug.–Sept. 2012, at 56, 58.

⁸⁰ *Id.*

⁸¹ *Id.*

order on the future.”⁸² Classicist John Lewis Gaddis has defined grand strategy as “the alignment of potentially unlimited aspirations with necessarily limited capabilities.”⁸³ For Gaddis, this alignment of aspiration and capacities is necessary across time, space, and scale.⁸⁴

Since truly institutionalized norms, practices, and social structures are deeply embedded, when one’s goal is to achieve some *institutional* change, one should select a *grand strategy* that identifies how one will use a combination of strategies and tactics to achieve the desired end.⁸⁵ Grand strategy is forward thinking, and tries to identify what the institution should look like in the future, whether it should be reformed, resisted, abolished, or something else.⁸⁶ When it comes to changing institutions, grand strategy requires a choice between five stances: resistance, the creation of parallel institutions, integration, reformation, and abolition. I will discuss each of these, in turn.

1. *Resistance*

The first grand strategy related to institutional change involves seeking to *resist* the operation of a particular institution.⁸⁷ There are times when resistance might serve as a “mere” strategy or even just a tactic⁸⁸ on the road towards the desired abolition of the institution.⁸⁹ When resistance itself is the grand strategy, this may be because one has concluded that abolition is not possible: that one’s goal is not aligned with one’s capacities.⁹⁰ That is, a movement might decide

⁸² *Id.* at 59.

⁸³ GADDIS, *supra* note 14, at 21.

⁸⁴ *Id.*

⁸⁵ Ganz argues that effective strategy is “a whole series of tactics” that turn short-term opportunities into long-term gains, including “new *institutional* rules that govern future conflicts in ways that privilege one’s interests.” GANZ, *supra* note 57, at 10 (emphasis added). In a way, Ganz’s “effective strategy” looks a lot like grand strategy, and it is embedded in an institutional framework.

⁸⁶ See MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 69 (1970) (arguing that “so long as oppression persists, oppressed men and women retain the right” to withhold “what they have to give: their loyalty, service, and obedience”).

⁸⁷ On the strategy of resistance lawyering, see generally Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

⁸⁸ For a discussion of the role that Rosa Parks’s action of defiance was part of a larger, integrated strategy to fight segregation in Montgomery, Alabama, see generally Coleman, Nee & Rubinowitz, *supra* note 57.

⁸⁹ MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 97 (1958) (embracing Mahatma Gandhi’s argument that “non-violent resistance” is one of the “most potent weapons” for “oppressed people in their quest for social justice”).

⁹⁰ It is important to make these assessments, to choose the grand strategy, in light of the institutional and institutionalized forces aligned against a movement. See Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1748 (2006) (arguing that reform of the carceral state requires confronting “institutions and interests” that are “deeply embedded”).

the institution it wants to change is too resilient and resistant to that change, but the movement's participants do not wish to engage with that institution.⁹¹ Such resistance can be passive: choosing not to cooperate.⁹² Or it may be active: using tactics such as civil disobedience to make it more difficult or costly (using the broad definition of cost) for the institution to operate.⁹³ Again, if civil disobedience is a tactic on the road to abolition, however, then resistance itself is not a grand strategy, but a means to an end.

2. Create Parallel Institutions

When the institution presents some positive features but members of a movement do not wish to participate or sustain that institution as it currently exists, or are excluded from it, the movement might choose to create its own parallel institutions to gain the benefits of that form of institution.⁹⁴ During the Jim Crow era, African-Americans worked to create parallel institutions across all areas of modern life—from Black-owned financial institutions to colleges and universities.⁹⁵ In the absence of integration, there were benefits to creating and sustaining such parallel institutions.⁹⁶ The grand strategy of creating parallel institutions is deployed to permit outsiders to obtain at least some of the benefits that access to the exclusionary institutions might generate.⁹⁷ Another example

⁹¹ German theologian Dietrich Bonhoeffer described different types of resistance to institutions which have a degree of general application: from aiding the victims of the institution to taking a more activist stance, what Bonhoeffer called “seizing the wheel” and trying to steer the ship of state towards institutional change. For a description of Bonhoeffer’s theory of resistance, see MICHAEL P. DEJONGE, *BONHOEFFER ON RESISTANCE: THE WORD AGAINST THE WHEEL* 6–10 (2018).

⁹² See, e.g., ROBERT HELVEY, *ON STRATEGIC NONVIOLENT CONFLICT: THINKING ABOUT THE FUNDAMENTALS* 38 (2004) (describing “political noncooperation” as a tactic “aimed primarily at the rejection of authority”).

⁹³ *Id.* at 39 (describing “intervention” as direct actions that might spur a violent response from authorities that then broadens general support for the actions).

⁹⁴ In the decades before passage of laws against discrimination in real estate and lending, African-Americans created financial institutions that would serve their communities. DAN IMMERGLUCK, *FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA’S MORTGAGE MARKET* 47–48 (2009).

⁹⁵ *Id.*; see, e.g., F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA* 96–97 (2013) (describing development of historically Black colleges and universities as a response to Jim Crow). Of course, the creation of parallel institutions is often a product of necessity, not choice, and forced upon a group. See, e.g., *id.* at 85, 96, 106, 115–16 (describing maintenance of segregation).

⁹⁶ W.E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 330 (1935) (noting the need for separate educational institutions because of white resistance to integration).

⁹⁷ Claims of the benefits of separate institutions can also contribute to promotion of those separate institutions to preserve segregation and hegemony. See, e.g., Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 917–26 (2019) (describing efforts

of this approach is the worker cooperative movement.⁹⁸ Among some workers and worker organizers, there is a sense that the political economy of capitalism is deeply institutionalized and unlikely to result in dramatically better working conditions and wages for workers under current employer–employee relations and the laws that govern them.⁹⁹ Workers are creating parallel worker-owned businesses and enterprises to improve working conditions for themselves,¹⁰⁰ while also potentially creating a site for political mobilization.¹⁰¹

3. *Integration*

When creating parallel institutions will not generate the same quality or quantity of benefits that gaining access to an institution itself might produce, a group might turn to the grand strategy of integration.¹⁰² The legal strategy utilized by the NAACP LDF in the leadup to the campaign to integrate schools (and institutions generally) identified avenues to challenge the doctrine of “separate but equal.”¹⁰³ It would argue for integration because separate, parallel institutions were inherently unequal.¹⁰⁴ This grand strategy, once again, might serve as a mere tactic on the road to a different grand strategy: e.g., reform. A movement’s leaders might believe that integration is a step towards changing

to support “Black Capitalism” in the late 1960s as a way to undermine social supports and maintain racial hierarchy).

⁹⁸ See Carmen Huertas-Noble, *Worker-Owned and Unionized Worker-Owned Cooperatives: Two Tools to Address Income Inequality*, 22 CLINICAL L. REV. 325, 328–29 (2016).

⁹⁹ See, e.g., *id.* at 328 (discussing that “worker-owned cooperatives and its more democratic ownership and governance structure” is a “promising structural change to the traditional form of business organization” and can serve as an “important strategy for addressing income inequality”).

¹⁰⁰ Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 BERKELEY J. EMP. & LAB. L. 65, 81–82 (2013) (describing benefits of worker-owned cooperatives).

¹⁰¹ Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 475 (2001) (describing worker-owned cooperatives as offering a “method for creating jobs in poor communities” while also “establish[ing] sites of collective action that can grow into critical loci of community change”).

¹⁰² Some who opposed the creation of civil unions as a substitute for full marriage equality for the LGBTQIA+ community made this type of argument. See, e.g., David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73, 75 (2005) (“[A]ssigning a separate legal status to a group of individuals is a label of inferiority and an official invitation to more harm.”).

¹⁰³ CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER THE LAW: AN AUTOBIOGRAPHY* 62–63 (1998).

¹⁰⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954) (holding that separating children from “others of similar age and qualifications solely because of their race generates a feeling of inferiority”).

the functioning of the institution from within.¹⁰⁵ Efforts to improve the racial diversity of the board of large corporations,¹⁰⁶ or giving workers a stake in board decisions,¹⁰⁷ are, at times, grand strategies in their own right; they might also have a different grand strategy in mind that would flow from that integration.¹⁰⁸ Integrating governing bodies and other policy making settings can result in new perspectives that can help to shape organizational behavior or reform industry practices.¹⁰⁹ Whether that integration is the means to an end or an end in itself will determine whether it is a tactic, a strategy, or a grand strategy.

4. Reform

Those seeking change might accept the general institutional arrangements as either fully entrenched or not in need of dramatic alteration. They might, nevertheless, want to change institutions in incremental ways. Reform can also serve as a strategy and not grand strategy when the hope is that incremental reform will lead to broader, more institutional changes.¹¹⁰ At the same time, mere reform, particularly legal reform, can also serve to further solidify the grip of an institution by serving to perpetuate it and neutralizing critiques and weakening opposition by appearing to represent progress and change.¹¹¹

¹⁰⁵ See, e.g., Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study with LatCritical Commentary*, 13 BERKELEY LA RAZA L.J. 119, 141–43 (2002) (arguing greater diversity among faculty and students in law schools can lead to curricular reform more generally).

¹⁰⁶ For an analysis of the “business case” for diversity on corporate boards, and whether such diversity will lead to better business outcomes and is thus a means to an end, see David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553–55 (2004).

¹⁰⁷ Ewan McGaughey, *Democracy in America at Work: The History of Labor’s Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697, 698–700 (2019) (describing legislative efforts to improve worker participation in corporate boards).

¹⁰⁸ See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 49 (2004) (recognizing integration can serve the interests of existing institutions in order to sustain them).

¹⁰⁹ See, e.g., MATTHEW SYED, *REBEL IDEAS: THE POWER OF DIVERSE THINKING* 20–22 (Flatiron Books 2021) (2019) (describing advantages of diverse teams).

¹¹⁰ See, e.g., INT’L COMM’N AGAINST THE DEATH PENALTY, *HOW STATES ABOLISH THE DEATH PENALTY* 7–9 (2013), <https://icomdp.org/wp-content/uploads/2020/10/Report-How-States-abolition-the-death-penalty.pdf> [<https://perma.cc/A9M6-AQBJ>] (describing “different paths” taken within different countries towards abolition of the death penalty).

¹¹¹ See ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 116 (2005) (describing the ability of legal reform to “solidf[y]” an institution).

5. Abolition

The final institutional grand strategy is the most dramatic: the abolition of the institution itself. Abolition is the choice when the institution is, in many ways, beyond reform, indeed, beyond saving.¹¹² The overall problems and injustices the institution create far outweigh its potential benefits, and thus a reformist grand strategy is not sufficient to bring about desired outcomes.¹¹³ A grand strategy of abolition helps reset expectations, permitting members of a movement to imagine a world in which the institution no longer exists.¹¹⁴ Other seemingly “grand” strategies described here can sometimes be deployed as strategies on the road to a grand strategy of abolition—even a weak, reformist strategy could be chosen when it seems most likely to lead to the greater goal of abolition.¹¹⁵

At the same time, setting a grand strategy of abolition may cause backlash and resistance from those who disagree about the institution’s balance of positive and negative characteristics: some may argue that the costs do not outweigh the ultimate benefits of preserving the institution.¹¹⁶ Such an approach will create opposition from those invested in the continued maintenance of the institution as a way to order life, preserve certain hierarchies, and generate benefits for insiders.¹¹⁷ Where the other grand strategies tend to leave

¹¹² See, e.g., Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/D7NF-S4F4>] (arguing that police reform is not sufficient to preserve public safety in communities of color).

¹¹³ The movement to abolish slavery in the United States faced a significant theoretical and tactical schism, illuminating different potential paths to a grand strategy of slavery’s abolition. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 54–62 (2019) (describing debate over abolition constitutionalism). Some thought that the Constitution should itself be abolished and the Union dismembered because it protected slavery, while others sought to invoke the Constitution’s (and the Declaration of Independence’s) core principles of liberty and equality. *Id.* at 55.

¹¹⁴ Christy E. Lopez, Opinion, *Defund the Police? Here’s What That Means*, WASH. POST, June 8, 2020, at A21, A21 (arguing for the need to “reimagine the role” the police “play in public safety”); see Kaba *supra* note 112 (discussing the ways in which society would be improved by a general abolition of the police).

¹¹⁵ Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 614–17 (2021) (describing efforts at reform that can help lead toward abolition).

¹¹⁶ Compare Kaba, *supra* note 112, with James A. Gagliano, *Calls to Defund the Police Are Dangerous*, CNN (Aug. 15, 2020), <https://www.cnn.com/2020/08/15/opinions/defunding-police-dangerous-crime-gagliano/index.html> [<https://perma.cc/UD56-5DR2>]. Taking costs seriously can also have its benefits in abolitionist rhetoric. See, e.g., Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 579 (2004) (describing the “reexamination” of relative costs and benefits in efforts to end the death penalty).

¹¹⁷ During the effort to amend the Constitution to include the Equal Rights Amendment, advocates of the Amendment faced opposition from those who were able to advance the

institutional arrangements largely in place—whether it is the creation of parallel institutions, integration, reform or even resistance—the explicit goal of a grand strategy of abolition is the end of the institutional order.¹¹⁸ As a result, it is against this approach that resistance to change will be strongest; those who benefit from the institutional arrangements, and those who have the most to lose if they end, will seek to preserve the institutional status quo.¹¹⁹ Others may accept that a particular institution creates injustices but might believe full abolition might create more harm than good.¹²⁰ In some ways, this reaction reflects the activation of prospect theory—the notion that we value losing something we already possess more than we value a potential gain.¹²¹

* * *

Given the different approaches within the grand strategy taxonomy, how does a group or movement settle on a particular grand strategy, one that will align aspirations with capacities? The following case study of the effort to bring marriage equality to the United States attempts to bring to life the considerations that factor into this choice.

D. Case Study: *Changing the Institution of Marriage*

An analysis of the Gaddis definition of grand strategy—the alignment of aspirations with capacities¹²²—suggests that it is more than a definition. It is, itself, *a strategy for developing a grand strategy*. That is, one articulates potential aspirations and then assesses whether one has the capacity, resources, and opportunity to achieve them. In this section, I will use as a case study the decades-long campaign to achieve marriage equality. This was an effort to

rhetoric that the status quo benefited women. Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 426–27 (2008).

¹¹⁸ See, e.g., Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32, 44 (2021) (arguing the goal of prison abolition is to replace components of the carceral state “with nonpunitive ways of addressing harm that empower, rather than disenfranchise, vulnerable populations and communities”).

¹¹⁹ At the same time, as Kimberlé Crenshaw has argued, pressing for change only within existing institutional constraints can mean that the “potential for change is both created and limited by legitimation.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368 (1988).

¹²⁰ See, e.g., William J. Stuntz, *Reply: Criminal Law’s Pathology*, 101 MICH. L. REV. 828, 831 (2002) (arguing that abolition of prosecutorial discretion would probably “do more harm than good”).

¹²¹ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 277–80 (1979) (describing prospect theory).

¹²² GADDIS, *supra* note 14, at 21.

change the *institution* of marriage.¹²³ The decades-long effort to achieve marriage equality, which culminated in the Supreme Court's decision in *Obergefell v. Hodges* in 2015,¹²⁴ was not an easy one, and there were many debates, discussions, disagreements, and even schisms along the way.¹²⁵ Analyzing the campaign—which involved, in essence, debates over aspirations and capacities—helps illuminate the process of reaching for and setting a grand strategy. Indeed, the campaign for marriage equality revealed the complex, integrated, multi-factor assessment of aspirations and capacities that often goes into the development of grand strategy.¹²⁶

At the time of the emergence of the gay rights movement, advocates started talking about how to change the way society viewed members of the LGBTQIA+ community; but for many, recognition of same-sex marriage was not central to that effort in the movement's earlier days.¹²⁷ Over the course of the decades-long campaign, advocates would end up deploying the full range of approaches within the institutional change taxonomy described above.¹²⁸ These discussions were not always strictly substantive in nature; that is, they were not simply debates over the value of providing the LGBTQIA+ community with access to the institution of marriage.¹²⁹ Instead, discussions often blended an analysis of the merits of a goal with an assessment of the movement's capacity to realize it.¹³⁰ Thus, the discussions exhibited the hallmarks of a grand strategy calculus within the taxonomy. In order to develop a grand strategy for institutional change, there is often, first, an aspirations assessment; second, a

¹²³ Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 325–34 (2004) (arguing that the exclusion of same-sex couples “from the marital institution conveys to” them “and other excluded individuals that their families are not equally valued participants in society”); *see also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412–13 (Conn. 2008) (finding that the state's separate “civil union” law for same-sex couples violated the state's constitution).

¹²⁴ *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

¹²⁵ *See infra* notes 127–30 and accompanying text. The account set forth below draws from several resources, including generally WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* (2020); NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* 1–10 (2017).

¹²⁶ FRANK, *supra* note 125, at 1–10.

¹²⁷ *Id.* at 50–51 (noting that advocates were “animated by an awakening . . . to the central importance of visibility and public acceptance” while “none made access to marriage a priority”).

¹²⁸ *Id.* at 1–10. As Nan Hunter points out, advocates throughout the campaign for marriage equality frequently attempted to message that their goal was access to and not alteration of the institution of marriage. Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1719–20 (2017).

¹²⁹ FRANK, *supra* note 125, at 2–3.

¹³⁰ *Id.* at 87–90 (describing the beginning of an incremental strategy designed to accomplish marriage equality, recognizing the need to ensure public support for the effort).

capacity inventory; and third, a synthesis of the two to achieve the alignment necessary to pursue that grand strategy.

1. *The Aspirations Assessment*

This component begins with goal setting: what does the movement aspire to achieve? But, consistent with the Gaddis prescription for grand strategy,¹³¹ those aspirations must always align with capacities for an approach to qualify as a grand strategy. The first question advocates faced was whether to even press for marriage equality, and there was not anything close to unanimity on this point within the advocacy community.¹³² There appears to have been four broad “camps” when it came to addressing the marriage equality question: those who saw marriage equality as a means to an end,¹³³ those who saw it as an end in itself,¹³⁴ those for whom it was not a high priority,¹³⁵ and those who thought it should not be a priority at all.¹³⁶ As film director John Waters said when efforts to integrate both marriage and the military were underway: “I always thought the privilege of being gay is that we don’t have to get married or go in the Army.”¹³⁷ While Waters was certainly being a bit cheeky, the sentiment was salient: some within the advocacy community did not want to dignify such a discriminatory institution by, in turn, striving to become a part of it.¹³⁸ I wish to just highlight these positions here though; a full analysis of these different camps deserves full-length book treatment and has received it several times over!¹³⁹

¹³¹ GADDIS, *supra* note 14, at 21.

¹³² FRANK, *supra* note 125, at 1–10.

¹³³ Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, NAT’L GAY & LESBIAN Q., Fall 1989, at 8, *reprinted in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 756–57 (Mark Blasius & Shane Phelan eds., 1997) (arguing that marriage equality would lead to greater equality for the gay community).

¹³⁴ Andrew Sullivan, *Here Comes the Groom*, NEW REPUBLIC (Aug. 28, 1989), <https://newrepublic.com/article/79054/here-comes-the-groom> [<https://perma.cc/KHQ2-XD2Q>] (arguing marriage equality would strengthen same-sex relationships).

¹³⁵ See, e.g., Tom Geoghegan, *The Gay People Against Gay Marriage*, BBC (June 11, 2013), <https://www.bbc.com/news/magazine-22758434> [<https://perma.cc/872H-4UL4>] (describing the perspective of those who thought the LGBTQIA+ community should focus on priorities other than marriage equality).

¹³⁶ See generally Claudia Card, *Against Marriage and Motherhood*, HYPATIA, Summer 1996, at 1 (arguing against acceptance of the constraints of the institutions of marriage and motherhood in their contemporary form).

¹³⁷ Rebecca Mead, *John Waters Stars as the Groom Reaper*, NEW YORKER (Mar. 19, 2007), <https://www.newyorker.com/magazine/2007/03/26/the-groom-reaper> [<https://perma.cc/2SNM-U9Q7>].

¹³⁸ See e.g., Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK NAT’L GAY & LESBIAN Q., Fall 1989, *reprinted in* SAME-SEX MARRIAGE: PRO AND CON 118–24 (Andrew Sullivan ed., updated ed. 2004).

¹³⁹ As examples of such works, see generally *id.*, and ESKRIDGE & RIANO, *supra* note 125.

Whether to classify a position within either the reformist or the integrationist camp was a question about whether the effort to pursue marriage equality is a means to an end (reform) or an end in itself (integration). Since there was a sufficient degree of tactical overlap—both camps desired marriage equality—¹⁴⁰ it might matter less, in this instance, whether that effort is seen as an end in itself or merely a means to an end. Rather, the strategy-tactic divide, if one existed here, seemed to coalesce around a strategy: pursue marriage equality. This sort of strategic agreement is something that can give rise to a broad coalition. That is, even where groups do not agree on an ultimate goal—a grand strategy—they may reach consensus on the *means* to achieve their potentially heterogeneous ends.¹⁴¹ This can be a powerful tool for coalition building, which can increase a movement's capacities.¹⁴² It activates what Derrick Bell called “interest convergence”: the idea that institutional change is possible when different groups might share a desired outcome, even if they did not embrace such an outcome for the same reason.¹⁴³

The decision to move ahead—to strive for what can only be described as an integrationist approach—reflected tactical consensus among those who favored marriage equality, regardless of any differences over strategic ends.¹⁴⁴ This consensus, as one author described it,

reflected a growing recognition that acceptance at the center of society was crucial to full equality, and that if the world could see gay people as fully belonging to the most mainstream of American institutions—if it could see them as assimilable—it would be impossible to view them as a subversive, destabilizing force in society.¹⁴⁵

¹⁴⁰ FRANK, *supra* note 125, at 7–8 (describing how the LGBTQIA+ movement eventually recognized marriage equality was essential to its pursuit of equal rights).

¹⁴¹ See, e.g., RAY BRESCIA, *THE FUTURE OF CHANGE: HOW TECHNOLOGY SHAPES SOCIAL REVOLUTIONS* 156 (2020) (describing the coalition effort to increase worker wages).

¹⁴² This often occurs through the process of “frame extension” when a Social Movement Organization (SMO) enlarges its “adherent pool by portraying its objectives or activities as attending to or being congruent with the values or interests of potential adherents.” David A. Snow, E. Burke Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOCIO. REV. 464, 472 (1986).

¹⁴³ Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–26 (1980) (describing convergence of interests that resulted in the decision in *Brown v. Board of Education*). For a discussion of scholarship applying interest-convergence theory to other contexts outside of race relations law, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 154–55 nn.25–28 (2011).

¹⁴⁴ As Frank points out: “Conventional tactics do not always mean limited goals, and vice versa, since an activist can adopt an incremental approach as a strategy with the ultimate goal being radical change.” FRANK, *supra* note 125, at 30.

¹⁴⁵ *Id.* at 8.

2. *The Capacity Inventory*

The campaign achieved its goal of securing marriage equality throughout the United States.¹⁴⁶ In some ways, it is easy to conduct a retrospective analysis of whether a campaign's capacities were aligned with its aspirations precisely because of this success.¹⁴⁷ But success was not a foregone conclusion; it was a hard-won victory that required an alignment of resources with goals.¹⁴⁸ While there seemed to be a consensus among enough advocates to pursue marriage rights for the LGBTQIA+ community,¹⁴⁹ there was not always agreement as to how to achieve it, or who should take what steps in the pursuit of that goal.¹⁵⁰ This raised questions about the alignment of capacities and goals. While some resources seemed available to the advocacy community,¹⁵¹ tactics had to be carefully calibrated so as not to force decisions by courts, legislatures, or voters when it seemed any of those groups or bodies might reach decisions contrary to the desired goal.¹⁵² Making matters worse, a strategic or tactical misstep could even lead to backlash, or set the effort back—for example, a ruling in the Supreme Court that the Constitution did not recognize a right to marriage equality.¹⁵³ Amidst the decades-long campaign for marriage equality, there were concerns that a full integrationist approach, rather than an incremental one (that, for example, sought broad recognition for civil unions), did not have the desired popular support.¹⁵⁴ Thus, for some, what was achievable was not full marriage rights (marriage equality), but rather some kind of parallel institution (civil unions).¹⁵⁵ This was a question of capacities and aspirations, the essence

¹⁴⁶ *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

¹⁴⁷ Ganz attributed the success of the United Farmworkers Union in its efforts to reform farm labor practices to the superior strategic capacity of that union. GANZ, *supra* note 57, at 8.

¹⁴⁸ *Id.*

¹⁴⁹ As Frank argues: “By the mid-1990s gay legal advocates had developed a rough consensus that, however one felt about the merits of marriage, solidarity was needed in fighting for the equal worth of same-sex relationships.” FRANK, *supra* note 125, at 101.

¹⁵⁰ *Id.* at 1–10.

¹⁵¹ *Id.* at 334–38 (describing the teams of lawyers that worked on marriage equality efforts, many of them on a pro bono basis).

¹⁵² Leonore F. Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255, 277–308 (2020) (describing marriage equality's incremental litigation strategy).

¹⁵³ Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. S52, S56 (2015) (describing fears of backlash if the marriage equality question was presented to the Supreme Court before it was ready to support full marriage equality).

¹⁵⁴ See, e.g., ESKRIDGE & RIANO, *supra* note 125, at 188–95 (describing debates over civil union legislation in Vermont in the early 2000s).

¹⁵⁵ David L. Chambers, *The Baker Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and a Speculation*, 25 VT. L. REV. 5, 6–7 (2000) (describing the adoption of civil unions in Vermont).

of the grand strategy equation. Indeed, any time one strives to align a movement's aspirations with its capacities, one is grappling with identifying one's grand strategy. But one cannot analyze these components in a vacuum; grand strategy always requires a synthesis of the two, as the following discussion shows.

3. *The Aspirations-Capacities Synthesis*

Once there was a degree of agreement among a critical mass of advocates within the broader movement that nothing short of full marriage equality was the right strategy, there was still concern that a broadside legal strategy that tried to force the Supreme Court's hand by getting a marriage equality case before it as quickly as possible could backfire.¹⁵⁶ Thus, there needed to be an alignment between aspirations and capacities, and a careful consideration of how each might impact/affect the other in pursuit of a comprehensive and effective grand strategy.

Efforts in the 2000s and early 2010s mostly centered around opposing ballot referenda designed to prevent local government officials from recognizing same-sex marriages.¹⁵⁷ Towards the end of the decade, after California voters passed such a referendum, advocates reassessed the campaign and scaled it back a little, looking to build support for marriage equality in a more incremental fashion.¹⁵⁸ An effort in New York in 2011 succeeded in achieving the first recognition of same-sex couples in legislation; most previous victories had come through state courts.¹⁵⁹ Sensing a change in public opinion, emboldened advocates used ballot initiatives as ways to achieve marriage equality in the states, winning such victories in three states in 2012, and defeating an anti-marriage-equality effort in a fourth.¹⁶⁰

Throughout this process, while some still wanted to a definitive ruling from the Supreme Court as soon as possible, an incrementalist approach prevailed—

¹⁵⁶ Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), <https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/> [<https://perma.cc/Q8FZ-4YRE>] (describing advocates' fears that an aggressive legal strategy could lead to defeat and set the broader movement back).

¹⁵⁷ See David Masci & Ira C. Lupu, *Overview of Same-Sex Marriage in the United States*, PEW RSCH. CTR. (Dec. 7, 2012), <https://www.pewforum.org/2012/12/07/overview-of-same-sex-marriage-in-the-united-states> [<https://perma.cc/PJ79-ZM6K>] (describing history of ballot referenda related to marriage equality in the United States).

¹⁵⁸ FRANK, *supra* note 125, at 193 (describing embrace of incremental campaign after losing the Proposition 8 campaign in California).

¹⁵⁹ *Id.* at 266 (describing the passage of marriage equality legislation in New York State).

¹⁶⁰ Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012) [hereinafter Ball, *Marriage Plot*], <https://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865> [<https://perma.cc/P4N2-MLTT>].

one motivated by a perceived alignment of capacities with the ultimate goal.¹⁶¹ In the early 2010s, the sense was that the Supreme Court was not quite ready to rule in favor of marriage equality; as a result, groups like Freedom to Marry worked to build support for broader recognition of marriage equality on a state-by-state basis.¹⁶² Momentum began to build.¹⁶³ President Obama expressed his support for marriage equality rights¹⁶⁴ and the U.S. Department of Justice announced that it would not defend the federal Defense of Marriage Act (DOMA)¹⁶⁵ in a challenge to a section of it.¹⁶⁶ After victory in the DOMA case,¹⁶⁷ advocates began to challenge state laws against same-sex marriage, which ultimately led to the victory in *Obergefell v. Hodges*¹⁶⁸ where the Supreme Court held such laws violate equal protection guarantees and privacy interests.¹⁶⁹

As this description of the marriage equality campaign shows, a social change campaign's capacity inventory, particularly one that seeks to formulate a grand strategy—bringing aspirations and capacities together—matches the campaign's resources to its goal or goals. Choosing a grand strategy thus requires an assessment of the institution change that a movement wants to pursue, the capacities of the movement to bring about that change, and a synthesis of the two types of analysis, recognizing that one cannot be considered in a vacuum. I will return to these themes in subsequent Parts.

III. THE NAACP AND THE CHALLENGE OF INTEGRATING GOLF COURSES

A. Dismantling Jim Crow

It could be argued that the legal campaign to dismantle Jim Crow started, in many respects, with the challenge to segregation of passenger railroads that resulted in the *Plessy* decision.¹⁷⁰ After that dramatic setback, groups seeking

¹⁶¹ FRANK, *supra* note 125, at 225–32 (describing the tensions over aggressive as opposed to incrementalist legal strategies).

¹⁶² *Id.* at 225–27 (describing advocacy position of promoting an approach of winning support for marriage equality on a state-by-state basis because it was “highly unlikely” that the Supreme Court would “step in and recognize a national freedom to marry when only a handful of states allowed it”); Ball, *Marriage Plot*, *supra* note 160.

¹⁶³ Ball, *Marriage Plot*, *supra* note 160.

¹⁶⁴ *Id.* (describing President Obama's shift in support in favor of marriage equality).

¹⁶⁵ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022).

¹⁶⁶ Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to John A. Boehner, Speaker, U.S. House of Rep. (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/5257-VWEC>].

¹⁶⁷ *United States v. Windsor*, 570 U.S. 744, 774 (2013).

¹⁶⁸ *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

¹⁶⁹ *Id.* at 666, 675.

¹⁷⁰ On the legal campaign that led to the Court's decision in *Plessy*, see generally CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 28–60 (1987).

to bring legal challenges to the “separate but equal” doctrine attempted a few plans of attack against it, with proponents of different strategies articulating arguments that reflected an attempt to balance aspirations against capacities, although the arguments often centered around capacities, or at least had capacities questions stalking their aspirations.¹⁷¹ The NAACP was itself founded in 1909 and those who supported it sought equal treatment of the African-American community.¹⁷² But, given what might have appeared possible legally and socially at the time, what equal treatment meant was the subject of significant debate.¹⁷³ That debate, described below, reveals the grand strategic thinking behind the approach that would unfold over the next fifty years.

One of the early examples of the NAACP’s strategic thinking is reflected in what has come to be known as the Margold Report.¹⁷⁴ In that memorandum, Nathan Margold, an attorney in private practice in New York, attempted to articulate an approach to fighting segregation that he believed stood some chance of success.¹⁷⁵ It was a response to a prior memorandum provided by an NAACP donor that laid out an explicit and aggressive legal strategy that would challenge segregation head-on through the courts and make the costs of preserving the status quo too much for Southern governments to maintain.¹⁷⁶ The Margold Report was very much an analysis of what the author thought was possible: a sense of the receptivity of the courts and society in general to challenges to the separate but equal system.¹⁷⁷ Arguing that the majority was not ready to accept integration, Margold advocated for the acceptance of separate institutions generally but wanted to address specific situations where separate institutions were egregiously unequal, to ensure that they would be made equal.¹⁷⁸ Margold argued against “frittering away funds” on sporadic challenges to segregation.¹⁷⁹ This reflected an analysis of possibilities, a

¹⁷¹ See *infra* text accompanying notes 177–206.

¹⁷² On the founding of the NAACP and its early activities and focus, see Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 L. & HIST. REV. 97, 103–21 (2002).

¹⁷³ See discussion *infra* pp. 25–30.

¹⁷⁴ *Our History*, NAACP, <https://naacp.org/about/our-history> [<https://perma.cc/DYL4-LDAQ>] (explaining the role of the Margold Report on the evolution of the NAACP legal strategy to combat racial discrimination); NATHAN R. MARGOLD, PRELIMINARY REPORT TO THE JOINT COMMITTEE SUPERVISING THE EXPENDITURE OF THE 1930 APPROPRIATION BY THE AMERICAN FUND FOR PUBLIC SERVICE TO THE N.A.A.C.P. 15 (1931), *microformed on Papers of the NAACP*, Part 3 The Campaign for Educational Equality, Series A, Reel 4 (Univ. Publ’ns of Am.).

¹⁷⁵ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 133 (1975).

¹⁷⁶ *Id.* at 132–33.

¹⁷⁷ *Id.* at 133.

¹⁷⁸ *Id.* at 134–35.

¹⁷⁹ Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 L. & SOC. REV. 275, 299 (2019).

calibration of aspirations to capacities and an admission that overturning *Plessy* was likely not achievable.

Some who disagreed with Margold's analysis still felt that a broadside against *Plessy* was not likely to succeed any time soon.¹⁸⁰ One of the strategies was not necessarily to promote better separate and parallel institutions, but to achieve integration by holding segregated institutions up to the light and revealing when the requirement of separate *and* equal institutions was not being satisfied.¹⁸¹ Reflecting an acute sense of the costs associated with preserving the status quo, part of this analysis was that it was simply going to be too expensive to create separate institutions for African-Americans; thus, integration of at least some institutions was likely.¹⁸² We saw this strategy in the graduate and professional school cases *Sweatt v. Painter*¹⁸³ and *McLaurin v. Oklahoma State Regents*¹⁸⁴ where the LDF tried to show that governments could not create truly equal institutions of higher education and enforcement of the separate but equal doctrine in such situations would result in integration of at least some institutions.¹⁸⁵ This approach involved an assessment of the costs associated with creating separate institutions: elites would have to succumb to the creation of integrated institutions because the cost of compliance with providing truly equal institutions would be too much to bear.¹⁸⁶ This grand strategy was a bit more aggressive than that laid out by Margold, but it was still consistent with a sense of the advocates' capacities.

At least some within the advocacy community felt not only that segregation was too entrenched and unlikely to be dismantled anytime soon (a capacities analysis),¹⁸⁷ but also that the grand strategy of creating parallel institutions was not necessarily a bad one.¹⁸⁸ One of the more prominent and outspoken advocates of this position was one of the intellectual and moral leaders within the NAACP, W.E.B. Du Bois,¹⁸⁹ who argued that it was in fact better for the African-American community to keep and maintain separate institutions, where

¹⁸⁰ See KLUGER, *supra* note 175, at 136.

¹⁸¹ *Id.* at 135.

¹⁸² E.g., Coleman, Nee & Rubinowitz, *supra* note 57; JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 174 (1998).

¹⁸³ *Sweatt v. Painter*, 339 U.S. 629, 631, 635 (1950).

¹⁸⁴ *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 638–39 (1950).

¹⁸⁵ WILLIAMS, *supra* note 182, at 174–75 (describing focus on costs of maintaining separate facilities as a way to force integration).

¹⁸⁶ *Id.* at 174.

¹⁸⁷ See, e.g., W.E.B. Du Bois, *The Anti-Segregation Campaign*, CRISIS, June 1934, at 182 [hereinafter Du Bois, *Anti-Segregation Campaign*].

¹⁸⁸ See, e.g., Du Bois, *supra* note 96, at 328.

¹⁸⁹ W.E.B. DuBois, NAACP, <https://naacp.org/find-resources/history-explained/civil-rights-leaders/web-du-bois> [<https://perma.cc/C7PJ-WJHX>] (describing Du Bois as one of the founding members of the NAACP and “one of the foremost Black intellectuals of his era”).

such institutions were not necessarily the product of discrimination.¹⁹⁰ Du Bois appears to have felt segregation was inevitable. He argued that “[i]n this period of frustration and disappointment” due to failed efforts to combat segregation, “we must turn from negation to affirmation, from the ever-lasting ‘No’ to the ever-lasting ‘Yes.’”¹⁹¹ And if segregation was inevitable, the African-American community should try to make the best of it, rather than expending resources and energy trying to promote integration: “Indeed, there is nothing else we can do.”¹⁹² If advocates were going to say “No segregation, Never and Nowhere,” he would challenge them and ask “what are you going to do about it?”¹⁹³

His response to his own question follows:

Let me tell you what you are going to do. You are going back to continue to make your living in a Jim-Crow school; you are going to dwell in a segregated section of the city; you are going to pastor a Jim-Crow Church; you are going to occupy political office because of Jim-Crow political organizations that stand [in] back of you and force you into office. All these things and a thousand others you are going to do because you have got to.¹⁹⁴

If segregation was, in fact, inevitable, it was through the creation of parallel institutions that African-Americans could engage in mutual aid and support.¹⁹⁵ Moreover, Du Bois advocated for the renunciation of “a program that always involves humiliating self-stultifying scrambling to crawl somewhere where we are not wanted; where we crouch panting like a whipped dog.”¹⁹⁶ Instead, the African-American community should “stand erect in a mud-puddle and tell the white world to go to hell, rather than lick boots in a parlor.”¹⁹⁷

Still others felt integration and the end of Jim Crow and its parallel institutions was the only appropriate strategy, even if the grand strategy adopted aspects of other strategies along the way.¹⁹⁸ One other such strategy included refraining from directly challenging segregation itself as the centerpiece of their arguments seeking to integrate institutions. That is, the main thrust of the cases

¹⁹⁰ W.E.B. Du Bois, *Segregation*, CRISIS, Jan. 1934, at 20, 20 [hereinafter Du Bois, *Segregation*] (“[T]here should never be an opposition to segregation pure and simple unless that segregation does involve discrimination.”).

¹⁹¹ Du Bois, *Anti-Segregation Campaign*, *supra* note 187, at 182.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Du Bois, *Segregation*, *supra* note 190, at 20 (“Groups of communities and farms inhabited by colored folk should be voluntarily formed. . . . [C]olored people should come forward, should organize and conduct enterprises, and their only insistence should be that the same provisions be made for the success of their enterprise that is being made for the success of any other enterprise.”).

¹⁹⁶ Du Bois, *Anti-Segregation Campaign*, *supra* note 187, at 182.

¹⁹⁷ *Id.*

¹⁹⁸ See MOTLEY, *supra* note 103, at 63–65.

in the leadup to the decision in *Brown v. Board of Education*¹⁹⁹ mostly focused on the argument that separate institutions had to be equal and, in the absence of that equality, the majority institution had to be integrated.²⁰⁰ This approach would shift when leaders made the assessment that the Supreme Court was ready to take up the question of whether *Plessy* should be overruled completely.²⁰¹ That assessment included a review of not just select victories in cases involving public institutions of higher education, but also an incorporation of the Court's holding in *Shelley v. Kraemer*, where it found that racially discriminatory restrictive covenants in land contracts violated the Constitution's Equal Protection Clause.²⁰²

Following this decision, the NAACP continued to push the limits of the *Plessy* doctrine in educational institutions, bringing cases such as *Sweatt* and *McLaurin*, setting the stage for the victory in *Brown v. Board of Education*.²⁰³ Throughout this period, and across the country, the LDF, which had begun to consider forming as a separate organization from the national NAACP,²⁰⁴ was leading the legal fight and trying to coordinate a strategy that would get the right case to challenge segregation before the Supreme Court at the right time. All the while, they had local NAACP chapters, individual members, and even non-members looking to challenge *Plessy* in different contexts.²⁰⁵ In the final years of *Plessy*'s existence as precedent, the grand strategy appeared to be focused on integration.²⁰⁶ As Constance Baker Motley, one of the leading lawyers at the LDF at the time,²⁰⁷ explained, a case like *Sweatt* “presented the first opportunity to compare a law school established by the state for whites with a supposedly similar facility for blacks.”²⁰⁸ That “basement law school” as she called it, was “in no way comparable to the school for white law students.”²⁰⁹ Because of this, “the case could be easily won under the ‘separate but equal’ doctrine.” As a result, “[a] frontal assault on segregation was unnecessary, particularly since the arguments against it had not been fully developed.”²¹⁰

¹⁹⁹ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁰⁰ MOTLEY, *supra* note 103, at 60–65. Motley describes that, with decisions like *Sweatt* and *McLaurin*, “the legal stage was set for an attack on segregation, per se. We were all fired up, legally speaking. There was no turning back.” *Id.*

²⁰¹ *Id.* at 64–66.

²⁰² *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

²⁰³ MOTLEY, *supra* note 103, at 65; *Brown*, 347 U.S. at 491–92.

²⁰⁴ On the final actions that resulted in the separate incorporation of the LDF, see generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 478–86 (1994).

²⁰⁵ See Eskridge, *supra* note 44, at 2081.

²⁰⁶ See *supra* note 102 and accompanying text; MOTLEY, *supra* note 103, at 63.

²⁰⁷ *The Life and Legacy of Constance Baker Motley*, LEGAL DEF. FUND, <https://www.naacpldf.org/naacp-publications/ldf-blog/cbm-100/> [https://perma.cc/QPM7-WQ87].

²⁰⁸ MOTLEY, *supra* note 103, at 63.

²⁰⁹ *Id.*

²¹⁰ *Id.*

The strategy adopted was, for the most part, explicitly incremental and carefully calibrated to neutralize opposition and not antagonize potential supporters.²¹¹ The core of the arguments, even those in *Brown*, emphasized civic and political equality; civil rights leaders believed it “would arouse Southerners” to press for social equality because that is what those communities feared the most.²¹² The arguments did not contain “every legal theory afloat at that time.”²¹³ The advocates wanted,

whites to understand that we were seeking not social equality but civil equality—the right to vote, the right to go to public schools, the right to travel free from state-enforced segregation, and the right to be free from state-sanctioned lynchings and police assaults based on race.²¹⁴

As Constance Baker Motley, one of the architects of the strategy explained “[n]o suggestion of social equality can be found in the *Brown* briefs for this reason—an instance of lawyering to win a case coming to the fore.”²¹⁵ In other words, the legal strategy was embedded in a larger grand strategy.

For the LDF at the time, keeping track of and on top of all the different opportunities for challenging racist practices was a Herculean effort; even managing “just” the education cases were “a major undertaking” for the LDF.²¹⁶ But the ultimate aspiration, the end of segregation, “represented the premier goal” of the advocates.²¹⁷ Across the nation, leaders of the civil rights movement were often struck by the “fierce urgency of now,” as Martin Luther King, Jr., later proclaimed in his “I Have a Dream” speech,²¹⁸ while the lawyers trying to take the wheel of the campaign sometimes preached caution.²¹⁹ Even with the LDF’s leadership, however, there was not always agreement on strategy and tactics,²²⁰ and the case of golf courses, described next, exemplified this internal tension.

²¹¹ *Id.* at 69.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ MOTLEY, *supra* note 103, at 69.

²¹⁵ *Id.*

²¹⁶ *Id.* at 65.

²¹⁷ *Id.*

²¹⁸ Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *reprinted in* LENWOOD G. DAVIS, *I HAVE A DREAM: THE LIFE AND TIMES OF MARTIN LUTHER KING, JR.* app. V, at 261 (1969).

²¹⁹ Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 814 n.115 (describing Thurgood Marshall’s cautious approach to social change).

²²⁰ See discussion *infra* Part III.B.

B. The Debate Within the NAACP LDF over Golf Courses

Golf first came to the United States in the eighteenth century, but its broad adoption would take over one hundred years.²²¹ African-Americans played a significant role in the early days of American golf: they designed courses, some on which Black golfers alone would play, but also many popular courses those designers could not themselves utilize on account of their race.²²² An African-American inventor was the first to patent the golf tee.²²³ African-Americans became caddies, and it was in the golfer-caddy relationship where African-Americans, because of their deeper familiarity with the game, held a uniquely equal—even superior—role to the golfers.²²⁴ In this somewhat intimate relationship, Black caddies were able to cajole, criticize, and even mock the golfer for whom they were working in ways they would not be able to otherwise.²²⁵ Even the richest man in the world, John D. Rockefeller, who became an avid golfer, would sometimes face dressing down by his African-American caddies.²²⁶

African-Americans also took up golfing across the country, creating their own golf courses and even an integrated golfing association, where white golfers and Black golfers played and competed in tournaments together.²²⁷ Across the nation, however, many courses did not permit African-Americans to play on them.²²⁸ Seven of these public courses were in Atlanta.²²⁹ One was the Bobby Jones Municipal Golf Course, to which a group of African-American golfers, mostly professionals from within Atlanta's Black middle class, sought access.²³⁰ They worked with the local NAACP branch and sought support from the national LDF for a lawsuit, which they would file in June 1953.²³¹ That suit sought a court order to open the course to Black golfers because there was no “separate” and “equal” course provided by the city government.²³²

Although the plaintiffs in Atlanta filed their action in search of this relief, within the LDF, there was a debate over whether integrating golf courses should be a priority for the national legal team and whether to direct limited resources

²²¹ DEMAS, *supra* note 20, at 2–3.

²²² *Id.* at 6, 8.

²²³ *Id.* at 5.

²²⁴ *Id.* at 9–12.

²²⁵ *Id.* at 12–13.

²²⁶ *Id.* at 14.

²²⁷ DEMAS, *supra* note 20, at 85.

²²⁸ *Id.* at 147–48 (describing segregation of golf courses).

²²⁹ KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 120 (2005) [hereinafter KRUSE, *WHITE FLIGHT*].

²³⁰ DEMAS, *supra* note 20, at 151.

²³¹ *Id.*; Kevin M. Kruse, *The Politics of Race and Public Space: Desegregation, Privatization, and the Tax Revolt in Atlanta*, 31 J. URB. HIST. 610, 614 (2005).

²³² DEMAS, *supra* note 20, at 152.

to support local efforts in Atlanta for this purpose.²³³ Thurgood Marshall, leader of the LDF at the time, believed that the organization should not expend the organization's limited resources helping wealthier Black people get access to an elite institution,²³⁴ arguing that the organization should devote such resources to addressing discrimination in institutions where a change to those institutions would help the African-American population as a whole, which is why he wanted to focus on improving education.²³⁵ When the advocates in Atlanta who were pushing to integrate the local course asked for assistance from the LDF, Marshall's response was "loud and clear," as Motley would later recount: "No, we are not going to spend any money on a golf course case," he would argue "because we could not justify spending money for a few doctors in Atlanta to play golf. We are going to use the money to get the black kids admitted to white schools."²³⁶ Once again, this decision reflected a grand strategy calculus: an assessment of aspirations in light of capacities. The leadership wanted to "play[] down any notion that LDF was seeking social equality with whites."²³⁷ Moreover, integrating golf courses should not be a priority because most courses at the time were private and thus beyond the reach of equal protection guarantees.²³⁸ For Motley, this was a question of "[c]larifying the legal priorities" which "was a task [the] LDF lawyers could never escape."²³⁹

But the LDF could not end such efforts if the golfers wanted to press their case. Indeed, the golfers worked with the local NAACP branch and were able to get the assistance of a local lawyer working on a pro bono basis.²⁴⁰ The federal judge who heard the case issued a favorable decision to the golfers, requiring that the golf course integrate, in a way.²⁴¹ This decision was issued several months *after Brown*, yet the judge essentially ignored its core holding: that separate but equal was inherently unequal, finding "[t]he 'separate but equal' doctrine as recognized by our courts is not in conflict with the Fourteenth Amendment," holding that the *Plessy* decision was "unaffected by the ruling in [*Brown*]" because that latter decision only "applied to public education."²⁴² Still, the judge found that the municipality had not provided Black golfers with access to a separate golf course that was equivalent to the course on which white golfers alone could play.²⁴³ He would order the course integrated, but delay the judgment's effect in order to afford the defendants "a reasonable opportunity to

²³³ MOTLEY, *supra* note 103, at 69–70.

²³⁴ *Id.* at 69.

²³⁵ *Id.*

²³⁶ *Id.* at 69.

²³⁷ *Id.* at 69–70.

²³⁸ *Id.* at 70.

²³⁹ Motley, *supra* note 103, at 70.

²⁴⁰ *Id.* at 69.

²⁴¹ *Holmes v. City of Atlanta*, 124 F. Supp. 290, 293 (N.D. Ga. 1954), *aff'd*, 223 F.2d 93 (5th Cir. 1955), *vacated*, 350 U.S. 879 (1955).

²⁴² *Id.* (footnote omitted).

²⁴³ *Id.*

promptly prepare and put into effect regulations for the use of the municipal golf facilities which, while preserving segregation, will be in full and fair accord with its principles.”²⁴⁴

The municipality responded to the ruling by opening the course to African-American golfers two days a week.²⁴⁵ The plaintiffs did not find that acceptable,²⁴⁶ and nor was it consistent with *Brown*.²⁴⁷ Accordingly, the plaintiffs wanted to appeal the case to the Fifth Circuit.²⁴⁸ At this point, the LDF came in to support the appeal, which ultimately found its way to the Supreme Court.²⁴⁹

The Supreme Court issued a brief opinion upholding the core directive of *Brown* and ordering the municipality to integrate the course fully.²⁵⁰ While Marshall had feared that an effort focused on integrating the Atlanta course would only benefit a “few doctors,” in reality, once the Supreme Court issued its decision requiring full integration of the course, the African-American community’s response was cautious, but the decision still galvanized it.²⁵¹

In the aftermath of the *Brown* decision a few months earlier, enforcement of integration orders faced significant resistance, backlash, and intransigence in virtually every corner of the South.²⁵² Efforts to integrate public accommodations like schools and swimming pools often resulted in white elected officials simply closing facilities instead.²⁵³ The effort to integrate such institutions certainly meant the materialization of some of the fears of those who preached incrementalism: in some instances, the Black community was not necessarily better off, even with the nominal end of Jim Crow, causing many to ask whether the efforts had gone too far, too fast.²⁵⁴

²⁴⁴ *Id.* at 294.

²⁴⁵ DEMAS, *supra* note 20, at 152.

²⁴⁶ *Id.* at 153.

²⁴⁷ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴⁸ DEMAS, *supra* note 20, at 153; *Holmes v. City of Atlanta*, 223 F.2d 93 (5th Cir. 1955), *vacated*, 350 U.S. 879 (1955).

²⁴⁹ KRUSE, WHITE FLIGHT, *supra* note 229, at 118.

²⁵⁰ *Id.*; *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955).

²⁵¹ On the aftermath of the decision in *Holmes*, see DEMAS, *supra* note 20, at 154–57, and KRUSE, WHITE FLIGHT, *supra* note 229, at 119–21.

²⁵² *Resistance to School Desegregation*, EQUAL JUST. INITIATIVE (Mar. 1, 2014), <https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/> [<https://perma.cc/YT7G-EELE>]. It is also likely that it was this resistance, and its vehemence and violence, that helped galvanize support for civil rights and led to more successes for the civil rights movement. See EQUAL JUST. INITIATIVE, *SEGREGATION IN AMERICA* 42–69 (2018), <https://segregationinamerica.eji.org/report.pdf?action=purge> [<https://perma.cc/7DST-3PAX>] (discussing the Southern responses to *Brown* and the wide variety of actions undertaken by civil rights organizers to fight against those refusing to comply with *Brown*’s command).

²⁵³ KRUSE, WHITE FLIGHT, *supra* note 229, at 123–24.

²⁵⁴ See KLUGER, *supra* note 175, at 748–53 (describing the aftermath of *Brown* and resistance to efforts at integration).

With the municipal golf courses in Atlanta, however, things were different. Elected officials concluded that there were enough white people who still wanted to golf, even if the courses were integrated.²⁵⁵ At a meeting between elected officials and workers on the city courses who faced the loss of their jobs were those courses to close, the workers expressed their opposition to closures: unemployment was not a price they were willing to pay to avoid integration of the courses.²⁵⁶ As a result, the municipality relented, and African-American golfers flocked to courses throughout the city.²⁵⁷ This outcome emboldened the community to press for more integration in other institutions, including the University of Georgia, where Motley would later represent an individual who was the son and grandson of two of the plaintiffs who had fought to integrate the Bobby Jones course.²⁵⁸ Despite fears that an integrated golf course would benefit just a small and elite subset of the African-American community, while taxing the resources and capacity of the advocates, the victory was a triumph with wide-ranging effects.²⁵⁹ The nature of the institution being integrated—a popular community resource that the city was unwilling to shut down—ended up meaning that the goal of actually integrating an institution was ultimately achievable. With other institutions, advocates might have been blindsided by the willingness of the white community to forego the benefits of such institutions by closing them in order to avoid integration. Golf courses, perhaps the least likely institution, or at least one of the least “important” institutions, that advocates might have attacked, ended up being one where their victories were not Pyrrhic.²⁶⁰

* * *

The campaign to integrate municipal golf courses in Atlanta, Georgia, in the 1950s led to surprising victories, and revealed aspects of the grand strategy calculus.²⁶¹ While those reforms took place nearly seventy years ago, the operation of golf in the United States as an institution continues to raise serious questions as to whether the benefits of preserving golf in its current form outweigh its benefits.²⁶² Is it worth asking: does the continuation of golf as an institution in the United States need to change? If it does need to change, what form should that change take and what grand strategy might effect that change? Such questions are at the heart of the grand strategy equation. The next Parts address these issues in depth.

²⁵⁵ KRUSE, WHITE FLIGHT, *supra* note 229, at 119–22.

²⁵⁶ *Id.* at 119.

²⁵⁷ DEMAS, *supra* note 20, at 156.

²⁵⁸ *Id.* at 158–59.

²⁵⁹ *Id.* at 191–93.

²⁶⁰ What Is a ‘Pyrrhic Victory?’, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/pyrrhic-victory-meaning> [<https://perma.cc/86P5-N6UM>].

²⁶¹ *Id.* at 155–57.

²⁶² See *infra* Part IV.

IV. THE COSTS OF COURSES

The golf course problem as it presents itself today is not simply one of racial discrimination. Golf clubs and courses across the nation long excluded women and religious minorities from membership and access,²⁶³ and some, operating under the “private club” exception to civil rights law,²⁶⁴ still discriminate in many ways.²⁶⁵

Still, some will argue that golf courses provide positive benefits to society: e.g., they offer opportunities for players to engage in outdoor physical activity where they can exercise and breathe in fresh air.²⁶⁶ They can also serve as a locus in which participants can build social capital.²⁶⁷ During the global COVID-19 pandemic, golf courses have offered some an opportunity to commune with others outdoors and in a social setting consistent with safe social distance protocols.²⁶⁸ Prior to the pandemic, there was a twenty-two percent drop in the number of golfers in 2018 compared to 2003 and a net reduction of over 1,200 golf courses.²⁶⁹ While the pandemic has seen a two percent increase in golf rounds played since COVID restrictions were lifted and golf became an attractive, outdoor option to exercise and socialize, the long-term trend over the last twenty years is clearly negative.²⁷⁰ Whether golf is on a permanent

²⁶³ See CHAMBERS, *supra* note 2, 4–6.

²⁶⁴ 42 U.S.C. § 2000a(e) (exempting “private club[s] or other establishment[s] not in fact open to the public” from public accommodations protections of civil rights laws).

²⁶⁵ See Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club*, 25 PEPP. L. REV. 495, 500–16 (1997) [hereinafter Jolly-Ryan, *Chipping Away*] (describing the treatment of private clubs in civil rights law); see also Jennifer Jolly-Ryan, *Tee Off About Private Club Discrimination on the Taxpayer’s Dime: Tax Exemptions and Other Government Privileges to Discriminatory Private Clubs*, 13 WM. & MARY J. WOMEN & L. 235, 236–42 (2006) [hereinafter Jolly-Ryan, *Tee Off*] (describing the history and contemporary practice of discrimination in private golf clubs).

²⁶⁶ See generally Bahman Farahmand, G. Broman, Ulf De Faire, Denny Vågerö & Anders Ahlbom, *Golf: A Game of Life and Death—Reduced Mortality in Swedish Golf Players*, 19 SCANDINAVIAN J. MED. & SCI. SPORTS 422 (2009) (describing health benefits of golf, including reduced mortality).

²⁶⁷ Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOCIO. THEORY 14, 17–20 (1989) (describing the relationship between social capital and exclusive activities, like golf).

²⁶⁸ Jena McGregor, *Coronavirus Shutdowns Are Making Golf Courses an Oasis for Stir-Crazy Americans Eager to Get Out and Tee It Up*, WASH. POST (May 20, 2020), <https://www.washingtonpost.com/business/2020/05/20/coronavirus-lockdowns-are-making-golf-courses-an-oasis-stir-crazy-americans-eager-get-out-tee-up/> [https://perma.cc/A8JT-FEKD].

²⁶⁹ John L. Crompton, *Implications of the Rise and Decline of Golf*, NAT’L RECREATION & PARKS ASS’N (June 25, 2020), <https://www.nrpa.org/parks-recreation-magazine/2020/july/implications-of-the-rise-and-decline-of-golf/> [https://perma.cc/S99T-Z9NU].

²⁷⁰ *Id.*; Mike Stachura, *The Numbers Are Official: Golf’s Surge in Popularity in 2020 Was Even Better than Predicted*, GOLF DIGEST (Apr. 7, 2021), <https://www.golfdigest.com/story/national-golf-foundation-reports-numbers-for-2020-were-record-se> [https://perma.cc/3SYP-FDH2].

downswing, or is experiencing a resurgence, regardless, the question remains: is golf worth it?

Golf courses are costly in nearly every sense of the term, from their impacts on the environment to their broader effects on society at large.²⁷¹ If these costs were factored into the price of playing and maintaining golf course infrastructure, that price would likely only exacerbate the inequalities and social impacts golf generates. Their exclusion, notwithstanding their impact, means society as a whole is not just absorbing those costs—it is subsidizing them.

A. *Environmental Impacts*

Some of the most dramatic effects from the construction, operation, and maintenance of golf courses are to the environment. Sarah Schindler has made a powerful case that municipalities should ban residential lawns because of their impact on the environment, from their use of water to irrigate them and pesticides to keep them lush, to the emission of greenhouse gasses from lawnmowers.²⁷² What are golf courses but giant lawns? As such, the environmental impacts of golf courses are considerable.²⁷³ According to one estimate, the typical golf course uses over 300,000 of gallons of water a day.²⁷⁴ Maintaining this grass “crop” requires tons of harmful pesticides and fertilizer which can make its way into groundwater and water systems.²⁷⁵ Manicuring the acres of grass on golf courses are lawnmowers that contribute significantly to greenhouse gas emissions.²⁷⁶ In addition, courses are often built on precarious ecosystems.²⁷⁷ While some have been built in a way that preserves the natural habitat of the areas they occupy, many have not, wreaking havoc on the migratory patterns of birds and the habitats of fish and other wildlife.²⁷⁸ Since many courses were built before the adoption of laws and regulations that require environmental impact statements and other similar reviews prior to construction, their environmental impact has rarely been subject to review

²⁷¹ See *infra* Parts IV.A–E.

²⁷² See generally Sarah B. Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. 394, 405–13 (2014) (describing harms from residential lawns and recommending ways governments can eradicate them).

²⁷³ Frank Deford, *Water-Thirsty Golf Course Needs to Go Green*, NPR (June 11, 2008), <https://www.npr.org/2008/06/11/91363837/water-thirsty-golf-courses-need-to-go-green> [<https://perma.cc/AU8P-LJGF>].

²⁷⁴ *Id.*

²⁷⁵ David B. Dornak, *A New Generation is Teeing Off: Is Tiger Woods Making Divots on Environmentally Sound Golf Courses?*, 23 COLUM. J. ENV'T. L. 299, 315–21 (1998).

²⁷⁶ Pernilla Tidåker, Therese Wesström & Thomas Kätterer, *Energy Use and Greenhouse Gas Emissions from Turf Management of Two Swedish Golf Courses*, 21 URB. FORESTRY & URB. GREENING 80, 83–84 (2017) (describing the emissions from maintaining grass on golf courses).

²⁷⁷ See Johan Colding & Carl Folke, *The Role of Golf Courses in Biodiversity Conservation and Ecosystem Management*, 12 ECOSYS. 191, 202–04 (2009).

²⁷⁸ See *id.*

through democratic processes.²⁷⁹ These adverse effects on the environment are almost never factored into the true cost of maintaining golf courses.²⁸⁰

B. *The Opportunity Costs Associated with Maintaining Golf Courses*

The commitment of large parcels of land, many located within cities or nearby suburbs, incur significant opportunity costs.²⁸¹ Golf courses are typically lush, open spaces that could easily serve other uses, like trails, parkland, etc. One could also imagine more beneficial uses that do not require such open space, like mixed-use neighborhoods with ample affordable housing. Once constructed in a community, often at great expense, the costs of that construction become “sunk costs”: with a gravitational pull of their own, creating a barrier to repurposing the land for other, more beneficial uses.²⁸² If given a proverbial blank slate, would those same communities choose to use that space as a golf course? Thus, the opportunity costs associated with operating and maintaining legacy golf courses in areas where the present community might choose alternate uses—through deliberative, inclusive processes—are considerable.

C. *The Cost of Play*

The cost to play golf is significant. The average cost to play a round of golf in the United States is approximately \$61, more than a day’s wages from an eight-hour shift at the federal minimum wage.²⁸³ But to say the cost to play golf is limited to these fees is the same as saying the cost to ski is the price of a lift ticket. Like skiing, golf requires the purchase or rental of equipment. And it is not a sport one can typically walk onto a course and play without practice and instruction.²⁸⁴ Both equipment and instruction can cost significant sums; and

²⁷⁹ See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (requiring environmental impact statement regarding new proposed initiatives subject to its application).

²⁸⁰ For a discussion of cost–benefit analysis and the importance of internalizing harms, see Duncan Kennedy, *Cost–Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 393–400 (1981).

²⁸¹ R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 158 (1988) (defining opportunity costs as “the greatest value” any alternate use of a resource would yield).

²⁸² Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 323 (2002) (describing concept of sunk costs).

²⁸³ *How Much Does It Cost to Play Golf? Here Are Average Green Fees In America*, GOLF NEWS NET (Nov. 5, 2020), <https://thegolfnewsnet.com/golfnewsnetteam/2020/11/05/how-much-does-it-cost-to-play-golf-here-are-average-green-fees-in-america-121143/> [<https://perma.cc/MA6S-Y8JJ>].

²⁸⁴ Jessica Marksbury, *Golf 101: Dos and Don’ts for Beginners*, GOLF.COM (Mar. 29, 2017), <https://golf.com/instruction/golf-101-dos-and-donts-for-beginners/> [<https://perma.cc/87J9-NT46>]; Brian Zimmerli with Joel Beall, *Am I Too Poor to Play Golf?*, GOLF DIGEST

there might also be the need to rent a cart if a player is unable to walk the course on their own.²⁸⁵ In addition, there are individual opportunity costs associated with playing golf: a round of golf usually takes at least four hours to play.²⁸⁶ As a result, the total costs of playing golf turn out to be prohibitive, resulting in a resource diversion that is not open to anyone at any time.

D. Engines of Elitism

For the first decades of golf's existence as a sport in the United States, many golf courses, even municipal ones, were limited to play by white males only.²⁸⁷ Private courses have historically discriminated against people of color, women, and Jewish people.²⁸⁸ For some private courses, integration has only occurred in the last few decades due to political and legal pressure on those courses to change.²⁸⁹ Remarkably, there are still private clubs in operation that continue to discriminate.²⁹⁰ Thus, whether it was the patent racism and sexism that plagued the operation of golf courses in the first half of the twentieth century, that which persisted for the next several decades, or that which lingers to this day, golf courses are historic sites of exclusion and discrimination.²⁹¹

Because of the considerable cost to play and the historic discrimination that have served as hallmarks of golf for the last century, golf courses and golf clubs have been engines for the preservation of inequality in many forms.²⁹² With the expansion of golf in the late nineteenth century, at a time of growing inequality and increased immigration to the United States, the institutionalization of golf took hold as a reflection of Anglo-Saxon virtues and manners.²⁹³ What is more, at the turn of the nineteenth to the twentieth century, a Darwinian sense that businessmen were engaged in a fight against nature, were risk takers and

(Apr. 30, 2019), <https://www.golfdigest.com/story/am-i-too-poor-to-play-golf> [<https://perma.cc/JC2K-SYTV>] (describing the expenses related to playing golf).

²⁸⁵ *How Much Does a Golf Cart Cost to Rent?*, BEST GOLF ACCESSORIES, <https://bestgolfaccessories.net/blog/how-much-does-a-golf-cart-cost-to-rent/> [<https://perma.cc/Z8TY-EGYJ>].

²⁸⁶ Matthew Fortuna, *How Long Does 18 Holes Take? Proper Pace for Every Scenario*, GOLFLINK, https://www.golflink.com/facts_4799_how-long-does-golf-holes.html [<https://perma.cc/PN2A-JA9S>] (estimating that it takes roughly 4 to 4.5 hours for a foursome of amateurs to play an 18-hole round of golf).

²⁸⁷ See *supra* Part III.B.

²⁸⁸ Jolly-Ryan, *Chipping Away*, *supra* note 265, at 495–500.

²⁸⁹ *Id.* at 517–28; Jolly-Ryan, *Teed Off*, *supra* note 265, at 240.

²⁹⁰ Gavin Newsham, *Inside the Secretive World of America's Men-Only Golf Clubs*, N.Y. POST (May 22, 2021), <https://nypost.com/article/inside-americas-men-only-golf-clubs/> [<https://perma.cc/4X9D-924U>].

²⁹¹ Jolly-Ryan, *Chipping Away*, *supra* note 265, at 495–97.

²⁹² See *supra* Parts III.B–C.

²⁹³ Orin Starn, *Caddying for the Dalai Lama: Golf, Heritage Tourism, and the Pinehurst Resort*, 105 S. ATL. Q. 447, 451 (2006).

individualistic, and needed strategic thinking and an analytical approach, meshed well with the skills that were seen as central to success in golf.²⁹⁴

The golf course and the golf club, both being mostly private at the time,²⁹⁵ became places where white elites could build social capital within an exclusive enclave made up of lavish facilities where they could perpetuate racial and economic hierarchies.²⁹⁶ The institutionalization of golf took on both a physical and symbolic form: that “golf courses and club houses [in the United States] resembled aristocratic gardens and manor houses in the United Kingdom was not a mere coincidence.”²⁹⁷ With mechanisms that maintained their exclusivity, like admissions policies and the high cost of equipment, golf clubs became “a perfect site to convert and reproduce multiple forms of assets, promoting eventually the formation of symbolic capital and consequently distinction.”²⁹⁸

Over the course of the last two hundred years, golf in the United States has become “the aristocratic pastime *par excellence*.”²⁹⁹ As bastions of exclusion, golf clubs and courses have been sites where elites can “rub elbows” with other elites.³⁰⁰ On the links and in the clubhouse after a round of golf, individuals welcomed into such spaces have an unfair economic and career advantage over those excluded from them.³⁰¹ As a locus where elites gather, golf courses have been places where elites meet with elites; it thus has reflected cultural hegemony and served as a site for perpetuating it.³⁰²

²⁹⁴ RICHARD J. MOSS, *GOLF AND THE AMERICAN COUNTRY CLUB* 55–58 (2001).

²⁹⁵ Napton & Laingen, *supra* note 2, at 26–27. The number of private courses in the United States outnumbered public courses until the 1960s. *Id.* at 26.

²⁹⁶ Hugo Ceron-Anaya, *An Approach to the History of Golf: Business, Symbolic Capital, and Technologies of the Self*, 34 J. SPORT & SOC. ISSUES 339, 349–50 (2010).

²⁹⁷ *Id.* at 349.

²⁹⁸ *Id.* at 354.

²⁹⁹ KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 99 (1985) (emphasis added).

³⁰⁰ Colleen Kane, *8 of the World's Most Exclusive Clubs—Can You Join?*, FORTUNE (Jan. 30, 2015), <https://fortune.com/2015/01/30/6-of-the-worlds-most-exclusive-clubs-can-you-join/> [https://perma.cc/L4AB-8D6P].

³⁰¹ Scott R. Rosner, *Reflections on Augusta: Judicial, Legislative and Economic Approaches to Private Race and Gender Consciousness*, 37 U. MICH. J.L. REFORM 135, 139 (2003) (describing how exclusivity of golf clubs “perpetuates the socioeconomic differences between the excluded and non-excluded groups”); *see also* Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry*, 16 J. LEGAL ASPECTS SPORT 25, 28–29 (2006) (describing economic impact on women’s career advancement resulting from their exclusion at private golf clubs); DIANA KENDALL, *MEMBERS ONLY: ELITE CLUBS AND THE PROCESS OF EXCLUSION* 53 (2008) (describing the unequal access to cultural capital as a result of exclusion from social and country clubs).

³⁰² *See, e.g.*, Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAWS. J. 89, 90–91 (1998) (describing impact of discriminatory membership practices on business opportunities for those excluded).

E. Subsidizing Golf Courses

If the costs associated with constructing, maintaining, and operating golf courses were truly borne by those who use them, and priced into the cost of play, golf would only become more exclusive. But instead of requiring golf courses to internalize the harms they cause, we subsidize them.³⁰³ Municipal governments often operate public golf courses at a loss, not calibrating the price to play to the cost of operating the course.³⁰⁴ If they did, they would only make the cost of play even more prohibitive. We also subsidize private courses in subtle and not so subtle ways.³⁰⁵ Private courses, if they are organized as nonprofit entities, are exempt from corporate and property taxes.³⁰⁶ In the constitution of the state of California, there is a provision that essentially shields many courses from having to pay millions of dollars in taxes each year.³⁰⁷ Sometimes the undervaluation of courses occurs by bureaucratic fiat and not by explicit legal or constitutional provision.³⁰⁸ In Seattle, for example, two private courses are reportedly valued at roughly five percent of the valuation of neighboring properties per square foot, resulting in a tax windfall of millions of dollars in taxes each year.³⁰⁹ Thus, not only are golf courses externalizing many

³⁰³ See *supra* Part IV.B.

³⁰⁴ See, e.g., Lisa Broadt, *Florida Municipal Golf Courses Have Lost Nearly \$100M over Past Five Years*, TCPALM, <https://www.tcpalm.com/story/news/local/shaping-our-future/growth/2018/04/18/florida-municipal-golf-courses-have-lost-nearly-100-m-over-past-five-years/407554002/> [<https://perma.cc/HG7V-HEXE>] (Apr. 20, 2018) (describing the costs to sustain municipal golf courses in Florida).

³⁰⁵ See *supra* Part IV.B.

³⁰⁶ For a description of the tax treatment of private clubs, see Rosner, *supra* note 301, at 174–77, and Jolly-Ryan, *Teed-Off*, *supra* note 265, at 250–52.

³⁰⁷ CAL. CONST. art. XIII, § 10 (“Real property in a parcel of 10 or more acres which, on the lien date and for 2 or more years immediately preceding, has been used exclusively for nonprofit golf course purposes shall be assessed for taxation on the basis of such use, plus any value attributable to mines, quarries, hydrocarbon substances, or other minerals in the property or the right to extract hydrocarbons or other minerals from the property.”) A review of the protections for golf courses in just one state reveals the ways that golf courses are sometimes treated differently than other potential uses of the land. Generally, speaking, golf courses, as parkland, cannot be converted for any non-park purpose. CAL. PUB. RES. CODE § 5401(a) (West 2022). In 1960, California voters passed a ballot referendum that ensured that tax assessors could not assess the property upon which golf courses are built for a use other than as a golf course. Robert E. Hanna, *California Pioneers in Tax Relief Effort*, 13 USGA J. & TURF MGMT. 14, 15–16 (1961). So, a golf course could be found in a neighborhood with multimillion dollar homes on small lots, yet it could not be assessed to take into account any other, potentially more lucrative, uses.

³⁰⁸ Paul Chapman, *It’s Time to End Public Subsidies for Private Golf Courses*, URBANIST (May 29, 2020), <https://www.theurbanist.org/2020/05/29/its-time-to-end-public-subsidies-for-private-golf-courses/> [<https://perma.cc/U3NZ-M6W4>].

³⁰⁹ *Id.*

of the harms they cause and the costs they impose,³¹⁰ in many settings the community is subsidizing them.³¹¹

* * *

The costs associated with maintaining golf courses are considerable. They are externalized and imposed on the community, many members of which do not utilize such courses. Making matters worse, the institution is not just exclusive, it perpetuates inequalities. Adding insult to injury, golf courses, with all of their harmful consequences, also require subsidies to even operate them in the first place. In the next Part, I explore some of these phenomena through a case study of a single course operated in the borough of the Bronx in New York City.

V. LET THEM EAT BLUE GRASS: A GOLF COURSE IN THE BRONX

The history and present operation of the golf course located at Ferry Point in the Bronx, constructed in the mid-2010s on the previous site of a landfill, help to illuminate the costs of constructing, maintaining, and operating a golf course in the midst of a community in need, one that was hit particularly hard during the pandemic and, if given a choice, would likely put such land to different use.

A. History of the Bronx

The northmost part of New York City, which is the only borough within the city connected to the mainland United States, had been occupied for nearly 6,500 years by Indigenous peoples who had created settlements mostly around the Bronx River.³¹² An adjacent waterway, Westchester Creek, enters the northernmost part of the East River at an area that came to be known as Ferry Point.³¹³ The indigenous inhabitants settled there, where they fished and hunted, and raised crops in the nutrient rich river-adjacent land.³¹⁴ The first white settlers established homesteads and farms there, including the Broncks family, which would lend its name to both the river and the borough.³¹⁵ In the early twentieth century, when the first subway system was extended to the Bronx, the

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² N.Y. CITY GOV'T, ALL BOROUGH MAP, https://www.nyc.gov/html/dot/downloads/pdf/bridgerpt05_allboro.pdf [<https://perma.cc/8CNX-L4EE>]; EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 5–9 (1999); STEPHEN PAUL DEVILLO, *THE BRONX RIVER IN HISTORY & FOLKLORE* 35 (2015).

³¹³ STEPHEN JENKINS, *THE STORY OF THE BRONX: FROM THE PURCHASE MADE BY THE DUTCH FROM THE INDIANS IN 1639 TO THE PRESENT DAY 15* (1912); *Ferry Point Park*, N.Y.C. PARKS, <https://www.nycgovparks.org/parks/ferry-point-park> [<https://perma.cc/FNK9-FZBH>].

³¹⁴ BURROWS & WALLACE, *supra* note 312, at 5–9.

³¹⁵ DEVILLO, *supra* note 312, at 40–42.

borough was mostly farmland, although mills and other industrial uses had sprung up alongside the Bronx River.³¹⁶

From 1900 to the early 1950s, the population of the Bronx expanded considerably, from roughly 200,000 inhabitants to the over 1.5 million who reside there today, although the borough experienced a dip in population in the early 1980s.³¹⁷ It was at this time that the Bronx, particularly the South Bronx, became synonymous with urban decline and disinvestment.³¹⁸ Today, many of its neighborhoods have been revived, and it is now “a far more stable and vibrant community.”³¹⁹ Even the notorious Charlotte Street, the rubble-strewn site then-President Jimmy Carter visited in 1977 to highlight the borough’s woes because it resembled a bombed-out city, is now the location of Charlotte Gardens: eighty-nine “one story ranch-style houses, with picket fences, satellite dishes, immaculate lawns, and tree-lined streets.”³²⁰

Today, if the Bronx were a state, it would be more populous than ten states and the District of Columbia.³²¹ At the same time, the Bronx is the poorest county in New York State,³²² and home to the nation’s poorest congressional district.³²³ Right before the pandemic, median household income in the borough

³¹⁶ *Id.* at 124–29.

³¹⁷ OFF. OF THE N.Y. STATE COMPTROLLER, AN ECONOMIC SNAPSHOT OF THE BRONX 2 (July 2018), <https://www.osc.state.ny.us/files/reports/osdc/pdf/report-4-2019.pdf> [<https://perma.cc/E7XF-3YV6>]; N.Y. CITY GOV’T, TOTAL POPULATION—NEW YORK CITY & BOROUGH, 1900 TO 2010, https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/historical-population/nyc_total_pop_1900-2010.pdf [<https://perma.cc/N2ZH-TP9T>].

³¹⁸ Carmen Huertas-Noble, Jessica Rose & Brian Glick, *The Greening of Community Economic Development: Dispatches from New York City*, 31 W. NEW ENG. L. REV. 645, 648 (2009) (describing the South Bronx as once serving as “a national symbol of urban blight”).

³¹⁹ *Id.*

³²⁰ Robert Worth, *Guess Who Saved the South Bronx?*, WASH. MONTHLY (Apr. 1, 1999), <https://washingtonmonthly.com/1999/04/01/guess-who-saved-the-south-bronx/> [<https://perma.cc/4CJ2-LHC8>].

³²¹ See *QuickFacts Bronx County, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/bronxcountynewyork/PST045221> [<https://perma.cc/VF6X-UQKM>] (Bronx County Population 1,424,948 as of July 1, 2021); *State Population Totals and Components of Change: 2020–2022*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html> [<https://perma.cc/8KEM-6UFV>] (Download Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico April 1, 2020 to July 1, 2022).

³²² Andrew DePietro, *Poorest Counties in Every U.S. State 2021*, FORBES (Sept. 1, 2021), <https://www.forbes.com/sites/andrewdepietro/2021/09/01/poorest-counties-in-every-us-state-2021/?sh=5d696430312a> [<https://perma.cc/JFS5-R6QV>].

³²³ Rep. Ritchie Torres on “*That Triumph of Hope*,” CBS NEWS (Dec. 12, 2021), <https://www.cbsnews.com/news/congressman-ritchie-torres-progressive-democrat/> [<https://perma.cc/E33H-H82H>]; see also Eugene Daniels, Krystal Campos & Michael Cadenhead, *Ritchie Torres Represents America’s Poorest Congressional District. He’s on a Mission to Save Public Housing*, POLITICO (Apr. 26, 2021), <https://www.politico.com/news/2021/04/26/>

was roughly \$45,000,³²⁴ far lower than the median for the entire nation, which was over \$67,000.³²⁵ The poverty rate is twice the national average, and a significant number of households in the county pay more than sixty percent of their monthly income on rent.³²⁶ Roughly one in four families in the Bronx is food insecure.³²⁷

Despite the legacy of thousands of years of farming in the areas that now make up the Bronx, almost no significant parcel of land in the borough, apart from hydroponic farming inside buildings,³²⁸ is dedicated to farmland. Although not a site for farming anymore, the Bronx still plays a central role in the New York region's—indeed, the nation's—food system.³²⁹ The Hunts Point area of the Bronx houses several food distribution centers that supply approximately nine percent of the nation's food.³³⁰ Moreover, while the Bronx has several large parks, including Van Cortlandt Park in its northwest corner, the poorest area of the Bronx, the South Bronx, has few parks and little green space.³³¹

The relative low income of its residents and their racial and ethnic makeup has meant that the Bronx has been a prime target for adverse environmental uses for generations. During the Robert Moses era in New York City,³³² highways like the Cross Bronx Expressway were constructed that split up neighborhoods

ritchie-torres-new-117th-congress-freshman-members-diversity-2021-484443 [https://perma.cc/2CNK-AVVF].

³²⁴ *Estimate of Median Household Income for Bronx County, NY*, FED. RSRV. ECON. DATA, <https://fred.stlouisfed.org/series/MHINY36005A052NCEN> [https://perma.cc/6VAM-9JGC].

³²⁵ EMILY A. SHRIDER, MELISSA KOLLAR, FRANCES CHEN & JESSICA SEMEGA, U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2020*, at 1 (Sept. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> [https://perma.cc/FQ8V-M67M].

³²⁶ OFF. OF THE N.Y. STATE COMPTROLLER, *supra* note 317, at 7 (“According to the U.S. Census Bureau, 60 percent of Bronx households devoted at least 30 percent of their incomes to rent (the level at which rent is considered a burden.)”); SHRIDER, KOLLAR, CHEN, SEMEGA, *supra* note 325, at 1 (“The official poverty rate in 2020 was 11.4 percent.”).

³²⁷ *Health Focus Area*, BRONX CMTY. FOUND., <https://thebronx.org/health/> [https://perma.cc/8G6R-DLY9].

³²⁸ *See About Us*, MI OH MY HYDROPONIC FARMS COOP., <https://www.miohmyfarms.com/about> [https://perma.cc/QMJ2-AEY6].

³²⁹ Emily Payne, Alexina Cather & Charles Platkin, *Hunts Point Distribution Center: A Report with a Spotlight on the Produce Market*, HUNTER COLL.: N.Y.C. FOOD POL’Y CTR. (Jan. 10, 2018), <https://www.nycfoodpolicy.org/hunts-point-distribution-center-brief-overview-spotlight-produce-market/> [https://perma.cc/W5SB-DJVZ].

³³⁰ *Id.* (describing Hunts Point food distribution entities employing 10,000 people, supplied produce to nine percent of the nation and 23,000 restaurants, and to sixty percent of the produce distributed to 23 million people in the larger New York City metropolitan area).

³³¹ *See Bronx Park: Park Map*, N.Y.C. DEP’T OF PARKS & RECREATION, <https://www.nycgovparks.org/parks/bronx-park/map> [https://perma.cc/K2Z6-CF34].

³³² *Robert Moses*, N.Y. PRES. ARCHIVE PROJECT, <https://www.nypap.org/preservation-history/robert-moses/> [https://perma.cc/9HX6-DUEE].

and brought increased truck and automobile traffic through the borough.³³³ Vehicle emissions tell just part of the story, as the borough is the site of filtration plants and other industrial complexes that spew toxins into the air.³³⁴ This confluence of effluents likely contributes to the South Bronx having the highest asthma rate in the nation.³³⁵ The presence of comorbidities like asthma, diabetes, and obesity within the population, coupled with residential overcrowding, and the fact that many residents are essential workers, staffing New York City's hospitals and grocery stores during the height of the COVID-19 pandemic, means that the Bronx has also been particularly hard hit by the public health crisis caused by the virus.³³⁶

B. *The Ferry Point Course*

Despite the fact that it is densely populated and there is little space devoted to public parks, particularly in the South Bronx, the Bronx is home to five golf courses, several of them municipal courses owned by the City of New York³³⁷ One of these municipal courses, the one located at Ferry Point Park in the southeast corner of the borough that was constructed in the mid-2000s, is certainly one of the most expensive courses—private or public—ever

³³³ ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 860–84 (1974) (describing the construction of the Cross-Bronx Expressway and its impacts on the neighborhoods through which it was constructed). On the impacts that highway construction had on African-American communities across the United States generally, see Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1273–78 (2020).

³³⁴ Hazar Kilani, ‘*Asthma Alley*’: *Why Minorities Bear Burden of Pollution Inequity Caused by White People*, GUARDIAN (Apr. 4, 2019), <https://www.theguardian.com/us-news/2019/apr/04/new-york-south-bronx-minorities-pollution-inequity> [<https://perma.cc/56DR-4HXV>].

³³⁵ *Asthma in the Bronx*, SBH HEALTH SYS. (Aug. 30, 2016), <https://www.sbhny.org/blog/asthma-in-the-bronx/> [<https://perma.cc/5PCT-7R35>].

³³⁶ Kimiko de Freytas-Tamura, Winnie Hu & Lindsey Rogers Cook, *It’s the Death Towers’: How the Bronx Became New York’s Virus Hot Spot*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/nyregion/bronx-coronavirus-outbreak.html> [<https://perma.cc/HFN3-337F>]; BUREAU OF FISCAL & BUDGET STUD., OFF. OF THE N.Y. CITY COMPTROLLER, NYC HOUSING BRIEF: HIDDEN HOUSEHOLDS 5 (Oct. 2015), https://comptroller.nyc.gov/wp-content/uploads/documents/Hidden_Households.pdf [<https://perma.cc/DF6R-QZM5>] (“The largest proportion of crowded dwellings observed in New York City was in the Bronx, where 12.4 percent of all dwelling units were crowded in 2013, up from 11.1 percent in 2005.”)

³³⁷ *Golf Pass, Bronx Golf Guide*, GOLFPASS, <https://www.golfpass.com/travel-advisor/course-directory/4860-bronx/> [<https://perma.cc/66BL-2M2C>].

constructed in the United States.³³⁸ At present, it is operated by the Trump Organization under a contract with the City of New York.³³⁹

Prior to the construction of the course, the Ferry Point area of the Bronx had been used for a landfill for decades, which included “a heap of trash and stolen cars and at least one human body.”³⁴⁰ In the 1970s, white homeowners in an adjacent neighborhood lobbied the City of New York to construct a golf course on the site in the hopes that it might drive up property values.³⁴¹ The city had wanted to put a park there, but at that time “white interest saw that alternative as a threat to safety, a magnet for the Black and brown residents of the public housing complexes nearby.”³⁴² In 1998, the administration of then-Mayor Rudy Giuliani announced the plan for a new course that would be designed by Jack Nicklaus with the goal of attracting professional tournaments to the site, creating jobs, and bringing revenue to the city.³⁴³ It would be the first course created within city limits since 1964.³⁴⁴ There was a catch, however. City taxpayers had to pay the costs of constructing the course, and, given the expense, it was likely the cost to play would be considerably higher than at other municipal courses within city limits.³⁴⁵ Today, the cost to play at the Ferry Point course is roughly three times that of other municipal courses in New York City, nearly \$200,³⁴⁶

³³⁸ John Paul Newport, *A Course Grows in the Bronx*, WALL ST. J. (Oct. 9, 2009), <https://www.wsj.com/articles/SB10001424052748704471504574449402598061912> [<https://perma.cc/27N7-JEBG>] (describing Ferry Point course as the most expensive public golf course ever built in the United States); Daina Beth Solomon, *Trump’s L.A. Golf Course Still Carrying Handicap*, L.A. BUS. J. (Oct. 31, 2016), <https://labusinessjournal.com/news/2016/oct/31/trumps-l-golf-course-still-carrying-handicap/> (on file with the *Ohio State Law Journal*) (describing the cost of the renovations to Trump Organization’s golf course in Los Angeles at over \$250 million, making it the most expensive course to construct in the United States).

³³⁹ Drew Harwell, *Taxpayers Built this New York Golf Course. Trump Reaps the Rewards*, WASH. POST (Aug. 25, 2016), <https://www.washingtonpost.com/news/business/wp/2016/08/25/taxpayers-built-this-new-york-golf-course-trump-reaps-the-rewards/> [<https://perma.cc/MZ2H-66GA>].

³⁴⁰ Ginia Bellafante, *Removing the Name ‘Trump’ Won’t Save a Golf Course in the Bronx*, N.Y. TIMES [hereinafter Bellafante, *Removing*], <https://www.nytimes.com/2021/01/15/nyregion/trump-golf-course-ferry-point-bronx.html?searchResultPosition=1> [<https://perma.cc/P3JB-N3WV>] (Oct. 20, 2021).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Lisa W. Foderaro, *With Trump Proposal to Expand Bronx Golf Course, Some See Red, Not Greens*, N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2016/11/16/nyregion/trump-bronx-golf-course-expansion-ferry-point-park.html> [<https://perma.cc/U339-N4ZV>].

³⁴⁵ Bellafante, *Removing*, *supra* note 340.

³⁴⁶ *Id.*; *Golf Courses and Driving Ranges*, N.Y.C. DEP’T OF PARKS & RECREATION, <https://www.nycgovparks.org/facilities/golf> [<https://perma.cc/SKU2-FR5V>].

or the equivalent of more than a day's wages for someone making even New York's minimum wage, which is roughly twice the national average.³⁴⁷

From the start of construction on the site of the old landfill, cost overruns were considerable; the first contractor tapped to construct and then maintain the course was terminated from the project for excessive cost overruns.³⁴⁸ This created an opportunity for the Trump Organization to take it over, which it did in 2011, under a contract on extremely favorable terms.³⁴⁹ In fact, the contract to operate the course did not require the Trump Organization to pay the city for the construction of the course or for the first four years of its operation, at a time when the city was also reimbursing the organization for municipal fees related to its operation, like water and sewer charges.³⁵⁰ After those first four years, the Trump Organization was supposed to pay the city just seven percent of gross revenues.³⁵¹ In 2019, the first year such a payment was required, the Trump Organization paid the city approximately \$300,000, which was basically offset by payments the city made back to the Trump Organization.³⁵² According to Trump Organization filings, the course lost nearly three-quarters of a million dollars in the twelve-month period ending in March 2020, raising questions about whether the organization paid the city anything that year since it reported no gross revenue.³⁵³ After the organization's initial payment in 2019, one estimate noted that if the city were to receive less than \$560,000 a year in royalties from the course, it would not realize the cost of construction until the year 2247.³⁵⁴ The ultimate cost to construct the course ran to \$123 million, which makes the Ferry Point course the most costly municipal course ever built in the United States, far exceeding the previous record of \$70 million for the construction of a public course in San Diego in the late 2000s.³⁵⁵ As part of the course construction, and to mollify community concerns that the course might

³⁴⁷ *Minimum Wage Tracker*, ECON. POL'Y INST., https://www.epi.org/minimum-wage-tracker/#/min_wage/New%20York [https://perma.cc/4FZZ-KPLA] (Jan. 1, 2023) (noting that NY State's minimum wage at \$14.20/hr for non-tipped workers, nearly twice the average of the federal minimum wage of \$7.25/hr).

³⁴⁸ Harwell, *supra* note 339.

³⁴⁹ *Id.*

³⁵⁰ Rich Calder, *Trump Making a Mint on NYC Golf Course 'City Is Paying Him to Run,'* N.Y. POST (June 13, 2016), <https://nypost.com/2016/06/13/trumps-new-york-golf-course-is-actually-doing-really-well/> [https://perma.cc/34YQ-CAVK].

³⁵¹ *Id.*

³⁵² David A. Fahrenthold, *Trump Golf Course in the Bronx Lost Money Last Year, City Documents Show*, WASH. POST (July 26, 2019), https://www.washingtonpost.com/politics/trump-golf-course-in-the-bronx-lost-money-last-year-city-documents-show/2019/07/26/f36d03da-afa8-11e9-8e77-03b30bc29f64_story.html [https://perma.cc/ZT7W-27XG].

³⁵³ David A. Fahrenthold & Jonathan O'Connell, *New York City to Consider Ending Contracts with Trump that Bring His Company \$17 Million a Year*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/politics/new-york-trump-cancel/2021/01/11/3527257e-545a-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/FY68-2QPQ].

³⁵⁴ Bellafante, *Removing*, *supra* note 340.

³⁵⁵ Newport, *supra* note 338.

be too expensive for local residents, a nine-acre strip of adjacent land—roughly five percent of the acreage occupied by the course—³⁵⁶was converted to a public park.³⁵⁷ Maintenance of that park is woeful, bathrooms were not constructed for years after it was open and inadequate shade means many residents do not take advantage of the space.³⁵⁸

At one point after the park opened, the Trump Organization sought approval from the local community board in the Bronx to expand the Ferry Point course's footprint to reconfigure two holes.³⁵⁹ The organization offered to improve certain facilities in the public park, but access to that portion of the park would be restricted.³⁶⁰ This prompted Martin A. Prince, chairman of the local community board that received the proposal to ask that if the golf course was to be expanded, "[t]hen give me a green miracle on the other side."³⁶¹ He continued: "The majority of our residents do not play golf. From the point of view of a parent and Bronxite, give us something that's going to benefit us. We are a struggling community. We need real help, not make-believe help."³⁶²

This sentiment was echoed by one commentator, in response to the construction of the luxury course in general:

Residents of the neighboring area in the Bronx, among them cricket players from a wide range of countries, are upset that the park adjacent to the golf course . . . remains a wreck of parched grass, filth and trash-filled parking spaces while the Trump facility next to it glistens.³⁶³

She asked: "Wouldn't a cricket stadium, or at least well-kept fields, absent the Trump name, have served the immigrant population of the Bronx more effectively?"³⁶⁴

The mayor's office in the City of New York considered ways to terminate the Trump Organization's operations in several public parks after Donald Trump's comments in his speech announcing his candidacy for the office of the

³⁵⁶ See *supra* note 26.

³⁵⁷ Ginia Bellafante, *Golf Course Deal with Donald Trump Leaves New York City in the Rough*, N.Y. TIMES (Aug. 12, 2016) [hereinafter Bellafante, *Golf Course Deal*], <https://www.nytimes.com/2016/08/14/nyregion/golf-course-deal-with-donald-trump-leaves-new-york-city-in-the-rough.html?searchResultPosition=7> [https://perma.cc/NPU2-P2P4]; Ginia Bellafante, *Trump's Golf Course, a Lesson in Inequality*, N.Y. TIMES (July 2, 2015), <https://www.nytimes.com/2015/07/05/nyregion/trumps-golf-course-a-lesson-in-inequality.html> [https://perma.cc/4RJP-WBMG].

³⁵⁸ Bellafante, *Golf Course Deal*, *supra* note 357.

³⁵⁹ Foderaro, *supra* note 344.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ Ginia Bellafante, *Blasting Out of a Trump Trap*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/30/nyregion/blasting-out-of-a-trump-trap.html?searchResultPosition=3> [https://perma.cc/C2ED-SJGJ].

³⁶⁴ *Id.*

President in 2015.³⁶⁵ Five years later, after the attack on the U.S. Capitol on January 6, 2021, the U.S. Professional Golfers Association (PGA) rescinded its agreement to have one of the major American golf tournaments, the 2022 U.S. Open, hosted by the Trump Organization's Bedminster course in New Jersey.³⁶⁶ After the events of January 6, 2021, the City of New York also formally announced that it was going to cancel the contracts for several institutions run by the Trump Organization, including the Ferry Point course.³⁶⁷ At the time of this writing, the Trump Organization, acting through its subsidiary corporation operating the course, won in the trial court, preventing the cancellation of the contract.³⁶⁸

C. *The Costs of Ferry Point*

From this overview of its history, it would seem apparent that the Ferry Point course does not just impose a wide range of costs, but has also enjoyed and continues to enjoy considerable subsidies from the City of New York.³⁶⁹ In other words, taxpayers paid for its construction and are footing the bill for maintaining the Ferry Point course.³⁷⁰ The opportunity costs are also considerable, as the course is located in one of the poorest counties in the nation—one that has been hit terribly hard by the COVID-19 pandemic.³⁷¹ It is quite likely that, if given a choice, this community, and communities like it across the country, would not choose to dedicate a significant parcel of land within their respective communities for use as a golf course. If that is the case generally, is there a strategy or strategies for addressing this mismatch between community aspirations and capacities? Is there a grand strategy for addressing the golf course problem?

³⁶⁵ Erin Durkin, *Donald Trump Blasts Efforts to Review Contracts He Has with NYC, Wants City to Thank Him for 'Amazing' Work*, N.Y. DAILY NEWS (July 8, 2015), <https://www.nydailynews.com/news/politics/trump-blasts-efforts-review-contracts-nyc-article-1.2284812> [<https://perma.cc/SPA6-J9PC>].

³⁶⁶ Matt Stieb, *The Trump Reckoning Spreads to the Golf World*, N.Y. MAG. (Jan. 11, 2021), <https://nymag.com/intelligencer/2021/01/pga-leaves-trump-bedminster-club-british-open-avoids-trump.html> [<https://perma.cc/JN7T-6XJ9>].

³⁶⁷ Emma G. Fitzsimmons, *New York City Will End Contracts With Trump Over Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2021/01/13/nyregion/nyc-trump-golf-carousel-ice-rinks.html> [<https://perma.cc/FTP3-MN76>] (Aug. 11, 2021).

³⁶⁸ *Trump Ferry Point LLC v. Silver*, No. 155933/2021, 2022 WL 1057020, at *17 (Sup. Ct. N.Y. Apr. 8, 2022).

³⁶⁹ Bellafante, *Golf Course Deal*, *supra* note 357; Calder, *supra* note 350.

³⁷⁰ Bellafante, *Golf Course Deal*, *supra* note 357; Calder, *supra* note 350.

³⁷¹ de Freytas-Tamura, Hu & Cook, *supra* note 336.

VI. GRAND STRATEGY AND GOLF COURSES

There are many potential uses for land. Some of them are destructive and have harmful consequences. Some of them are constructive and bring benefits to individual landowners or the community. In the United States, a significant portion of land mass is dedicated to golf courses.³⁷² Some are legacy courses embedded physically and socially within the community in which they are situated, with a historical connection to and place in that community.³⁷³ Others seem anachronistic or worse: decidedly misplaced, out of sync with the communities that surround them.³⁷⁴ Regardless of whether a particular golf course seems a good fit for a community—and regardless of whether that community embraces the course, considers it an important amenity or site for the promotion of physical and mental well-being, and a location where its members can develop social capital—the costs associated with constructing and maintaining a golf course are considerable, and often hidden.³⁷⁵ Moreover, both public and private courses alike are often subsidized by those who have never and likely will never set foot on a golf course in their lives.³⁷⁶ For these reasons, it is appropriate to consider whether golf in the United States as an institution is serving the communities in which golf courses are found. If not, are there appropriate approaches, utilizing the taxonomy of grand strategies for institutional change described previously, from which we can choose to address what I have called the golf course problem? This Part tries to answer these questions. It also tries to offer a methodology for choosing a grand strategy when it comes to social change generally, regardless of the particular change a group might want to achieve.

³⁷² See sources cited *supra* note 1.

³⁷³ Some of America's golf courses are practically synonymous—literally and figuratively—with the communities in which they are located, like August National Golf Course in Augusta, Georgia, and Shinnecock Hills Golf Course along the Shinnecock Hills in Southampton, NY. Jim Dobson, *The Top 20 Most Exclusive Golf And Country Clubs In America Honored With Platinum Status*, FORBES (May 21, 2021), <https://www.forbes.com/sites/jimdobson/2021/05/21/the-top-20-most-exclusive-golf-and-country-clubs-in-america-honored-with-platinum-status/?sh=cefe21427e7d> [https://perma.cc/G5ZN-3NU4]. Like with the land where the Ferry Point course is located, the Shinnecock course is also on land once utilized by a Native American nation, the Shinnecock Indian Nation. *The Shinnecock Indian Nation: Who We Are*, SHINNECOCK INDIAN NATION, <https://www.shinnecock-nsn.gov/> [https://perma.cc/GH3T-9ZZL]. On the “aura” and “atmosphere” at Winged Foot, a decades-old golf course in Westchester County, NY, which hosts the U.S. Open on a regular basis, see Michael Bamberger, *The Meaning of Winged Foot: The Club's Exceptional Courses Aren't the Only Thing that Set It Apart*, GOLF (Sept. 14, 2020), <https://golf.com/news/features/meaning-winged-foot-us-open-site/> [https://perma.cc/47W9-PBL4]

³⁷⁴ For a discussion of Ferry links, see, for example, *supra* Part V.

³⁷⁵ See discussion *supra* Part IV.B.

³⁷⁶ See discussion *supra* Part IV.E.

A. Who Chooses?

Before discussing the considerations that should go into choosing a grand strategy in any social change space, it is important to identify the appropriate decisionmaker or decisionmakers within a group or movement. In this space today, particularly in progressive circles, this question often comes down to a choice between grassroots leaders and other professionals.³⁷⁷ Lawyers in particular, who might channel their advocacy towards legalistic responses to their clients' problems,³⁷⁸ do not have a monopoly on expertise around broader institutional change and the grand strategies related thereto.³⁷⁹ When it comes to assessing a group's capacities, resources, strengths, potential allies, and the ways in which a different grand strategy might attract or repel supporters, the grassroots leaders, and not the professionals, will have a much better grip on the holistic and multi-dimensional aspects of institutional change efforts, mostly because they are the ones who have a better sense of the organization's capacities and are in a better position to frame, shape, inspire, and appreciate its aspirations. One of the critiques of Bell's interest-convergence theory is that it seems to remove agency from communities that must wait for their interests to align with those of elites.³⁸⁰ A focus on grand strategy regarding institutional change gives greater leeway to the community seeking change to select those approaches that align their capacities and aspirations within different fields, not simply those where an elite alliance is necessary for such change.³⁸¹

³⁷⁷ See, e.g., Raymond H. Brescia, Robin Golden & Robert A. Solomon, *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 855–57 (1988) (arguing for client-centered approach towards lawyering for the community that engages community leadership to set priorities for nonprofit legal services offices). On the professionalization of social movement organizations, see THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 171–74 (2004).

³⁷⁸ Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 223–24 (2016) (“The tension between social justice goals and legal means is not inherent” but “a product of the path development of legal practice in which every dispute is characterized and defined as one between individuals or between individuals and the state.”).

³⁷⁹ A lawyer may have a sense of the relative strength of a legal claim, to the extent they can predict how a particular judge, court, or the courts generally may rule. They can also prepare drafts of proposed legislation in ways that might make it more attractive to a particular legislature, or more easily adopted by a legislative body. But those are just some of the tactics a group may choose to use to advance institutional change.

³⁸⁰ Driver, *supra* note 143, at 175 (“By implicitly encouraging black citizens to await the magical moment when their interests converge with the white majority, the interest-convergence thesis sharply discounts the capacity of black people to participate in their own uplift.”)

³⁸¹ See, e.g., ERIC ALSTON, LEE J. ALSTON, BERNARDO MUELLER & TOMAS NONNENMACHER, *INSTITUTIONAL AND ORGANIZATIONAL ANALYSIS: CONCEPTS AND APPLICATIONS* 163 (2018) (“[T]he interest group can try to influence the venue where [an]

The tactical choices a group might make may include litigation or legal campaigns, but will certainly involve grassroots organizing, demonstrations, other public actions, and media efforts: tactics that the lawyer likely has less expertise to assess, shape, or steer.³⁸² Thus, when assessing capacities and aligning them with the preferred grand strategy, the perspectives of lawyers and other professionals are not inherently privileged with respect to assessing the broad range and types of capacities that might be at the group's disposal, and the type of grand strategy that group chooses to pursue.³⁸³ What is more, community engagement with strategy setting is far more likely to foster support for that grand strategy.³⁸⁴ The construction of a bottom-up plan is one consistent with Guinier and Torres's demosprudence.³⁸⁵ It involves the wielding of what Jeremy Heimans and Henry Timms describe as "New Power," which is the product of a strategy "made by many."³⁸⁶ Having a hand in the selection and construction of a grand strategy leads to buy-in, which, in turn, converts to long-range support for the campaign, the type of support that is necessary for the sustained commitment necessary in institutional change efforts where collective action problems proliferate.³⁸⁷

The range of considerations that go into a group's institutional analysis and capacity inventory should involve constant dialogue between the group's leadership, its members, and any professional support they have, including lawyers.³⁸⁸ For Ganz, a responsive, iterative process is critical to effective strategic action, and a group's strategic capacity is stronger with diverse voices

issue is considered, bringing some organizations into play that might not otherwise participate in the process.").

³⁸² See, e.g., SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 6 (rev. and updated 3d ed. 2011) (1994) (arguing that social movement advocacy occurs when "ordinary people—often in alliance with more influential citizens and with changes in public mood—join forces in confrontation with elites, authorities, and opponents").

³⁸³ See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1921–25 (2007) (discussing the role of lawyers in relation to social movements).

³⁸⁴ ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 93 (1990) (describing the phenomenon where there is greater adherence to rules and processes for collective action when participants in that effort play a role in setting the norms and rules for community behavior); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162–63 (2006) (arguing that when individuals have meaningful input into a judicial process, they see that process as more legitimate).

³⁸⁵ Guinier & Torres, *supra* note 45, at 2755.

³⁸⁶ JEREMY HEIMANS & HENRY TIMMS, *NEW POWER: HOW POWER WORKS IN OUR HYPERCONNECTED WORLD—AND HOW TO MAKE IT WORK FOR YOU* 2 (2018).

³⁸⁷ This engagement can itself lead to the building of social capital, which helps communities solve collective-action problems. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 66–69 (2000).

³⁸⁸ This inclusive approach is consistent with one suggested in a recent work calling the cocreation of ideas for transformative social change "Movement Law." Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 846 (2021).

contributing to the strategy-making process.³⁸⁹ A movement's assessment of an institution's characteristics that might be the targets of advocacy—as well as the group's capacities, goals, and the grand strategy it selects to achieve those goals—are all decisions that the group must and should make for itself.³⁹⁰ There still has to be a group, though: an active constituency is necessary for any grand strategic effort. To date, no such constituency has yet emerged on a broad scale to address the golf course problem, although some local efforts have coalesced around golf course conversions in particular communities.³⁹¹

What is more, when it comes to identifying a constituency for addressing the golf course problem, one cannot ignore that there are also entrenched interests that support the continuation of golfing and the preservation of golf courses as golf courses.³⁹² There are those who stand to make money on golf (and would lose money by its demise), like those who make golf equipment or who own or operate golf courses.³⁹³ There are also those who simply enjoy the sport.³⁹⁴ Playing a round of golf can be a rewarding, physically and emotionally. But so are many other things that do not impose such costs on society. The question is whether a constituency, then a coalition, might form around addressing the golf course problem.

One way to catalyze a movement to address this institutional problem would be for grassroots leaders who wish to try to mobilize a constituency to change the way Americans golf, would be for such leaders and their supporters try to uncover and highlight the costs associated with preserving golf courses as an institution. Since there are such significant societal costs associated with playing golf,³⁹⁵ would exposing such costs, highlighting them, and promoting an effort to align those costs with the cost to play serve as an effective strategy to build the sort of movement necessary to effectuate such change? Such an effort calls

³⁸⁹ GANZ, *supra* note 57, at 8.

³⁹⁰ HAHRIE HAN, *HOW ORGANIZATIONS DEVELOP ACTIVISTS: CIVIC ASSOCIATIONS AND LEADERSHIP IN THE 21ST CENTURY* 62–70 (2014); *see also* GANZ, *supra* note 57, at 23–31 (describing strategic capacities through the example of attempts to unionize California farm workers).

³⁹¹ *See, e.g.,* Adele Peters, *Need Land for Parks and Housing? There Are Plenty of Useless Golf Courses to Repurpose*, FAST CO. (Mar. 6, 2019), <https://www.fastcompany.com/90315242/need-land-for-parks-and-housing-there-are-plenty-of-useless-golf-courses-to-repurpose> [<https://perma.cc/R8G8-ELYY>] (describing efforts to repurpose several golf courses across the country).

³⁹² *See, e.g.,* Mark Ellwood, *Without Golf, What Happens to a Golf Community?*, N.Y. TIMES (Sept. 9, 2022), <https://www.nytimes.com/2022/09/09/realestate/golf-course-park-preserve-land.html> [<https://perma.cc/DL4X-UBX4>].

³⁹³ *See, e.g.,* Nora Kelly Lee & Nat'l J., *Here's How Much Money Donald Trump Collects from His Many Golf Courses*, ATLANTIC (July 22, 2015), <https://www.theatlantic.com/politics/archive/2015/07/heres-how-much-money-donald-trump-collects-from-his-many-golf-courses/448413/> [<https://perma.cc/8254-YFEH>].

³⁹⁴ Farahmand, Broman, De Faire, Vågerö & Ahlbom, *supra* note 266, at 419 (“Golf is a popular sport worldwide.”).

³⁹⁵ *See* discussion *supra* Part IV.

for an analysis of the institution itself, which is the first component of the grand strategy equation, once a constituency for change emerges. At the same time, revealing and framing injustice can help catalyze the emergence of such a movement in the first place, reflecting the symbiotic relationship different components of the grand strategy approach: mobilization, institutional assessment, and a capacity inventory, as the subsequent discussion reveals.

B. *Characteristics of the Institution*

As Acemoglu and Robinson argue, extractive institutions impose long-term costs on society.³⁹⁶ Between the high environmental impact of golf courses,³⁹⁷ the opportunity costs associated with the dedication of large parcels of land to golf courses,³⁹⁸ the fact that the cost of golfing often creates a barrier making it difficult for many to play,³⁹⁹ and the hierarchy-perpetuating function of golfing itself, particularly the operation of private clubs,⁴⁰⁰ it is difficult to argue that golfing, as an institution, is not extractive in nature. Just one aspect of this extractive quality is the fact that, historically, courses have discriminated based on race, gender, and, in effect, class, due to the high cost of play, even when that cost is subsidized.⁴⁰¹ Drawing from the social change taxonomy, then, would full integration of golf lessen the disconnect between cost and value to the community? In reality, golf's true integration would create a paradox: bringing the cost down to the point that golfing makes sense for a broad cross section of the community will only impose greater costs on that community, forcing it to subsidize the sport even more. Such integration does not seem to be an appropriate approach to remedying the golf course problem.

Others have tried other approaches in the social change taxonomy. Some courses have tried to reduce their environmental impact.⁴⁰² Efforts are underway to democratize the sport by making it less challenging, like making the holes larger and using disks instead of balls.⁴⁰³ The bold emergence of a controversial

³⁹⁶ ACEMOGLU & ROBINSON, WHY NATIONS FAIL, *supra* note 47, at 73–79.

³⁹⁷ See discussion *supra* Part IV.A.

³⁹⁸ Merrill & Leatherby, *supra* note 1.

³⁹⁹ See *supra* Part IV.C; see also Bellafante, *Removing*, *supra* note 340 (“[T]he cost of playing 18 holes on a Saturday morning is \$185.”).

⁴⁰⁰ See generally Jolly-Ryan, *Chipping Away*, *supra* note 265.

⁴⁰¹ See *supra* note 263 and accompanying text.

⁴⁰² See generally, e.g., AUDUBON INT’L, FACT SHEET: ENVIRONMENTAL MANAGEMENT PRACTICES FOR GOLF COURSES, https://auduboninternational.org/wp-content/uploads/2019/02/G_E-Environmental-Management-Guidelines-for-Golf.pdf [<https://perma.cc/67TA-XMJE>] (describing best practices for environmentally sound maintenance of golf courses).

⁴⁰³ Larry Olmsted, *Can a Bigger Hole Save Golf? Top PGA Tour Pros Follow the Masters with Bold Experiment*, FORBES (Apr. 15, 2014), <https://www.forbes.com/sites/larryolmsted/2014/04/15/10890/?sh=58086a1378c5> [<https://perma.cc/5DC6-ZMG5>]; Beau Dure, *Disc Sports Keep on Growing—and Aim to Expand Their Empires*, GUARDIAN (Sept. 10, 2021), <https://www.theguardian.com/sport/2021/sep/10/disc-sports-keep-on-growing-and-aim-to-expand-their-empires> [<https://perma.cc/8P9Z-95QU>].

new golf association,⁴⁰⁴ LIV, has also attempted to introduce innovation into tournament play to increase spectator interest in the sport, like a “shotgun” start to the match, meaning players all start from different holes on the course at the same time.⁴⁰⁵ But as in the first half of the twentieth century, with the construction of courses for African-Americans,⁴⁰⁶ whether these new approaches are considered reform or the creation of parallel institutions, in practice, they do not address the broader golf course problem: the courses on which such versions of the sport are played still impose environmental, financial, and opportunity costs on the community.

The ultimate grand strategy a group or movement chooses to bring about institutional change requires a balancing between aspirations and capacities. At the inception of a campaign, the institution’s characteristics, and the group’s perspective on those characteristics, will have a significant impact on framing the discussion. If the cultural and political institution is considered as having some value to the group, albeit after some change the group wants to see, then abolition of the institution, as an institution, may not be what the group desires.⁴⁰⁷ If the group would like to see the institution change (and if the group has access to some way to change it), then a reformist stance might be appropriate.⁴⁰⁸ If the institution cannot be saved—if any good that may come from it is far outweighed by the harms it generates, and those harms will not change, or the effort to change them may be beyond the group’s capacity—then abolition may be the appropriate response.⁴⁰⁹ At the same time, if those who might change the institution do not have access to the institution, do not possess the capacity to change it, or do not want to be a part of the institution in its current form and are unwilling to work to gain access in order to change it, an

⁴⁰⁴ Tariq Panja & Andrew Das, *What Is LIV Golf? It Depends Whom You Ask.*, N.Y. TIMES (Feb. 21, 2023), <https://www.nytimes.com/article/liv-golf-saudi-arabia-pga.html> [<https://perma.cc/X8SA-VX28>].

⁴⁰⁵ Edward Sutelán, *LIV Golf Rules, Explained: The Biggest Differences vs. PGA Tour Include Shorter Rounds, Teams & Shotgun Starts*, SPORTING NEWS (Sept. 2, 2022), <https://www.sportingnews.com/us/golf/news/liv-golf-rules-pga-tour/iywjdqfqrerdej1hzcg0vd6c> [<https://perma.cc/W459-5B4S>].

⁴⁰⁶ DEMAS, *supra* note 20, at 146–47.

⁴⁰⁷ See Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 445–47 (1998) (arguing that representative democratic institutions need reform and advocates for an injection of more direct democracy, but not abolition altogether).

⁴⁰⁸ That does not mean more radical change to an institution is not possible at some point; it can also be catalyzed by more modest reforms first: “[C]ampaigns for legal reform can win substantial gains and are frequently the only vehicles through which more far-reaching change takes shape; struggles for reform, in other words, beget more radical possibilities and aspirations.” Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 116 (2009).

⁴⁰⁹ Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–800 (2018) (arguing for the abolition of the doctrine of qualified immunity for government actors).

abolitionist stance may again be appropriate. The question will be whether there is something of value that the institution might bring to the group or society as a whole. If engagement with the institution has value to those who have access to it, and access seems possible through effort within the group's capacity, an integrationist approach might seem appropriate.⁴¹⁰ To a certain extent, the group's aspirations may hinge on the nature of the institution, but, as is far more often the case, the potential aspirations a group has cannot be seen separate and apart from their perceived capacities.

C. Capacities of the Movement

A group's assessment of its resources can shape the grand strategy in significant ways because the resources might include the capacity to bring litigation, as was the case in the marriage-equality movement's work, or the ability to influence key legislators, agency personnel, religious organizations, community groups, business leaders, or even celebrities.⁴¹¹ The group's resources will inevitably shape both its strategy and then its grand strategy: resources, tactics, and strategies must be marshaled in a coherent, integrated fashion, and in a way that is fluid, adaptive and experimental, to be effectively aligned and in service of the larger objective.⁴¹² Advocates can take a nuanced approach to select the appropriate targets, actions, and strategies using the most effective tactics at their disposal, deployed at the appropriate time, at the appropriate place, to achieve a desired outcome.⁴¹³

If one were to assess the value of golf as an institution, standing alone, and to do so without also conducting an inventory of the capacities of those who might be mobilized to press for a change in that institution, one might conclude that abolition is the most appropriate *approach* for addressing the golf course problem. But any effort to reform institutions, especially deeply embedded ones, requires an evaluation of aspirations in light of capacities. And the capacity to change golf in a dramatic way may be beyond the capacity of any social movement that might arise to call for such change. As previous discussions have shown, costs, broadly defined, help to shape and determine the possibility of change, and what society is willing, and not willing to give up, to preserve the

⁴¹⁰ This subject ran through the debate within the NAACP LDF on whether to support the effort to integrate golf courses. See *supra* Part III.B.

⁴¹¹ When members of a group can leverage their extended personal and professional relationships, they can often build broad-based coalitions. Jane McAlevey calls this "whole worker organizing." JANE F. MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 19 (2016).

⁴¹² See GANZ, *supra* note 57, at 25–30 (discussing the unionization of California farmworkers as an example of such fluid and integrated marshalling of resources in service of the organizer's grand strategy).

⁴¹³ See GADDIS, *supra* note 14, at 21 (describing the role of time, space, and scale in devising grand strategy).

status quo.⁴¹⁴ A social movement's ability to identify the benefits of change, and to channel energies in a way to leverage their resources in an effective way, can be the difference between the success and failure of that movement. Can the perceived benefits of addressing the golf course problem outweigh the costs of change, or of preserving the status quo?

Any reasonable assessment of the true costs of preserving the institution of golf in its current form would identify those costs as considerable: from environmental degradation to the loss of large swaths of land that could be put to much better use, particularly in densely inhabited communities that could use more accessible green space for parks and other outdoor uses.⁴¹⁵ As an exclusive institution, golfing also can serve to perpetuate inequality and the status quo by creating space where social inequality is preserved and extended. If it is determined that the costs of maintaining golf in its current state do not outweigh its benefits, is abolition the answer? Is it possible? That is, is it the appropriate grand strategy in which aspirations and capacities are aligned?

D. The Aspirations-Capacity Synthesis and the Golf Course Problem

Any aspirations-capacities calculus requires a careful calibration of, and synergy between, chosen tactics, strategies, and grand strategy, viewed together, and by the people who know them the best. An effort to assess and determine the costs of preserving golf courses would look at things like the environmental impacts of particular golf courses and the opportunity costs associated with preserving courses as opposed to their potential alternate uses. Subnational governments could adopt an approach used by the U.S. Department of Defense when considering review of existing military bases under the Base Realignment and Closure process.⁴¹⁶ This process, which gained steam after the fall of the Berlin Wall, has resulted in the closure or repurposing of hundreds of military bases in the last thirty years after a holistic review of the costs and benefits of preserving such bases and the possible repurposing of such bases for civilian use.⁴¹⁷ In the golf course context, a similar comprehensive process could assess the costs and benefits associated with preserving and maintaining the courses and engage the public in a visioning process for the best, most constructive, community-focused use of the sites.

Communities do not need to wait for government entities to commence such processes, however. With municipal courses in particular, through inquiries under state freedom of information laws, advocates could request information

⁴¹⁴ See *supra* Part II.B.

⁴¹⁵ Peters, *supra* note 391.

⁴¹⁶ 10 U.S.C. § 2687.

⁴¹⁷ Thomas William "T.W." Bruno, Note, *Bringing Sexy BRAC: The Case for Allowing Local Governments to Control Environmental Cleanup in the Military Base Closure and Redevelopment Process*, 32 WM. & MARY ENV'T L. & POL'Y REV. 513, 513–14 (2008); CHRISTOPHER T. MANN, CONG. RSCH. SERV., R45705, BASE CLOSURE & REALIGNMENT (BRAC): BACKGROUND & ISSUES FOR CONGRESS 12–13 (2019).

about course usage, operating budgets, revenue, environmental impacts, etc.⁴¹⁸ When groups and individuals understand the economics and the environmental impacts of the courses in their communities, and the extent to which those communities are subsidizing public courses directly, it will help raise awareness about the consequences of maintaining golf courses in those communities and the extent to which taxpayers are subsidizing such operations.

With private courses as well, although the information will not be as readily available, a review of public records regarding property taxes will help communities understand the extent to which private courses are paying their fair share of taxes when compared to what those who put their property to different uses are paying. The extent to which private courses are receiving favorable tax treatment and to the extent that favorable treatment requires that communities are unable to provide critical services in the community, or must charge other property owners more in property taxes to provide such services, might galvanize support for, at a minimum, a reassessment of the value of the land on which those courses are situated. Property assessment is a complex process, but it typically takes into account the potential value of property according to its most valuable use, which is an opportunity–cost analysis.⁴¹⁹ If municipalities are not treating the tracts upon which golf courses are situated in a manner consistent with their approach toward other properties, a reevaluation of those properties should follow, which would mean not just higher tax revenues for local governments, but also a realignment of costs and benefits for those who actually use those courses. That is, courses will likely pass along the burden of satisfying these higher taxes to those who actually play on those courses in the form of higher fees. This clientele will ultimately decide whether that round of golf is really worth it if the actual cost to play is something those who use the course must bear.

A focus on the true costs to society in general and communities in particular might help force change in the approach to golf in the United States. When communities conduct an audit of the costs associated with maintaining a golf course and point out that those costs are mostly borne by taxpayers at large, many of whom will never play golf, it will help to highlight the true impact a golf course imposes on the community. With that awareness, a strategy—even a grand strategy—may emerge. Among the strategies most useful for addressing the golf course problem, several have presented themselves over time: the creation of parallel institutions, integration, and reform. Is it time to consider a fourth: abolition?

⁴¹⁸ On the value of government transparency and the role of transparency-promoting freedom of information laws in promoting that value, see Suzanne J. Piotrowski, *Transparency: A Regime Value Linked with Ethics*, 46 ADMIN. & SOC'Y 181, 183–86 (2014).

⁴¹⁹ For a description of the tax assessment process generally, including the application of the “highest and best use” standard, see INT'L ASS'N OF ASSESSING OFFICERS, IMPROVING REAL PROPERTY ASSESSMENT: A REFERENCE MANUAL 425 (1978).

If after considering different options, a constituency arose that wanted to agitate for some considerable change to the way the United States deals with the golf course problem, and that constituency decided that it had the ultimate aspiration that it wanted to abolish golf—at least in its current form—is such an aspiration consistent with the capacities of those who might strive to carry out such a grand strategy? At present, such a constituency does not seem to exist. But that may simply be a function of the embedded nature of the institution: communities have not yet imagined a potential end to golf and what that could mean for them. A reformist approach, rather than a grand strategy—one that seeks to expose the true costs of golf and impose them on those who actually benefit from it—may serve as a stop along the way towards an ultimate grand strategy of abolition.

When those costs are exposed, a coalition may emerge that desires some degree of reform, like the imposition of the true costs of operating and maintaining a golf course on those who most benefit from its existence: the players. This coalition might include local advocacy groups, the members of which who might want to see different uses for the site on which a course is constructed, local homeowners who want to lower their property tax bill, and environmentalists who would like to end the subsidies for polluters. Once the costs are fairly allocated and externalities are no longer imposed on those who do not benefit from the presence of golf courses, it is possible that those who do utilize the course will determine that the cost is simply too high to do so, meaning the courses are likely to wither on the proverbial vine. It is also possible that the more golf becomes even more exclusive, there may be less interest in playing it. The creation of parallel, non-golf alternatives to golf courses might also strengthen the sentiment that the golf course problem may actually have a solution. With those golf courses that remain, as exclusive as they might become, their use will transform from a mark of pride to one of shame, though that sentiment may not arise any time soon.⁴²⁰

With greater awareness of the high cost of golf to society—in terms of its environmental consequences, opportunity costs, and the extent to which it perpetuates inequality—a characteristic that will only be exacerbated as golf's costs are aligned with its price—it is possible that what Cass Sunstein would call a “norm cascade”⁴²¹ could reach inexorable proportions and ultimately resolve the golf course problem in a way that is most beneficial for society as a whole, and in a manner of the community's choosing.

⁴²⁰Regulatory change in the public health space appears to have led to some instances of norm change. *See, e.g.,* Jason J. Czarnezki, *New York City Rules! Regulatory Models for Environmental and Public Health*, 66 HASTINGS L.J. 1621, 1655 (2015) (describing the successes of several public health measures designed to shift norms).

⁴²¹CASS R. SUNSTEIN, *HOW CHANGE HAPPENS* 4, 9–10 (2019).

VII. CONCLUSION

There is no question that golf is an institution embedded in the fabric of American culture.⁴²² Thousands of square miles of some of the most valuable real estate in the United States is dedicated to it.⁴²³ But the costs of maintaining this institution are considerable.⁴²⁴ If communities were aware of the true costs associated with preserving golf as an institution, understood the extent to which communities are subsidizing it, and given real options for repurposing golf courses to better, more democratic and inclusive uses, it is unlikely that golf could survive in its current form.

In the end, by seeing golf through an institutional lens, we are potentially able to see a path forward for institutional reform. By seeing social change itself through the institutional change taxonomy, we are also able to understand the extent to which real social change must confront institutionally embedded habits and practices. In the pursuit of social change through this institutional approach, we are able to formulate not just a strategy to bring it about, but also a grand strategy—an alignment of aspirations and capacities—for effective and durable social change.

⁴²² See, e.g., Merrill & Leatherby, *supra* note 1.

⁴²³ For example, California's Pebble Beach course is valued at over \$3 billion today. Paul Sullivan, *If You Had Bought Stock in Pebble Beach 20 Years Ago, Here's What It Would Be Worth Today*, GOLF (Feb. 9, 2020), [https://golf.com/travel/stock-pebble-beach-20-years-ago-worth-today/#:~:text=\[https://perma.cc/E4XB-GNRJ\]](https://golf.com/travel/stock-pebble-beach-20-years-ago-worth-today/#:~:text=[https://perma.cc/E4XB-GNRJ]).

⁴²⁴ See *supra* Part IV.