Externality Entrepreneurism

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The way that economists have taught us to think about externalities — asking us to identify, measure, and internalize them — while useful, has also created a substantial blind spot. According to economic thinking, the law ought to incentivize or force those who create externalities to internalize them. Yet, internalizing externalities is just one way of many that externalities shape law and politics: legal and political actors frequently employ externalities to galvanize or oppose change by strategically identifying, selecting, framing, and promoting externalities. These actors exaggerate and highlight different externalities with the aim of capturing the attention of individuals, the media, networks of interest groups, and ultimately legal and political decision-makers. We call those who use externalities this way "externality entrepreneurs." Externality entrepreneurism is prevalent in all levels and branches of government and in almost every area of law and policy, yet it is unexplored in existing scholarship. This Article seeks to remedy that neglect and begin the broader conversation about this vitally important lens. Because externality entrepreneurism is so ubiquitous and universal, understanding it is critical not only for those who wish to create change in our political and legal institutions but also for those who wish to more fully understand and evaluate the mechanisms by which such change occurs.

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INTRODUCTION

In December 2014, Mickey Mouse caught the measles: an outbreak that began in Disneyland ultimately infected about 150 people across the United States with most victims concentrated in California.[1] This event transformed "the happiest place on Earth" into ground zero for a potentially deadly disease.

Shortly before the outbreak, we wrote a paper that hypothesized that the way the public talked about vaccination might change in the face of a major disease outbreak.[2] Up to that point, it was common to hear commentators speak about the positive societal impacts of individuals getting vaccinated: that those who vaccinate increase society's ability to shield itself from disease by reducing the number of potential vectors by which disease can spread, something often referred to as "herd immunity."[3] Indeed, herd immunity has long been identified as a prototypical example of a positive externality — a benefit that a decision confers on third parties.[4] We argued that, despite the frequent and consistent positive framing of the effects of vaccination, if a crisis such as a serious disease outbreak hit, talking about the negative societal impact (a negative externality framing) caused by failure to vaccinate — that those who did not vaccinate spread the disease to others — might seem more natural.[5]

As the nation focused on an increasing number of bedridden measles patients, primarily children wearing mouse ears, we observed this shift to the negative framing of vaccination externalities

[1] Alicia Chang, *Large Measles Outbreak Traced to Disneyland Is Declared Over*, BOS. GLOBE (Apr. 18, 2015) https://www.bostonglobe.com/news/nation/2015/04/17/large-measles-outbreak-traced-disneyland-declared-over/uJHu9o1pV87PFmOWvtHFLJ/story.html.

[2] *See* Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 138, 154, 162-63 (2014).

[3] *See id.* at 138.

[4] Many have discussed herd immunity as a quintessential positive externality, *see, e.g.*, Gaia J. Larsen, *Skewed Incentives: How Offshore Drilling Policies Fail to Induce Innovation to Reduce Social and Environmental Costs*, 31 STAN. ENVTL. L.J. 139, 189 (2012); Nathan Alexander Sales, *Regulating Cyber-Security*, 107 NW. U. L. REV. 1503, 1540-41 (2013), but have not considered the way this public framing of vaccination externalities might shift over time.

[5] *See* Sun & Daniels, *supra* note 2, at 138, 154.

occurring: it became quite commonplace for commentators to characterize those who did not vaccinate as inflicting negative externalities on others and putting society at risk. Some of the blame for the outbreak also found its way to those who have publicly advocated against vaccinations. As the outbreak spread, major media outlets ran article with titles like *Disneyland: The Latest Victim of the Anti-Vaxxers*,[6] *Blame Disneyland Measles Outbreak on Anti-science Stubbornness*,[7] and *Anti-vaccine Parents Boost Measles Comeback*.[8]

Particularly in California, vaccination advocates highlighting these negative externalities began to argue, as well, for new legal measures that would make it more difficult for parents to opt their children out of otherwise mandatory vaccinations. In June of 2015, the California Legislature responded to these calls for change and passed legislation that prevents parents from opting their kids out of vaccinations for religious or philosophical reasons.[9]

Consider the ways a few prominent newspapers framed the externalities of vaccination on the day that the legislation was passed. The New York Times quoted a father whose child was suffering from leukemia and therefore could not be vaccinated as saying, "The social impact of not having children vaccinated is truly life-threatening for some[.]"[10] The Los Angeles Times quoted a doctor treating a four-year-old boy (infected as a five-month-old — too young to be vaccinated) suffering a deadly measles complication infecting his brain, who argued, "This isn't a question of personal choice. . . . This is an obligation to society."[11] The Guardian quoted a doctor who also serves as a state senator saying, "As a pediatrician, I have personally

[6] Jeffrey Kluger, *Disneyland: The Latest Victim of the Anti-Vaxxers*, TIME (Jan. 23, 2015), http://time.com/3664553/disneyland-measles-antivaxxers/.

[7] Editorial, *Blame Disneyland Measles Outbreak on Anti-Science Stubbornness*, L.A. TIMES (Jan. 15, 2015, 6:58 PM), http://www.latimes.com/opinion/editorials/la-ed-measles-disneyland-20150116-story.html.

[8] Editorial, *Anti-Vaccine Parents Boost Measles Comeback*, USA TODAY (Jan. 27, 2015, 8:07 PM), http://www.usatoday.com/story/opinion/2015/01/27/measles-vaccine-disneyland-herd-immunity-editorials-debates/22435357/.

[9] The bill did include a narrow medical exemption for children for whom a licensed physician determines the vaccine is not "safe." *See* CAL. HEALTH & SAFETY CODE § 120370 (West 2015).

[10] Jennifer Medina, *California Set to Mandate Childhood Vaccines Amid Intense Fight*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/26/us/california-vaccines-religious-and-personal-exemptions.html.

[11] Patrick McGreevy & Rong-Gong Lin II, *California Assembly Approves One of the Toughest Mandatory Vaccination Laws in the Nation*, L.A. TIMES (June 25, 2015, 6:16 PM), http://www.latimes.com/local/political/la-me-pc-vaccine-mandate-bill-up-for-vote-thursday-in-california-assembly-20150624-story.html.

witnessed children suffering life-long injury and death from vaccine-preventable infection[.]"[12]

What does the evolution of the debate surrounding vaccination in the wake of the Disney outbreak tell us about externalities? The changing characterization of vaccination was anything but accidental; those advocating stricter legal requirements for vaccination emphasized the negative externalities that non-vaccination inflicts on others. Yet the reasons for this shift are not fully captured by the traditional economic approach to externalities, which focuses on identifying, measuring, and internalizing externalities[13] and views law primarily as a mechanism for incentivizing or forcing this externality internalization.

Instead, this rhetorical shift underscores that those seeking political or legal change often harness externalities in ways that are currently overlooked in the literature on externalities. The Disney outbreak shows the importance of identifying, selecting, framing, and promoting externalities to strategically advance change. The incident illustrates the role and value of externalities in the push and pull of politics: players frame and highlight particular externalities to garner support for particular political ends. Is it any surprise that political players relied on doctors and parents of sick, even dying, children to get the message out in the media? To most readers, the choice of messengers and messages will hardly seem surprising. In the face of crisis, it would probably seem odd, for example, for the media to instead focus on healthy children who benefitted from herd immunity.

Yet, whatever it is that is intuitive about these uses of externalities is missing from existing scholarship. Indeed, even though the marketing of externalities is commonplace in all levels and branches of government and in almost every area of law and policy, the art of

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[12] Tom McCarthy, *Mandatory Vaccination Bill for Public Schools Passes California Legislature*, GUARDIAN (June 25, 2015, 5:06 PM), http://www.theguardian.com/us-news/2015/jun/25/california-approves-mandatory-vaccination-bill.

[13] *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 684 (1973) ("Welfare economists have urged that harmful externalities be 'internalized' to eliminate excessive amounts of nuisance activity."); Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1655 (2011) (noting that "prior scholars have focused . . . on various mechanisms . . . for resolving . . . externalities" with the consistent goal of "forc[ing] parties to 'internalize' their external costs . . . ."); Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1132 (2010) ("The standard solution to negative externalities . . . is to change the incentives of individual choices by legally internalizing some of the costs of the harms.").

packaging and selling externalities has not been studied in a holistic way. This Article seeks to remedy that neglect and begin the broader conversation about what we term "externality entrepreneurism." This lens for understanding how externalities are employed in law and politics has broad application: examples developed in the Article include issues as diverse as climate change, same-sex marriage, takings, abortion funding, First Amendment rights, and the Black Lives Matter movement. Moreover, externality entrepreneurism amounts to much more than linguistics: the way externalities are selected, framed, and promoted can reshape who we view as wrongdoers in a particular situation — and, in turn, lay the groundwork for redefining underlying rights and responsibilities. Because externality entrepreneurism is so ubiquitous and important, understanding it is critical not only for those who wish to create change in our political and legal institutions but also for those who wish to more fully understand and evaluate the mechanisms by which such change occurs.

The Article proceeds as follows. In Part I, we define externality entrepreneurism and situate it in the broader entrepreneurism literature. We also explain our focus on externalities, rather than on costs and benefits, more generally. Part II explains that externalities play a much larger role in our political and legal processes than one would expect. We explain that much of politics and law is a push and pull between competing externalities. Part III discusses a wide range of saliences that externality entrepreneurs may attempt to play upon in order to drive political and legal outcomes. These include cognitive, emotional, moral, media, network, geographic, and temporal saliences. In Part IV, we explore some of the factors that may make externality entrepreneurs more or less successful in pursuing political and legal change and provide an overview of some of the conditions that serve as common openings and obstacles to successful externality entrepreneurism. Part V focuses on why understanding externality entrepreneurism matters so much and how we might think about whether it is beneficial or detrimental to our political and legal systems.

I. EXTERNALITY ENTREPRENEURISM

In this Part, we first define externality entrepreneurism. In doing so, we explain how our approach to externalities goes well beyond the economic analysis and thinking typically associated with externalities. We next situate externality entrepreneurism in the broader literatures on externalities and entrepreneurism. Finally, we justify our focus on

entrepreneurism that exploits externalities, in particular, rather than costs and benefits, more generally.

A. A Brief Definition of "Externality Entrepreneurism"

Our working definition of an externality entrepreneur is a person who strategically identifies, selects, frames, and publicizes externalities to create opportunities to influence political and legal outcomes. So understood, externality entrepreneurs are a subset of what Professor Robert Dahl called "political entrepreneurs,"[14] although externality entrepreneurs work in both political and legal forums. To provide a fuller context for this definition of externality entrepreneurism, we briefly discuss each of the words found in the term.

1. Defining and Describing "Externalities"

We begin with externalities. Externalities go by a variety of names in the literature, including spillovers,[15] side effects,[16] and third-party costs and benefits.[17] Whatever term is employed, the definition of externalities is deceptively simple: the costs and benefits that decisions create for third parties.[18] One classic example of an externality is air

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[14] *See* ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 6 (1961). Political entrepreneurs have often proven valuable in politics in overcoming group coordination problems. *See* RUSSELL HARDIN, COLLECTIVE ACTION 35-37 (1982). In discussing what he called entrepreneurial politics (politics aimed at benefitting the many at the expense of the few), Professor James Wilson has highlighted the role of crisis in enabling political entrepreneurs to affect that sort of politics:

> [I]t requires the efforts of a skilled entrepreneur who can mobilize latent public sentiment (by revealing a scandal or capitalizing on crisis), put the opponents of the plan publicly on the defensive (by accusing them of deforming babies or killing motorists), and associate the legislation with widely shared values (clean air, pure water, health, and safety).

JAMES Q. WILSON, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 370 (James Q. Wilson ed. 1980). Externality entrepreneurism occurs in all branches of government, including the judiciary, and at all levels of government.

[15] *See* Kelly, *supra* note 13, at 1641.

[16] *See, e.g.*, IRVIN B. TUCKER, MACROECONOMICS FOR TODAY 112 (9th ed. 2015) ("Even when markets are competitive, some markets may still fail because they suffer from the presence of side effects economists call externalities.").

[17] *See, e.g.*, F.H. BUCKLEY, JUST EXCHANGE: A THEORY OF CONTRACT 117 (2005) ("Positive externalities confer third-party gains, and negative externalities impose third-party costs.").

[18] *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 24 (1990) (defining externality as "the effect of one person's decision on someone who is not a party to

pollution produced by a factory; the burden of the pollution is borne by the factory's neighbors, rather than by the factory owners who make the critical choices about manufacturing processes and pollution-control equipment that determine how much pollution the factory will emit.[19] Despite the apparent simplicity of this definition, once we scratch the surface, we see that defining and describing externalities is anything but simple.

a. The "External" in Externalities

One initial complexity is determining what counts as an externality. The attempt to define externalities generates a range of important questions, but one of the central questions is how we should think about whether an effect is a third-party or "external" effect — that is, to what must the effect be "external"? A particular decision? A particular decision-maker? If the latter, how should we think about

that decision"). The most commonly used alternative definition is the failure of markets to account for costs and benefits. A.C. PIGOU, THE ECONOMICS OF WELFARE 183 (4th ed. 2013) ("[O]ne person A, in the course of rendering some service, for which payment is made, to a second person B, incidentally also renders services or disservices to other persons . . . of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties."); Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, *in* PUBLIC EXPENDITURES AND POLICY ANALYSIS 59, 67 (Robert H. Haveman & Julius Margolis eds., 1970) (defining externality as the absence of a functioning market); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE J. ON REG. 23, 29 (1996) ("costs and benefits that are not directly priced by the market system"); Harold Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) ("What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile . . . ."). A number of scholars have convincingly argued that the definition of externalities is ambiguous. *See, e.g.*, ANDREAS A. PAPANDREOU, EXTERNALITY AND INSTITUTIONS 13-68 (1994); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 541-42 (1998); Kelly, *supra* note 13, at 1643 n.6; Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 546 n.180 (1999); *see also* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1436-41 (1989); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2325-26 (1995); Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1818-19 (1993). Andreas Papandreou states that the term could be understood as a particular phenomenon (e.g., overconsumption of a resource). PAPANDREOU, *supra*, at 46. These definitional ambiguities need not concern as much here, however, except as they provide additional fodder for externality entrepreneurs, as discussed below.

[19] TUCKER, *supra* note 16, at 112.

who is the relevant decision-maker? An institution as a whole? A particular member of an institution? Consider, for example, how we might think about what counts as an externality of a court decision. Any effect external to the judge who decides the case? Any effect external to the particular parties before the court? Any effect external to the judiciary? We could also pose similar questions about a piece of legislation: is an externality any effect external to the member who drafted the bill? To the members who voted for it? To the lobbyists who supported it? To the parties regulated by it?

Thus, at least in many instances, what counts as an externality depends on one's perspective — and, most critically, on the identification and characterization of the relevant decision-makers.[20] Accordingly, the very existence of an externality is, in important respects, less a fact than a matter for argument and, thus, potential fodder for an externality entrepreneur.

b. Coasian Externalities: Attributing Externalities

The second complexity arises when we think about to whom to attribute an externality — a problem most prominently identified by Coase and often illustrated with a classic example that he provided. Coase asked us to imagine two neighbors — a farmer and a rancher.[21] In the hypothetical, the rancher's cows proved unable to resist the appeal of the farmer's crops, destroyed the fence that separated the properties, and either ate or ruined the farmer's crops.[22] Coase explained that, when trying to trace the source of the harm outlined in the story, we are left with a judgment call about how to frame the problem.[23] Is the source of the problem the fact that the rancher's cows broke through the fence or that the farmer's crops provided an irresistible inducement?

These bilateral or "Coasian" externalities remind us that, when presented with an externality, externality entrepreneurs can dispute

[20] One might also ask whether there are some external effects that are so minimal, so small, so trivial that they ought not count as externalities at all. *Cf.* RESTATEMENT (SECOND) OF TORTS § 821F cmt. c (AM. LAW INST. 2016) ("The law does not concern itself with trifles."). Like the question of what counts as "external," however, whether some effects are so truly de minimis that they should not qualify as externalities depends largely on whether the relevant externality entrepreneurs can persuade others to view them that way.

[21] *See* R.H. Coase, *The Problem of Social Cost*, 3 J. LAW. & ECON. 1, 2-6 (1960).

[22] *See id.*

[23] *See id.*

the source of the harm or the benefit at issue, though in some cases a particular framing may come more naturally than others.

c. Mirrored Externalities: Positive or Negative Frames

A third complexity in describing externalities is that any particular externality can be framed as either a negative externality or its mirrored positive externality, depending on how the cause or source of the externality is articulated.[24] For example, we might explain that a landowner who preserves wetlands on her property generates positive externalities (e.g., flood control) for adjacent landowners; conversely, we might say that a landowner who destroys wetlands on her property inflicts negative externalities (e.g., increased flooding) on adjacent landowners.[25] Similarly, we might describe a community's choice about whether to provide generous funding for secondary education through either a positive or negative externality frame: a choice to provide that funding creates positive externalities for the community as a whole (a more skilled workforce), whereas a choice to deny such funding produces negative externalities for the wider community (a less skilled workforce).[26]

Thus, the externalities of a particular situation can be framed as either positive or negative. In our prior work, we describe the choice between casting an externality as a positive or negative externality as a choice between "mirrored" externalities.[27] The vaccination example in the Introduction is another example of a mirrored externality: the choice to immunize one's self and children against contagious diseases is traditionally described as generating positive externalities (fewer disease vectors), but given the right conditions, the decision not to vaccinate could be described as creating negative externalities (increased disease vectors).[28] The positive and negative externalities are simply mirror images of each other.

Although, as with Coasian externalities, in some situations one particular framing may seem more natural than others, the vaccination example demonstrates the potential for the most natural framing to shift from positive to negative (or vice versa) and suggests the possibility that such shifts may be influenced, not only by external events, but also by the purposeful choices of externality entrepreneurs.

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[24] *See* Sun & Daniels, *supra* note 2, at 138.

[25] *See id.* at 144-45.

[26] *See id.* at 145.

[27] *See id.* at 138.

[28] *See supra* Introduction.

d. Externality Webs, "Second-Order" Externalities, and Uncertainty

A fourth complexity when dealing with externalities is that externalities rarely exist in isolation. Instead, we typically find that externalities exist in complex chains, networks, and webs of interrelated effects. For example, consider the causal chain of just one set of externalities associated with an oil spill: the spilled oil may contaminate the stock of local shellfish, which, in turn, damages the livelihood of local fishermen, which hurts other local businesses no longer patronized by the fishermen, which leads to further layoffs and economic distress, which decreases local property values, which decimates the budget of local schools, and so on. The causal chain, or "externality cascade," could be traced much further out in time and in multiple different directions across various policy areas from the environment to the economy. The "pure economic loss" doctrine in torts — and proximate causation principles, more generally — are just a few of the many legal responses to the potentially infinite reach of externalities.[29]

Similarly, any discussion of externalities must confront the fact that government action responding to externalities will almost always create externalities of its own. We call these "second-order externalities." Just as proponents of legislation commonly cite the externalities that legislation will address, opponents just as frequently cite the externalities the legislation itself will create. Second-order externalities abound whenever the government acts and, indeed, even when it chooses not to act and thus to maintain the status quo. In the takings context, for example, Justice Blackmun has explicitly acknowledged second-order externalities: "[m]odern government regulation exudes intangible 'externalities' that may diminish the value of private property far more than minor physical touchings."[30]

The existence of such complex chains of externalities, including second-order externalities, suggests that arguments about the scope and existence of externalities often take place in the context of significant uncertainty. This uncertainty takes many forms: uncertainty about the magnitude of attenuated effects, concomitant uncertainty about the relative magnitude of different effects, and uncertainty about the correct causal attribution of particular effects. This uncertainty can have important consequences for how the causes, scope, and weight of particular externalities are viewed and assessed.

[29] *See* discussion *infra* Part IV.B.6.

[30] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 447 (1982) (Blackmun, J., dissenting).

And, more broadly, each of the issues identified in this Part — from externality webs to second-order externalities to uncertainty — creates openings for externality entrepreneurs to choose particular externality framings that will best accomplish their aims.

e. Externality Menus

Many of the complexities discussed above, particularly the nearly infinite proliferation of externalities and the uncertainty in identifying causation, create serious difficulties for scholars and economists engaged in traditional economic analysis of externalities.[31] While the commonly evoked economic implications of externalities are not irrelevant to us here, they are not central to our interests either.

Rather, what interests us is the way that players in political and legal forums highlight and frame externalities in the pursuit of strategic leverage. That is not to say that internalizing externalities is never the end game. Certainly it can be and often is. However, so can a host of other things, including reallocating rights; placing blame; asking for mercy; scoring points; playing to a constituency; or gaining access to a myriad of other tools at the disposal of political and legal actors. Given this lens, we are less concerned with an economic balance sheet and more concerned with the ways externalities facilitate storytelling, shoehorning arguments, and coloring relevant facts. Thus, we depart from the traditional economic use of externalities, unless an externality entrepreneur is exploiting such economic analysis as part of her rhetorical case. In other words, the traditional economic conception of externalities (along with its associated tools in the economic tool box) is just one of many potential externality frames that can be employed in pursuit of some legal or political end.

So understood, the very same complexities that may create difficulties for economists attempting to define and quantify externalities with precision generate choices — and thus opportunities — for intrepid externality entrepreneurs. Indeed, each of these complexities expands the menu of externalities from which an externality entrepreneur may choose. For example, in thinking about externality entrepreneurism, we can embrace a fluid definition of externalities: an externality is any effect that an externality entrepreneur can persuasively frame as external to a relevant decision

[31] *See, e.g.*, DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 186-87 (2000) (arguing that trying to identify and quantify the externalities of, for example, having a baby involves too much uncertainty to permit reasonable calculations).

or decision-maker in a way that implicates the kind of fairness and efficiency concerns that make externalities such powerful levers for driving social and legal change. That is, externalities, for our purposes, are defined and determined by perception — perception that is often shaped and manipulated by externality entrepreneurs.[32] Thus, all of the different effects discussed above might "count" as externalities depending on the context, the audience an externality entrepreneur is trying to reach, and the arguments that entrepreneur advances. In essence, the externality entrepreneur can choose what counts as an "externality" so long as she can successfully persuade others of that understanding.

The menu of choices for an externality entrepreneur is thus both wide and deep. In any given context, an externality entrepreneur can manipulate the public's understanding of the scale of decision and resulting effects so that many different effects can be framed as externalities. Similarly, an externality entrepreneur can choose among Coasian externalities by choosing which side of the externality equation to highlight and thereby choosing who to brand as the "wrongdoer" in any particular situation. An externality entrepreneur can likewise choose whether to emphasize a negative externality or its positive mirror, depending on which framing is more likely to instigate (or suppress) action in a particular context. Moreover, positive and negative framings may help facilitate particular outcomes. Negative externality framings tend to suggest the appropriateness of particular policy solutions, such as taxes, fines, or government prohibitions on a particular good or activity.[33] In contrast, positive externality framings suggest the appropriateness of a different array of policy actions, including "subsidies, public education, information disclosure, or government funding or provision of a particular good."[34] Thus, an externality entrepreneur, by choosing either a positive or

[32] Another definitional complexity is the distinction typically drawn by economists between pecuniary externalities (those that merely redistribute wealth) and technological or true externalities (those that are real resource effects and thus implicate Pareto efficiency). *See, e.g.*, Randall G. Holcombe & Russell S. Sobel, *Public Policy Toward Pecuniary Externalities*, 29 PUB. FIN. REV. 304, 306-10 (2001). Much like the other definitional complexities discussed above, for our purposes, it does not matter whether an externality is pecuniary or technological, except to the extent that the underlying force and logic of this distinction affects the ability of an externality entrepreneur to leverage an externality to generate legal change. *Cf. id.* at 305 (arguing that "in many cases, public policy takes into account the effects of pecuniary externalities, and resources are allocated less efficiently as a result").

[33] Sun & Daniels, *supra* note 2, at 170.

[34] *Id.* at 170-71.

negative externality framing, can bolster the case for a particular type of political or legal action.

And, equally important, the externality entrepreneur can cull externalities from the complex causal chains and webs of interrelated effects — including potential second-order externalities — focusing on those that are most likely to galvanize (or halt) legal change. Likewise, externality entrepreneurs can capitalize on uncertainty in the source or extent of externalities to tell the externality story that best suits her agenda so long as she is able to tell a compelling enough story to persuade her target audience. All of these choices create the space in which externality entrepreneurs can work.

The externality entrepreneur's scope for argument in choosing and framing externalities is extensive, but not unlimited. The work of Robert Ellickson and others suggests, for example, that externality entrepreneurs must attend to the social norms and understandings in which externalities are embedded.[35] But, as we have previously argued, there is a mutually constitutive relationship between externalities and social norms and thus between externalities and legal norms.[36] Underlying social norms and existing legal rights can shape the way that we view attribution of externalities, but externality campaigns exploiting particular externalities can also shape who we view as wrongdoers in a particular situation — and, in turn, lay the groundwork for redefining underlying rights and responsibilities.[37] That, in essence, is the work of externality entrepreneurs explored below.

2. Understanding "Entrepreneurism"

As mentioned earlier, externality entrepreneurs are a subset of what Professor Dahl called "political entrepreneurs."[38] We want to

[35] *See, e.g.*, Ellickson, *supra* note 13. There is undoubtedly a complex relationship between social norms and law. Sometimes law follows community norms; sometimes law influences community norms, but almost always the two are connected somehow. As any student of law will attest, these rights ebb and flow as society changes: custom often drives diverse areas of law, from torts (e.g., negligence's incorporation of industry standards and practices) to corporate law (e.g., the business judgment rule) to international law (e.g., customary international law).

[36] *See* Sun & Daniels, *supra* note 2, at 178 (arguing that a campaign emphasizing the negative externalities of an activity may help "delegitimiz[e] existing legal and moral entitlements" related to the activity and that "there is a symbiotic, mutually constitutive relationship between externality framing and existing entitlements: existing entitlements shape the most natural externality framing, and externality framing, in turn, shapes our sense of appropriate entitlements").

[37] *See id.* at 178-79.

[38] *See supra* note 14 and accompanying text.

emphasize, however, that while it is quite common to hear entrepreneurism evoked in politics as a near synonym for political savvy, our use of entrepreneurism is meant to conform to the more traditional usages of the word.

Though we apply the term in legal and political settings, we use the term entrepreneurism in much the same way that entrepreneurism scholars often do, as "the discovery, evaluation, and exploitation of entrepreneurial opportunities."[39] It is a shrewdness or "alertness" that is absent in others,[40] particularly when facing uncertainty and risk.[41] One of the giants of the entrepreneurism literature, Professor Joseph Schumpeter, identified five types of entrepreneurial innovations, which include new or improved goods; new methods of production; new markets; new sources of inputs; and, new ways of organization.[42] Schumpeter spoke of industries facing the "perennial gale of creative destruction,"[43] and Professors Gordon Smith and Darian Ibrahim explain that, in this light, the entrepreneur is "an agitator who mixes things up by introducing new information into a complacent market."[44] Indeed, much of market entrepreneurism literature focuses on the extent to which these opportunities come in the form of novel changes.[45]

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[39] Jonathan T. Eckhardt & Michael P. Ciuchta, *Selected Variation: The Population-Level Implications of Multistage Selection in Entrepreneurship*, 2 STRATEGIC ENTREPRENEURSHIP J. 209, 209 (2008); *see also* SCOTT SHANE, A GENERAL THEORY OF ENTREPRENEURSHIP: THE INDIVIDUAL-OPPORTUNITY NEXUS 4 (2003) (including, within his definition of entrepreneurism, "an activity that involves the discovery, evaluation and exploitation of opportunities"); D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1535-36 (2013) (introducing the "opportunity cycle," which includes resources, opportunity creation, and opportunity exploitation). While many entrepreneurism scholars focus on opportunity as the defining attribute of entrepreneurism, this definition is, in some ways, inadequate. Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 VA. L. REV. 1425, 1435-36 (1967) (discussing the difficulties associated with defining entrepreneurism).

[40] *See* ISRAEL M. KIRZNER, COMPETITION AND ENTREPRENEURSHIP 36-37 (1973).

[41] Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 12 (1994).

[42] JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE 66 (Redvers Opie trans., Harvard Univ. Press 1961) (1934).

[43] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 83-84 (2013) ("This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in."); *see also* Smith & Ibrahim, *supra* note 39, at 1541.

[44] Smith & Ibrahim, *supra* note 39, at 1541.

[45] *Id.* at 1540-45 (providing overview of relevant literature).

Some of the scholarship on legal and political entrepreneurism picks up on similar themes. Of particular note in this literature is Professor William Riker's work on "heresthetics," which describes how political actors can alter the political playing field by probing until the actor "finds some new alternative, some new dimension that strikes a spark in the preference of others."[46] As Professors Mark Schneider and Paul Teske put it so well, "Riker's heresthetician thus resembles Schumpeter's entrepreneur: both engage in creative destruction, tearing apart existing political-economic arrangements in order to create new ones."[47] Within this literature, we also see policy entrepreneurs promote policy innovations and skillful attorneys effect legal change through impact litigation.[48] Novelty of ideas and approaches separates entrepreneurs from the crowd and allows them to disrupt legal and political markets, which provides a pathway to alter outcomes.[49]

B. Why Externality Entrepreneurism

We now turn to the question of why entrepreneurs focus attention on externalities instead of on costs and benefits more generally. Here, we discuss a number of reasons grounded in fairness concerns and human cognition that externalities, particularly negative externalities, are much more powerful in the hands of an externality entrepreneur than mere costs.

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[46] WILLIAM H. RIKER, THE ART OF POLITICAL MANIPULATION 64 (1986).

[47] Mark Schneider & Paul Teske, *Toward a Theory of the Political Entrepreneur: Evidence from Local Government*, 86 AM. POLITICAL SCI. REV. 737, 739 (1992).

[48] *See e.g.*, Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI., 738, 739 (1997); Lara Bergthold & Felix Schein, *Moving Forward Social Causes Through Impact Litigation*, HUFFINGTON POST (July 11, 2013, 7:17 PM), http://www.huffingtonpost.com/lara-bergthold/moving-forward-social-causes-through-impact-litigation_b_3582680.html (discussing the role of impact litigation in creating social change).

[49] As discussed above, within the entrepreneurism literature, Joseph Schumpeter has identified five types of entrepreneurial opportunities, including new or improved goods; new methods of production; new markets; new sources of inputs; and new ways of organization. *See* SCHUMPETER, *supra* note 42, at 66. In addition to framing externalities, one could draw corollaries to Schumpeter's five entrepreneurial activities in the political/legal context: developing new or improved policies; implementing new strategies to create law and policy; exploring untapped venues; finding or creating new facts on the ground that provide an impetus for new law and policy; and organizing and expanding networks and coalitions.

As discussed below in Part II, externalities are a major driver for arguments for and against political and legal change.[50] One reason that they receive so much attention is because they are ubiquitous: externalities are everywhere and inhere in almost every real-life decision, whether that decision is to act or to maintain the status quo. Of course, the same is also true of costs and benefits more generally, so why the focus on externalities particularly, rather than simply on costs and benefits or advantages and disadvantages more generally?

We begin with economic thinking, which tells us that externalities matter because parties to a transaction or bargain have no incentive to take those costs or benefits into account when striking their deal. The divergence between the parties' costs and social costs leads to efficiency losses for society as whole. Consequently, economists argue, social policy should help ensure that most — though not all — externalities are internalized by the parties so that their private choices will produce more optimal (efficient) consequences for society as a whole.[51] This view of externalities goes a long way toward explaining why economists approach externalities the way that they do: identifying, quantifying, and internalizing externalities stems societal efficiency losses. This economic perspective on externalities underscores why economic thinkers in the realms of politics and law pay particular attention to externalities and why they often cite externalities as primary justifications for government intervention and regulation.[52]

While economic thinking suggests that externalities are facts to take into account, for the entrepreneur, externalities are fluid — more of an argument or an assertion. In virtually every context in which we are counting mere costs and benefits, an externality is just waiting in the wings to be employed. This means that, in many contexts, the difference between externalities and costs and benefits is elusive, if not illusory. Because almost any benefit or harm has related third-party beneficiaries or bearers of costs, for externality entrepreneurs, the difference between benefits and harms, on one hand, and externalities, on the other, is often primarily a difference in the sophistication of delivery. An externality entrepreneur can choose to frame a problem as one of costs and benefits, on the one hand, or externalities, on the

[50] *See infra* Part II.

[51] As noted earlier, economists traditionally distinguish between pecuniary and technological externalities. *See* Holcombe & Russell, *supra* note 32, at 306-10. Only the latter implicate Pareto efficiency and require internalization to prevent efficiency losses.

[52] *See* sources cited *supra* note 13.

other, depending on which framing better furthers her legal and political goals. Often the externality framing will prove more persuasive. For example, when opposing a government plan, why talk about a particular program costing $5 billion, when one can evoke struggling taxpayers who will bear the burden but will derive little if any benefit from the program at issue? When seeking to encourage carpooling, why focus just on the benefits to those who carpool instead of tapping into the "warm glow" associated with generosity by emphasizing how that choice can benefit so many others?[53]

There are other important but less well explored reasons that externalities, particularly negatively framed externalities, resonate with people — resonance that externality entrepreneurs can likewise harness to galvanize legal and political change. Externalities implicate a number of fairness arguments that tend to resonate with the public and also tap into vital aspects of human cognition that give externalities particular salience in human decision-making.[54]

First, negative externalities (costs inflicted on third parties) raise significant concerns about substantive and procedural fairness. Almost all systems of morality from the Golden Rule to the Veil of Ignorance[55] call on adherents to account for and respect the interest of others and to refrain from selfishly "taking advantage" of them. These concerns have often found expression in law.[56] Much of takings jurisprudence, for instance, is animated by the principle that government should not be allowed to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[57]

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[53] *See* Sun & Daniels, *supra* note 2, at 184 & nn.178–79.

[54] In making this case, we concern ourselves less with deep, academic philosophical thought and more with the kind of "everyday" philosophy that seems likely to resonate with the individuals to whom externality entrepreneurs seek to appeal.

[55] *See* JOHN RAWLS, A THEORY OF JUSTICE 118 (1999).

[56] *See* Paul Rozin, *The Process of Moralization*, 10 PSYCHOL. SCI. 218, 220 (1999) ("Within the context of virtually any moral system, unwarranted harm to others is a moral violation."); *id.* at 218-19 (arguing that the "code of autonomy" — one of "three moral codes around the world" — "emphasizes harm to others as the basis for moral judgment, and is the predominant code in the Western world"); *id.* at 220 (arguing that "the decline of both magic and religion in the modern Western world, coupled with the human need for meaningful accounts, particularly of misfortunes" may have "led to modern Western hypersensitivities to the principal moral doctrine of doing no harm to others") (internal citations omitted).

[57] United States v. Armstrong, 364 U.S. 40, 49 (1960). William Michael Treanor has observed that there is a "remarkable degree of assent across the spectrum of opinion" that the purpose of the Takings Clause is to avoid this kind of unfairness.

These imperatives likewise inform foundational arguments about the proper role and scope of government intervention. For example, the traditional "harm principle" articulated by John Stuart Mill suggests that a person's scope of action should be limited by government only when those actions negatively affect others.[58] Government regulation of private behavior to limit harm to others thus tends to be less controversial than government regulation motivated by more paternalistic impulses. And, indeed, as we have argued elsewhere, a campaign focused on the negative externalities of a particular activity is one of the strongest political "call[s] to action" that one can imagine.[59]

Externalities, particularly when framed as negative externalities, may likewise implicate arguments about procedural fairness: that people who lacked the opportunity to make their case before a particular forum should not be negatively affected by decisions made without their input. These arguments, which often come to the fore in dormant Commerce Clause cases,[60] echo the "no taxation without representation" slogan that galvanized the American colonies against the British crown. Positive externalities may also come into play: for example, it may seem unfair to require someone to confer gratuitous benefits on others.

These arguments can hold sway even when a person is technically represented in the decision-making process, if she nonetheless appears to lack sufficient voice to influence the process. If an externality entrepreneur can make a persuasive case that members of a particular group are "bystanders" being unfairly affected by decisions they cannot effectively control (or significantly, influence), she can likewise harness the sense of unfairness that makes externalities so powerful.

Second, important facets of human cognition — including heightened sensitivity to fairness and the combined effect of loss aversion and the particular salience of involuntary risk — may be at

William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997).

[58] *See* JOHN STUART MILL, ON LIBERTY 11 (Will Jonson ed. 2014) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

[59] Sun & Daniels, *supra* note 2, at 185 ("Strong dominance of negative frames may serve as a 'call to action' and ignite campaigns to redefine legal and social rights and obligations.").

[60] *See, e.g.*, Edwards v. California, 314 U.S. 160, 174 (1941) ("[N]on-residents who are the real victims of the [California] statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy.").

play in earning externalities their privileged place in the hierarchy of human concerns. The fairness implications of externalities discussed above may resonate, not just as persuasive arguments on their own terms, but by tapping into the strong human preference for fairness.[61] Experimental evidence suggests that people exhibit this strong preference for fairness from a very early age.[62] Adults likewise share this affinity for fairness: in an experimental game, adults were "much happier when they receive[d] a financial reward they perceive[d] as fair than when they receive[d] the same reward but perceive[d] it to be unfair."[63]

In addition, because, as noted in the prior section, all externalities can be framed as either positive or negative, human psychology provides a pathway to emphasize or deemphasize particular externalities just by framing them in a positive or a negative light. Specifically, the availability of the negative framing means that all externalities can be discussed in ways that trigger loss aversion. In its simplest form, loss aversion means that people fear potential losses more than they value potential gains.[64] Thus, for any potential externality, externality entrepreneurs have an important opportunity to frame the issue in a way that maximizes its salience by emphasizing the negative externality framing.[65]

While losses alone resonate more strongly than gains, the salience of a loss is even more magnified when the loss is involuntary or beyond one's control. And the defining characteristic of all externalities — their sine qua non — is that they are (or at least are perceived as being) borne involuntarily: decision-makers inflict them on bystanders. While one may sometimes be able to take defensive actions to minimize the risk of actually bearing the externality (by, for

[61] *See* Stephanie Plamondon Bair, *The Psychology of Patent Protection*, 48 CONN. L. REV. 297, 338 & n.247 (2015) (summarizing the "[a]mple psychological evidence [that] supports the idea that humans feel strongly about fairness" and noting that "[m]any scientists . . . believe that our preference for fairness is an evolutionary trait that is hard-wired into our systems").

[62] *See id.* at 338 (explaining that "[b]abies as young as fifteen months old favor experimenters who distribute toys evenly over those who do not" and "[c]hildren as young as three take merit into consideration when asked to distribute stickers").

[63] *Id.* at 338-39.

[64] *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 278 (1979) (laying out their classic argument that, from a rational-actor perspective, people tend to overvalue losses and undervalue gains).

[65] Of course, loss aversion increases the salience not just of externalities, but also of losses more generally.

example, choosing not to send children to a school that admits unvaccinated students or moving away from a polluting factory), the affected person has no effective say in whether the risk is generated in the first instance and, in many situations, would have to take extremely burdensome, unreasonable measures to avoid encountering the risk. Empirical studies of risk perception suggest that the involuntariness of a risk is one factor that influences whether that risk is a "dread risk" that generates a particularly strong response from people.[66] Because dread risks are perceived as particularly threatening, people are more willing to support strict regulation to mitigate externalities that pose those sorts of risks.

In sum, because externalities implicate substantive and procedural fairness and tap into aspects of human cognition that give them particular salience and weight, externalities often occupy a privileged place in the hierarchy of human concerns and thus play an outsized role in shaping politics and law. These characteristics give externalities particular power in "delegitimizing existing moral and legal entitlements to engage in a particular activity,"[67] and thus in galvanizing social and legal change. But still, not all externalities will have equal weight and persuasiveness, and exploiting differences in the persuasive power of externalities is exactly where externality entrepreneurism can really have an impact. We now move on to take a closer look at the potential impact of externality entrepreneurism in politics and law.

II. EXTERNALITY ENTREPRENEURISM IN POLITICS AND LAW

Externality entrepreneurs in both political and legal contexts often point to externalities, particularly negative externalities, to justify government intervention or reallocation of rights. Indeed, many scholars have made the point that externalities set the stage for discussions of government regulation or other sorts of intervention.[68]

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[66] While early research perhaps overstated the importance of (in)voluntariness in influencing risk perception, later research continues to suggest that it is an important factor that heightens perception of risk. *See* Paul Slovic, *Perception of Risk*, 236 SCI. 280, 282-83 (1987) [hereinafter *Perception of Risk*].

[67] Sun & Daniels, *supra* note 2, at 178-79 (describing how campaigns focused on secondhand smoke externalities helped redefine smoking from "a normal, socially acceptable activity (even a right) to an antisocial activity that can be regulated and banished from the public sphere").

[68] *See, e.g.*, David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 722 (1987) ("'Externality' is a slippery concept, one less often used to elucidate a supposed 'problem' than to justify government

Sometimes advocacy focused on externalities in both legal and political forums conforms to traditional economic notions about the treatment of externalities. For example, Justice Alito, writing for the majority in *Koontz v. St. Johns River Water Management District*, recently noted in the land use context that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."[69]

However, externality entrepreneurs don't always take their cues from the economists' playbook. This Part attempts to shine light on the role of externalities in political and legal change and to demonstrate that externality entrepreneurism not only emerges in some unexpected contexts, but is often employed not necessarily to urge internalization of externalities, but to accomplish a variety of other goals that are related only tangentially, if at all, to the traditional economic treatment of externalities. Thus, while we ought to give credit to economists for developing a variety of ways to weigh and monetize nonconventional "goods" — like their use of contingent valuation to derive a value for humpback whales[70] — the economists' approach to externalities overlooks the broader reasons political and legal actors evoke these competing externality frames. The point is not to identify, quantify, and internalize externalities. Rather, the point is much more instrumental: externality entrepreneurism is at work in identifying, selecting, framing, and publicizing externalities for political and legal strategic ends, such as scoring points in a legal argument or political debate, representing a client or constituency, or trying to win over a judge or a potential political ally.

A. Externalities Used to Justify Political Decisions

As noted above, the idea that externalities are used to justify government intervention by the political branches is hardly novel. In fact, many scholars and commentators would take that proposition as

intervention to 'solve' it."); Fred S. McChesney, *Current Excuses for Regulating Futures Transactions: Avoiding the E-Word*, 74 CORNELL L. REV. 902, 903 (1989) ("When the [word externalities] is uttered, would-be regulators have discovered, people ordinarily opposed to regulation may be convinced that government regulation is appropriate . . . .").

[69] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (citations omitted).

[70] FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 158-60 (2004).

a given.[71] Still, the role externalities play in justifying political actions needs further consideration, expansion, and refinement. The role externalities play in politics is often underappreciated because the sorts of harm that traditionally trigger our notions of externalities — harms rooted in economic thinking — are salient in a much smaller subset of cases than those in which externalities (i.e., effects of a decision on third parties) actually come into play.[72] Perhaps the easiest way to illustrate this point is through an example.

Consider the role of externalities in the recent emotional debate surrounding the decision to remove the Confederate flag from the grounds at the South Carolina State Capitol Building. Proponents of removing the flag highlighted a variety of externalities that displaying the flag inflicted. First, members of the legislature claimed the flag causes some citizens pain because it serves as a reminder of the State's former practice of slavery. For example, members said that the flag "brings back horrible memories of slavery"[73] and called it "a symbol of hate."[74] A second sort of externality came in the form of exacerbating the pain of those whose loved ones were massacred in the historic Emanuel African Methodist Episcopal Church in Charleston: "That flag that stands outside has stood as a thumb in the eye of those families in Charleston who lost loved ones, and we all know it."[75] While many of the arguments against the flag carried hefty emotional baggage, others did not. Perhaps chief among these was an argument

[71] *See, e.g.*, sources cited *supra* note 68.

[72] Indeed, Judge Calabresi, in an ambitious new book about the future of law and economics, has argued that economic theory needs to take fuller account of "moral externalities," such as the "mental suffering" that commodifying certain goods imposes on people who have moral objections to that commodification. GUIDO CALABRESI, THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 27-28 (2016). He argues that while these moral externalities differ in some respects from "traditional externalities" because "Coasean internalization is almost always impossible," they are nonetheless real costs that "impact on the legal order that we actually see" and that economic thinking should take into account. *Id.*

[73] Alan Blinder, *South Carolina's Senators Take Step to Remove the Confederate Flag*, N.Y. TIMES (July 6, 2015), http://www.nytimes.com/2015/07/07/us/south-carolina-capitol-confederate-battle-flag.html.

[74] Ben Brumfield, *Jenny Horne's Tearful Confederate Flag Speech Shakes S.C. State House*, CNN (July 9, 2015, 7:04 PM), http://www.cnn.com/2015/07/09/us/south-carolina-jenny-horne-speech/index.html.

[75] Joy-Ann Reid, *The True Story of the South Carolina Confederate Flag Debate*, MSNBC (July 18, 2015, 7:38 AM), http://www.msnbc.com/msnbc/the-true-story-the-south-carolina-confederate-flag-debate.

that taking down the flag would be good "for economic development, for jobs, and all the things we want to do here."[76]

Externalities played a role on the other side of this issue, as well. Some claimed removing the flag would prove harmful to the proud heritage of South Carolinians. In that vein, members of the legislature argued that the flag evoked memories of "ancestors carrying that flag into battle."[77] Another line of attack was the speculation that other Civil War symbols would be next — that some activists were seeking to "go beyond the flag" to "remove vestiges of what the South was."[78]

We could go on, but this is enough fodder to make a few points that illustrate the shortcomings of thinking about externalities primarily, if not solely, through an economic lens. While one could easily couch this debate as a debate about values, history, heritage, the shadow of the Emanuel African Methodist Episcopal Church Massacre, or even economic growth, one could also view each of these as arguments about externalities. One can only speculate about the end goals of the lawmakers participating in this debate. However, one could imagine that externalities were used not only to strengthen arguments or to win over colleagues, but also to accomplish a variety of other purposes, such as signaling to constituents and supporters or even positioning in preparation for a future reelection campaign. Externality entrepreneurism, not economic thinking, led lawmakers to evoke externalities. Instead of using economic value as a common metric to weigh hurt feelings, a proud heritage, and further pain of those who lost loved ones, lawmakers used externalities to appeal to moral intuition, experience, and emotions. Ultimately, this externality campaign helped delegitimize displaying the flag.

B. Externalities Used to Justify Judicial Decisions

Externalities likewise permeate the work of the judiciary, often animating decisions leading to legal change, as well as decisions to maintain the status quo. Indeed, one might argue that a court deals, or at least should deal, exclusively in externalities, if externalities are understood as effects on someone other than the decision-maker. Judges are not supposed to take account of decisions' direct effects on

[76] Richard Fausset & Alan Blinder, *Oratory on Confederate Flag in South Carolina Legislature Shows Deep Divisions*, N.Y. TIMES (July 8, 2015), http://www.nytimes.com/2015/07/09/us/confederate-flag-debate-south-carolina-house.html.

[77] *Id.*

[78] *Id.*

their own well-being. In fact, if such effects exist, they might well warrant the judge's recusal.[79]

The law and economics literature provides a myriad of examples of the ways externalities can play an important role in guiding legal thought. Without doubt, the identification and internalization of externalities undergirds many important areas of law, including environmental laws, consumer protection statutes, and common law tort.[80] But the externalities that have gotten the attention of the vast majority of law and economic scholars tell only part of the story of the role of externalities in the workings of the judiciary. Despite the many externalities at play in judicial cases, there are only a small subset that the judiciary treats in the ways an economist might envision: attempting to identify, quantify, and then internalize them. Instead, the examples discussed below demonstrate that litigants and courts often point to and highlight certain externalities to strengthen arguments and justify decisions in a variety of other ways.

One might be tempted to conclude at the outset that, while the existence of externalities undoubtedly shapes legal doctrine, the space for true externality entrepreneurism in judicial — as opposed to more political — forums is limited. While the potential for various characterizations and framings of externalities remains, the chance to powerfully influence legal outcomes might be substantially limited by the common law and other established legal doctrines that dictate how certain externalities are understood, what baselines they are measured against, and how particular externalities should be attributed among various possible sources or legal causes.

Nonetheless, there remains sufficient indeterminacy in many legal tests and doctrines to allow ample room for externality entrepreneurs working in the judicial arena to leverage a wide variety of externality arguments. Sometimes judges are asked, as in nuisance cases, to decide which party (of a Coasian pair) ought to bear responsibility for a disputed externality. Sometimes they are asked to consider how far

[79] A corollary exists in political arenas as well: when decision-makers are motivated by effects on themselves, we worry that officials are violating the public trust. What might warrant recusal in the judicial context might well warrant a conflict-of-interest disclosure. In the most extreme cases, a decision-maker's receipt of private benefits might warrant public corruption charges, a congressional ethics investigation, or impeachment.

[80] *See, e.g.*, DAVID S. CLARK, ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN & GLOBAL PERSPECTIVES 491 (2007) ("[T]he fundamental role of environmental law is to internalize externalities."); Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 30 (2011) (noting that the tort "system is designed to force the internalization of costs imposed on others").

liability for an externality cascade should extend. Other times, courts have many parties who potentially are to blame for a particular externality, such as air pollution, and courts are asked which if any of them will be held responsible. These kinds of legal inquiries are rarely so constrained by precedent that externality entrepreneurs have no sway.

In many other cases judges are asked — just as policymakers are — to consider and weigh divergent externalities, without quantifying them or even attempting to reduce them to a common metric. Perhaps the most memorable description of the difficult decisions facing judges who are asked to balance competing externalities is the critique Justice Scalia leveled at the *Pike* balancing test, which requires courts to suss out violations of the dormant Commerce Clause by determining if the burden on interstate commerce is grossly excessive in comparison to the measure's local benefits.[81] He said, "This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[82] In response, Professor William Stuntz once said, "Courts make such judgments regularly, and at least in some cases they do not seem particularly hard to make. Some lines are very short, and some rocks are very heavy."[83]

[81] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[82] Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Justice Thomas has similarly said of the same test that it was "no principled way to decide," United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 353 (2007) (Thomas, J., concurring), and that it "invites us, if not compels us, to function more as legislators than as judges," Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting). Other balancing tests have been similarly characterized. *See, e.g.,* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 527-28 (1996) (Thomas, J., concurring) (criticizing the balancing test governing regulation of commercial speech as an "inherently nondeterminate" standard that required courts to "weigh incommensurables" such that "individual judicial preferences will govern application of the test"); Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1073 (2002) ("Balancing effectively defers to the judge the resolution of the key difficulties. She must decide what values to attach to the various interests, considerations, and factors . . . . Not surprisingly, in some cases, the balance struck can seem so precarious that if one were to reverse the court's balancing exercises, the opinion might still be just as persuasive."); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1137 (2005) ("There are no means for methodically and objectively comparing the value of speech and the harm that it causes.").

[83] William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth*

We readily admit that the space for externality entrepreneurism in court is by no means unlimited, but the number of cases with something close to average-sized lines and rocks is by no means a null set. Moreover, externality entrepreneurs often have particular opportunities to influence legal outcomes and doctrine in cases of first impression and in contexts in which the law is evolving and common law baselines are in flux. In both of these contexts, rather than attempting to measure and weigh externalities against each other, or simply looking to internalize them, courts value and account for these externalities in other ways, ways that provide openings for the work of externality entrepreneurs to pursue legal change by framing and leveraging various externalities. The following examples explore the power of identifying, selecting, and framing externalities in the judicial context.

1. Common Law Nuisance

Nuisance law provides fertile ground for externality entrepreneurs. Nuisance law has been famously characterized as an "impenetrable jungle"[84] and lacking "anything resembling a principle."[85] Understanding externality entrepreneurism is particularly important in this context, as it helps explain why nuisance law simultaneously appears so chaotic and so intuitive. What makes nuisance law hard is very basic — even definitional. Lack of predictability permeates the most basic questions: whether a particular activity constitutes a nuisance, how much of a particular activity is allowed before it crosses the threshold, and how background facts (such as type of neighborhood, cultural norms, and resources of the parties) should factor into these decisions. Even where (if anywhere) nuisance appears clear, the results can change according to time, place, and circumstance.

Despite the difficulty of pinning down nuisance law, something about it is extremely intuitive. So even as it is plausible to contend, as Professor Prosser has, that nuisance means "all things to all people,"[86] it is also one of those areas of law in which even when a crystalline

Amendment, 114 HARV. L. REV. 842, 869 n.91 (2001).

[84] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984). In other writing, Prosser has called nuisance "a legal garbage can." William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1949).

[85] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting); Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) (calling nuisance "vague and indeterminate").

[86] KEETON ET AL., *supra* note 84, at 616.

rule cannot be articulated, one can still conclude, "I know it when I see it." While there is nothing but arguments and counter arguments in the weeds, at 10,000 feet, definitional difficulties largely dissipate.

While it may seem counterintuitive, the critical role externalities play in nuisance law helps explain both its unpredictability and its intuitive nature. Nuisance law, of course, is often associated with externalities. Judge Guido Calabresi and Douglas Melamed, in a landmark article, recognized early that the goal of internalizing externalities is a major driver of nuisance law.[87] Indeed, at the 10,000 foot level, one might define nuisance in terms of the externalities suffered by property owners and by the public more generally. However, this explanation does not offer much, other than telling us to carefully measure externalities, once we get into the weeds. What it overlooks is all the framing, positioning, highlighting, and storytelling that lawyers do along the way to take nuisance from a potential cause of action to a favorable judicial decision or settlement. The slipperiness of nuisance is merely a reflection of the many nuances and pivots that externality entrepreneurs introduce to the mix. And the intuitive nature of nuisance reflects the fact that individual cases often turn on who can tell the most compelling externality story.

While externality entrepreneurism permeates nuisance law, its role is clearest when we examine cases in which courts must confront whether new activities or evolving technologies alter what counts as a nuisance. These cases, in which plaintiffs seek to push the envelope of nuisance law, are even harder to resolve by appeals to precedent. Recently, for example, we have seen a number of cases that have applied nuisance law to novel facts related to the generation of renewable energy. Some of the cases challenging the siting of renewable technologies have a familiar feel to them despite the new factual contexts. For example, litigants have sued over the siting of a wind farm, alleging that the wind turbines would constitute a nuisance,[88] with litigants pointing to visual blight and shadow flicker and noises caused by turning turbines.[89]

In some of these cases, the hand of the entrepreneur is particularly visible. In *Prah v. Mahretti*, for example, the Supreme Court of Wisconsin considered the argument that an ordinary shadow of an ordinary building (here a neighbor's home) could constitute a

[87] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115-16 (1972).

[88] Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 419-20 (7th Cir. 2010); Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508 (Tex. Ct. App. 2008).

[89] *Rankin*, 266 S.W.3d at 510.

nuisance because the shadow interfered with a homeowner's solar panels.[90] The court ultimately found that a shadow that interferes with solar energy could constitute a nuisance. While shadows were once considered a cognizable nuisance, most American courts long ago abandoned that view. The *Prah* court breathed new life into this nuisance claim by reemphasizing and recasting the externalities imposed by shadow. The court explained:

> [A]ccess to sunlight has taken on a new significance in recent years. In this case the plaintiff seeks to protect access to sunlight, not for aesthetic reasons or as a source of illumination but as a source of energy. Access to sunlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy.[91]

Wisconsin is not the only state that has been persuaded by this reframing of the relevant externalities to provide new legal protections from the negative externalities that shadows inflict on solar energy production.[92]

The point here is not to determine whether shadows that interfere with solar energy production should or should not be considered a nuisance. Rather the point is to show that this foraging for legal precedence by leveraging arguments surrounding externalities is something that economic thinking about externalities misses. It is a blind spot because in the world of "identify, measure, and internalize," an externality is treated as a matter of fact rather than of assertion. How such an argument is asserted, framed, and packaged is something that economists would want to strip down in order to compare apples to apples. However, lawyers, plaintiffs, and jurists with an externality-entrepreneur mindset are less concerned about comparing apples and more concerned with results-oriented cherry picking.

Another way to conceptualize the breadth of options available to externality entrepreneurs in the nuisance context is to consider surprising contexts in which nuisance has made its way. Quickly consider three examples, one contemporary and two historical. First, the most modern example: a court in California has recently been asked to consider whether the behavior of an autistic child might

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[90] Prah v. Maretti, 321 N.W.2d 182, 191 (Wis. 1982).

[91] *Id.* at 189.

[92] *See* Michael Pappas, *Energy Versus Property*, 41 FLA. ST. U. L. REV. 435, 448-49 (2014).

constitute a public nuisance.[93] The lawsuit, which at the time of writing was in mediation, alleges that the externalities the autistic child is imposing on the neighborhood include hitting and biting other children.[94] The historical examples likewise demonstrate plaintiffs' reliance on a surprising range of alleged externalities. In a very interesting article, Professor Rachel Godsil details the ways that whites attempted to use nuisance law during the Jim Crow era to keep blacks out of predominantly white neighborhoods.[95] These attempts were generally unsuccessful (though not always!).[96] In addition, Professor John Nagle catalogs a wide range of creative nuisance claims rooted in moral judgments in his delightful article, *Moral Nuisances*.[97] While the claims range from lawsuits aimed at everything from nude beaches[98] to cemeteries,[99] perhaps the most surprising example he highlights is that of a (successful!) lawsuit neighbors brought against an unmarried couple alleging that their cohabitation amounted to nuisance per se.[100]

While nuisance law may be one of the most flexible common law doctrines available to externality entrepreneurs, it is hardly the only doctrine that creates ample space for externality entrepreneurism. Professor Kenneth Abrahams has referred to the tort standard of reasonableness, for example, as an example of "unbounded norm-creation."[101] Certainly, entrepreneurs play a substantial role in the push and pull over new and evolving norms in this context. Moreover, externality entrepreneurs are not limited to squishy standards when they forage. The abolition of privity for products liability[102] and the

[93] Tracy Seipel, *Judge Sends Sunnyvale Autistic Boy's Parents, Neighbors Back to Court for Mediation*, MERCURY NEWS (Sept. 22, 2015, 8:21 AM), http://www.mercurynews.com/health/ci_28857391/sunnyvale-controversial-case-about-autistic-boys-behavior-heads.

[94] *See id.*

[95] *See generally* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006) (describing the use of nuisance law to enforce Jim Crow laws).

[96] *Id.* at 520.

[97] *See generally* John C. Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001) (discussing various types of nuisances).

[98] *See id.* at 266.

[99] *See id.* at 288.

[100] *See id.* at 295.

[101] Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1194 (2001).

[102] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 80-81 (N.J. Sup. Ct. 1960).

extension of the implied warranty of fitness to housing[103] provide examples of how reevaluation of relevant externalities can change even clear-cut rules.

2. Externalities and the Judicial Definition of Rights

While externalities exert more influence in nuisance law than we typically recognize, the augmented role of externalities in that context may not come as such a surprise because nuisance law is all about externalities. We now turn to a realm in which we might not expect externalities to play a particularly strong role: the definition of individual rights, particularly constitutional rights.

Even before economists popularized the notion of externalities, some constitutional rights, like the right to just compensation in the event of a taking, were justified as requiring government to internalize externalities. Thus, as noted earlier, in 1960, Justice Black, writing for the Court, explained that the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[104]

In many other contexts, however, externalities seem — at least at first blush — to be irrelevant to the definition and recognition of rights. Indeed, the whole purpose of rights is often to stake out what individuals may do, consequences (to others) be damned. Consider, for example, the freedom of speech protected by the First Amendment. Much of the conversation about freedom of speech explicitly aims to ignore externalities and expressly disavows their relevance. Thus, in *Texas v. Johnson*,[105] the Court supported its holding that flag burning was protected speech by proclaiming: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[106] According to the logic of the case, certain externalities, indeed most externalities, suffered by the audience are legally irrelevant. After all, freedom of speech matters most when third-party listeners take offense or the speech results in some other sort of externality.

Despite its disavowal of externalities, however, when one digs deeper, it turns out that First Amendment law is often all about

103 *See, e.g.*, Lemle v. Breedan, 462 P.2d 470, 475 (Haw. 1969).

104 Armstrong v. United States, 364 U.S. 40, 49 (1960).

105 491 U.S. 397, 411 (1989).

106 *Id.* at 414.

externalities. While offensive speech may have to be tolerated, there are numerous contexts in which the Supreme Court has allowed the government to restrict speech: incitement of "imminent lawless" behavior and violence;[107] fighting words;[108] true threats that evoke fear of violence;[109] patently offensive material;[110] sexually explicit speech that is likely to harm children;[111] and speech that involves the "sexual exploitation and abuse of children."[112] In all of these cases, speech generates serious externalities, though it would be a bit ridiculous to think about internalizing them. Nonetheless, as this enumeration suggests, many of the arguments and rationales offered in delineating the boundaries of speech protection center on externalities. Indeed, even many of the fundamental purposes that the Court says undergird the protection of speech are likewise centered on externalities. We protect speech because it furthers the marketplace of ideas and society's pursuit of truth;[113] because suppressing speech risks government instability[114] and corruption;[115] and because limiting speech interferes with individual autonomy.[116]

The power of the externality story told in any particular First Amendment case or context can shape both the outcome of particular

[107] Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

[108] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[109] *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003) (explaining that the "prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur'") (internal citation omitted).

[110] *See* Miller v. California, 413 U.S. 15, 16-18 (1973).

[111] *See* Ginsberg v. New York, 390 U.S. 629, 636 (1968).

[112] New York v. Ferber, 458 U.S. 747, 757 (1982).

[113] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (referencing a "free trade in ideas"); Milton, *Areopagitica*, *in* FREE PRESS ANTHOLOGY 1, 16 (Theodore Schroeder ed., 1909) ("Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.").

[114] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing "that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones"), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 444 (1969).

[115] *See* N.Y. Times Co. v. United States, 403. U.S. 713, 719 (1971) (Black, J., concurring); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (emphasizing "the value [of] free speech . . . in checking the abuse of power by public officials").

[116] *See Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); *cf.* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

cases and the longer arc of the Court's jurisprudence. One striking example of the influence of a powerful externality story, compellingly told, is the Court's decision in *Virginia v. Black*, which, while striking down the Virginia cross-burning statute at issue in the case, held that Virginia could "outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation" that "signal[s] . . . impending violence" and terrorizes its targets.[117]

Many, including the Virginia Supreme Court, believed that the Court would invalidate cross-burning statutes based on its earlier, unanimous decision in *R.A.V. v. City of St. Paul*, in which the Court overturned a hate-speech ordinance challenged by a teenager who had been convicted for burning a cross in front of an African-American family's home.[118] The Court in *R.A.V.* held that the content-based restriction on speech, even hate speech, was facially unconstitutional.[119] The tide seemed to turn against the straightforward application of *R.A.V.* to all cross burning, however, when at oral argument, Justice Thomas, who rarely speaks during argument, made an impassioned case that cross burning is sui generis because it symbolizes and evokes the "reign of terror" the Ku Klux Klan inflicted on black communities in the South for generations.[120]

While Justice Thomas's position that cross burning deserves no constitutional protection whatsoever did not completely carry the day, his persuasive recounting, both at oral argument and in his dissent, of the externalities that cross burning inflicts on black Americans seemed to sway Justices who were inclined to hold that all cross burning is protected symbolic speech.[121] He recounted, for instance, the effect of the cross burning on the mother in the family, who fell to her knees in tears, overwhelmed by "frustration," "intimidation" and "fear[] for her husband's life."[122] He quoted at length the victim's stark testimony about what cross burning "symbolized to her as a black American:

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117 Virginia v. Black, 538 U.S. 343, 363 (2003).

118 *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

119 *See id.* at 381.

120 *See* Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES (Dec. 12, 2002), http://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on-cross-burning.html (arguing that Justice Thomas's comments captivated the other Justices and shifted "the court's mood . . . while the justices had earlier appeared somewhat doubtful of the Virginia statute's constitutionality, they now seemed quite convinced that they could uphold it as consistent with the First Amendment").

121 *See id.*

122 *See Black*, 538 U.S. at 390 (Thomas, J., dissenting).

'[m]urder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that could happen to a person.'"[123]

As with the Speech Clause, much of the law surrounding the Religion Clauses of the First Amendment is shaped by a clash of externalities: on the one side are externalities imposed by government on religious observers — externalities that might violate the Free Exercise Clause — and, on the other side, are externalities that government accommodation of religious beliefs might impose on non-observers or other government actors trying to do their jobs — externalities that, in some circumstances, might run up against Establishment Clause prohibitions.

One of the great debates in the Free Exercise context has focused on the question of what kind of government-created (second-order) externalities on religious observers "count": only those that are intentionally caused by targeting religion or also those incidentally imposed by neutral government action? The Supreme Court's decision in *Employment Division v. Smith*,[124] which held that religious observers are not entitled to a Free Exercise exemption from generally applicable rules that don't target religion, resolved this question against religious observers, in part, because of the difficulties the contrary rule would pose for government administration of the laws.[125] Thus, the Constitution did not require the government to make accommodations for most religiously motivated behavior. Even though the case itself was against Oregon's Employment Division and the plaintiffs were, in fact, challenging the denial of unemployment benefits after they were fired for violating Oregon's drug laws by smoking peyote in a religious ceremony, Justice Scalia (writing for the majority) framed the battle of externalities as one that pitted the hardships on religious observers, not against the attendant difficulties of administering religious exemptions in unemployment programs, but against the rule-of-law difficulties of creating religious exemptions to generally applicable criminal laws.[126] This framing of the relevant

[123] *Id.* at 390-91.

[124] 494 U.S. 872 (1990).

[125] *See id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'") (quoting Lyng v. Nw. Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988)).

[126] *See id.* at 884-85 (treating respondents' position as a claim for an exemption "from a generally applicable criminal law" that would undermine the rule of law and allow every person to "become a law unto himself") (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

externalities as existential threats to effective government undoubtedly carried more weight than mere administrative burdens.

After *Smith*, the question of when government can voluntarily accommodate (or require private entities to accommodate) religious adherents without running afoul of the Establishment Clause has become critical. In this realm, too, externalities have played a central role in shaping the law. Litigants opposed to such accommodations have emphasized the externalities those accommodations often impose on others (particularly nonbelievers or those of other faiths) and courts have increasingly affirmed that those externalities are constitutionally relevant. For example, in *Cutter v. Wilkinson*,[127] after upholding the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[128] against a facial Establishment Clause challenge, the Court noted that courts should consider third-party burdens in future as-applied challenges.[129]

These third-party burdens — one would be hard pressed to find a more perfect synonym for externalities in common parlance — have become the focus of many Establishment Clause challenges, whether it be the burdens inflicted on employers and coworkers in accommodating an employee or coworker in Sabbath day worship[130] or the burdens on taxpayers of a tax exemption for religious periodicals.[131] In the recent *Hobby Lobby* case, which held that private employers could claim a Religious Freedom Restoration Act (RFRA) exemption to Obamacare's contraception mandate, petitioners emphasized the externalities that exemption would impose on female employees' access to contraceptive care.[132] While this externality entrepreneurism was insufficient to sway the Court against the exemption, the majority was nonetheless attentive to this concern,

[127] Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

[128] 42 U.S.C. § 2000cc-1 (2012).

[129] *See Cutter*, 544 U.S. at 720 ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . .").

[130] *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating a state law requiring employers to let employees have their Sabbath off because the law allowed no consideration of even "substantial economic burdens" on employers or "significant burdens on other employees required to work in place of the Sabbath observers").

[131] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (holding Texas state tax exemptions for religious periodicals fail strict scrutiny under the Establishment Clause and force nonqualifying taxpayers to function as donors).

[132] *See* Burwell v. Hobby Lobby Stores, 573 U.S. 2751, 2788 (2014).

finding that the government had other tools available for mitigating this externality.[133]

These examples demonstrate just a few of the ways externality entrepreneurism occurs in both law and politics. While some specific obstacles to externality entrepreneurism in the courts will be discussed in Part IV.B.6 below, the examples explored above demonstrate that externality entrepreneurism permeates the work of all branches and all levels of government.[134] We will discuss a number of other diverse examples in the next Part, which focuses on how externality entrepreneurs leverage externalities to galvanize change by framing and selecting externalities in a way that maximizes their salience.

III. EXTERNALITY FRAMING AND SALIENCE

As the prior section suggests, externality entrepreneurism is so common and has so much potential for driving legal and political change because there are so many choices available to externality entrepreneurs — so many different opportunities to identify, select, frame, and publicize externalities. Each of these externalities and externality frames has different potential salience with the entrepreneur's target audience. As discussed in Part I.B, externalities, particularly negative externalities, are likely to have more salience than mere costs and benefits for a number of reasons, ranging from the moral intuitions associated with third-party impacts to the emotional and cognitive salience of fairness concerns. Still, some externalities tug on these strings harder than others. Different kinds of saliences (including moral, cognitive, or media saliences) may further amplify or suppress different externality framings. Thus, the successful externality entrepreneur carefully selects which externalities to highlight and how to frame those externalities to maximize potential for galvanizing legal change or protecting a preferred status quo from similar efforts by other externality entrepreneurs.

This Part identifies and discusses different kinds of saliences that an externality entrepreneur may consider in making these choices. We recognize that the boundaries between these types of salience are quite permeable and that the categories are overlapping, rather than mutually exclusive, but each discussion can help elucidate some aspect of the entrepreneur's task. In turn, this understanding helps us become more adept at recognizing and critiquing these strategies. This

[133] *Id.* at 2759-60.

[134] *See infra* Part IV.B.6.

Part thus begins by discussing three sorts of internal, overlapping filters on information: cognitive, emotional, and moral salience. We then turn to two external filters: media and network salience. Finally, we discuss issues of scale: geographical and temporal salience. Externality entrepreneurs may be able to draw on each of these types of salience to strengthen efforts to achieve legal and political goals.

A. Cognitive Salience

An externality entrepreneur choosing which externalities to highlight and how to frame those externalities should recognize that various externalities and externality framings play differently within the human psyche. A number of different cognitive phenomena, identified in the work of behavioral economists and cognitive psychologists, may affect the power of an externality to move a person, individually, or to motivate legal change, more broadly. The work of externality entrepreneurs in exploiting these phenomena often underscores just how far this use of externalities departs from the standard economic understanding that externalities ought to be internalized so that they can be properly accounted for in decision-making. Rather than internalization, entrepreneurs draw out aspects of externalities that heighten our attention to them and thereby increase their salience. While there are a substantial number of ways that this can occur, we focus on four phenomena — loss aversion, the availability heuristic, dread risks, and psychic numbing — that can affect the psychological salience of an externality. These are by no means the only ways entrepreneurs can alter an externality's cognitive salience, but they are important ones and discussed below for illustrative purposes.

The first phenomenon that can alter the psychological salience of an externality is loss aversion. As described in Part I.B, loss aversion means, at base, that people fear potential losses more than they value potential gains. In relation to externalities, the skilled externality entrepreneur choosing which side of a mirrored externality to highlight — choosing whether to describe an externality in positive terms or as its mirrored negative externality — recognizes that employing the negative frame may activate loss aversion and increase the externality's salience.[135] Because of this, the entrepreneur often uses the negative externality as her clarion call: as we have argued elsewhere, "negative externalities . . . are often viewed as a call to action, while positive externalities are viewed merely as an occasion

[135] *See* Sun & Daniels, *supra* note 2, at 177.

for celebration."[136] Thus, for example, as the Introduction suggests, activists arguing to expand childhood vaccination requirements may have more success highlighting the negative externalities that flow from failure to vaccinate than the positive externalities that increased vaccination rates would produce.

Second, to magnify an externality's salience, externality entrepreneurs can also exploit the availability heuristic,[137] "a mental shortcut by which an individual judges the probability of an event by . . . her ability to conjure up examples of that event . . . ."[138] The externality entrepreneur can highlight recent, vivid, and often atypical examples of the externality to suggest that the externality is common and widespread. Entrepreneurs can also highlight negative externality narratives to trigger "availability cascades," in which increasing public attention fixates on a particular risk, often a "dread" risk, and that public attention creates a self-reinforcing spiral of public concern.[139]

Focusing on these kind of dread risks is a third way that externality entrepreneurs can alter, and potentially magnify, the salience of particular externalities. Some externalities, like radiation risks, evoke particularly strong reactions, which might be parlayed into political action.[140] Another way to leverage dread risks is to emphasize the involuntariness of certain externalities. As noted earlier, one factor that gives all externalities particular cognitive salience is that they involve involuntary risk and losses. Involuntariness is, however, a matter of degree, rather than an absolute. Thus, externalities that appear to be particularly "involuntary" because they are not encountered willingly and cannot be avoided through reasonable measures are likely to be among the more powerful externalities in the entrepreneur's quiver. This sense of involuntariness may be heightened when victims are perceived as having little, if any, choice, as is true in the case of children or people who lack the resources to take protective action to avoid an externality's effects. To some extent, externality entrepreneurs can manipulate these notions of voluntariness and associated responsibility as they seek to influence

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[136] *Id.* at 140.

[137] *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999).

[138] Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1150 (2011).

[139] *See* Kuran & Sunstein, *supra* note 137, at 685-88; Sun & Daniels, *supra* note 2, at 178 (discussing how negative externality campaigns are more likely to spark the kind of "availability cascades" Kuran and Sunstein discuss).

[140] *See* Slovic, *Perception of Risk*, *supra* note 66, at 283.

Coasian externality attribution — which party is perceived as creating any particular externality — though existing social and legal norms may preclude some potential attributions.[141]

A third cognitive phenomenon, psychic numbing,[142] likewise shapes the kinds of externalities that effective externality entrepreneurs are likely to emphasize and also underscores the divergence between the economic view of externalities and the realities of successful externality entrepreneurism. From the economic perspective, the magnitude of the externality — the number of people affected and the size of those impacts — would be critical to making the case that an externality needs internalization because it is causing large market distortions and because the resulting efficiency losses would thus more likely outweigh the costs of incentivizing or forcing that internalization.

In contrast, an externality entrepreneur may well discover that emphasizing the number of people affected by a particular externality dulls, rather than heightens, public interest in addressing the underlying problem. Experiments by Professor Paul Slovic and others have demonstrated that people are less likely to take action, such as donating to hunger relief organizations, when the appeal emphasizes the statistical scope of the problem than when the appeal is focused on a single needy child.[143] Perhaps even more startling is the empirical finding that people will donate less in response to an appeal that combines the story of a single child with statistics about how many other children share her plight than when the appeal features only that child.[144]

Together these findings suggest that a successful externality entrepreneur will often be trying, not only to identify a striking, sympathetic victim as the "face" of a widespread problem, but also, to the extent possible, to make that victim the entire (or at least primary) focus of the story. A single identifiable victim is often likely to be the most effective way to galvanize legal change. The recent death of the beloved Cecil the Lion at the hands of a Minnesota trophy hunter provided just such an opportunity for animal rights activists hoping to catalyze legal reforms outlawing big-game trophy hunting. The chair of the Zimbabwe Conservation Task Force explained that the task force

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141 *See* Sun & Daniels, *supra* note 2, at 149-52.

142 *See generally* Paul Slovic, *"If I Look at the Mass I Will Never Act": Psychic Numbing and Genocide*, 2 JUDGMENT & DECISION MAKING 79 (2007), http://journal.sjdm.org/jdm7303a.pdf (reporting a study testing the limits of psychic numbing).

143 *Id.* at 88.

144 *See id.* at 88-90 (explaining that emotional response dissipates as the number of victims increases and, at some point, "collapses").

"want[s] to use Cecil's legend to get [a] moratorium on all lion hunting" and noted that the task force had "been trying to draw attention to this for the last 16 years and it's only coming to fruition now."[145]

These are just four ways of many that entrepreneurs can alter the psychological salience of externalities or select externalities that maximize that salience. A number of other cognitive phenomena suggest the difficulty externality entrepreneurs will face in trying to persuade a constituency that a favored activity, one generally viewed as beneficial, nonetheless creates harms that need to be remedied. The affect heuristic, for instance, suggests that trying to ascribe negative externalities to something that the relevant audience views positively and has some attachment to is going to be difficult.[146] Confirmation bias likewise suggests that people are likely to filter out information that conflicts with their preexisting views and focus instead on arguments that confirm their prior opinions.[147] All of these examples suggest that a successful externality entrepreneur will need to attend to the different cognitive saliences of any externality she considers leveraging.

Moreover, externality entrepreneurs will also need to be aware of the synergies and interrelationships between cognitive salience, and the other two internal filters on information — emotional and moral salience — discussed below. Mounting evidence suggests that individuals are likely to engage in what Professor Dan Kahan calls "politically motivated reasoning" — filtering facts and arguments to help form and reinforce "beliefs that maintain a person's connection to and status within an identity-defining affinity group whose members are united by shared values."[148] These findings confirm that, while it is helpful to consider each of the three internal filters individually, they are often more overlapping and interconnected than discrete and distinct.

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[145] Matthew Weaver, *Cecil the Lion's Cubs Most Likely Killed by Rival Lion, Say Conservationists*, GUARDIAN (July 29, 2015), http://www.theguardian.com/environment/2015/jul/29/cecil-the-lions-cubs-likely-most-killed-by-rival-lion-say-conservationists.

[146] *See, e.g.*, Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000).

[147] *See, e.g.*, Joshua Klayman, *Varieties of Confirmation Bias*, *in* DECISION MAKING FROM A COGNITIVE PERSPECTIVE: ADVANCES IN RESEARCH AND THEORY 385, 386 (Jerome Busemeyer et al. eds., 1995).

[148] Dan M. Kahan, *The Politically Motivated Reasoning Paradigm*, *in* EMERGING TRENDS IN SOC. & BEHAV. SCI. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703011.

B. Emotional Salience

Externality entrepreneurs may also seek to identify and highlight externalities that have strong emotional salience.[149] These externalities often have particular emotional resonance because the externality's "perpetrators" are particularly unsympathetic and we feel driven to prevent them from taking advantage of others or, conversely, because the externality's "victims" are particularly sympathetic and we feel driven to protect them. For example, for some constituencies, highlighting externalities that affect racial minorities, immigrants, the poor, or other historically disenfranchised groups has particular emotional resonance. For others, highlighting externalities that affect property owners or small businesses might strike a more powerful emotional chord. Similarly, for some audiences, externalities inflicted by multinational companies might evoke a particularly powerful emotional response, while for others, second-order externalities inflicted by government intervention may carry the most emotional weight. The most effective externalities may be those that have the most cross-cutting and universal emotional resonance, such as those that affect children.[150]

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[149] There is, of course, significant overlap between emotional and moral salience, just as there is significant overlap between cognitive salience and both moral and emotional salience. *See* Rozin, *supra* note 56, at 218 (noting that "[m]any moral prohibitions relate to disgust, a powerful emotion of negative socialization").

[150] *See id.* at 220 (arguing that the particular "salience of [harm to] children is clear in the contemporary discourse on sidestream smoke, and played and plays a prominent role in American debates about alcohol (e.g., fetal alcohol syndrome, children killed by drunk drivers) and drugs (e.g., crack babies)" and that "[n]atural sympathies for children are amplified by their innocence, their vulnerability, and the larger magnitude of the potential amount of life lost") (internal citations omitted). The importance of the universal resonance of harm to children was illustrated in the recent Supreme Court arguments in *Evenwel v. Abbott*, which considered whether the "one-person, one-vote" principle required Texas to use the number of eligible voters, rather than total population, to draw legislative districts. Evenwel v. Abbot, 136 S. Ct. 1120 (2016). Such a holding would have profound implications for representation in areas with high numbers of non-voters, whether those non-voters are undocumented workers, other non-citizen residents, disenfranchised felons, or children. In particular, many saw the challenge to population-based apportionment as an attempt to limit minority representation by shifting representation away from areas with large concentrations of non-citizen immigrants. Rather than directly confronting controversial issues of race and citizenship, however, the oral arguments focused primarily on the effects the proposed rule would have on representation of children. *See also* Tierney Sneed, *SCOTUS Tip Toes Around Minorities in Important Voting Rights Case*, TALKING POINTS MEMO (Dec. 8, 2015, 2:49 PM), http://talkingpointsmemo.com/dc/scotus-race-immigration-children-evenwel (noting that, in the oral arguments, "the explicit question of minority representation was largely left untouched as the

The legal and political debate over same-sex marriage demonstrates the importance that focusing on externalities with strong emotional resonance can have in either countering or promoting legal change. At first blush, it might seem surprising that the debate over same-sex marriage has been so dominated by discussions of externalities. After all, neither the "liberty" narrative that underpinned many early gay rights victories nor the "equality" narrative that increasingly came to define the gay rights movement seems particularly bound up in externalities. However, as discussed earlier in Part II.B.2, the boundaries of individual rights are often determined by reference to effects on others.

And, indeed, arguments about the effects of same-sex marriage on children have played a critical role in shaping the debate.[151] From the beginning, opponents of same-sex marriage framed the debate largely in terms of the externalities that recognizing same-sex marriage would inflict on individuals not party to those marriages. While a number of such externalities were identified, even those that were nominally about harm to someone or something other than children — such as harm to the institution of heterosexual marriage — were ultimately about potential harm that would come, either directly or indirectly, to children. Opponents focused on harms that recognizing same-sex marriage might cause both to children raised by same-sex couples[152]

arguments focused on what the case means for districts with large populations of children" and reiterating that "[t]ime and time again, the oral arguments returned to the presence of children"). The Court's unanimous opinion rejecting the claim that voter numbers had to be equalized also seemed to give particular weight to the interests of children, singling them out as the primary example of a group that needs representation, even though its members lack the right to vote. *Evenwel*, 136 S. Ct. at 1132 ("Nonvoters have an important stake in many policy debates — children, their parents, even their grandparents, for example, have a stake in a strong public-education system — and in receiving constituent services, such as help navigating public-benefits bureaucracies.").

151 *See* Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2056 (2015) (noting that "the legal advances of the marriage-equality movement have been largely gained through an emphasis on parental responsibility and the best interests of children" and that it "is through their role as *parents*, not as partners, that same-sex couples have gained primary traction as an acceptable model of family organization, and one worthy of state recognition").

152 *See, e.g.*, Ruth Butterfield Isaacson, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CALIF. L. REV. 121, 123 (2010) ("[T]he first child-centered arguments in the same-sex marriage debate focused on the harms to children raised by same-sex parents — specifically, that such children suffer stunted social and psychological development and face stigmatization by their peers.").

and to children of heterosexual couples, whose parents might choose not to marry if the link between marriage and child-rearing was severed or who might be exposed to public school curriculum contrary to their family values.[153] This focus on children taps into widely shared instincts and deeply felt obligations to protect children, with their unique vulnerabilities[154] and as-yet-unrealized potential, from externalities that harm them or burden their future prospects.

The particular emotional resonance of harm to children made focusing on those externalities a potentially potent, but also risky, strategy for opponents of same-sex marriage. Once the public and courts began to sour on opponents' sociological claims that children reared by same-sex couples are worse off than those raised by opposite-sex couples, same-sex marriage proponents were poised to co-opt the powerful harm-to-children externality.[155] The first state court to hold that its state constitution required recognition of same-sex marriages found merely that, while a family headed by a mother and father "present[ed] a less burdened environment" for child development,[156] same-sex couples were capable of developing nurturing parent-child relationships and the state had failed to establish that same-sex marriage had "adverse effects upon the optimal development of children."[157] A decade later, however, when the Massachusetts Supreme Court became the second state court to hold that its state constitution required recognition of same-sex marriage, the court went much further, reasoning that "[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex

[153] *See, e.g.*, *id.* at 123 (describing television advertisements in California's Proposition 8 debate dramatizing the argument that "children *will* be taught about gay marriage" in public schools in the state unless voters block state recognition of same-sex marriage).

[154] *See* Marvel, *supra* note 151, at 2067.

[155] *See* Kirk Mitchell, *Opponents in Gay Marriage Lawsuits Clash over Impact on Kids*, DENVER POST (Mar. 30, 2014), http://www.denverpost.com/news/ci_25455406/opponents-gay-marriage-lawsuits-clash-over-impact-kids (reporting that "[p]laintiffs in gay marriage lawsuits contend that the strategy of the states in attacking same-sex parenting is backfiring because legal bans on gay marriage hamper parents from providing for kids"); *see also* Marvel, *supra* note 151, at 2070-72 (arguing that the 1999 Vermont decision, *Baker v. State*, 744 A.2d 864 (Vt. 1999), requiring at least civil unions for same-sex couples illustrated "the rhetorical power of the child" because the plaintiffs "succeed[ed]. . . by highlighting the vulnerability of the children of same-sex parents," an "affective maneuver [that] proved so successful that from this point on it would prove a critical strategy for same-sex marriage cases").

[156] Baehr v. Miike, No. 91-1394, 1996 WL 694235, *17 (Haw. Ct. App. Dec. 3, 1996).

[157] *Id.* at *17-18.

marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'"[158] Over time, same-sex marriage proponents, encouraged and emboldened by growing judicial acceptance of their narrative, began actively recruiting same-sex couples with children to be the face of the movement and "showcasing a group they had once sidelined: children."[159]

While the battle over harm to children continued in various lower courts, by the time Justice Kennedy wrote the Supreme Court's opinion in *Obergefell v. Hodges*[160] holding that same-sex couples had a Fourteenth Amendment right to marry,[161] same-sex marriage proponents had effectively claimed the rhetorical high ground on harm to children.[162] Justice Kennedy's *Obergefell* opinion first described the general benefits that children enjoy from state recognition of their parents' union, including "permanency and stability."[163] At the crucial rhetorical juncture, the opinion shifted from describing the positive externalities of extending marriage to same-sex couples to the negative externalities of withholding that recognition, heightening the emotional power of the argument that same-sex marriage provides critical protection to vulnerable children:

> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.

158 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003) (internal quotation marks omitted) (Cordy, J., dissenting).

159 Joan Biskupic, *In U.S. Gay Marriage Cases, Children Emerge in the Limelight*, REUTERS (Jul. 20, 2014, 2:12 AM), http://www.reuters.com/article/2014/07/20/us-usa-courts-gaymarriage-insight-idUSKBN0FP02Q20140720 (arguing that *United States v. Windsor*, 133 S. Ct. 2675 (2013), marked a turning point in encouraging this strategy among lawyers representing same-sex couples).

160 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

161 *See id.* at 2602.

162 Justice Kennedy's 2013 opinion in *United States v. Windsor* signaled the Court's likely embrace of this argument. *See* 133 S. Ct. 2675, 2694 (2013) (holding that the Defense of Marriage Act treats same-sex marriages as "second-tier marriage[s]" and thereby "humiliates tens of thousands of children now being raised by same-sex couples").

163 *See Obergefell*, 135 S. Ct. at 2600.

> The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[164]

Once the rhetorical advantage on harms to children shifted from same-sex marriage opponents to proponents, opponents resorted to emphasizing externalities on another potentially vulnerable group — religious adherents who oppose same-sex marriage because of their religious commitments. Arguments about impacts on religious observers were a part of opponents' rhetorical arsenal from the beginning, but they took on increasing importance as the debate progressed. Chief Justice Roberts's dissent in *Obergefell*, for instance, did not explicitly discuss the question of harm to children,[165] but did argue that the majority's opinion "creates serious questions about religious liberty,"[166] and detailed specific harms religious observers might encounter in the decision's aftermath.[167] Justice Alito's dissent likewise emphasized that the decision would be used to "vilify Americans who are unwilling to assent to the new orthodoxy."[168] This tactic was not particularly successful, however. Externalities on religious adherents do not seem to have the same kind of emotional resonance today that they once did, as religious observers have increasingly been depicted as perpetrators of hate and intolerance, rather than innocent third parties whose interests should be protected.[169]

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[164] *Id.* at 2600-01.

[165] Chief Justice Roberts discusses the majority's argument about stigmatizing children of same-sex marriages only to make a slippery-slope argument that the same rationale would presumably apply to polygamous and other nontraditional marriages. *Id.* at 2622 (Roberts, J., dissenting).

[166] *Id.* at 2625.

[167] *See id.* at 2625-26.

[168] *Id.* at 2642 (Alito, J., dissenting).

[169] After the Supreme Court's 1990 decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), an incredibly diverse coalition of groups from across the political spectrum supported the passage of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1993). *See, e.g.*, Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895-96 (1994) ("[RFRA] was supported by a wall-to-wall coalition of religious and civil liberties groups, including the ACLU, People for the American Way, the National Council of Churches, major Jewish organizations, the National Association of Evangelicals, the Mormons, and some conservative religious groups of which most of you have never heard."); Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html (noting the formation of this "unusual coalition" of liberal, conservative, and religious groups in response to the 1990 Supreme Court decision in *Employment Division v. Smith*). It is hard to imagine a similar coalition coming together today. Indeed, the ACLU has recently declared that it no

C. Moral Salience

Much as externalities have power to shape our sense of the moral propriety[170] of a particular activity,[171] the moral power of an externality may shape its ability to generate legal change. Externalities that tap into deeply held moral commitments are likely to be more effective in instigating legal change than those perceived as morally neutral.[172]

A number of factors can influence the moral salience of a particular externality. While all externalities seem to involve some element of unfairness, externalities that seem particularly unfair — that infringe on rights or liberties we hold particularly dear or that target people who are already vulnerable and who lack the resources to respond or protect themselves — may strike a particularly strong moral chord.

One powerful example of how perceived unfairness can generate moral outrage, which in turn drives legal change, was the massive political backlash sparked by the Supreme Court's decision in *Kelo v. City of New London*.[173] The Court held in *Kelo* that government can use eminent domain to take property from one private landowner and transfer it to another private party in order to promote economic development.[174] The decision immediately triggered public outrage that crossed all of the traditional political fault-lines, "cut[ting] across gender, racial, ethnic, and partisan" divides, and provoked angry condemnation "across the political spectrum ranging from Ralph Nader on the left to Rush Limbaugh on the right."[175] Ultimately, more

longer supports RFRA because "it is now often used as a sword to discriminate against women, gay and transgender people and others." Louise Melling, Opinion, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html.

170 While morality can be intuitive and thereby closely related to cognitive and emotion salience, it is often related to an external philosophical commitment and grounded in its own logic. We thus treat it separately here, despite significant overlap.

171 *See* Rozin, *supra* note 56, at 219 (observing that it was the "harmful effects" of secondhand smoke that "play[ed] a special and critical role in American moral discourse on smoking"); Sun & Daniels, *supra* note 2, at 179 (arguing that "antismoking campaigns emphasizing the negative externalities of smoking appear to have helped 'denormalize' smoking, shifting the baseline assumption from smoking as a normal, socially acceptable activity (even a right) to an antisocial activity that can be regulated and banished from the public sphere").

172 *See* Rozin, *supra* note 56, at 218 (arguing that when activities acquire a moral stigma, "[g]overnments may take action, as through taxation or . . . prohibitions").

173 Kelo v. City of New London, 545 U.S. 469 (2005).

174 *See id.* at 469.

175 Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93

than forty states adopted legislation limiting eminent domain in *Kelo*'s aftermath, a legislative backlash likely greater than that triggered by "any other Supreme Court decision in history."[176]

What accounts for the depth and breadth of this backlash? The public reaction was, to some extent, foreshadowed by both the majority and dissenting opinions. The majority, for its part, was careful to note both that condemnations impose real hardships on individuals and that states are free to adopt stricter limits on takings than the Constitution requires.[177] The dissenters denounced the Court's decision, giving voice to the argument that would fuel the public backlash: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process."[178]

At the core of the public backlash was a widely shared judgment that it was immoral for the City of New London to force Susette Kelo, who had "lovingly refurbished" her "900-square-foot Victorian house" and painted it "a vintage shade of salmon pink,"[179] and the other plaintiffs — one of whom was "an octogenarian who had lived in her house since her birth in 1918" and who lived next-door to her adult son[180] — to give up their homes simply because the city decided someone else could make more productive use of their property. Researchers conducting experimental studies of factors that influence people's perceptions of the moral propriety of takings found that, consistent with the outcry in *Kelo*, takings are viewed as particularly immoral if they interfere with significant "personal attachment" or "subjective value" of the owner — attachment that is likely to increase with the length of ownership.[181] The experimental findings suggested

MINN. L. REV. 2100, 2104-05 (2009).

176 *Id.* at 2101-02. Somin argues that much of this legislation was merely symbolic in nature and less than truly effective in limiting the use of eminent domain for economic development purposes. *See id.* at 2120.

177 *See Kelo*, 545 U.S. at 489.

178 *Id.* at 494 (O'Connor, J., dissenting).

179 Charlotte Allen, *'Kelo' Revisited*, WKLY. STANDARD MAG. (Feb. 10, 2014), http://www.weeklystandard.com/articles/kelo-revisited_776021.html.

180 Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 725 (2008).

181 *See id.* at 744 ("A long term ownership not only caused participants to feel worse about moving, but also significantly increased the perception that the move was morally wrong, whatever the purpose of the move.").

that it was the "plaintiffs' relationship to their property in *Kelo*, even more than the nature of the public purpose at issue" that triggered the public backlash,[182] though the suspect purpose also contributed, to a lesser extent, to the public sentiment that the taking violated a deeply held American moral commitment to the sanctity and security of one's home.[183]

That the Institute for Justice, the libertarian non-profit who litigated the case, hand-picked Kelo to be the lead plaintiff at least in part because she was the paragon of a devoted homeowner seems almost beyond doubt.[184] In so doing, the Institute emphasized the externalities of economic-development takings that had the most moral salience and leveraged the resulting moral outrage to drive the public campaign to put the legislative brake on such takings.

In a quite different policy realm, one of the most striking recent examples of reframing an externality to increase its moral salience is Pope Francis's encyclical on climate change.[185] The encyclical seeks to transform environmental harms into social justice issues and to reframe climate change as a moral crisis that creates a moral imperative to act. While the Pope discusses the great damage done to Mother Earth herself,[186] he emphasizes the harms that climate change will inflict on the most vulnerable among us:

> Many of the poor live in areas particularly affected by phenomena related to warming, and their means of subsistence are largely dependent on natural reserves and eco-systemic services such as agriculture, fishing and forestry. They have no other financial activities or resources which can enable them to adapt to climate change or to face natural disasters, and their access to social services and protection is very limited . . . . There has been a tragic rise in the number of migrants seeking to flee from the growing poverty caused by environmental degradation. They are not recognized by

182 *Id.* at 745.

183 *See id.*; *see also* John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 784-85 (2006).

184 JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE 166 (2009).

185 POPE FRANCIS, ENCYCLICAL LETTER, LAUDATO SI' (2015), http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf.

186 *Id.* at para. 2 (describing how Mother Earth "now cries out to us because of the harm we have inflicted on her by our irresponsible use and abuse of the goods with which God has endowed her").

> international conventions as refugees; they bear the loss of the lives they have left behind, without enjoying any legal protection whatsoever. Sadly, there is widespread indifference to such suffering, which is even now taking place throughout our world. Our lack of response to these tragedies involving our brothers and sisters points to the loss of that sense of responsibility for our fellow men and women upon which all civil society is founded.[187]

Whether this emphasis on the externalities that climate change will inflict on the poor and the concomitant reframing of climate change as a social justice issue will be effective in motivating legal change and overcoming the many obstacles to climate change legislation remains to be seen, but this strategy has real potential for destabilizing the existing order and, as will be discussed further in Part III.E below, opening new pathways for coalition building.

D. Media Salience

Externality entrepreneurs can use the media to amplify externality entrepreneurism. The process of the media sifting through potential issues, zeroing in on them, and then prioritizing them is what McCombs and Shaw labeled "agenda-setting."[188] Externality entrepreneurism is part of agenda-setting: it can contribute to building the frame through which stories are reported. Media coverage allows entrepreneurs to model the framing of arguments not only to public but also to those involved in political and legal processes. It can increase our awareness of events, alter the salience we assign to events, and change our interpretation of those events.

There is little need to convince most of those in the political process — where press releases and press conferences are routine — about the power of media in framing issues. Furthermore, lawyers and courts often implicitly recognize that power when, for example, potential jurors are screened out based on their exposure to various media stories.

Scholarship on media salience has attempted to understand what aspects of a story are covered and why and to identify how the media prioritizes the potential issues it might cover.[189] That scholarship

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[187] *Id.* at para. 25.

[188] *See* Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 176-77 (1972); *see also* Maxwell E. McCombs, *A Look at Agenda-Setting: Past, Present, and Future*, 6 JOURNALISM STUD. 543, 546 (2005).

[189] *See* W. Russell Neuman et al., *The Dynamics of Public Attention: Agenda-Setting*

suggests that framing issues is just the first step in evaluating media salience because agenda-setting by the media and the public can interact, altering the relative saliences of an issue among the public and the media. Scholars have found that the more prominent an issue is in the media's agenda, the greater the chances are that it will capture the public's attention.[190] Increasingly, media scholars have focused not only on whether coverage increases public attention but also on whether the media's framing of the stories it covers changes the way the public "defin[es]," "interpret[s]," "moral[ly] evaluat[es]," and perceives potential solutions to the relevant problems.[191]

While pinning down the way that media salience expands and contracts presents difficulties, for the externality entrepreneur, the puzzle is how to steer it, not diagnose it. To examine the ways media salience can be channeled, consider the various ways the media has handled the October 2015 leak of classified government documents about the U.S. government's use of militarized drones. In this news cycle, many stories focused on a profound externality of U.S. drone policy: that drone strikes on purported terrorists often result in the deaths of others not specifically targeted. The worst statistics in the leaked report estimated that over a five-month period almost 90% of those killed by drone strikes on a particular mission in Afghanistan were innocents not specifically targeted by the United States.[192]

Three different headlines suggest the range of media framings of drone-death externalities. The first headline reads, "Drone Strikes Accomplished Less and Killed More, Report Finds."[193] This headline basically highlights the newly discovered information without much spin. A second headline reads, "Obama-led Drone Strikes Kill Innocents 90% of the Time: Report."[194] This headline attempts to pin externalities of the program on President Obama. The third headline reads, "There's a New Edward Snowden: Terrifying Abuses of Drone

Theory Meets Big Data, 9 J. COMM. 193, 193-98 (2014) (providing literature review).

190 *See* MAXWELL MCCOMBS, SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC OPINION 149-65 (2014) (summarizing studies).

191 *See* Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 52 (1993).

192 *See* Andrew Blake, *Obama-Led Drone Strikes Kill Innocents 90% of the Time: Report*, WASH. TIMES (Oct. 15, 2015), http://www.washingtontimes.com/news/2015/oct/15/90-of-people-killed-by-us-drone-strikes-in-afghani/.

193 Kelsey D. Atherton, *Drone Strikes Accomplished Less and Killed More, Report Finds*, POPULAR SCI. (Oct. 15, 2015), http://www.popsci.com/drone-strikes-report-the-intercept.

194 Blake, *supra* note 192.

Program Exposed by Anonymous Government Whistleblower."[195] This last headline attempts to tap into a sense of mistrust of the U.S. military and espionage establishments and to color the leak as an act of heroism. The point of all of this is not that any one of these lenses is right or wrong — even though they might be — the point is that the story provides an opportunity for the media (and those with influence over the media) to recast the same externality for very different purposes.

In contrast, the externalities associated with climate change have proven difficult to harness and, consequently, the issue has not gotten the sort of traction one might expect from a crisis many call the challenge of the Twenty-First Century.[196] Many of the externalities climate change is likely to produce do not readily lend themselves to media coverage: they are slow-moving and global in scale, both of which make the harm difficult to encapsulate, and are produced by complex interactions that require an understanding of complicated science, simplified, if at all, with a graph. Many of the most dramatic externalities are in the future and are a matter of some uncertainty, which is difficult to explain and creates opportunities for confusion and skepticism.[197] Moreover, not only is it difficult to point to any single dramatic event and attribute it to climate change, it is also just as difficult to attribute responsibility for climate change itself to any particular entity, even a country. Climate change may be the challenge of the century, but it is no surprise that it is difficult to get people to focus on the problem.

Choosing externalities with high media salience is, nonetheless, critical to an externality entrepreneur's success in instigating political and legal change. Because the media is often event-oriented, it is somewhat vulnerable to co-opting, both in its coverage and its framing of stories. Within legal scholarship, one of the best examples of manipulation of media salience is found in Professors Timur Kuran and Cass Sunstein's article on availability cascades. They describe many examples and suggest that:

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[195] Jack Mirkinson, *There's a New Edward Snowden: Terrifying Abuses of Drone Program Exposed by Anonymous Government Whistleblower*, SALON (Oct. 15, 2015, 11:04 AM), http://www.salon.com/2015/10/15/theres_a_new_edward_snowden_terrifying_abuses_of_drone_program_exposed_by_anonymous_government_whistleblower/.

[196] *See, e.g.*, Barack Obama, President of the United States, State of the Union Address (Jan. 20, 2015) ("[N]o challenge — no challenge — poses a greater threat to future generations than climate change.").

[197] JAMES PAINTER, CLIMATE CHANGE IN THE MEDIA: REPORTING RISK AND UNCERTAINTY 22-24 (2013).

> [i]n one common pattern, a special-interest group supplies information to members of Congress, who then hold hearings that enable the group to testify and publicize its mission. During the process, journalists help spread the group's message, partly through leaks they receive. Citizens join the fray through letters, phone calls, and participation in talk shows, thus heightening awareness of the identified problem, as happened in the Love Canal and Alar scares. Eventually, laws or regulation are adopted that give the instigating group fresh opportunities to provoke new uproars in order to strengthen the achieved general consciousness.[198]

Of course, since Kuran and Sunstein wrote their article, the Internet has revolutionized the media and the ways in which the public gathers information. It has lowered not only the barriers to entry but also the cost of reaching a potential audience. Newspapers and network television face increased competition from diverse sources, from those that feel similar to traditional media sources (such as online and cable networks) to those that serve a reporting function but are much more informal (like tweets from eye witnesses to news-worthy events).

Given the flattening of the media, externality entrepreneurs are likely to find new media outlets, even though finding an audience for such media is often challenging. The Black Lives Matter movement provides an excellent example of harnessing the power of the media, particularly new media, to frame and highlight externalities.[199] This movement not only highlights mistreatment of individuals and communities of color by police and state and local justice systems, but also provides a frame to think about these challenges: as the product of long-standing but often-ignored racism within justice systems. We see this narrative play out in traditional media coverage, on social media, and in the protests sparked by the deaths of a growing list of people, including Eric Garner, Mike Brown, and Freddie Gray.[200] The title given to the movement communicates the desired frame:

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[198] Kuran & Sunstein, *supra* note 137, at 735.

[199] *See, e.g.*, *Black Lives Matter Activists Outline Policy Goals*, BBC (Aug. 21, 2015), http://www.bbc.com/news/world-us-canada-34023751; Elahe Izadi, *Black Lives Matter and America's Long History of Resisting Civil Rights Protesters*, WASH. POST (Apr. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/19/black-lives-matters-and-americas-long-history-of-resisting-civil-rights-protesters/; Sara Sinder & Mallory Simon, *The Rise of Black Lives Matter: Trying to Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015), http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/.

[200] *See, e.g.*, *Freddie Gray Death: Protestors Highlight Other Police Deaths*, BBC (Apr. 28, 2015), http://www.bbc.com/news/world-us-canada-30341927 (providing examples

> One reason the chant "Black Lives Matter" is so important is that it states the obvious but the obvious has not yet been historically realized. So it is a statement of outrage and a demand for equality, for the right to live free of constraint, but also a chant that links the history of slavery, of debt peonage, segregation, and a prison system geared toward the containment, neutralization and degradation of black lives, but also a police system that more and more easily and often can take away a black life in a flash all because some officer perceives a threat.[201]

One of the reasons that the movement has taken root is that externality entrepreneurs have employed new media to help document these injustices and educate the broader public.

E. Network Salience

Networks can prove enormously important in political and legal processes. Labor unions, church groups, and civic groups may host political events and bring lawsuits, but these activities are only the beginning of their influence. Even networks that do not seem particularly political at first glance can play an important role in the political process. For example, consider a network of people who belong to the same church, farmers who raise crops in a particular area, or people who enjoy hiking and camping. The first of these — specifically evangelical Christians — served as the major fundraising and volunteer base that launched George W. Bush's career.[202] The second of these — specifically Iowan farmers — are intensely courted every four years by presidential candidates before the Iowan Caucuses. The third of these — particularly the Sierra Club — has grown from a social club into one of the most important political groups within environmental politics.[203] Of course, the range of networks is almost limitless, and these examples are just a few of many.

While there are many ways for externality entrepreneurs to tap into the power of networks, we are particularly interested in the ways

of cases protesters have highlighted across the United States).

[201] George Yancy & Judith Butler, *What's Wrong With 'All Lives Matter'?*, N.Y. TIMES: Opinionator (Jan. 12, 2015, 9:00 PM), http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/.

[202] *Religion and the Presidential Vote*, PEW RESEARCH CENTER (Dec. 6, 2004), http://www.people-press.org/2004/12/06/religion-and-the-presidential-vote/; Emmett H. Buell Jr., *The 2004 Elections,* 69 J. POL. 573, 581 (2007).

[203] *A Chronology of the Sierra Club*, 71 CAL. HIST. 160, 167-68 (1992).

arguments can be framed with the hope of reaching and activating networks. Networks often disseminate information relevant to politics and law, and in doing so, filter and color information for those within the network. They are also often the intended targets of information campaigns intended to spark political or legal action.

As an example of this sort of framing, consider again the way that Pope Francis frames part of his argument in favor of care for the earth and, particularly, action on climate change. In his encyclical on the topic, he declares that he "would like to enter into dialogue with all people about our common home."[204]

One of the ways that Pope Francis attempts to extend the dialogue beyond the boundaries of the Catholic faith is by drawing upon the teachings of spiritual leaders outside of Catholicism when framing the externalities of climate change. For example, Pope Francis uses the teachings of the "beloved Ecumenical Patriarch Bartholomew"[205] to frame those harms as spiritual and religious shortcomings, emphasizing "the need for each of us to repent of the ways we have harmed the planet";[206] "the ethical and spiritual roots of environmental problems";[207] and the need to "replace consumption with sacrifice, greed with generosity, wastefulness with a spirit of sharing."[208]

Given that the Patriarch Bartholomew is the leader of about 300 million Christians, probably making him second only to the Pope in his influence among living Christian leaders, the incorporation of his teachings into the Pope's encyclical is not only touching but also extremely helpful in its potential ability to rally Christians outside the Catholic Church.

Sometimes, the work of externality entrepreneurism is much more instrumental in its attempts to activate networks. For example, in the face of a complete political quagmire on climate change in the U.S. Congress, Professors Hari Osofsky and Jacqueline Peel draw a roadmap for a piecemeal strategy that attempts to identify a politically do-able list of actions that could be taken in the United States.[209] The potential actions fall into two baskets. The first strategy would be to focus efforts in Congress on actions that could attract broad support,

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[204] POPE FRANCIS, *supra* note 185, para. 3.

[205] *Id.* at para. 7.

[206] *Id.* at para. 8.

[207] *Id.* at para. 9.

[208] *Id.*

[209] *See* Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 695-96 (2016).

such as disaster resilience and economic development, including green jobs and energy efficiency.[210] The second strategy would focus on forums that are more likely to be friendly to climate-change mitigation measures. For example, one might focus on large metropolitan areas, which tend to be liberal and tend to want increased action on climate change.[211] Both types of strategies have potential for instigating change largely because of their potential for activating relevant networks. For example, energy efficiency appeals to a wide swath of potential constituencies: industries that manufacture energy efficient products; environmental groups; consumer groups who value saving on energy costs; fossil fuel industries that see energy efficiency as a way to become greener; and even utility companies that would not have to expand as much or as quickly if greater efficiency was achieved.[212] Similarly, local politicians in large metropolitan areas and more liberal states have routinely found it politically beneficial to take on climate change, particularly when the federal government stalls on the issue.[213] Part of the success of such local measures is due to local networks — including environmental groups, local politicians and their supporters, and local political parties.

F. Geographic Salience

The externalities associated with any particular situation or issue are likely to be felt at many different geographic scales, which creates opportunities for externality entrepreneurs to highlight the externalities most relevant to the scale at which the relevant policy decision will be made or, relatedly, to try to shift decision-making to a forum at the geographic scale at which the externalities best support her desired policy outcome. As economic theory would predict, there is little doubt that externalities manifested at a different geographical scale than the locus of decision are often ignored or treated very differently in decision-making than those felt by the decision-maker's constituents. That is, different externalities have different geographic salience.

Professors Arden Rowell and Lesley Wexler have undertaken a thorough review, for example, of how U.S. domestic policy-making values "foreign lives" — the lives of those who reside outside of the United States.[214] They found that U.S. regulatory practice on valuation

[210] *See id.* at 702.

[211] *See id.* at 753.

[212] *See id.*

[213] *See id.* at 753-54.

[214] *See* Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499,

of foreign lives was both "highly opaque" and "extraordinarily confusing," but that the "general practice" was to assign a zero value to foreign lives.[215] In addition to the obvious political obstacles to valuing foreign lives that result from foreigners' lack of representation in U.S. decision-making bodies,[216] Rowell and Wexler suggest that a number of the cognitive phenomena discussed above — including psychic numbing and the identifiability of a particular victim — may cause Americans to assign lower values to foreign than domestic lives.[217] In particular, they note that "the qualities that make a person identifiable and relatable — that cue an affective response to that person's plight — may be strongly related to the political, geographic, or social distance of the potential victim from the potential intervener."[218]

Given the differing geographic salience of different externalities, we would expect that externality entrepreneurs try to identify and "match" the externalities they highlight to the geographic scale at which the decision will occur or, alternatively, to channel decision-making to a locus that matches the scale of the externalities that otherwise have the greatest salience. Recent fights over net metering for electricity consumers who install roof-top solar panels help illustrate this strategy. Electricity utilities throughout the country have been challenging the amount of credits that such solar customers receive for sending excess power back into the electricity grid, arguing that solar customers use the grid without paying for that infrastructure and that the credits exceed the actual value of the electricity they contribute.[219] Given the positive externalities typically associated with increased solar energy (and decreased fossil fuel consumption), arguments by electricity utilities that unfair pricing is cutting into their profits aren't likely to be particularly persuasive. However, while green energy confers at least some benefits on local electricity consumers, most of those positive externalities inure to the benefit of others who reside elsewhere.[220]

501 (2014).

[215] *Id.* at 539.

[216] *See id.* at 507.

[217] *See id.* at 514, 516-17.

[218] *Id.* at 517.

[219] *See* Joby Warrick, *Utilities Wage Campaign Against Rooftop Solar*, WASH. POST (Mar. 17, 2015), https://www.washingtonpost.com/national/health-science/utilities-sensing-threat-put-squeeze-on-booming-solar-roof-industry/2015/03/07/2d916f88-c1c9-11e4-ad5c-3b8ce89f1b89_story.html.

[220] This is not to suggest that individuals will always pay less attention to externalities that occur at greater geographic space. *See, e.g.*, Rowell & Wexler, *supra*

The political debate was thus ripe for an externality campaign focused on externalities that hit closer to home, and some utility companies have leveraged exactly this kind of externality — arguing that net-metering creates serious inequities by forcing lower-income electricity consumers in that area to subsidize the power of well-to-do customers who can afford rooftop solar.[221] In Arizona, a flash-point for the net-metering debate, electricity industry supporters have sponsored ads comparing net-metering to a selfish adult bringing his own ice cream to an ice-cream truck, where he uses up so many of the free toppings that the truck's proprietor is forced to raise the price of ice cream for all of his devastated young customers.[222] One Arizona utility has since imposed a $50 monthly fee on many net-metering customers.[223] This action suggests the effectiveness of externality entrepreneurism strategies that leverage local externalities to influence local decision-making.

G. Temporal Salience

Externalities also differ in their temporal dimensions and those differences can influence the current salience of any particular externality identified in an ongoing political or legal debate. Externalities vary across time: some follow immediately upon a particular action while others may not manifest for years, decades, centuries, or even longer. How do these differences in temporal scale affect the persuasive weight people attach to externalities?

One might expect that we would give less weight to externalities that occur in the future than those that occur today, and there are many reasons to believe this is so.[224] For example, most people exhibit

note 214, at 511 (describing how some "cosmopolitan" philosophical commitments dictate that individuals should value harm to people far away identically to harm to people close by).

[221] *See* Warrick, *supra* note 219 (noting that "[i]n some states, industry officials have enlisted the help of minority groups in arguing that solar panels hurt the poor by driving up electricity rates for everyone else," and quoting argument of a utility trade association leader that net-metering opposition is "not about profits" but "about protecting customers" from "unreasonable cost shifts").

[222] Prosper.org *Ice Cream for Fairness!*, YOUTUBE (Oct. 21, 2013), https://www.youtube.com/watch?v=zJ8tToIeQ_U \ (last visited Aug. 10, 2016).

[223] Warrick, *supra* note 219.

[224] This issue is related to, though also distinct from, the issue of discounting — which suggests that future externalities should be discounted so they can be expressed in present-day dollars. Discounting alone does not necessarily imply that future externalities are less weighty than current ones, but assumptions implicit in the selected discount rate might reflect that bias.

an "optimism bias," which — if indulged — suggests that future generations (or future selves) are likely to be better off than the current one. This assumption, in turn, might suggest that future generations will be better able to absorb any hits to their utility and thus that we should be less concerned with externalities that have a long time-horizon than those that pose immediate threats. Moreover, just as spatial distance may diminish the gravitational pull that an externality exerts on our emotions and psyche,[225] temporal distance may also reduce an externality's power.

On the other hand, some evidence suggests that when processing future risks — particularly catastrophic risks that may affect future generations — people tend to put greater (and arguably undue) weight on those risks.[226] This is one manifestation of the dread-risk heuristic mentioned above.[227] For example, the heuristic suggests that while people are unlikely to give enough weight to some future risks of climate change, such as loss of wildlife habitat, people might nonetheless overreact to dire risks, such as habitat loss so severe that it leads to mass starvation. An externality entrepreneur may carefully highlight or downplay particular risks with different temporal scales in order to trigger responses that harmonize with her end goal.

IV. OPENINGS AND OBSTACLES: THE POTENTIAL AND LIMITS OF EXTERNALITY ENTREPRENEURISM

The success of any given externality entrepreneur depends not only on her skill in highlighting and leveraging externalities that have the greatest salience, but also on a wide range of other issues that make change more or less likely. Part IV.A identifies some of these potential openings for policy change and evaluates how successful externality entrepreneurs can exploit (or create) these opportunities, while Part IV.B considers common obstacles to effective externality entrepreneurism, as well as some ways that externality entrepreneurs can attempt to overcome these challenges.

A. Openings for Policy Change

The successful externality entrepreneur will be seeking not only novel externalities and externality framings, but also novel opportunities and openings to maximize receptivity to a particular

[225] *See* Rowell & Wexler, *supra* note 214, at 514-17.

[226] *See* Slovic, *Perception of Risk*, *supra* note 66, 282-83.

[227] *See id.* at 281-83; *see also, supra* Part III.A.

externality campaign and thereby maximize the chance that a particular policy outcome can be achieved. While we have no doubt that externality entrepreneurs will be more successful than we have been in identifying these novel openings when a particular externality will be most salient and an audience most inclined to support the desired legal outcome, we nonetheless attempt in this section to identify some of the circumstances that might create favorable openings for entrepreneurs to exploit, including crisis (both real and manufactured), disruptive technologies, and favorable legal and political climates.

1. Crisis

Externality entrepreneurs revel in crisis because crisis creates openings for externality entrepreneurs to do that which previously seemed impossible. This apt description of how financial crises create policy opportunities illustrates the point:

> Financial crises provide an impetus for reform. Popular sentiment against the financial industry, often in reaction to excesses that accompanied a preceding boom, weaken industry influence over regulators. As discontent galvanizes the public to demand reform, voters coalesce around so-called "political entrepreneurs" ready to provide it. These shifts in the relative political influence of the financial sector and the general public are associated with increased financial regulatory oversight.[228]

All of this is reminiscent of what Rahm Emmanuel said in the context of the auto industry crisis: "Rule one: Never allow a crisis to go to waste. They are opportunities to do big things."[229] While many took exception to Emmanuel's proposed tactics, one thing is certain: it seems good advice for potential externality entrepreneurs.

Why do crises provide openings to externality entrepreneurs? Crises often will heighten the salience of externalities across multiple dimensions. For example, crises can activate both loss aversion and the availability heuristic, thereby amplifying the psychological salience of externalities, particularly negative externalities.[230] Crises can also

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[228] Iman Anabtawi & Steven L. Schwarcz, *Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure*, 92 TEX. L. REV. 75, 98 (2013).

[229] Jeff Zeleny, *Obama Reviewing Bush's Use of Executive Powers*, N.Y. TIMES, Nov. 10, 2008, at A19.

[230] *See* Sun & Daniels, *supra* note 2, at 161.

reinforce the emotional salience of externalities by arousing powerful emotions, such as fear, anxiety, sadness, and sympathy. Crises are likely to evoke strong moral responses, as well. In times of crisis, the conscience calls out clearly. Similarly, when someone is (even arguably) responsible for a crisis, our moral condemnation is often every bit as pronounced as our desire to help victims. Highlighting negative externalities — and identifying those who inflict them — helps persuade the public that those who are responsible are bad actors if not villains. Crises also magnify media salience. The media responds to people's hunger for information when a hurricane hits, a terrorist strikes, or a stock market heads into free fall. Externality entrepreneurs can leverage this media focus by highlighting externalities that heighten individual responses to crisis and thus increase the volume of calls for political and legal responses to crisis.[231] It is no surprise that many of the crises that have captured the public's attention have resulted in major political and legal responses: 9/11 engendered the Patriot Act;[232] the Mickey Mouse measles epidemic, discussed in the Introduction, transformed California's vaccination laws; the BP Oil spill resulted in the greatest environmental fines ever levied by the EPA;[233] and the financial crisis resulted in the bail-out of big banks and the auto industry and paved the way for the Dodd-Frank Act.[234]

Crises need not, however, arise out of unusual events; crises can "arise" when externality entrepreneurs shine light on otherwise ordinary events. The ability of externality entrepreneurs to help engineer a sense of crisis can prove critical. Much of the work of Dr. Marin Luther King, for example, was based on standing up to discrimination that had previously gone unchallenged, at least in the public eye. Making blacks ride in the back of the bus was always wrong, but it did not garner the public's attention until Rosa Parks refused to give up her seat at the front of the bus. This event then became a catalyst for bus strikes and protests in Montgomery, Alabama, that launched the civil rights movement. Similarly, the environmental movement in the 1970s was in significant part an effort

231 *See* Kuran & Sunstein, *supra* note 137, at 694.

232 BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 57 (2006).

233 Daniel Gilbert & Sarah Kent, *BP Agrees to Pay $18.7 Billion to Settle Deepwater Horizon Oil Spill Claims*, WALL ST. J. (July 2, 2015, 6:31 PM), http://www.wsj.com/articles/bp-agrees-to-pay-18-7-billion-to-settle-deepwater-horizon-oil-spill-claims-1435842739.

234 Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 401 (2012).

to highlight the pollution that had plagued the United States for generations, with early publicity efforts culminating in widespread public participation in a carefully orchestrated Earth Day Campaign. Today, the Black Lives Matter movement has largely proceeded by documenting and drawing attention to problems that had gone essentially unnoticed by the general public even as they had become commonplace for racial minorities.

2. Disruptive Technologies

Technological change can also create new inroads for externality entrepreneurs. One of the most dramatic ways that new technologies generate new openings for externality entrepreneurism is by making it much easier to document externalities in powerful ways that help persuade the public to take action. The advent and proliferation of color television in the mid-1960s, for example, proved "a bonanza" for the fledgling environmental movement.[235] Just as the 2015 Gold King Mine spill — in which the EPA accidentally released millions of gallons of mine waste containing heavy metals into a tributary of the Animas River in Colorado — was vividly captured in video footage that showed the river running a sickening yellow-orange,[236] color television allowed environmental activists in the 1960s to bring striking images of water and air pollution into the American home: "A yellow outfall flowing into a blue river does not have anywhere near the impact on black and white television that it has on color television; neither does brown smog against a blue sky."[237] Similarly, the explosion of smart phones, Twitter, and even police body cameras, has proliferated horrific images of police brutality — particularly against African Americans — that have helped fuel the Black Lives Matter movement. Especially when shared through social media, these images give immediate voice and visibility to the externalities that police brutality inflicts on individuals and communities.

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[235] James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, *in* READINGS IN CYBERETHICS 273, 283 (Richard A. Spinello & Herman T. Tavani eds., 2d ed. 2004).

[236] Mariano Castillo, *Pollution Flowing Faster than Facts in EPA Spill*, CNN (Aug. 10, 2015, 10:20 PM), http://www.cnn.com/2015/08/10/us/colorado-epa-mine-river-spill/ (observing that "[t]he mustard hue of the Animas River in Colorado — the most visible effect of a mistake by the Environmental Potential Agency that dumped millions of gallons of pollutants into the water — is striking" and that "[j]ust a glance at a photo of the orange-yellowish slush is enough to know that something seems wrong").

[237] Boyle, *supra* note 235, at 283.

Technological change can also create openings for externality entrepreneurs in another important way: the advent of a new technology can create a powerful argument for displacing older technologies that generate higher levels of externalities (or externalities with greater salience). Externality entrepreneurs can thus argue that this new technology should be substituted for the old by drawing stark comparisons between the harms created by the new and old technologies. This is the current plight of coal mining operations and coal-fired energy, as they are increasingly contrasted with clean-burning natural gas and renewable energies. The invention of shatter-resistant glass, the seatbelt and air bags, the catalytic converter, and hybrid technologies have changed the benchmark for measuring externalities and thus, in many cases, the standards used in the auto industry. Many have argued that the real key to getting greenhouse gas reductions is finding new technologies that will serve as adequate substitutes and thereby enhancing the ability of externality entrepreneurs to highlight the externalities of existing technologies.

3. Political or Legal Climate

Pressure for legal or political change does not exist in a vacuum; rather, it is filtered through various legal and political institutions that can amplify (or muffle) calls for change. Institutions have many facets: on one level, they are made up of traditions, precedent, rules, and competing priorities. When these aspects of institutions are aligned favorably, the change externality entrepreneurs seek is purchased at a much more affordable price. These institutions are also made up of people, and calls for change may (or may not) be met by particular champions well positioned to propose bills, extend legal precedents, or draft agency rules. In some instances, interest groups are better aligned, on balance, to push the work of an externality entrepreneur forward. Sometimes salience that presses for action, even if comes on strong initially, will dissipate fairly quickly; in a political or legal climate favorable to action, the cogs will move more quickly and change may be well underway before the salience of the galvanizing externality fades.

Political and legal institutions are not just asked by externality entrepreneurs to respond to a call for change, but also to determine what change will look like. After the BP Oil Spill, change could have meant reallocating regulatory authority to monitor deep sea drilling; expanding environmental or worker's safety protections in legislation, regulations, and common law; or restricting or banning deep sea drilling going forward. The call for change rarely comes with explicit

instructions or binding obligations. Thus, externality entrepreneurs can tailor narratives that speak to constituencies within the political and legal institutions that are most receptive to the type of change the externality entrepreneur hopes to instigate.

B. Obstacles

The would-be externality entrepreneur will undoubtedly confront, not just openings favorable to change, but a whole host of obstacles as she attempts to identify, select, frame, and publicize particular, salient externalities to generate preferred legal and political outcomes. Not least of these challenges is the likelihood that other innovators will run conflicting externality campaigns opposing the entrepreneur's preferred outcomes. Many of these challenges inhere in the very nature of entrepreneurism: like all entrepreneurs, externality entrepreneurs must choose where to focus their limited resources and, like all entrepreneurs, they risk choosing badly. Other obstacles to externality entrepreneurism are structural — created by existing legal and political institutions, such as the multiplicity of forums in which some externality entrepreneurs must simultaneously operate and the legal rules that govern judicial forums. This section addresses some potential obstacles to successful externality entrepreneurism, including the challenges associated with opportunity costs, shared or co-optable externalities, network conflicts, forum conflicts, externality stalemate, and legal roadblocks to externality entrepreneurism in the judicial forum. Throughout, it also identifies some ways externality entrepreneurs might try to navigate those obstacles or mediate potential conflicts.

1. Opportunity Costs of Externality Selection

Like all entrepreneurial choices, the choices of externality entrepreneurs have opportunity costs. Committing resources to highlighting a particular externality means that other potential externality campaigns may be abandoned, delayed, or deemphasized. Public attention, too, is a limited resource that may prevent even well-funded externality entrepreneurs from running multiple, high-profile externality campaigns at the same time. Thus, when externality entrepreneurs identify, select, and leverage particular externalities, they necessarily ignore or downplay others.

These challenges are apparent in Planned Parenthood's defense against recent attempts to defund it after the release of controversial videos showing its employees discussing collection and pricing of fetal

tissue. In defending itself, Planned Parenthood and many of its supporters have focused on a particular set of externalities that defunding would arguably produce: that many women would be deprived of basic health care services, including breast cancer screenings and other preventative care. [238] While highlighting its preventative care services, Planned Parenthood has repeatedly underscored that only "three percent of all Planned Parenthood health services are abortion services."[239]

Some supporters of Planned Parenthood have expressed concern that, in choosing its focus on preventative care externalities, the organization is abandoning, and perhaps endangering, what those supporters view as its core mission: providing abortion services. They argue that Planned Parenthood must engage in a full-throated public defense of abortion itself, by emphasizing the externalities of limiting abortion access, rather than attempting to deflect criticism by focusing

[238] *See* Lucy Bradley-Springer, *Standing Up for Planned Parenthood*, 27 J. ASS'N NURSES IN AIDS CARE 1, 1 (2016) ("Planned Parenthood provides important services in the overall effort to improve health care in the United States and in other countries around the world."); *see also* Raegan McDonald-Mosley, *Tearing Down the Fetal Tissue Smokescreen*, 373 NEW ENG. J. MED. 2376, 2376 (2015) ("These attacks [on Planned Parenthood] . . . ultimately harm the women, men, and young people who rely on [it] for affordable, specialized, high-quality health care . . . . In the wake of these [attempts], the health and medical community has attested to Planned Parenthood's critical role in providing reproductive health care to millions of Americans — care that could not be replaced if [its] opponents succeeded in eliminating Planned Parenthood health centers . . . ."); George P. Topulos et al., *Planned Parenthood at Risk*, 373 NEW ENG. J. MED. 963, 963 (2015) ("The contraception services that Planned Parenthood delivers may be the single greatest effort to prevent the unwanted pregnancies that result in abortion."); Ross Douthat, *There Is No Pro-Life Case for Planned Parenthood,* N.Y. TIMES (Aug. 5, 2015, 9:48 AM), http://douthat.blogs.nytimes.com/2015/08/05/there-is-no-pro-life-case-for-planned-parenthood/ ("[E]ven though Planned Parenthood performs hundreds of thousands of abortions every year, . . . to oppose channeling public dollars to its family planning operations is to be objectively pro-abortion, because those operations objectively prevent many more abortions still."); Michael Hiltzik, *The Cost of Defunding Planned Parenthood: Less Healthcare for 650,000 Women*, L.A. TIMES (Sept. 22, 2015, 7:56 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-cost-of-defunding-planned-parenthood-20150922-column.html (arguing that defunding would deprive "low-income women" of basic health care services); Valerie Richardson, *Planned Parenthood's Patients, Services Drop As Its Federal Funding Jumps*, WASH. TIMES (Dec. 29, 2015) (quoting Eric Ferrero, Vice President of Communications for Planned Parenthood), http://www.washingtontimes.com/news/2015/dec/29/planned-parenthoods-patients-services-drop-its-fed/?page=all ("90 percent of what [Planned Parenthood does] nationally is lifesaving cancer screenings, birth control, STI testing and treatment, and other preventative care.").

[239] *Planned Parenthood at a Glance*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/about-us/who-we-are/planned-parenthood-at-a-glance (last visited Jan. 26, 2016).

on the loss of more politically palatable preventative care services.[240] Otherwise, they worry, Planned Parenthood is effectively conceding that abortion itself may not be worth defending, and that implicit concession will undermine long-term support for Planned Parenthood's core mission.[241] The obvious rejoinder from other supporters is likely to be that, when the very enterprise is in danger, the best strategy may be preserving the institution so it can live to fight another day. These challenges are typical of the opportunity costs that externality entrepreneurs confront, including the potential for splintering and division among potential entrepreneurial allies.[242]

2. Shared or Co-optable Externalities

Another obstacle externality entrepreneurs may face occurs when the most salient externality, the one most likely to galvanize a particular legal or political change, can be claimed or co-opted by the

[240] *See, e.g.*, Tara Culp-Ressler, *You Can't Separate Abortion From the Rest of What Planned Parenthood Does*, THINK PROGRESS (Aug. 12, 2015, 4:04 PM), http://thinkprogress.org/health/2015/08/12/3690714/planned-parenthood-abortion-separate/ ("[S]eparating out abortion care" from other preventative services for women when defending Planned Parenthood "reinforces the stigma against abortion."); Katha Pollitt, *How to Really Defend Planned Parenthood*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/05/opinion/how-to-really-defend-planned-parenthood.html (arguing that abortion supporters should not couch their position in defensive terms). For further explication of the argument that Planned Parenthood should focus on defense of its core mission, see also KATHA POLLITT, PRO: RECLAIMING ABORTION RIGHTS 41-42 (2014).

[241] *See, e.g.*, Natalie Johnsen-Morrison, *We Must Proactively Defend Women's Right to Choose an Abortion*, MINNPOST (Aug. 13, 2015), https://www.minnpost.com/community-voices/2015/08/we-must-proactively-defend-womens-right-choose-abortion ("I regularly attend the local St. Paul Good Friday Planned Parenthood Clinic defenses and was appalled at one point when it was strongly suggested that we not use the word abortion on our placards, but use the words 'defend women's health.' I'm afraid that Planned Parenthood and NOW's strategy of relying on well-intentioned politicians and the Democratic Party to defend women's rights has actually enabled the anti-choice offensive and the chipping away of the historical gains women have won."); Monica Weymouth, *Here's the Problem With That Popular Planned Parenthood Defense*, PHILA. MAG. (Sept. 23, 2015), http://www.phillymag.com/news/2015/09/23/defund-planned-parenthood-defense/ ("[W]hen we rush to highlight what small part abortions play in their mission and how little taxpayer money is used to fund them, we seem to forget something. And that something is important: Abortions are legal . . . . When we point out that taxpayer money very rarely covers abortions, we should be ashamed that we compromised the access of low-income women, not smug that a Republican lawmaker got the facts wrong.").

[242] These challenges also demonstrate potential trade-offs between externality campaigns that are likely to produce short-term or long-term benefits for a particular externality entrepreneur or its clients.

opposition. When externality entrepreneurs on the other side of an issue can tell a different causal story about an externality — either about the attribution and causes of the externality or about the best solutions to minimize or eliminate it — the original entrepreneur may find her efforts stymied or even turned against her. The discussion of externality entrepreneurism in the same-sex marriage debate in Part III.B provides a prime example of how a powerful externality such as impacts on children can "flip" and become a central argument for the other side of the debate.

The shared externality phenomenon may also help explain, in part, why efforts at gun control have been largely unsuccessful, despite a continuous stream of high-profile, highly publicized events that have put a face, indeed many faces, on the victims of gun violence. Many expected that these events would create significant openings for policy change and have been surprised and dismayed when they have not. As one headline in *The Baltimore Sun* opined, "If Sandy Hook didn't change gun laws, nothing will."[243] The article quoted the tweet of a British political commentator who asserted that "Sandy Hook marked the end of the U.S. gun control debate. Once America decided killing children was bearable, it was over."[244]

While that is certainly one possible explanation for the impasse in the U.S. gun control debate, another is that gun control opponents have effectively claimed the children-victims-externality as their own by arguing that criminals will always have access to guns and that only armed citizens can stop mass shootings.[245] Under this view of the facts, gun control would actually exacerbate the risk of gun violence in the United States by leaving only the "bad guys" with guns. Recent attempts by gun control advocates to break the impasse by emphasizing other externalities of gun violence — including the

[243] Leonard Pitts, Jr., *If Sandy Hook Didn't Change Gun Laws, Nothing Will*, BALT. SUN (Sept. 3, 2015, 6:00 AM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-pitts-20150903-story.html.

[244] *Id.*

[245] *See, e.g.*, Fernando Santos, *In Wake of Shootings, a Familiar Call to Arms Drives Latest Jump in Weapon Sales*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/us/in-wake-of-shootings-a-familiar-call-to-arms-drives-latest-jump-in-weapon-sales.html (noting that many Americans respond to mass shootings with increased desire to own weapons to protect themselves and their families: "[i]n the wake of mass shootings in Paris, Colorado Springs and San Bernardino, Calif., Americans are once again arming themselves — stocking up on guns and ammunition, bringing weapons into their daily routines and requesting refresher courses from firing ranges").

devastating effects on victim's families[246] and on victims who are seriously injured but survive[247] — are likely to flounder for similar reasons: gun control opponents can easily claim that those externalities are also best avoided by arming law-abiding citizens rather than limiting access to guns. In contrast, some other specific gun externalities — such as accidental gun deaths or gun suicides[248] — would be much harder for gun control opponents to co-opt by claiming that rules preventing gun ownership actually cause and exacerbate the problem.[249]

A related challenge for externality entrepreneurism occurs when opponents find a way to neutralize the most salient externalities that the entrepreneur has leveraged in her efforts to induce a desired legal change, thus abating the demand for that reform. For example, after the U.S. Supreme Court invalidated the federal RFRA as applied to states,[250] many states adopted — and more states considered adopting — state RFRAs that would provide broad, robust protection to religious practice.[251] The primary externality narratives driving

246 Editorial, *The Children Left Behind After Mass Shootings*, N.Y. TIMES (Nov. 30, 2015), http://www.nytimes.com/2015/12/01/opinion/the-children-left-behind-after-mass-shootings.html (detailing the suffering of children of gun violence victims and noting that "this unnecessary suffering" also extends to parents, grandparents, grandchildren, nieces, nephews, husbands, wives, brothers, aunts, "lifelong friends," and "beloved colleagues" of the victims). The editorial explicitly seeks to refocus the externality debate, noting that "[s]ince no amount of dead bodies seems enough to spur lawmakers to rein in access to guns, let's focus on the living — the children gun violence leaves behind." *Id.*

247 *See* Eli Saslow, *After a Mass Shooting: A Survivor's Life*, WASH. POST. (Dec. 5, 2015), http://www.washingtonpost.com/sf/national/2015/12/05/after-a-mass-shooting-a-survivors-life/ (detailing the many ongoing physical and emotional challenges faced by one survivor of the Umpqua Community College mass shooting in November 2015).

248 *See* Allan Smith, *Bringing a Gun into Your Home Is 'Like Bringing a Time Bomb into Your House,'* (Jan. 7, 2016, 2:46 PM), http://www.businessinsider.com/having-a-gun-in-your-home-is-like-bringing-a-time-bomb-into-your-house-2016-1 (discussing correlations between gun ownership and suicide rates).

249 These specific externalities could, however, be reframed more broadly and lumped into a general weighing of deaths caused and prevented by gun ownership or potentially countered by popular slogans like "Guns don't kill people, people kill people," although those arguments might be least effective when dealing with the accidental deaths of children.

250 City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding that Congress lacked the power to require states to conform to RFRA's provisions).

251 Vikram David Amar & Alan Brownstein, *The (Limited) Utility of State Religious Freedom Restoration Acts (RFRAs): Part Two in a Two-Part Series of Columns*, JUSTIA VERDICT (May 8, 2015), https://verdict.justia.com/2015/05/08/the-limited-utility-of-state-religious-freedom-restoration-acts-rfras.

passage of these acts were abusive land-use regulations and deprivations of state prisoners' religious liberty.[252] The passage of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA)[253] in 2000 addressed these two specific concerns, thereby depriving state RFRA advocates of the coherent narratives they had relied on to promote state RFRAs. Indeed, Professors Vikram David Amar and Alan Brownstein have suggested that RLUIPA's existence continues to thwart both the passage and the successful political defense of recently proposed state RFRAs by divesting RFRA proponents of "easily described categories of state regulatory activity that burden religion in ways most people find problematic," thereby rendering "a modern state RFRA" an apparent "solution in search of a problem."[254]

3. Network Conflicts

Externality entrepreneurs may also confront serious obstacles when their strategy requires mobilization of multiple networks and an externality that resonates with one network as a strongly positive externality of a proposed change resonates with another network as a strongly negative externality. Such challenges confront the emerging coalition urging significant criminal justice and sentencing reform. For some networks inclined to support reform, reducing the sentence of convicted criminals is a positive externality that would facilitate the rebuilding of lives and families.[255] For other networks, a reduced

[252] *Id.* ("A pair of real-life settings received particular attention. One was land-use regulation. Religious congregations, it was argued, often found it extremely difficult to develop land to construct new houses of worship because of restrictive state and local zoning laws. . . . The other narrative involved the religious freedom of prison inmates. It was widely believed that state prison authorities imposed relatively arbitrary burdens on the ability of inmates to engage in worship or other religious activities.").

[253] 42 U.S.C. § 2000cc (2012).

[254] Amar & Brownstein, *supra* note 251. Amar and Brownstein argue that, after RLUIPA, "the only unifying narrative that describes a general problem, as opposed to isolated cases, to which modern RFRAs might be directed is the narrative grounded in religious objections to same-sex marriage and the claims for exemptions from civil rights regulations that prohibit discrimination on the basis of sexual orientation." *Id.* This avoiding-antidiscrimination-laws narrative has not proven particularly persuasive.

[255] Andrea Noble, *House Bill Would Reduce Prison Time for Some Offenders*, WASH. TIMES (Oct. 8, 2015), http://www.washingtontimes.com/news/2015/oct/8/house-bill-would-reduce-prison-time-some-offenders/?page=all (quoting House Representative arguing that criminal justice reform reducing minimum sentences "will help millions of families here in the United States"); *see* James Michael Bowers, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*, HUM. RTS. WATCH (Nov. 30,

sentence may be viewed as a significant negative externality of any reform policy — an externality at best to be tolerated as the cost of achieving other important goals, such as saving money.[256] This divergence may be a substantial impediment to criminal justice reform, as any significant justice reform is likely to require considerable coalition building across multiple networks to succeed.

Externality entrepreneurs have a number of different potential tools for mediating this type of network conflict. Coalition builders can work through different spokespersons or "vouchers"[257] who have credibility with different networks and hope, that as some evidence suggests, people will mainly listen to and credit the views of the spokesperson appealing to their network and discount or ignore the externality narrative coming from other quarters.[258] The work-product of these loose, divided coalitions is likely to be what Professor Cass Sunstein has called incompletely theorized agreements,[259] which avoid articulating underlying theory, rationales, and purposes.

Alternatively, these network conflicts can sometimes be mediated by choosing a forum or level of government (such as local politics) at which these conflicts are less severe or in which a particular network

2012), https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons (noting that a "prisoner's family experiences anxiety, pain, and hardship when a family member is incarcerated and unavailable to assist other family members"); *Why Should I Care?*, FAMS. AGAINST MANDATORY MINIMUMS (FAMM), http://famm.org/sentencing-101/the-facts/ (asserting that mandatory minimum sentences "[t]ear families apart, and distort our system of justice").

256 Marc Mauer, *Sentencing Reform amid Mass Incarceration — Guarded Optimism*, 26 CRIM. JUST. 27 (2011) (recognizing that reducing prison sentences may compromise public safety, especially in low-income areas and also citing the fiscal crisis as a motivating factor for policy change); Andrew Gargano, *Federal Sentencing Reform Can Reduce Prison Crowding and Save Money*, HILL (Apr. 29, 2015, 6:00 AM), http://thehill.com/blogs/congress-blog/judicial/240340-federal-sentencing-reform-can-reduce-prison-crowding-and-save (asserting that reducing prison sentences would both slow prison overcrowding and save $24 billion over 20 years).

257 Robert R.M. Verchick, *Culture, Cognition, and Climate*, 2016 U. ILL. L. REV. 969, 984 (2016).

258 This approach to promoting criminal justice reform may have been derailed, at least temporarily, on the Republican side by presidential candidate Ted Cruz's vitriolic attack on Republican Senator Mike Lee's criminal justice reform bill. *See* Molly Ball, *Why D.C. Hates Ted Cruz*, ATLANTIC (Jan. 26, 2016), http://www.theatlantic.com/politics/archive/2016/01/why-dc-hates-ted-cruz/426915/ (recounting Cruz's surprise attack on the bill, in which he claimed that it would result in the early release of more than 7000 violent criminals).

259 *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995); *see also* Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1, 1 (2007).

dominates. Much of the early policy movement on climate change issues, for example, has taken place at the local level.[260] Among the many reasons that climate change externality entrepreneurs have been more effective at pressing their case at the local level may be the ability to cast one of the externalities most feared by climate change opponents — widespread government intervention and its associated second-order externalities — as less threatening at the local than the federal level and the ability to target cities where the affected network is receptive to addressing climate change (perhaps even more receptive because of the lack of policy movement on the federal level).[261]

4. Forum Conflicts

Another potential obstacle to an externality entrepreneur's ability to capitalize on a particular externality to galvanize political and legal change is that externalities that have great resonance in a particular forum, such as a legislative debate about a proposed policy change, may lack resonance in another forum, such as a court, in which a particular policy is also being pursued or in which a decision-maker's assent is necessary for the actions of the first forum to take effect. The differing salience of particular externalities in different forums can force externality entrepreneurs to try to segment and divide their appeals between forums in ways that may lessen the rhetorical impact of their favored strategy or otherwise blunt the overall effectiveness of a particular strategy. An externality entrepreneur will be most stymied by this forum divide when the challenge is not that the externality that is most effective in provoking change in one forum lacks resonance in the other forum, but that that externality instead provokes a conflicting outcome in the second forum by, for example, affirmatively requiring a court to invalidate a legislative decision.

[260] *See, e.g.*, Janet K. Levit & Hari Osofsky, *The Scale of Networks?: Local Climate Coalitions*, 8 CHI. J. INT'L L. 409, 410 (2008) (noting state and local leadership in mitigation efforts); Verchick, *supra* note 257, at 1009 (noting that most adaptation efforts are the product of action on the local and regional levels). For a discussion of the motivation behind local policy initiatives, see Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1024 (2006) (noting that one reason state leaders have taken initiative on climate change is because their efforts "receive[] a disproportionate amount of media coverage on the issue in part because of the contrast between their proactive approach and the federal government's more passive stance").

[261] *See, e.g.*, Verchick, *supra* note 257, at 993-94.

This forum conflict may play out most often and clearly in divisions between externality salience between the political branches and the courts. Legal doctrine sometimes requires litigants to develop litigation strategies that focus on externalities that are far afield from the litigants' actual concerns but that have the most legal salience within a particular doctrinal framework. One striking example of this phenomenon was the justification of the landmark civil rights legislation of the 1960s under the Commerce Clause. The *Civil Rights Cases*, decided in 1883, held that Congress could not use its authority under Section 5 of the Fourteenth Amendment to regulate private action.[262] This precedent effectively precluded Congress and litigants from arguing for the most natural constitutional basis for Congress's power to enact the civil rights statutes — the Fourteenth Amendment — and thus from focusing their legal arguments on the most obvious harms of discrimination. Instead, at least in the courts, civil rights advocates were relegated to arguing about the laws' (sometimes much more attenuated) effects on interstate commerce.

One of the most important cases challenging the statutes was *Heart of Atlanta Motel v. United States*,[263] in which the Supreme Court upheld the application of the public accommodation provisions of the 1964 Civil Rights Act to a 216-room motel in Atlanta, Georgia.[264] Other than a passing reference to the fact that the Senate Committee Report "made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments,'"[265] the Court's opinion makes no mention of the primary harms of racial discrimination and segregation. Rather, the opinion focuses on the economic effects of racial discrimination and the concomitant effects on interstate commerce[266] and concludes that there is "overwhelming evidence that discrimination by hotels and motels impedes interstate travel."[267]

Two concurring opinions, by Justice Goldberg and Justice Douglas, take issue with the Court's cramped approach, and urge the Court to

[262] The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[263] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[264] *Id.* at 243.

[265] *Id.* at 250.

[266] *Id.* at 252 ("While the act adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."); *see also id.* at 253 (recounting how the "uncertainty stemming from racial discrimination had the effect of discouraging travel of a substantial portion of the Negro community").

[267] *Id.* at 253.

find Congressional power under the Fourteenth Amendment and give proper due to the true harms inflicted by racial discrimination. Justice Goldberg writes separately to "underscore" that — "as the Court recognizes" — "[t]he primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics."[268] He reminds the Court that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his color or race" and is "equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment."[269] Similarly, Justice Douglas presses the Court to recognize that the right to be free of racial discrimination "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines."[270]

It appears that the concurring Justices' objections are to both doctrine and rhetoric. A revised doctrinal framework recognizing the power of Congress to use the Fourteenth Amendment to regulate private racial discrimination would clear the way for subsequent legislation outlawing private racial discrimination in contexts in which the interstate economic effects — and thus Commerce Clause regulatory authority — might be less clear.[271] Equally as important, however, is the Justices' concern that emphasizing the effects of discrimination on interstate commerce, rather than the stigma and humiliation inflicted by racial discrimination, drains the opinion of its political and moral force — its political and moral salience — and thus blunts the rhetorical power of the Court's decision upholding landmark civil rights legislation.[272]

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[268] *Id.* at 375 (Goldberg, J., concurring).

[269] *Id.* at 376 (quoting S. REP. NO. 872, at 16 (1964)).

[270] *Id.* at 369 (Douglas, J., concurring).

[271] This concern for the outcome of future cases is a concern about the precedential effects of the *Heart of Atlanta* holding, which perpetuates the rule that the Fourteenth Amendment does not authorize Congress to regulate racial discrimination by non-state actors. These effects are, themselves, externalities that can be galvanized to argue against continued reliance on Commerce Clause, rather than Fourteenth Amendment, power.

[272] Imagine, for example, that before the Supreme Court's recognition of same-sex marriage in *Obergefell*, Congress had passed a federal law requiring all states to recognize same-sex marriage. If the Supreme Court then upheld that law as an exercise of Congress's Commerce Clause authority in an opinion that focused solely on the effects on interstate commerce, that opinion would likely have proven far less

Sometimes the divergence between legal and political salience is much more stark and can create serious difficulties for externality entrepreneurs who must simultaneously pursue their aims (or at least defend their handiwork) in both legislative and judicial forums. This conundrum would have been more pronounced in the civil rights examples if the Court (and Congress) had given credence to the argument, advanced by some opponents, that Congress's intent to remedy the moral and social — as opposed to purely economic — wrongs of discrimination precluded its exercise of Commerce Clause authority.[273] The ability of civil rights proponents to lobby for, and of politicians to argue in favor of, civil rights legislation would likely have been seriously hampered if their reliance on moral and social harms in the legislative arena precluded reliance on Commerce Clause authority to defend the law in the courts.

One context in which externality entrepreneurs often face this dilemma is when they promote anticompetitive legislation that favors local business interests at the expense of out-of-state or foreign companies. The externality argument with the most political salience in the local legislative forums — that out-of-state competition is injuring local business interests — is the very argument that will virtually ensure the law's invalidation under the dormant Commerce Clause in the courts.[274] In this case the "local harm" externality has both high legal and political salience, but those saliences cut in opposite directions for proponents of protective legislation: the "local harm" externality makes a strong case for passage of protective legislation in the local forum and simultaneously makes an almost air-tight case for judicial invalidation of that legislative measure. Thus an externality entrepreneur with a creative new suggestion for aiding local business at the expense of outsiders will be forced to adopt a second-best externality campaign to lobby for that measure or risk almost certain defeat in the courts.

satisfying to many same-sex marriage advocates and been a far less effective rallying cry in the court of public opinion than the *Obergefell* opinion. It is also possible, however, that in some situations, focusing on dry, less politically and emotionally charged harms might actually diffuse some of the explosive nature of an issue and allow for compromise and coalition building. *See infra* note 273 and accompanying text.

[273] The Court in *Heart of Atlanta Motel* soundly rejected the claim that Congress is constrained from using its Commerce Clause authority when it acts to remedy moral and social wrongs. *Heart of Atlanta Motel*, 379 U.S. at 358 ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

[274] *See, e.g.*, Edwards v. California, 314 U.S. 160, 174 (1941).

5. Externality Stalemate: Crossing Policy Boundaries

Many of the most intractable contexts for externality entrepreneurs are those in which opposing sides have long identified conflicting externalities that play out in quite different policy arenas. One of these classic contests pits environmental externalities against the projected second-order externalities of any pro-environment government intervention: job loss and other negative economic effects.[275] This job killer versus environmental harm line-up is so long standing that it might be ripe for disruption, but its persistence also speaks to the difficulty of entrepreneurism when conflicting externalities are so disparate and arguably incommensurate. Attempts to deal with incommensurability have often played out within the economic externalities framework as efforts to reduce the externalities to the common metric of money by monetizing the value of everything from ecosystem services[276] to the sweeping vistas in Yosemite National Park, [277] and such attempts often stall amidst disagreements about valuation techniques.[278]

Outside of the economic framework, externality entrepreneurs seeking to break such stalemates have various potential avenues open to them, though none that guarantees success. For example, externality entrepreneurs might seek to identify new externality arguments that seek to claim the opposition's traditional policy turf. For example, an externality entrepreneur worried that climate change activists are claiming the moral high ground by highlighting likely effects on the poor might counter this success by emphasizing the second-order externalities that climate change action might generate by impeding economic growth in developing countries and consigning

[275] *See* Peter Dreier & Christopher R. Martin, *"Job Killers" in the News: Allegations Without Verification*, U. N. IOWA (June 2012), http://www.uni.edu/martinc/JobKillerStudy_June2012.pdf (noting that a majority of media stories about "job killers" focused on federal government policies that regulated the environment).

[276] *See, e.g.*, Robert Costanza et al., *Changes in the Global Value of Ecosystem Services*, 26 GLOBAL ENVTL. CHANGE 152, 152 (2014) (estimating the value of total global ecosystem services).

[277] *See* NATIONAL PARKS SERVICE, CLEAR VIEW: WHAT IS IT WORTH?, https://www.nature.nps.gov/air/AQBasics/docs/benefitsSummFinal.pdf (last visited Jan. 27, 2015) (estimating the value of visibility at national parks).

[278] *See* Cliff S. Dlamini, *Types of Values and Valuation Methods for Environmental Resources: Highlights of Key Aspects, Concepts and Approaches in the Economic Valuation of Forest Goods and Services*, 4 J. HORTICULTURE & FORESTRY 181, 182-86 (2012) (describing various direct and indirect valuation methods and their relative strengths and weaknesses).

the most vulnerable to continuing poverty.[279] Conversely, climate change activists might seek to counter opponents' focus on economic harms by arguing that climate action will create "green" jobs.[280] These strategies might look like co-opting opponents' externalities — or at least co-opting their traditional policy domains.

Interestingly, highlighting externalities that resonate in opponents' traditional domains might be a strategy, not just for triumphing over opponents' externality campaigns, but also for building consensus and new coalitions. In this vein, Professors Osofsky and Peel have suggested what they call "going together" strategies for addressing climate change — strategies that focus on bridging "partisan divides" by framing issues (and thus externalities) in ways that both sides can potentially agree on, such as strengthening the economy and investing in disaster resilience.[281] Such strategies might also help break an externality stalemate by switching the focus to less controversial (or contested) externalities. This tactic might help depoliticize the issue somewhat, which might make both sides more receptive to broadening their perspectives and seeking compromise.[282]

6. Legal Resistance to Judicial Entrepreneurism

In Part II.B, we identified a litany of externalities at play in legal argumentation in courts. However, one might reasonably ask, with regard to judicial processes, just how much space externality entrepreneurs have in which to operate. That is, how much do judicial

[279] *See* Ambuj D. Sagar et al., *Climate Change, Energy, and Developing Countries*, 7 VT. J. ENVTL. L. 71, 80-84 (2006) (noting that some restrictions on energy use could hurt vulnerable populations).

[280] *See, e.g.*, WORLD BANK, INCLUSIVE GREEN GROWTH: THE PATHWAY TO SUSTAINABLE DEVELOPMENT 91-102 (2012); Luke Hurst, *Reducing Climate Change Would 'Create One Million Jobs*,' NEWSWEEK (Mar. 31, 2015, 10:45 AM), http://europe.newsweek.com/report-1-million-jobs-created-if-climate-goals-reached-318280?rx=us (reporting on the New Climate Institute's report that reversing climate change could lead to the creation of over one million jobs in the EU, U.S., and China).

[281] Osofsky & Peel, *supra* note 209, at 702 (suggesting that "those seeking regulatory change should frame issues in alternative ways that resonate with a broader range of moral beliefs and cultural values," and noting that this framing must go beyond "spin" to "identify[ing] areas of common ground and shared values that can be the foundation for real and tangible action").

[282] *See, e.g.*, Stephanie Bair, *This is Your Brain on Politics*, STAN. L. & BIOSCIENCES BLOG (Mar. 13, 2015), https://law.stanford.edu/2015/03/13/lawandbiosciences-2015-03-13-this-is-your-brain-on-politics/ (summarizing studies that demonstrate that, when addressing highly politicized issues, people tend to interpret new data in ways that confirm their preexisting political views and suggesting that "de-charg[ing] public discourse" might make individuals more open to persuasion).

doctrine, evidentiary rules, and the adversarial process itself constrain the work of externality entrepreneurs in identifying, selecting, and framing externalities?

Certainly, there are limits on the kinds of externality arguments that can be advanced in courts. A number of judicial rules and doctrines are explicitly designed to limit and control the impact of certain kinds of externalities in the litigation context. For example, the requirement of typicality in federal class actions means that plaintiffs' lawyers cannot simply select and present the most appealing, most sympathetic, most "salient" victims, unless the externalities borne by those victims are typical of those borne by the class as a whole.[283] Similarly, evidentiary rules permit judges to exclude externalities with great salience if the probative value of that evidence is outweighed by the risk of unfair prejudice[284] or if the externality is not grounded in good science.[285] Voir dire and jury sequestration likewise help limit juror exposure to externality narratives that have high media salience but low legal, doctrinal relevance.[286] Moreover, rules about proximate causation and related doctrines, like the pure economic loss rule,[287] render some externalities legally irrelevant — or at least outside the realm of judicial remediation.

All of the various doctrines and rules can create substantial obstacles to externality entrepreneurism in the courtroom. However, the examples enumerated in Part II.B above suggest that, in many contexts, there is nonetheless enough leeway for externality entrepreneurs working in the judicial arena to pursue legal change by leveraging the differing saliences of various externalities.

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283 FED. R. CIV. P. 23(a)(3); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) ("The Rule's four requirements — numerosity, commonality, typicality, and adequate representation — 'effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims."'") (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).

284 FED. R. EVID. 403.

285 Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

286 FED. R. CIV. P. 47 (governing jury selection and allowing peremptory challenges); UNIF. RULE OF CRIM. P. 513(d) (1987) (allowing a court to sequester the jury if "it appears the case is of such notoriety or the issues are of such nature that, absent sequestration, highly prejudicial matters are likely to come to the jurors' attention").

287 Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1019 (5th Cir. 1985) (denying recovery for pure economic loss). The pure economic loss rule limits tort recovery for economic damages "unaccompanied by personal injuries or property damages." Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 525 (2009).

V. THE IMPORTANCE OF UNDERSTANDING THE WORK OF EXTERNALITY ENTREPRENEURS

In this Article, we have attempted to lay the foundation for developing a comprehensive, nuanced understanding of the role of externality entrepreneurism in creating social change. A fuller understanding of this phenomenon provides legal and political historians with another set of tools for considering how certain legal and social changes were created. We hope that scholars will continue to build on and refine the framework we have begun to develop here. Activists might also employ this understanding more instrumentally as they work to effect change in a wide variety of policy and legal realms.

This final Part explores two other reasons that understanding externality entrepreneurism is so imperative. First, a more holistic understanding of externality entrepreneurism illuminates a number of vital normative questions about the work of externality entrepreneurs. Second, an appreciation of externality entrepreneurism is important because the reach of such entrepreneurism is much broader and deeper than appearances suggest.

A. Normative Assessments of Externality Entrepreneurism

One critical reason to analyze the work of externality entrepreneurs is to allow for fuller, more holistic normative assessment of their handiwork. Various legal luminaries, from Cass Sunstein and Timur Kuran[288] to Justice Stephen Breyer,[289] have criticized aspects of some tactics that we identify as externality campaigns, but clear identification of the contours and drivers of externality entrepreneurism in a way that cuts across disciplines, policy areas, and institutions may help to broaden perspective, identify patterns, and elucidate any number of significant normative discussions.

Indeed, a fuller understanding of externality entrepreneurism is likely to generate significant conflict and discussion about its desirability. For example, one might argue that we ought to embrace and encourage (or at least respect) the efforts of externality entrepreneurs, much as governments typically seek to promote more traditional entrepreneurism. On this view, the more externality entrepreneurs the better, as higher levels of entrepreneurism increase the odds that externality framings that appeal to greater numbers of

[288] Kuran & Sunstein, *supra* note 137, at 683.

[289] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

the relevant population will eventually emerge or, at least, that rampant entrepreneurism will provide a wide variety of choices to satisfy the varying tastes of subsets of the electorate. Moreover, by analogy to more general conceptions of the value of free speech, one might be inclined to argue that truth — however conceptualized — is most likely to emerge from the pitched battle of skilled externality entrepreneurs. At the very least, one might contend that there is no neutral or objective framing of any given issue and, accordingly, the best one can hope for is a free market of externality entrepreneurs in which entrepreneurs compete and the public ultimately decides which framings (and attendant policies and legal rules) they prefer.

In contrast, one might argue that externality entrepreneurism, on the whole, is likely to be detrimental to the creation of sound public policy, as attention and resources flow to issues for which entrepreneurs have generated the most compelling externality stories, rather than those that are, by some arguably objective measure, the most pressing or serious. Instead of the clash of externality entrepreneurs resulting ultimately in wise public policy, these arguments suggest that externality entrepreneurism distorts public policy and drives misallocation of precious resources. On this view, externality entrepreneurs create a host of their own externalities by contorting public policy-making to their own ends. Critics who view externality entrepreneurism through this lens may be inclined to find mechanisms for better buffering our political and legal institutions from the pressures created by some saliences.[290]

The more holistic understanding of externality entrepreneurism that this Article provides helps clarify the terms and breadth of this debate and elucidate many of the important questions that inform it. For example, the concern that externality entrepreneurs skew public policy might carry particular weight if, for example, there are consistent barriers to entry for externality entrepreneurs advocating particular positions. Relatedly, we might also ask whether certain kinds of issues — or certain types of harms — are at a systematic disadvantage in the competition for salience that can be translated into political and legal action.

A fuller understanding of externality entrepreneurism might also shed important light on questions about the role of false or misleading anecdotes and narratives in externality campaigns that produce political and legal change. How concerned ought we to be that the

[290] *See, e.g.*, *id.* at 60-61 (suggesting that regulatory decisions be made by government experts insulated from political pressures).

free-riding "welfare queen" at the heart of Ronald Reagan's externality campaign to reform the welfare system was "highly unrepresentative" of welfare recipients?[291] Or that the stories about "patient dumping" by hospitals that helped spark passage of the federal Emergency Medical Treatment and Active Labor Act (EMTALA) were also misleading and incomplete?[292] If externality entrepreneurism is often or always about selecting externalities that give a narrative out-sized impact or salience, then perhaps non-representativeness is more par-for-the-course than an occasion for outrage?

It may be that systematic study of externality entrepreneurism opens important windows of insight for answering these questions. It may also be that what we learn from understanding the breadth and ubiquity of externality entrepreneurism is that there are few generalizable answers and that context, in fact, continues to matter a great deal. Either way, the enterprise will have been an important and illuminating one.

B. The Underappreciated Scope of Externality Entrepreneurism

Another reason that identifying and analyzing the work of externality entrepreneurs is so important is that many more issues can plausibly, and arguably more persuasively, be framed as externality problems than one might expect. Indeed, potential externality framings lurk in the most unexpected of places, providing fodder — and many as-yet-unexploited opportunities — for creative externality entrepreneurs. Thus, the scope for externality entrepreneurism may be much greater than initial appearances suggest, particularly in the context of judicial decision-making.

We have already made the case that externalities play a key role in shaping judicial decision-making in a wide variety of contexts, but the potential range of externality framings in litigation is actually far greater than we have yet explored. Consider, for example, the role of externalities in arguments about the precedential effect of a proposed decision — and, in particular, appeals to hypotheticals, slippery slopes, and "parades of horribles."

Many of the externalities highlighted by courts and litigants in the judicial process are functions of precedent.[293] Courts confronting

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[291] David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L. J. 797, 804 (1998).

[292] *See id.* at 832-33.

[293] While precedent plays some role in shaping future outcomes in legislative and other political arenas, precedent has particular power in judicial systems that adhere to notions of stare decisis. *See generally* MICHELE LANDIS DAUBER, THE SYMPATHETIC

novel questions of law frequently pose hypotheticals to test the boundaries of proposed rules by imagining a third party who stands to benefit from, or will be harmed by, the outcome (i.e., precedent) set in the present case. For example, when the Supreme Court took up the question of same-sex marriage last Term in *Obergefell v. Hodges*, Justice Alito asked in oral argument, "Suppose we rule in your favor in this case and then after that, a group consisting of two men and two women apply for a marriage license, would there be any ground for denying them?"[294] Similarly, in the argument for *Burwell v. Hobby Lobby* about whether Hobby Lobby could be required to provide insurance coverage for contraception for its employees, Justice Kagan asked, "So suppose an employer . . . refuses to fund or wants not to fund vaccinations for her employees, . . . what happens then?"[295]

As these examples illustrate, arguments about the externalities of judicial decisions often take the form of slippery-slope[296] or "parade of horribles"[297] arguments. Almost by definition, whatever is downhill on the slope triggered by a decision is a foreseeable externality of that decision. The same is likewise true of the parade of horribles. What is paraded about as horrible depends largely on a calculation of what others would also find horrible, which may change with time, context, and society. Sometimes, parades of horribles end with obscenity,[298] sometimes with former slaves with firearms,[299] and sometimes with

STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2013) (describing the role of legislative precedent providing relief from natural disasters in shaping Congressional debates about providing welfare benefits during the Great Depression).

294 Transcript of Oral Argument at 17, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-574).

295 Transcript of Oral Argument at 5, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (No. 13-354).

296 Eugene Volokh, *The Mechanism of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003) (defining a slippery slope argument as "one that covers all situations where decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose").

297 The "parade of horribles" typically consists of "predictions of the adverse effects of accepting or rejecting, respectively, the proposal." David S. Caudill, *Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy*, 62 WASH. & LEE L. REV. 1653, 1653 (2005).

298 Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (stating that invalidating laws barring same-sex sexual activity would "call into question" "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity").

299 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 416-17 (1856) (arguing that if slaves were considered citizens they would, among things, have the right "to keep and carry arms wherever they went," which would "endanger[] the peace and safety of the

broccoli.[300] But whatever their exact content, the horribles paraded about are almost always externalities.

The relevant issue, however, is not simply whether a variety of arguably terrible effects can be understood and framed as externalities but whether, by transforming costs into externalities, externality entrepreneurs can gain a rhetorical advantage. Sometimes there may be little to be gained by such a framing, but, for many of the reasons discussed in Part I.B above, the externality framing may have greater resonance in many contexts than mere costs and benefits.

Consider, for example, the slippery slope concern articulated by Justice Souter's concurring opinion in *Washington v. Glucksberg*,[301] which confronted the issue of physician-assisted suicide.[302] Justice Souter argued that the possibility of a "slippery slope" was a genuine risk of recognizing a due process right to physician assisted suicide because doctors would not be in a good position to discern and maintain the line between truly voluntary and involuntary euthanasia.[303] This argument shifts the rhetorical focus from the parties before the court — who argued they were being denied autonomy over their own bodies — to those at the bottom of the slippery slope — truly vulnerable patients who might die at the hands of their doctors because of coercion or incapacity rather than meaningful choice. One might imagine an externality entrepreneur even more forcefully highlighting a second vulnerability of these patients: that their interests have not been directly represented in the case itself. In other words, the effects in question are externalities. So framed, the lack of effective representation in the case highlights and compounds the patients' existing vulnerabilities and strengthens the rhetorical case against recognizing the right.

The same rhetorical leverage of an externality framing may also be at play in a variety of other judicial contexts — some far afield from those we have already considered. Just as many debates about the existence and limits of individual rights are, at base, debates about externalities, many structural constitutional concerns likewise turn on externalities — externalities that cannot practically be internalized, but can be exploited for rhetorical advantage.

State").

300 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (suggesting that, if Congress could require individuals to purchase health insurance, it could also require individual citizens to purchase broccoli).

301 521 U.S. 702 (1997).

302 *See id.* at 752 (Souter, J., concurring).

303 *Id.* at 784-85.

For example, separation of powers violations might be understood through the lens of inter-branch externalities[304] or — even more fundamentally — as inflicting externalities on vulnerable individuals. Justice Kennedy argued in the line-item veto case, *Clinton v. City of New York*, that "[l]iberty is always at stake when one or more branches seek to transgress the separation of powers."[305] So framed, the relevant externalities for a separation-of-powers violation are harms to individual liberty from concentrated power and increased risk of tyranny. Even before the Court began emphasizing the role of separation of powers in protecting individual rights, the Court in *INS v. Chadha*, which invalidated the legislative veto, emphasized that "the very danger the Framers sought to avoid — the exercise of unchecked power" — had very real consequences for individual litigants like Chadha, not just for abstract constitutional principles and government structure.[306]

Another set of externalities often bandied about in judicial arguments and opinions are externalities that a particular judicial decision will create for the court system as a whole and, thus, for future litigants. Some of these arguments focus, for example, on a decision's impact on the Supreme Court's institutional integrity and credibility. Because the courts have neither "purse" nor "sword,"[307] courts must rely on the respect accorded them by the public and coordinate branches to ensure that their judgments are enforced. If a particular holding undermines a court's legitimacy, that creates ripple-effects (externalities) down the line for both courts and future litigants.[308] This possibility has often been loudly trumpeted by

[304] *Cf.* Mistretta v. United States, 488 U.S. 361, 382 (1989) (noting that "separation-of-powers jurisprudence" is "animated" by concerns about "encroachment and aggrandizement").

[305] Clinton v. City of New York, 524 U.S. 417, 450, 452 (1998) (Kennedy, J., concurring).

[306] INS v. Chadha, 462 U.S. 919, 966 (1983) (arguing that, because there were no real "constraints" on Congress's decision about Chadha's deportation, Chadha's individual "rights" were "subject to 'the tyranny of a shifting majority'").

[307] THE FEDERALIST NO. 78 (Alexander Hamilton).

[308] Similarly, arguments that emphasize that a proposed rule will open the floodgates to future litigation often suggest that a rising tide of cases will swamp the courts' ability to do their job. Such arguments have featured prominently in a wide variety of contexts, from judicial recognition of the tort of intentional infliction of emotional distress, *see, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952) (responding to argument that recognizing the new tort claim would "open the door to unfounded claims and a flood of litigation"), to interpretation of federal anti-discrimination statutes, *see, e.g.*, Davis v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting) (arguing that the "majority's

Supreme Court Justices dissenting from particularly controversial decisions, including the Supreme Court's decision during the 2000 presidential election to halt Florida's manual recount of votes[309] and the recent decisions recognizing same-sex marriage[310] and interpreting Obamacare.[311] The power of these appeals to court-legitimacy and credibility might be enhanced by further emphasizing that the victims of today's court-overreaching are tomorrow's vulnerable litigants who require the Court's intervention if justice is to be served.

CONCLUSION

The way that economists have taught us to think about externalities — asking us to identify, measure, and internalize them — while useful, has also created a substantial blind spot that obscures one of the most important uses of externalities in law and politics: the strategic identification, selection, framing, and promotion of externalities by externality entrepreneurs seeking legal and political advantage. This externality entrepreneurism occurs not only in all levels and branches of government, but also in most legal and political debates. Exploring the work of externality entrepreneurs in a holistic way helps us to better understand how entrepreneurs galvanize legal and political change by leveraging externalities with the greatest

limitations on [newly recognized] peer sexual harassment suits [under Title IX] cannot hope to contain the flood of liability" the Court's decision would unleash).

309 Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting) (arguing that the clear "loser" in the case was "the Nation's confidence in the judge as an impartial guardian of the rule of law"); *id.* at 157-58 (Breyer, J., dissenting) (arguing that the decision "in this highly politicized matter" risks "undermining the public's confidence in the Court itself" and creating "a self-inflicted wound . . . that may harm not just the Court, but the Nation").

310 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2612, 2624 (Roberts, C.J., dissenting) (excoriating the Court for "[s]tealing this issue from the people," and warning that "[t]he Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it."); *id.* at 2631 (Scalia, J., dissenting) (arguing that "[w]ith each decision of ours that takes from the People a question properly left to them — with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court — we move one step closer to being reminded of our impotence").

311 King v. Burwell, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting) (arguing that the majority's decision makes a "parody . . . of Hamilton's assurances to the people of New York" that the legislature, not the judiciary, controls the "purse" and concluding that the decision "will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites").

salience, to appreciate the common openings and obstacles to such entrepreneurism, and to assess both its benefits and risks.