

SUMMER 2024

TANGENTS

THE JOURNAL OF THE
MASTER OF LIBERAL ARTS PROGRAM
AT STANFORD UNIVERSITY

VOLUME 23

IN THIS ISSUE...

Memoir by

Barbara Wilcox

Poems by

John Angell Grant

Prabhu Palani

Kristin Kueter

Cheryl Solis

Essays by

Robert B. Mason III

Shashwat Vidhu Sher

Perry Karsen

PUBLICATION NOTES

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Photos also from MLA students Susan DeKlerk and Kelly A. Harrison.

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Letter from the Editors

We are pleased to present this issue of *Tangents*, the Journal of the Stanford Master of Liberal Arts Program.

For this, the 23rd volume, we have chosen a diverse group of works by current students and alumni, including:

- a memory piece in which the writer finds agency and purpose when she returns to UC Berkeley;
- four poems (“Brewster,” “New York,” “Cantor Museum, Stanford 2023,” and “The Poetry Doorman”);
- an essay exploring the legal battle over same-sex marriage;
- a study of Paul Fusco’s photography portfolio of Robert F. Kennedy’s assassination and funeral;
- an article examining the retirement planning landscape and the future of worker security in the United States.

Be sure to learn about this issue’s contributors, highlighted on the last pages.

We hope that our choices will provide enjoyable reading and inspire future contributions!

This is our sixth year of service as editors for *Tangents*, and we welcome feedback. The dedication and generosity of alumni and supporters of the MLA program continue to make our annual publication possible.

Thank you!

Candy Carter, editor

Teri Hessel, associate editor

Michael Breger, associate editor

Kelly A. Harrison, production editor

Grace Ann Harriman, production editor

Brewster

Kristin Kueter

As I peered into the top drawer of
my childhood jewelry box,
a blast of salty sea air hit my face,
a taste of sticky taffy stuck my teeth together,
and I found myself back at Saint's Landing Beach
with you in Brewster.

There, twisted and kinked,
lay the small-shelled necklace you bought me
on our last trip together
as mother and daughter,
curled around a small note written in cursive,
"for Rings and Dreams and Things...."

I loved our road trips more than
any precious or rare jewel
because you noticed me.
It was just us,
driving in solidarity against the world
in the clunky indestructible Volvo.

We'd always leave before dawn,
slinking away under night's cover,
giggling with a hushed glee
that fed our camaraderie.
Sometimes we'd head North, sometimes South,
sometimes all the way to Florida.

You were often wildly generous then
and always fantastically whimsical.
We'd slurp milkshakes for breakfast
and gorge on slices of the key-lime pies
that twirled in the automatic display cases
in the diners that lined Route 1.

"Want another slice?" you'd ask.
I couldn't really
but I did anyway,
wanting to make you happy,
wanting to make you like me,
wanting this to never end.

I'd pretend to the waitresses
that we were always this nonchalant,
at ease with each other, fun-loving.
I wasn't fooling anyone.
I took what I could get,
not knowing it was all you would ever give.

On our last trip to Saint's Landing,
it was hot and we were tired.
I spotted the small-shelled necklace.
"Mom?"
You said yes.
You were generous.

I wore that necklace on the drive back,
and all that summer.
I swore I'd wear it forever.
Now forever lives in the very top drawer
of my box
of Rings and Dreams and Things.

The ripped, tattered, and torn box that is
small enough to carry in the crook of my arm
but big enough to hold a lifetime of memories
that keep me dreaming
about when I was a daughter to my mother,
and you were a mother to me.



Fig 1 Paul Fusco/Magnum Photos

Paul Fusco's RFK—Motion in the Stillness of Death and Grief

Perry Karsen

IN JUNE OF 1968, Paul Fusco was a photographer for *Look* magazine and a member of Magnum Photos assigned at the last-minute to cover Robert F. Kennedy's burial in Arlington Cemetery. He rode the funeral train carrying Kennedy's casket from New York City's Penn Station to Union Station in Washington, DC. It was on this train ride immediately upon emerging from the train tunnel in New Jersey that Fusco, mesmerized by the throngs of people paying tribute to RFK alongside the train tracks, took a series of photographs of the mourners along the train route for the entire eight-hour journey. These now iconic photos express a panoply of emotions and metaphors: grief, solitude, sharing, family, country, religion, stillness of death, movement toward eternity, mourning in America, unity amidst diversity, vertiginous blurring of the times. As the day got later and the light began to fade, Fusco needed to lengthen the exposure time for his photos while striving to capture the visages of the people along the tracks. In capturing these faces, Fusco recognized that "there is a nakedness in them that is rare in public—these people don't think that anyone is looking at them" (Menand). The open shutter created a blurring in the background and at times in the people themselves—a rushing toward the stillness of death in time-lapse across the portfolio of Fusco's RFK photos. The train moves but the body it holds cannot; as the train advances toward the viewers, RFK's death seems to gather some form of momentum. This

dichotomy of stillness and motion also accentuates the grief and grieving of the RFK admirers mourning along the train route. By examining several specific images from the sweep of photos in Fusco's RFK portfolio, the viewer can discern this duality of stillness and motion in death, the photograph's capacity to "suspend time" (Nemerov) heightening the impact of the moment, reflects RFK's lifelessness in his death contrasted with the commotion of the events, and the profound grief enveloping it all.

Taken from a moving train, Fusco's photos exquisitely capture the stillness of death that is uniquely enabled by photography. Robert Kennedy's body is motionless in its casket on the moving train. Fusco's "photography immobilizes...[his] photographs snatch people out of time..." (Menand) and absorb them intently in the moment and in the event, the death of RFK. Barthes cites this relationship between photography and death in describing photography as a "figuration of the motionless and made-up face beneath which we see the dead" (Menand). Photographs, and the Fusco RFK photographs in particular, memorialize the dead. Photography's ability to capture time, stop time, and reflect on time create the postmemory of future generations to the assassination of Robert F. Kennedy (Hirsch 9). Many of the Fusco photos establish this memorial and postmemory, but one does so with extreme eloquence. A photo that is so expressive in honoring and memorializing the life of RFK that it manifests a profound "punctum" (Barthes 26).

In front of a crowd of people in a range of poses, actions, and states of remembrance, the baseball player, motionless, is solemnly fixated in contemplation (Fig. 1). He prominently centers the photo wearing a historical flannel baseball uniform, a record of history while himself creating a postmemory of the RFK assassination. He is standing atop a pile of dirt and gravel, the detritus of the calamity of events embodied in the funeral train. The static rigid background of a brick wall reinforces the stillness, finality, and permanence of the death traveling in the passing train. While the other background wall of an aging building has the faded writing and missing windows of the history, destruction, and demise of RFK's assassination. The baseball player's unyielding direct stare at the passing train (and possibly at Fusco taking the photo) reinforces the stillness of death and the stopping of time even as the train speeds by the baseball player and the goggle of mourners in various states of posture gathered with him.

Contrasted with the stillness and clarity in the baseball player image is the motion of the train and the accompanying blurring of the people in many of Fusco's photos as he shot the images from the moving funeral train. In Fig. 2 a man waves his hat, the motion captured through

the blurring of the man and his immediate surroundings reflects the advancement of time as it has transpired since Kennedy's death and the conveyance of his death toward his final resting place and his place in history. The tire tracks in the dirt by the side of the train tracks are a path in motion, the sands of time sweeping RFK on a pathway toward his ultimate destiny. The man standing in those tracks is also in movement as he leans in the direction of the traveling train and is swept up in the blurred motion of events. His is also a performance of sorts as he doffs his hat to the passing train, to RFK and what RFK represented for this man's life and circumstances. The man's audience, probably his family, watches for the train, and possibly his performance, from behind him in the relative safety of the foliage outside of the motion of devastating events. They are observers, huddled together as a family sheltering from the approaching death, not swept up by the motion of events like the man with the hat, but in need of each other's solace and protection. All dressed in the comfort of whites and light blues as they seek refuge from the deep red and black worn by the man performing with the hat. Even though the man did not likely know he was being photographed, his gesture "qualifies as a performance, an event [that] must have an autonomous existence prior to its documentation" (Auslander 3). He exists in this moment beckoning the rapidly approaching dark history, along with multitudes, all creating their own individual documentation.

The fleeting moments of time are pronounced as the man waves his hat in a blurring gesticulation. The world is swirling around him as time swallows him and his gesture of reverence and respect. "Our hello is a goodbye" (Nemerov); yet the man endures because he doesn't know his graciousness—his performance in honor of RFK—is being photographed. An audience is irrelevant as "the actions undertaken by the artist and depicted in the images become available to an audience as performances solely through their documentation...the audience to whom they assume responsibility is the audience for the documentation, not for the live event" (Auslander 6). And now, we, the audience, marvel at the documented depiction of motion and movement in these blurred photos along Fusco's route—capturing an object stilled for eternity, not directly seen but deeply felt, within the dignified mourners.

As the day wears on and Fusco needs to expose the film for longer periods of time, his images become more spectral in concert with the slain RFK lying forever still in his casket raised on chairs in the last car of the train. The blurred photos provide further meditations on how fragile and exposed we are to time, space, and events (Nemerov).

As the train rushes toward the mourners, RFK's death gathers momentum and force and an extra ordinary form of vitality. The mourners' encounter with the rush of time and flurry of calamitous events is transmuted into the roiling blur.

Photography's essence is the recording of light in all its forms and manifestations and all its conveyances of meaning. The woman in white (Fig. 3) is "in the center of the

bright yellow light emanating for a man's head appears as an incendiary device consuming his head, his hopes, his dreams, all now up in flames with the death of RFK. The other individuals in the image are indistinct within the gyrations of light from the moving train carrying the still body of RFK on its journey toward an indistinct history. The camera is uniquely able to transform light into meaning—unconscious optics. Walter Benjamin recognized



Fig 2
Paul Fusco/Magnum Photos

storm holding her place for a moment before being swept away in the spandrels of light" (Nemerov). She is anchoring herself against the engulfing chaos of events manifested by the approaching funeral train. The light envelops her, but only momentarily as the darkness of the moment rapidly approaches from all sides. The light dies around her. Her outstretched arms attempting to stabilize herself against the rush of the train, the assailing of swirling events. She is the embodiment of movement dramatically captured by the onslaught of light generated by that moving train holding the stillness of death. A streak of

that "the camera introduces us to unconscious optics as does psychoanalysis to unconscious impulses" (Benjamin 50). The dizzying whirling of light Fusco captures in this, and in other blurred photos, is the otherwise uncapturable freneticism of events documented in a stationary artistic format.

Taken together, the three photos discussed, and the entire Fusco portfolio, can be seen as expressing RFK's assassination in some grand spectral metaphysical way: like in a time lapse. The first photo of the baseball player reflects the stillness of and reverence for the body of the

slain political leader riding in the train. The historical baseball uniform worn by the man in the center of the photo harkens to the historic event embodied in the funeral train to Arlington National Cemetery. A Black man as the focal point of the photo with a multi-racial, class and age group gathered supportively behind him portrays RFK's ability to reach out across the spectrum of races, classes, and ages. The baseball player's pose in contemplation, reflec-

symbolic sign for the train to stop. For this tragic moment in history to halt, to have its momentum impeded, to cease its destiny. But time moves on as conveyed by the blurred man, his blurred hat, the path, and dirt trail he is standing on blurred with the motion of the train, the movement of history, the elapsed time of RFK's assassination and now the transporting of RFK's still body in the train inching toward Arlington. Despite his efforts to hail the train with



Fig 3
Paul Fusco/Magnum Photos

tion, intense straight-ahead focus and thought reinforces the seriousness and uncertainty of the event. The stillness of the figures in the image mirrors the stillness of their hero in his casket on the train. Fusco's camera on the train and the numerous cameras held by the throng of mourners providing a two-way line of communication across the chasm of death and despair.

The time-lapse advances with the second photo of the man waving his hat. The train moving toward him picking up momentum as he both waves his hat in respect and as a

the gesture of his hat, the momentum—the blurring—of history hurtling toward the uncharted stillness of RFK's burial cannot be stopped.

Time implodes in the third photo of the woman in white consumed by the vortex of motion, time, events converging around her in streaks and bursts of light, infused with the freneticism of the moment as time elapses toward the end of RFK's fateful odyssey. In this last of the three photos, time converges in a flurry of light around the woman in white as she reverentially pays her respect to the slain leader. Time as represented by the turbulence of light in this

culminating in this final photo in the *Aperture* book taken from the train (Fusco RFK Aperture 209) is the convergence of the motion of historic events, combined with the momentary stillness of history from RFK's death, resulting in this singular figure of the woman in white trans-fixed amid a cataclysm.

Just as the light made Fusco's photographs possible, Bobby Kennedy's aura radiated to his admirers along the train route. Kennedy was a light unto the world now casting "a passionate gloom for the loss of that fine valuable light" (Fusco RFK 8). His stillness in the casket riding

alone in grieving on that crowded train platform and with that grief fearing for the future. The grandmother in light blue at the right end of the platform clutches her grandchild close to her as if to protect him from the approaching moving train, protecting him from the now so unpredictable future. The child seems to be wriggling his arms to be set free to better observe the approaching train and to more freely engage in his own personal destiny. But his grandmother better understands the approaching perils as she intently stares for the advancing train and the future it manifests and strives to protect the young boy for just



Fig 4

Paul Fusco/Magnum Photos

in the final car of the moving funeral train posed a similar contradiction to the darkness of his death as "few lives have the value to illuminate themselves in their death" (Fusco RFK 8) as did Bobby Kennedy's. That passionate gloom as manifested so viscerally in the poses and expressions of the three women in the center of the photo wearing pink, dark blue, and a white/light blue blouse (Fig. 4). Like so many parables with threes, these three women poignantly capture the range of grief and gloom being experienced by RFK's assassination by touching a hand to an eye to wipe tears, to a cheek in disbelief, and to a mouth in exasperation. They are not

a little while longer. On the platform between the three women and the grandmother, two young women clutch onto the arm and shoulder of their respective companions as they, too, look toward the uncertain future personified in the coming RFK funeral train.

The grief was observed in "manifold ways" according to the historian and RFK biographer, Evan Thomas (Fusco RFK Aperture 11). Thomas, who rode in the funeral train from New York City to Arlington National Cemetery, observed this grieving first-hand as "the Catholics drank and told funny and sentimental stories...the Protestants weren't quite sure what to do, except to vaguely disapprove

of anyone having a good time...the Jews wept—they'd have torn their clothes if they had thought of it" (Fusco *RFK Aperture* 11). Each of the photos discussed here communicates this grief in their own way: The baseball player with his hand on his chin in contemplation staring straight ahead as he stands perfectly still and in focus; the family of the man with the hat standing behind him on the other side of the creek, his wife's arms crossed in a sign of protection and fear with her children huddled around her sharing in that protection as she looks out toward the direction of the oncoming train and the future it represents; the woman in white subsumed by the eddy of light fixed firmly in posture and gaze with hands out like a top to keep from being swept up by the maelstrom of light, events and uncertain future.

Motion collides with grief in the Fusco photos...and then diverges. The three women await the RFK train angled toward its arrival. We don't see them after the train passes and their grief has been honored. Like most of us, they likely move on to the next thing in their lives, subconsciously awaiting the next tragedy in the world that collides with their grief. Roger Angell, writing in *The New Yorker* in June of 1968, described the weeks following the tragedy when Americans were sustained by habit, by "the old elegance of mourning and the release of grief" (Overbey):

Each morning since the death of Robert Kennedy, we have awakened to the familiar knowledge that some terrible piece of news, some new jolt of the intolerable, awaits us just beyond the borders of sleep. We open our eyes to a corner of the bureau, a soft glint of mirror, morning sounds, and then it comes back...Like an invalid, we are each day less shocked to find that we are ill, each day more absorbed with our symptoms. (Overbey)

In America, "the irreversible is no longer strange," Angell wrote; it had become commonplace (Overbey). Fusco himself went on to make photographs of the lingering effects of the Chernobyl disaster and documented the funerals of US service members killed in the Iraq War. The motion of the RFK Funeral Train transformed into other cataclysmic events all carrying their own stillness amidst the unstoppable movement of the times.

Paul Fusco's RFK is a monumental work of photography that so eloquently displays the power of the photographic image to impact us visually, emotionally, psychologically. His images capture people, most of whom did not realize they were being photographed, at their most vulnerable

honesty conveying their feelings of the moment to themselves. The work in its artistry can be read in a multitude of ways: as a tension between motion and stillness and time and grief as I've examined here, and across political, sociological, philosophical, historical, and artistic realms. Those areas might be for another analysis. The review of four striking—punctum producing—photos illustrates how Fusco captures the contrast between the motion of the moving train and the stillness of the body lying in the casket in the final train car, and how he creates a time-lapse of RFK's assassination in a spectral metaphysical way. The grief that consumed the mourners photographed by Fusco is so evident in the faces, movements, postures, and presence that Fusco was able to project in his well-timed and well-constructed photos. Photographs uniquely capture a moment in time while also being able to convey motion, meaning and the passing of time. Fusco provides the viewer with another dimension, a raw human dimension, by his use of movement, light, vivid color, passages of time, and space along the RFK funeral train route from St. Patrick's Cathedral in New York City to Arlington National Cemetery in Washington, DC. His photographs create an indelible impression of the impact of RFK's assassination. Through this impression, Fusco has helped us grieve, heal, reflect, and he has gifted us with the power—the power of the photographic image—to somehow move forward.

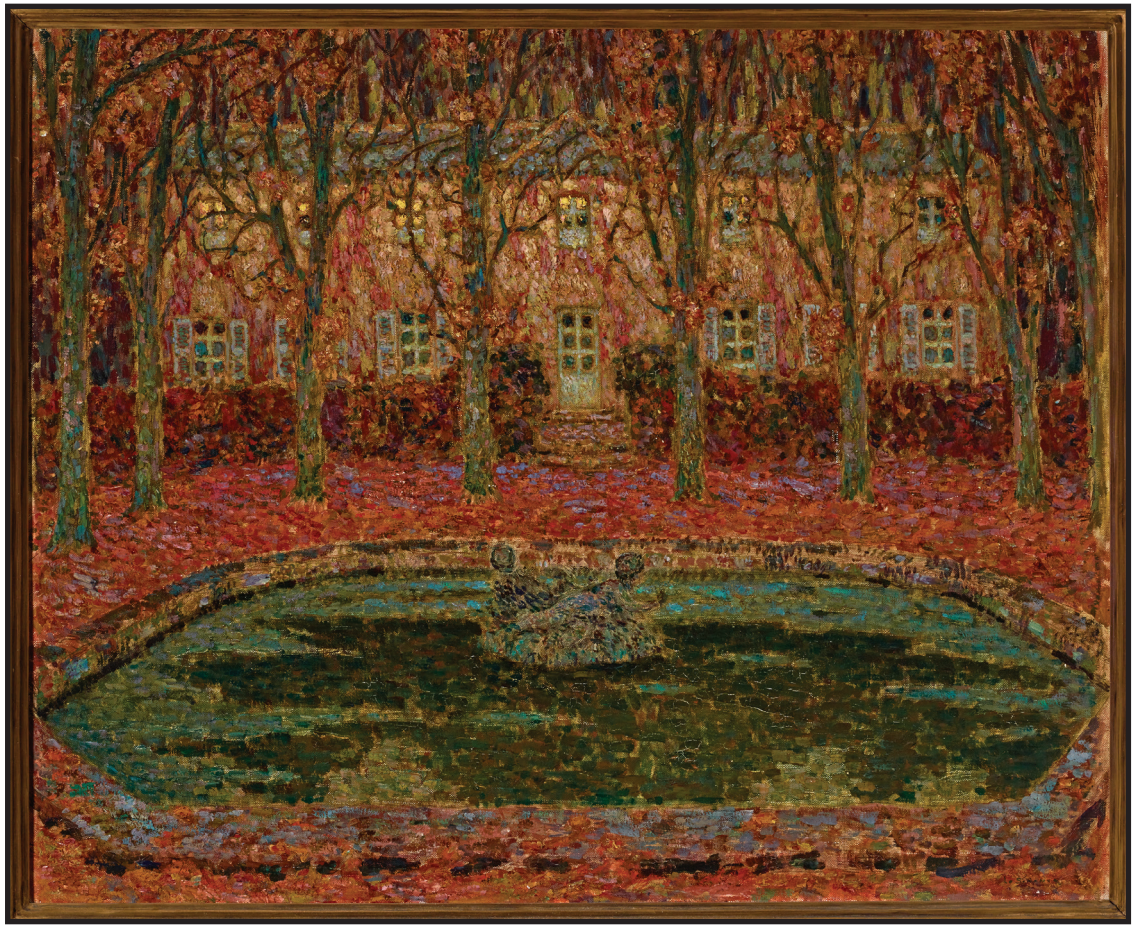
Works Consulted / Cited

- Auslander, Philip. "The Performativity of Performance Documentation." *PAJ: A Journal of Performance and Art*, Volume 28, Number 3, September 2006, pp. 1–10.
- Barthes, Roland. "Extracts from Camera Lucida." *The Photography Reader*, edited by Liz Wells, Routledge, 2019, pp. 19–30.
- Benjamin, Walter. "Art in the Age of Mechanical Reproduction." *The Photography Reader*, edited by Liz Wells, Routledge, 2019, pp. 42–50.
- Fusco, Paul. *RFK Funeral Train*. Magnum Photos Umbrage Editions, 2001.
- Fusco, Paul. *RFK. Aperture*, 2008.
- Goldberg, Vicki. *The Power of Photography: How Photographs Changed Our Lives*. Abbeville, 1991.
- Hirsch, Marianne. "Surviving Images: Holocaust Photographs and the Work of Postmemory." *The Yale Journal of Criticism*, Spring 2001, pp. 5–37.
- Menand, Louis. "Robert F. Kennedy's Funeral Train, Fifty Years Later." *The New Yorker*, 3 April 2018.
- Nemerov, Alexander. "Photography and History: Paul Fusco's RFK Funeral Train." Stanford University Continuing Studies Course—Along the Watchtower, 16 February 2023.
- Overbey, Erin. "R.F.K.: Life and Death on The Campaign Trail." *The New Yorker*, 4 June 2013.

New York

Prabhu Palani

Tongues grown familiar but not understood
Where Manet and friends exhibit on 81st and 5th
To reflect on our folly and greatness
Strides of purpose
In defiance of your never-ending
Wails and sirens
Shabat songs at Emanu-El
The Bells toll at St. Barts
Or the cacophony of Ganesh in Flushing
Outdone by the spirituality
Of a great anonymity
The million stars that shine alike
Outshone by your humanity
You stand tall like your Statue
The North Star for all to see.



Cantor Museum, Stanford 2023

Cheryl A. Solis

Up the marble stairs, across a river of cold stone,
 Near the wall of Diebenkorn's adamant geometries of space,
 Huddles the canvas of Sidaner, a French artist lesser-known,
 Than Morisot, imagist of fleeting time and private place.
 Painted strokes of bright orange leaves adorn his grey trunked trees,
 White windows in the sandstone face stare out at passersby,
 This house remains, by dark unruffled pool, lost in time's uncertainties.
 Where are the early Sunday figures of Sidaner's dreamy eye?
 No father doffs a bowler hat, no women stroll the garden scene.
 Where are the radiant children, *et la douceur de vivre*?
 Yet, bright the falling light against memories' blurred skein,
 As we are swept into the *mise-en-scène*, the silence falls away,
 We feel the absent figures, in the light that ever marks the joy,
 The brief and fervent fire of life, that once was had at Gerberoy.



Street Music

How a 1960s pop singer schooled me in writing history

Barbara Wilcox

MY THESIS ADVISER SENT me to UC Berkeley's Bancroft Library to read the letters of U.S. Sen. Hiram Johnson (1866–1945), a California governor at the close of the Gilded Age, a leader of the Progressive movement, and the man we can thank for the initiative-and-referendum process that distends our state ballots. Johnson, unlike the right-wing “stand-patters” of his own Republican Party and many of his fellow progressives, deplored the United States’ entrance into foreign wars and even more its manipulation of public opinion and constitutional law to further those war aims. He famously warned Americans

during World War I, my thesis topic, that “in our tenderness for democracy abroad we forget democracy at home.”

As I read, day after day, Johnson’s letters—which historian Kevin Starr once called fit to background a *Masterpiece Theater* series—I saw as clearly as if I were an eyewitness the war’s rampage in Johnson’s own family. A son who had seen action at Château-Thierry disappeared into the family attic after the Armistice and began downing his daily martinis at 11 a.m. Another son’s wife, whose tuberculosis worsened during the war, grew mortally ill in a Bay Area sanatorium because, Johnson wrote, his politi-

cal foes fought the son's draft exemption and no one else was able to care for her.

Johnson's letters are essential reading, my adviser Prof. David Kennedy told me. When you read them, he said, you will learn better than in any other way what World War I meant to America. So I chewed, five days a week, through Johnson's voluminous correspondence, commuting ninety minutes each way to the Bancroft and its rows of document boxes, mine containing folders with hundreds of fragile letters from the senator to his colleagues and friends. A train, another train, then a half-hour uphill walk to a lane of knob-knuckled sycamore trees that flank Berkeley's Campanile and, next door, the entrance to one of the greatest repositories of historical material in America.

As I read Johnson's letters, day after day, I wondered how to transmute what I was reading into my objective, a thesis. The story seemed as real to me as if I sat perched on Johnson's shoulder, but oppressively huge and complex. I saw Johnson's prescience but also, because hindsight is 20/20, some painful nuances he could not. "Senator, your son's got PTSD!" I wanted to jab him on the shoulder. "Put down your pen, run up to the attic and give him some love!" It's a familiar dilemma to anyone who's ever been asked to write a book-length manuscript. How do I shape this mountain of data that rises before me? Where is its bedrock, its ground floor? Where do I place the first stone? My heart broke for Hiram Johnson and his powerlessness against events and colleagues he despised, but feelings aren't a thesis. No, I needed a carefully constructed pyramid of facts.

The uphill walk to the Bancroft and the knobby trees were familiar to me because I had been a Berkeley undergraduate in the 1970s. Almost everything on my uphill trudge, though shabbier, was otherwise nearly unchanged to me and might have been so to Johnson. Many of the white Beaux-Arts buildings had been built while he was governor.

I walked up that hill with a chip on my shoulder. I had not been successful at Berkeley. I had endured crime, trauma, unmet psychological needs. Post-traumatic stress disorder, much less its treatment, did not enter the U.S. diagnostic manual until 1980, the year after I graduated. It was, though it took years for me to see it, a sizable achievement that I got a degree at all. Decades later, I yearned to do my education over, this time coherent and sentient and successful. This goal took me to Stanford, to the Master

of Liberal Arts program, and eventually to Prof. Kennedy and the Bancroft Library. Where, day after day, I read.

One Tuesday I broke my long journey home with a stop at the Berkeley Farmer's Market. Almost unconsciously, I was relieved that I had completed the day's archival deep dive safely, if not conclusively. I could never go to campus without being ever so slightly triggered. I felt no closer to a thesis that afternoon. Yet no stalker or rapist had jumped from the bushes at me.

The war of my own youth, of course, was Vietnam. It besieged us at the gates and colored our lives in ways I am still discerning. From the fifth floor of my freshman dorm, in April 1975, I watched in astonishment as a conga line of pro-Hanoi demonstrators snaked up and down Durant

Avenue chanting *Ho! Ho! Ho Chi Minh! Vietnam has won!*

As I mulled all this, I saw a portly woman with a guitar sitting on the curb that bordered the market, behind a produce vendor, playing and singing. She was solidly built with short dark-dyed hair, singing to no one in particular. Her voice was deep

and clear. I stopped to listen.

Street musicians are a common sight in the city, both in the 1970s and today. Some of them never leave Berkeley. Others busk there on their way up, or down. I'd see them sitting on curbs or on the Sproul Hall steps, unamplified, strumming acoustic guitar and singing. Future stars (Jonathan Richman, Greg Kihn, the Indigo Girls), former stars (Donovan, one morning quite by himself, almost unrecognized, at Sproul), all battling the ambient street noise and craziness with aplomb I never felt.

Freshmen were advised not to talk to them, or to any street people. They could take us, we were told, into currents of madness or extremism so deep we might never emerge. My father, an aerospace defense contractor, had worried about this: He could lose his security clearance if I got mixed up in radical politics.

I pulled out a small bill and moved to drop it in the woman's guitar case.

"I don't need that," she said. "I don't sing for that. I'll take it, though, to honor the situation. I'm honoring the spirit of the situation that we're creating. So thank you."

I nodded, politely. To make conversation, I asked her name.

"If I told you my name, you would probably know me."

"Which is?"

"You'll know it when I say it."

"No reason not to try me."

Like Spanky I breathed in the Berkeley air and breathed out stories—in her case melodies, in my case the beginnings of a thesis and eventually a book.

She waited a beat and then said, “Spanky McFarlane.”

I gave a start. Spanky and Our Gang were one of my favorite bands as a child. I grew up singing along with their hit songs on the AM radio: “Lazy Day,” “I’d Like To Get to Know You,” “Sunday Will Never Be The Same.” Their hits ran up and down the charts like billowing flags in 1967 and 1968. Crouched on the curb beneath me, Spanky let her words sink in.



She explained to me that she still sang, but mostly labor songs. She said she had studied the history of labor and its music. “Shall I sing a labor song for you?”

“Do you know ‘You Get No Bread with One Meatball’?” My mother, whose own dad was a longshoreman in New York City, loved this song.

“Some of it. I’ll sing what I know.”

As she launched into the tune, I wondered where Spanky and Our Gang had been when the anti-war ferment that kept Berkeley famous was happening. I didn’t need to think long: They were working, touring to support their string of hits. On June 23, 1967, the day before “Sunday Will Never Be the Same” peaked at #9 on the *Billboard* charts, President Johnson’s re-election drive hit its first derailment with what are sometimes called the “Century City Riots” against the war. “Sunday Morning” topped off at #30 on February 10, 1968, as ARVN and U.S. forces strove to beat back the Viet Cong’s Tet Offensive. The band charted during My Lai, during Martin Luther King’s and RFK’s assassinations, during the fractious Democratic National Convention in Chicago.

All this time, U.S. troops, of whom there were half a million in Vietnam in 1967, were also listening to Spanky and Our Gang, on Armed Forces Radio. Spanky has said in interviews that she never forgets these fans, especially the many who came home worse for wear. The week I met her, I later learned, she had volunteered at a “Stand Down,” a service point and meetup for veterans, near Travis Air Force Base. She also did a concert nearby.

Spanky strummed the song’s final chords. “I hope it was enough,” she said. She spoke in the same balls-out contralto she sang with.

“It was. Thank you.”

“I hope I’ve left you with something this afternoon.”

“You have.”

I asked Spanky what had brought her to Berkeley that day.

“This is where change happened. Where it still happens,” Spanky told me intently. “It happened through music, and it happened in person. It happened one song and one song’s listener at a time.”

I thought about this, the notion that there was something so resonant, so activating, so fecund in the Berkeley air that people actually came from around the country and even the world just to sing into it. It made me less fearful, more resolute. If Spanky could seat her gold-record-earning and now senior-citizen behind on a filthy Berkeley sidewalk, sans amplification, sans even a cushion, to tell a story, then certainly I could do no less in a library chair.

That Hiram Johnson and his frustration evoked feelings in me no longer seemed difficult or troubling. It merely meant that I was human. It actually gave me hope. As with Johnson, who left us rueful commentary on destruction that for all his power he could not avert, as with Spanky McFarlane, who provided both troops and resisters a soundtrack for a war she lived through secondhand, my success would not hinge on definitively solving some kind of problem. It would hinge on raising my voice and doing the best I could.

I renewed my quest to deal with, even to triumph over, my trauma at the hands of long-ago people who evidently derived from the Berkeley air a freedom to do harm. Like Spanky, I breathed in the Berkeley air and breathed out stories—in her case melodies, in my case the beginnings of a thesis and eventually a book. I began, from that moment, to enjoy my own agency. I began to get, at last, what I came for.



303 Creative LLC v. Elenis

Same-Sex Marriage as a Second-Class Constitutional Right?

Robert M. Mason III

IN 2015, THE UNITED STATES LGBTQ+ community scored a landmark legal victory in their quest for equal rights and respect under the law. Writing for a 5-4 majority vote in *Obergefell v. Hodges*, Associate Justice Anthony Kennedy held that marriage is a fundamental constitutional right that extends to both opposite-sex and same-sex couples, and state laws that restricted the right to marry to only opposite-sex couples or that refused to recognize same-sex marriages lawfully performed in other states violated the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.¹ In so holding, the Court recognized four principles and traditions demonstrating that “the reasons marriage is fundamental under the Constitution

apply with equal force to same-sex couples.”² First, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” Second, the right to marry “is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” Third, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” Fourth, marriage is a “keystone of our social order.”³ Allowing a state to ban same-sex marriage, or not recognize a same-sex marriage lawfully performed in other states, would frustrate the application of the four principles the Court articulated and would result in the unequal treatment of same-sex couples, which would be contrary to this nation’s concept of equal protection under the law.

But the victory won in *Obergefell* may prove to be short-lived. Thanks to Justice Kennedy's retirement and reconstitution of the Supreme Court at the hands of Donald Trump and a GOP senate majority, there is now a 6–3 conservative majority that threatens to chip away, if not eventually eliminate, the ability of same-sex couples to fully enjoy their rights enshrined in the Constitution. Eight years after *Obergefell*, the Supreme Court addressed the perceived conflict between the rights of free speech, religious beliefs regarding same-sex marriage, and the ability of same-sex couples to publicly celebrate their marriages. In *303 Creative LLC v. Elenis*,⁴ the conservative voting block displayed a premature willingness to interject its religious views on same-sex marriage rights and accept a case for review even though there was no controversy ripe for adjudication. Lorie Smith is the owner of a business in Colorado that offers website and graphic design, marketing advice, and social media management services. She recently decided to expand her offerings to include services for couples seeking websites for their weddings, which would include text, graphic arts, and videos to celebrate and convey the details of each couple's unique love story. Concerned that Colorado's Anti-Discrimination Act (aka Colorado's Accommodation Clause) would force her to express views favoring same-sex marriage that she doesn't approve of because of her religious convictions, she filed suit and sought an injunction against the State to clarify her right to refuse to provide expressive services to same-sex couples. Ms. Smith sought judicial relief even though no same-sex couple had tried to avail themselves of Ms. Smith's expressive website service to celebrate their marriage.

Nevertheless, the Supreme Court accepted the case. Writing for a 6–3 conservative majority, Associate Justice Neil Gorsuch framed the issues as follows: "Can a State force someone who provides her own expressive services to abandon her conscience and speak its preferred message instead?"⁵ Justice Gorsuch answered this question in the negative, reasoning that Lorie Smith's expressive services component of her business was a form of pure speech protected by the Constitution's First Amendment, and "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail."⁶ In reaching that conclusion, the Court found that Ms. Smith had shown that "a credible threat" existed that Colorado would seek to compel speech from her that she did not wish to produce.

Yet the undisputed factual record contradicted the Court's finding of a credible threat. Although in the past the Colorado Civil Rights Commission had enforced the Act, no evidence was presented that the Commission

would sue, or was even considering suing, Ms. Smith. The existence of the Accommodation Clause, by itself, establishes no threat. There was no evidence that the Commission told Ms. Smith that she must provide her website services to same-sex couples which would include expressions of support for same-sex marriages or face legal repercussions. The record in *Creative* contrasts sharply with the facts in the precedent that the Court cited, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁷ in which the owner refused on religious grounds to make a cake for a same-sex couple's wedding reception, and the Commission ordered the owner to cease and desist from discriminating against same-sex couples, and to prepare quarterly compliance reports for two years documenting the number of patrons denied service and why.

The absence of a credible threat also undermined the Court's conclusion that *Creative* centered on the need to protect the sanctity of the First Amendment's Free Speech Clause. Justice Gorsuch first set forth the accepted legal principle that the "First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided.'"⁸ Since Ms. Smith's website promised to contain images, words, symbols, and other modes of expression, her website qualified as pure speech, and Colorado's Accommodation Clause could not be used to compel Ms. Smith to convey forms of speech (i.e. favorable same-sex marriage sentiments) to which she does not agree. But as we have seen, the Commission had not ordered Ms. Smith to engage in any conduct that would compromise her right to free speech, nor had a same-sex couple availed themselves of Ms. Smith's website services. Thus, the danger stemming from compelling Ms. Smith to engage in a form of speech contrary to her beliefs was never present.

When we strip away the conservative majority's discussion of credible threats and the need to protect freedom of speech, we come to the actual reason why the Supreme Court agreed to accept *Creative*—to elevate Christian religious beliefs over the rights of LGBTQ+ persons protected by the Constitution, thus creating a caste-like system of rights. A caste, by its nature, involves the "granting or withholding of respect, status, honor, attention, privileges, resources, benefit of the doubt, and human kindness to someone on the basis of their perceived rank or standing in the hierarchy."⁹ Here, *Creative* has created a religious caste system of constitutional rights where the ostensibly sincerely held Christian belief that heterosexual marriage is the only type of marriage that may be recognized is at the apex of rights as a form of free speech, with same-sex marriages relegated to a subordinate constitutionally pro-

tected tier. We see the Court's efforts to elevate the status of Christian views on marriage throughout *Creative*, where the decision is sprinkled with references to "biblical truth" and "a sincerely held religious conviction" that marriage is a union between one man and one woman," along with references to "her beliefs," "abandon her conscience," "[her] sincere objection to doing so," and "defy her conscience about a matter of major significance."¹⁰ The Court's prior decision from *Masterpiece Cakeshop* also included religious phrases such as "Phillips (the cakeshop owner) is a devout Christian," "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman," and "[Mr. Phillips'] own most deeply held beliefs."¹¹

These questions are more than Jesuitical "what ifs" since biblical writings and the teachings drawn therefrom have been subject to varying and sometimes contradictory scholarly interpretations. If we look at Christianity and its views towards homosexuality, we find a body of scholarship that contends same-sex unions have been recognized and accepted even in the most religiously devout societies for centuries. In 1980, John E. Boswell, a professor at Yale who was a medieval philology scholar, authored *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*.¹⁵ In this groundbreaking work that went on to win the National Book Award, Professor Boswell translated and studied the original texts that form

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But anchoring a decision to religious principles is a tenuous approach to drafting binding judicial precedent because it begs a fundamental question: what is a sincerely held religious conviction and a biblical truth when it comes to the definition of marriage, and how is that sincerity and biblical truth measured or verified? What is a biblical truth? Presumably, Justice Gorsuch is referring to the Holy Bible, which history has shown to be an anthology of writings from different sources and hands prepared over several centuries.¹² How do we know what parts are the word of God versus the musings and opinions of clerics or other religious-affiliated individuals? What are we to make of the concept of marriage that may be contrary to those biblical truths or sincerely held beliefs? For example, the Unitarian Universalist Association, the United Church of Christ, and the Presbyterian Church all recognize same-sex marriage,¹³ with the Presbyterian Church going so far in 2015 to amend its constitution to change the description of marriage from being between "a man and a woman" to being between "two people."¹⁴ Would these churches' views on who can marry be afforded the same "sincerely held religious conviction" status that the Supreme Court has afforded to devout Christians?

the basis of Christian beliefs and argued that Christianity did not universally condemn homosexuality until the twelfth century, and those that did so based their feelings on something other than the teachings of Jesus Christ: "Roman society, at least in its urban centers, did not for the most part distinguish gay people from others and regarded homosexual interest and practice as an ordinary part of the range of human eroticism. The early Christian church does not appear to have opposed homosexual behavior per se. The most influential Christian literature was moot on the issue; no prominent writers seem to have considered homosexual attraction 'unnatural,' and those who objected to physical expression of homosexual feelings did so on the basis of considerations unrelated to the teachings of Jesus or his followers."¹⁶ As for the biblical passages that are cited as irrefutable proof that God and his followers condemned homosexuality, Professor Boswell studied the original texts and argued that the translations drew erroneous conclusions on the morality of homosexuality.¹⁷ In Professor Boswell's assessment, for a while, "[n] either Christian society nor Christian theology as a whole evinced or supported any particular hostility to homosexuality" but hostility towards gay people started to appear



in the later part of the twelfth century in literature and theological writings.¹⁸

Professor Boswell followed up *Christianity* with *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe*¹⁹ in which he argued that same-sex union rites had been widely practiced in the ancient world and had been accepted for a time by Christianity.²⁰ He reached this conclusion following his translation of Catholic and Orthodox liturgies for same-sex unions from the Greco-Roman world, through early Christianity, and into Medieval Europe. Professor Boswell's work is quite lengthy so a few examples of his findings will be provided here. First, during the Roman Empire, Professor Boswell found "there were also many same-sex couples in the Roman world who lived together permanently, forming unions neither more nor less exclusive than those of the heterosexual couples around them."²¹ Second, in his analysis of an eleventh-century treatise of Byzantine law, Professor Boswell concluded that "same-sex unions were well-known and effectively legal by that time[.]"²² Thus, despite the conventional wisdom that has pervaded Western Civilization for centuries, there is a wealth of textual evidence to dispute the notion that homosexuality and same-sex unions were a universally and consistently condemned practice among Christian communities.

Of course, we must acknowledge that Professor Boswell's writings and conclusions regarding Christianity's early tolerance for homosexuality and sanctioning of same-sex unions are not without their critics.²³ And even he thought his writings would be the beginning and not the end of the subject.²⁴ However, the fact that there is legitimate scholarly debate about the meaning of religious writings and practices when it comes to understanding Christian attitudes towards homosexuality in general and same-sex marriage in particular means that the Supreme Court should not be basing its decisions on the sincerity of a litigant's religious principles. A Court wishing to tether its decision on a Christian litigant's religious beliefs, no matter how sincerely those beliefs may be held, should decline to do so because it is certain to issue a decision filled with uncertainty as to how the decision should

be interpreted and applied in future cases where a party's religious beliefs are part of the controversy for resolution.

That is what is bound to happen post-*Creative* if the Supreme Court does not restrain itself from interjecting religion into its decisions. If someone is a member of a religion that embraces same-sex marriage and it is based on a religious writing, is that belief sincerely held? What happens if contrary, yet sincerely held beliefs regarding marriage are in conflict and escalate to a legal dispute? How is a Court to decide which set of religious beliefs should prevail in a constitutional challenge? How is the Court to resolve seemingly contradictory passages from the same biblical text about homosexuality? These questions have no easy answers, which places the Supreme Court in the unenviable position of choosing winners and losers in disputes that turn on the application of religious doctrine. Going forward, the Supreme Court should remember this observation from Saint Thomas Aquinas: "Because of the diverse conditions of humans, it happens that some acts are virtuous to some people, as appropriate and suitable to them, while the same acts are immoral for others, as inappropriate to them."²⁵ Given these differences of opinion, the Supreme Court should not function as a religious body that interjects itself into and attempts to resolve a legal dispute by acting as a religious arbiter.

The need to abstain from adjudicating religious controversies is why the Founding Fathers wisely decided to draw a line between matters of Church and State. The First Amendment of our country's Bill of Rights is clear on this subject: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In his letter to the Danbury Baptists, Thomas Jefferson explained that the purpose behind the First Amendment was to create a wall between church and state: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus build-

ing a wall of separation between Church and State.”²⁶ But rather than adhere to the separate lines of governance that our Constitution delineated, the current Supreme Court majority is acting as an extension of the church rather than the state in adjudicating controversies that turn on the consideration and application of religious beliefs.

In sum, sincerely held religious beliefs that are protected by the First Amendment cannot be elevated to the point where they can be used to discriminate against other protected classes whose rights are guaranteed by the Equal Protection and Due Process clauses in the Fourteenth Amendment. How can we say that Ms. Smith’s free speech rights to not support same-sex marriage are superior to the free speech rights of a same-sex couple who wants to use a publicly available service to celebrate their marriage? A business like *Creative’s*, which has voluntarily decided to make its expressive business available to the public, cannot utilize a religious litmus test to dictate which classes of people can avail themselves of that expressive service. As Justice Sotomayor rightly observed, the “First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners’ speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination.”²⁷ There is no credible way to reconcile the holding in *Obergefell* that same-sex marriages are protected by our Constitution, with the holding in *Creative* that a person who sincerely believes, based on religious teachings, that marriage can only be between a man and woman, can then use those religious beliefs to refuse to provide public expressive services. Something has to give here, and it should be the Court adhering to the Constitution and Thomas Jefferson’s warning to respect the separation of Church and State.

Unfortunately, it appears that at least Associate Justices Samuel Justice Alito and Clarence Thomas will not adhere to such advice. In a speech at a religious conference hosted by the Notre Dame Law School’s Religious Liberty Initiative in Rome, Justice Alito spoke of the larger struggle to protect freedom of religion: “All I’m going to say is that, ultimately, if we are going to win the battle to protect religious freedom in an increasingly secular society, we will need more than positive law.” He went further

and opined: “It is hard to convince people that religious liberty is worth defending if they don’t think that religion is a good thing that deserves protection[.]” He made these comments to an ideologically receptive audience who shared his concern that the United States was undergoing a “growing hostility to religion, or at least the traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors.”²⁸ And Justice Thomas

recently expressed his desire for the Court to overturn *Obergefell* because, in his view, it was wrongly decided.²⁹ Thus the foundational decision that recognized the right of same-sex couples to marry is in danger of

being overturned, which will effectively moot future legal challenges like the one in *Creative* as there may no longer be a constitutional right to same-sex marriage to protect.

A growing number of people are questioning the Supreme Court’s ability to act as a fair judicial tribunal. Following the Court’s decision to use *Dobbs v. Jackson Women’s Health Organization*³⁰ to eliminate the constitutional right to an abortion that had been recognized over 50 years ago in *Roe v. Wade*,³¹ a sizeable group of the public now see the Court “as politicians in robes” rather than impartial arbiters of the law.³² That distrust of the Court may also stem from the rising influence of The Federalist Society, a once small cadre of conservative law students, that has evolved into an influential organization that vets potential nominees to the federal bench to ensure that they have the proper conservative credentials. The current

conservative block of six was either personally vetted by The Federalist Society or socialized with its members.³³

A recent example occurred in 2023 when Associate Justice Amy Coney Barrett spoke at

the Federalist Society’s 2023 annual gala that included, among the 2,500 attendees, fellow Associate Justices Neil Gorsuch, Samuel Alito, and Brett Kavanaugh.³⁴

The Supreme Court has taken notice of these shifting public perceptions and has attempted to address the situation. In the conclusion of the majority opinion in *Biden v. Nebraska*, Chief Justice John Roberts commented on what he termed “a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary.”³⁵ As a means of allaying expected criticism of the Supreme Court’s right-leaning trend, Chief Justice Roberts assured all who follow Supreme Court decisions that the Supreme Court

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was simply carrying out its traditional judicial function of applying the facts to the applicable law and reaching its conclusion. Chief Justice Roberts then cautioned that the public should not be misled by how Associate Justice Elena Kagan's dissent characterized the Supreme Court's decision because "[a]ny such misperception would be harmful to this institution and our country."³⁶

But any harm that the Supreme Court may have caused to its reputation through its recent decision-making has been self-inflicted.

With a string of decisions handed down in the waning days of June 2023, which included *Creative*, the conservative majority has engaged in unabashed acts of judicial activism that will for the foreseeable future tarnish the integrity of, and the respect for, the Supreme Court as an impartial judicial tribunal. The conservative majority has acted beyond its traditional role as arbiter of the law. Instead, it has fancied itself as an authoritative body absolute that may disregard precedent and create its own law, even when such new law lacks any credible judicial predicate. In effect, the conservative

majority is acting less like a Supreme Court and more like an all-powerful Ayatollah, whose decisions represent the final word on all forms of jurisprudence, governance, and religious beliefs.

Referring to the conservative majority as an Ayatollah is not hyperbole. An Ayatollah, which literally means "sign of God," is a scholar who has "reached the level *mujtahid*," the highest level of religious studies, and is "permitted to exercise *ijtihad*," which is the "interpretation of classical sources of jurisprudence, using one's reason, in order to ascertain new rulings in a modern context."³⁷ Thus, for an Ayatollah, the study of law and religion are intertwined, and pronouncements are made without regard to the traditional separation of church and state doctrine that has

been enshrined into the First Amendment of our country's Bill of Rights. Rather than adhere to the separate lines of governance that our Constitution delineated, the conservative majority is behaving in a more Ayatollah-like manner with its penchant for braiding legal and religious doctrines into their decisions.

Justice Alito's call to protect religious freedom is even similar to the words of Ayatollah Khomeini who spoke out on June 3, 1963, against the dangers of the Shah of Iran

allowing Western Civilization to encroach on Iranian religious tenets: "We come to the conclusion that this regime also has a more basic aim: They are fundamentally opposed to Islam itself and the existence of the religious class. They do not wish this institution to exist; they do not wish any of us to exist, the great and the small alike. The ruling circles have violated the sacred rules of Islam and are heading for trampling underfoot the very tenets of the Holy Qur'an[.]"³⁸ While Ayatollah Khomeini had to wait for the 1979 Islamic Revolution to restore Iranian religious beliefs to their place in the country and its governance, Justice Alito and his conserva-

tive brethren will not have to wait for a similar political uprising. With *Creative*, it appears that the conservative majority is well on its way to integrating Christian doctrine into Supreme Court decisions, thus transforming the Court from a branch of the judiciary into a separate and autonomous theocracy that will remain entrenched until the ideological composition of the Supreme Court is altered.

One way to make that alteration is to remind all Americans of the need to exercise their right to vote. Whoever wins the presidency is entitled to nominate persons to the Supreme Court, which once confirmed by the Senate enjoy a lifetime appointment. This power was exercised from 2017 to 2020 when Donald Trump defeated Hilary



Clinton in the electoral college vote, and during his term, Trump appointed three justices to the Supreme Court, which gave the conservatives a 6–3 majority. Those who did not vote in 2016 because they felt that it did not matter which party occupied the White House yet are now unhappy with the current roster of justices on the Supreme Court need to remember that presidential elections have consequences that will be felt decades after an election has been certified. Before the passage of the Voting Rights Act of 1965, people fought, marched, and died to secure

the right to vote for all Americans. In his 1957 “Give Us the Ballot” speech, Dr. Martin Luther King, Jr. spoke passionately about the importance of voting: “So long as I do not firmly and irrevocably possess the right to vote, I do not possess myself[.]”³⁹ The sacrifice Dr. King and others made for future generations of Americans should be remembered and honored each time the opportunity to vote presents itself.



Endnotes

- 1 (2015) 576 U.S. 644.
- 2 *Id.*, slip op., p. 12.
- 3 *Id.*, slip op., pp. 12–16.
- 4 (2023) 600 U.S.
- 5 *Id.*, slip op., p. 19.
- 6 *Id.*, slip op., p. 14.
- 7 (2017) 584 U.S. ____.
- 8 303 U.S. slip op., p. 8.
- 9 Wilkerson, Isabel. *Caste: The Origins of Our Discontents*. Random House, 2020, p. 70.
- 10 600 U.S. slip op., pp. 4, 7, 19, 23, and 25.
- 11 584 U.S. slip op., p. 3.
- 12 See Swensen, Kristen. *A Most Peculiar Book: The Inherent Strangeness of the Bible*. Oxford University Press, 2021, p. 21; and Riches, John. *The Bible: A Very Short Introduction*. (2000: Oxford University Press.) at 9.
- 13 See Liechty, Steven. “Marriage Equality and LGBT Rights.” United Church of Christ June 17, 2015, citing <http://uccfiles.com/pdf/2005-EQUAL-MARRIAGE-RIGHTS-FOR-ALL.pdf>; July 1, 1996 “Support of the Right to Marry for Same-Sex Couples 1996 Resolution of Immediate Witness.” [Support of the Right to Marry for Same-Sex Couples | Resolution of Immediate Witness | Social Witness Statements | UUA.org](#); and Heery, Patrick D. “What same-sex marriage means to Presbyterians.” March 20, 2015 [Presbyterian Church \(U.S.A.\) - What same-sex marriage means to Presbyterians \(pcusa.org\)](#).
- 14 Heery, Patrick D. (www.pcusa.org/news/2015/3/17/presbyterian-church-us-approves-marriage-amendment/).
- 15 Boswell, John. *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*. The University of Chicago Press, 1980.
- 16 *Id.*, p. 333.
- 17 *Id.*, pp. 92–95 (Genesis 19), 95–97 (Judges 19:22ff), 100–103 (Leviticus [18:22 and 20:13]), and 104–107 (Acts).
- 18 *Id.*, p. 333–334.
- 19 Boswell, John. *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe*. Harper Collins, 1994.
- 20 *Id.*, p. 280.
- 21 *Id.*, p. 65.
- 22 *Id.*, p. 229.
- 23 See Harvey, John F. “[Book review of] *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, by John Boswell.” *The Linacre Quarterly*, vol 48, no. 3, article II, 1981.
- 24 See Clark, David. “The Inevitable Errors of First Explorations? Revisiting John Boswell’s Christianity, Social Tolerance and Homosexuality.” *Medieval*, November 8, 2016.
- 25 *Summa Theologica*, quoted in *Christianity*.
- 26 Jefferson, Thomas. “Jefferson’s Letter to the Danbury Baptists.” U.S. Library of Congress, January 1, 1802.
- 27 *Runyon v. McCrary* (1976) 427 U.S. 160.
- 28 Egelko, Bob. “Separation of church and state cloudier.” *San Francisco Chronicle*, August 22, 2023.
- 29 Dobbs, 597, Thomas, J., concurring, slip op., p. 2.
- 30 (2022) 597 U.S. 215.
- 31 (1973) 410 U.S. 113.
- 32 Levendury, Matthew. “Has the Supreme Court become just another political branch? Public perceptions of court approval and legitimacy in a post-Dobbs world.” *Science Advances*, March 8, 2024.
- 33 See Matthews, Dylan and Byrd Pinkerton. “The incredible influence of the Federalist Society, explained.” *Vox* June 3, 2019; and Feldman, Noah. *Takeover: How a Conservative Student Club Captured the Supreme Court*. Pushkin Industries, 2021, audiobook.
- 34 Gerstein, Josh and Josh Sisco. “Justice Barrett keeps it light at Federalist Society gala.” *POLITICO*, November 9, 2023.
- 35 (2023) 600 U.S., slip op., p. 25.
- 36 *Id.*, p. 26.
- 37 Adib-Moghaddam, Arshin, ed. *A Critical Introduction to Khomenei*. Cambridge University Press, 2014, pp. xvi–xviii.
- 38 Rieffer-Flannagan, Barbara Ann. *Evolving Iran: An Introduction to Politics and Problems in the Islamic Republic*. Georgetown University Press, 2013, pp. 23–24.
- 39 Tensley, Branden “What Martin Luther King Jr. said about voting rights and why celebration without legislation dishonors his legacy” CNN [Why celebration of MLK Day without legislation defangs the civil rights leader’s legacy | CNN Politics](#)

The Poetry Doorman

John Angell Grant

Sometimes a poem is like a door stop;
It holds open a door
Through which I can walk
To freedom.

Whew;
It's nice to be on the other side of things.
Where the grass is green,
And the birds are chatting away,
And the laissez-faire cat is sleeping in the sun,
Ignoring those birds.
Life is good.

Back through on the other side of the poetry door,
However,
Things look darker.
I peer into the shadowy opening,
From where I came.

Though it's dark
I can hear something;
A little rustling;
What is that?
I can't tell.
I strain.
Then,
In the distance,
I hear a train speeding up,
Blasting its horn.

It has been suggested that I not close this door.
That was the recommendation, at least,
From the poetry doorman.
Maybe doorman is the wrong word.
He was a happy guy
Sitting on a stone
Near by
When I first passed through.
I asked if I needed a ticket,
He shook his head, "No."
So I came through.
"Just don't close the door,"
Was all he said.

The Shift that Redefined Retirement Security

A Brief History

Shashwat Vidhu Sher

THE HISTORY OF RETIREMENT security in the U.S. is closely tied to the ideas around economic security arising out of the Great Depression and later directed by socio-political sensibilities. By 1920, many states and the federal government implemented a public pension plan for their employees (Nat. Conf. 3, Nuschler et al. 3). Though some private enterprises also offered pensions, many American workers still lived with no assurance of a secure future—a situation exacerbated by the Great Depression in the 1930s. In response, economists promoted the idea of social insurance, which itself traces back to the 1880s and requires contribution from the beneficiary towards an economic security net. The effort resulted in the Social Security Act of 1935 to provide “Greater Security for the Average Man” (Neocleous 369). The idea of ‘social security’ affected retirement security directly. Private companies found the liberal thought process behind social insurance to be the perfect tool for countering the criticism against capitalism. Companies rapidly expanded “insurance, healthcare and income-maintenance options” like retirement plans projecting a paternalistic image (372). However, a series of events with political and economic ramifications in the latter half of the 20th century again changed the conception of retirement security for both employers and employees. By discussing the changes in the retirement planning landscape and the associated terms, we will understand the current state and the future of worker security in the U.S.

Defined Benefit Plans

The primary vehicle for providing the pensions was the Defined Benefit plans or D.B. plans, as we refer to them in the rest of the paper.

As the name suggests, D.B. plans provide employees a defined benefit, usually a fixed monthly payout based on their years of employment, accrual rate, and average salary of the past few years before retirement (Broadbent et al. 3). Hence, D.B. plans provide the benefits at retirement as part of a fixed formula tied to the employment period rather than depending on the plan's investment returns. The most significant advantage of a D.B. plan is that the monthly payout is a lifetime commitment to the employee by the employer. Employers are legally obligated to make the promised payments once the benefits accrue

and are vested. The employer assumes all the investment risks associated with the D.B. plan and hence controls the retirement fund (Kaplan 57). By 1975 almost 98% of public sector employees and 88% of private-sector employees were covered by D.B. pension plans (Munnell et al., “Why have Defined”, 2). D.B. plans still dominate the public sector, but the private sector has moved to an alternate retirement plan type.

Defined Contribution Plans

Originating in 1956, Defined Contribution, or D.C. plans, were the less popular of the two plan types available to employees. D.C. plans started as profit-sharing plans by the employers, which through later changes allowed employees to make tax-deferred contributions (Sollee 78). As Broadbent et al. describe, a D.C. plan is a pension scheme where “workers accrue funds in individual accounts administered by the plan sponsor. The contributions of employees are typically deducted directly from their pay and frequently some portion of these contributions is matched by the employer” (Broadbent et al. 7). At retirement, the employee receives a lump sum of the savings amount. However, as opposed to D.B. plans, return on the D.C. plan investment is subject to market risk, with no fixed payout at the time of retirement. The most prominent feature of D.C. plans is the transfer of risk from employer to employee in maintaining her retirement portfolio. An employer is not legally bound to provide the employee with a fixed benefit. On the flip side, the employee is free to invest her retirement fund in a plan option she deems profitable. Though D.C. plans were less attractive than D.B. plans

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before 1980, a series of events in the 60s and 70s changed the status quo.

The Build-Up for the Shift

Because of a string of high-profile bankruptcies, the crisis of terminated pension plans became a public focus in the 1960s. Leading the charge was the infamous Studebaker case (Lowenstein). Facing reduced sales and tough competition, the already failing auto manufacturer closed its last production plant in South Bend, Indiana, in December of 1963. With the firm declaring bankruptcy, workers were suddenly left with no pensions to cover their

future. The case was already in media because of past woes of Studebaker and the fight for workers' benefits by the labor union, United Auto Workers (UAW). During the litigation against Studebaker, UAW actuary Max Block commented that "when a pension plan is terminated, its funds are never better than inadequate," leaving the worker with an uncertain future and his family in economic insecurity (Wooten 68). However, even after an aggressive campaign by UAW, the fall eventually left many workers high and dry as only those who had already retired could get an assured pension. Describing the case as the 'Most Glorious Story of Failure in the Business,' James Wooten writes that 4,192 employees, many with "40 years of service... received a lumpsum payment worth 15 percent of the value of their pension" (77). The human tragedy that unfolded in the Studebaker case and a few other companies like Penn Central Railways created a lack of trust towards employers in American workers, which needed a timely solution.

The social turmoil following bankruptcies jolted the government to take definite measures to safeguard workers' rights and preserve employee trust in the establishment. Starting in 1965, New York Senator Jacob Javits commenced a very public campaign for pension reforms (Whitten). With the help of the Senate Labor Subcommittee set up to investigate private pensions, he publicized the inadequate funding of many D.B. plans. There was also substantial outside support from labor unions towards the cause. During the bankruptcy of Penn Central Railways in 1970, UAW president Leonard Woodcock expressed his displeasure on government trying to bail out the investors but not providing any insurance to "meet the urgent need of wage earners and lower-salaried workers who stand to lose the protection of privately negotiated pensions" (Woo-

ten 160). Testimonies of workers like Stephan Duane brought private D.B. plan failures into the nation's attention. Due to his company shutting shop, Stephan was left with no pension to cover his retirement. His agony and disappointment are evident in his description of himself as a "big loser with 32 years [of service and getting] absolutely nothing out of it" (US Cong. Sen. Comm. On Labor 119). By the early 1970s, media routinely covered the pension problem with a September 12, 1972, NBC broadcast of *Pensions: The Broken Promise* showing the consequences of poorly funded pension



plans on millions of American workers. Soon after, Javits presented the status of active D.B. plans and gave an ominous warning that "millions of American workers will [never] get anything from the plans on which they stake their future" (164). Such claims, combined with public support towards the cause, made a persuasive case for Congress to take action without further delay.

After a decade-long fight for pension reforms, in 1974, Congress passed the Employee Retirement Income Security Act (ERISA) to protect workers' pension funds in the private sector. As Tyler Bond notes in *Why Pensions Matter*, "ERISA regulates how an established pension plan operates, including vesting requirements and the survivor benefits for spouses. It also created the Pension Benefit Guaranty Corporation [PBGC], which acts as a backstop for closed pension plans that do not have the funds to pay promised benefits" (3). Not only did ERISA

protect workers' rights in ensuring a safer retirement, but it also assuaged the growing insecurity in the mind of many Americans regarding the dependability of their employers. Though ERISA's purpose was to alleviate the D.B. plan problem in private firms, its implementation and changes in tax code in subsequent years actually marked the beginning of the shift from D.B. to D.C. plans.

The Beginning of the Shift

New provisions in the Internal Revenue Code (IRS) and a series of regulatory changes in the 1980s ushered in the era of D.C. plans. In 1978, the IRS started offering a provision for employees to take cash wages or direct them to an individual retirement account via section 401(k). The tax deferral provision provided in the 401(k) became lucrative for companies to latch on, and they moved most of their employees towards D.C. plans. Soon after, strict reporting guidelines on funding/vesting and rising PBGC premiums increased

the administrative burden to keep D.B. plans running (Broadbent et al. 19–20). Per participant cost increased from \$1 to \$16 between 1974 and 1990, resulting in many employers freezing their D.B. plans (Cong. Res. Service, "Pension", 20). A move from D.B. to D.C. plans halved the administrative cost for the employer and became the preferred retirement scheme for most of the private enterprises. However, as we discuss next, the changes eventually created a new set of problems.

The non-applicability of ERISA in the public sector contributed heavily towards making D.B. plans a political tool. D.B. plans provided by the state or local government organizations were never under the regulatory framework of ERISA or PBGC, which kept the costs of running such plans low. As a result, D.B. plan participation in the public sector dropped only 12% in 45 years (1975–2020) (Munnell et al. 5, Cong. Res. Service, "Worker", 3). Much of

the support towards maintaining the status quo of D.B. plans is the working of labor union-government nexus (Butrica et al.) Most government jobs like teachers and firefighters are unionized, giving them immense bargaining capability. As Healey et al. have observed:

Public sector unions are often highly involved in raising funds and donating to the campaigns of political candidates, often with the goal of preserving the pension status quo... As important as it may be to take on the challenge [of pension reform] many lawmakers are still politically incentivized to maintain the status quo for as long as possible. (34)

Because of the power unions hold, candidates will find it increasingly difficult to get elected if they do not

of *laissez-faire* when dealing with the subject of retirement security in the private sector as it decided not to impose binding requirements on private sector companies to offer D.B. plans. Instead, it decided to provide favorable tax treatment to encourage D.C. plans. This move suggests that policy-makers supported the employers with potential lobbying power and influence over campaign contribution while making the private sector employee look out for herself. As shown in Fig. 1, the number of D.C. plan participants in the private sector has increased from 10 million to 85 million (an increase of 850%) between 1975 and 2019, whereas D.B. plans have decreased 43% in the same period. This statistic is a glaring testimony to the government's stance

er-employee relationship, which affected the meaning of loyalty and support in the workplace. In the 1980s, as a response to growing global competition, many U.S. companies backed new management strategies like the 'Six Sigma' methodology centered on efficiency and keeping labor costs low (Semuels). Organizations started favoring a rolling door approach in treating their employees and downsized their workforce. Not much importance was given to retention and hence, a need for playing the role of a caretaker by providing life-long pensions. Employers on practical consideration preferred the D.C. plan model as it promoted a low-obligation environment to look after the retirement security of the employee. Researchers like Peter Cappelli and Daniel Yankelovich talk about this phenomenon as the breakdown of an implicit contract between the employer and the employee. The old model of loyalty for a lifetime economic security was no longer the norm (Cappelli 200–202). Echoing the opinion, Economist Katharine Abraham says that "restructuring of the employment relationship marginalizes workers because employers no longer have a long-term commitment to them. Workers become less secure as companies try to hedge against a volatile business cycle" (Abraham 85). As discussed above, promotion of D.C. plans went in parallel with abandoning D.B. plans. Pensions were the symbol of employer responsibility towards worker retirement and "by freezing DB pensions, firms unilaterally reneged on this implicit contract" (Patki 6). The social implication of the new retirement support ideology adopted by employers soon started showing its effects on the employees.

The shift to D.C. plans started a new cycle of broken trust between employer and employee. With the freezing of D.B. plans, only the existing employees of an organization could get the pension benefits. Giving new joiners the lone option of D.C. plans meant potential morale issues and the ability to perform the job efficiently. Commenting on the same, the Pension Review Board states: "If retirement benefits for new

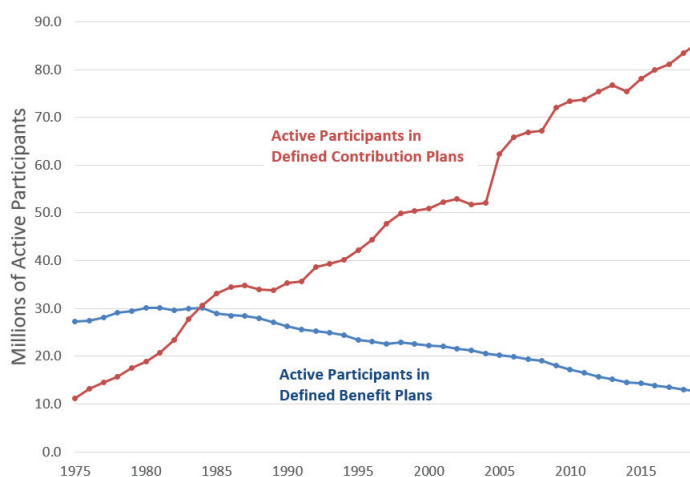


Fig 1: Active Participants in Private-Sector Pension Plans 1975–2019
Source: U.S. Department of Labor, Employee Benefits Security Administration (EBSA), Private Pension Plan Bulletin Historical Tables and Graphs: 1975–2019, September 2021, Table E7, <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>.

promise to maintain or increase the defined benefits provided to the public sector employees. Hence, pensions that started as a social program supported by the government to provide a dignified living for retirees devolved into a political tool used in election promises (McGuinn 4).

Political agenda, unfortunately, took over the good intentions behind ERISA and 401(k), especially when we see the apathetic treatment of the private sector employees left only with the option of D.C. plans. The U.S. government followed a policy

on retirement security on the lines of "political philosophy of individual responsibility vs. state responsibility for retirement savings" (Munnell et al., "Why have Some", 7). It is not that the support of D.C. plans is fundamentally wrong, but without an alternative, government's policy leaves the employee at the mercy of employers and market forces.

The Changing Employer-Employee Dynamics

The new retirement paradigm brought by D.B. to D.C. plan shift was also a result of changing employ-

hires are perceived to be less generous than benefits in place for current members, the implication may be that future employees are expected to work for a lower total compensation package” (Pension Review Board 17). The new situation led to mistrust and insecurity in the workplace. It is ironic that a call for pension reforms came from restoring trust in corporations and promoting worker security, but the implementation perpetuated the original problems. In the old model, the employer banked on the employee commitment, just as the employees trusted the company in providing stable employment and retirement security (Cappelli 204). With the trust gone, questions on loyalty and insecurity crept into the minds of both the employer and the employee, respectively. The new employer-employee relationship combined with other factors, as discussed below, has given birth to a new breed of employees with a very different approach towards jobs and retirement security.

Pensions that started as a social program supported by the government to provide a dignified living for retirees devolved into a political tool used in election promises

The New Age Employee

As a response to the changing employment situation and personal ambitions, Generation X and millennials have a higher proclivity for job-switching, increasing the popularity of D.C. plans (Rajnes 24). The rationale behind the D.B. plan structure was to promote longer job tenure with an organization. However, with D.B. plans gone and taking the security of pensions with them, more and more employees in the private sector are going for newer jobs every 3–4 years. Also, encouraging a shorter tenure with an organization is a desire for faster career growth. For most new-age employees, earning a higher salary is the top consideration,

especially if they have an education loan or to increase their standard of living (Hershbein 2, Karahan). As the salary increase in the ongoing job is negligible to the increase obtained via a shift, employees are always looking for new opportunities (Miller). As a result of the new trend, millennials can have up to 20 jobs in their career compared to only 12 for baby boomers (Bakker, US BLS). In such a job environment, a D.C. plan like 401(k) makes much more sense for the employee to protect her retirement savings from being lost as it is not tied to an employer like a D.B. plan and is transferable from one job to the other. Though a move to D.C. plans has its justifications, it also has ramifications for retirement security.

Prioritizing Today; Risking Tomorrow

Accepting D.C. plans as a primary source of savings provides insight into perplexing retirement considerations of the modern employee. D.C. plans indeed align better with an employment situation where the employee is not looking for any long-term commitment. However, it also strengthens a low-obligation attitude in the private sector towards retirement security. So, in a bid to look after herself, the employee is also perpetuating the problem of no assured pension benefits. In the desire for a higher salary and climbing the corporate ladder, employees move away from the traditionally ‘safe’ public jobs, where defined benefits are still common (Pub. Retirement Res. Lab 1). As employees gravitate towards private jobs, they take up D.C. plans, which means they alone are now responsible for their retirement. They weigh the needs of the present in terms of earning a good salary, higher than the certainty of a monthly pension under a D.B. plan, something known as hyperbolic discounting (Knoll 24). To secure their future, they willingly or unwillingly depend on their judgment about retirement investment, a theme we touch on next in this paper. Overall, it will not be incorrect to say that many employees, in order to take advantage of job-switching and D.C. plans, certainly play a gamble with their retirement security.



Democratization of Stock Market and Associated Risks

An increased risk appetite because of familiarity with the financial market is also one of the strong factors contributing to the move towards D.C. plans. Since the early 1980s, deregulation and technological advances have contributed significantly to the number of U.S. households having direct stakes in mutual funds and stocks (Broadbent et al. 21, Duca 1). With more information on how the stock market works, people exhibit a degree of confidence in managing their own investments. This behavior directly leads to employees opting for (when presented a choice) or accepting (when there is no choice) a D.C. plan to manage their retirement savings. From data collected by Saad and Jones, the percentage of Americans who own stocks either directly or through 401(k) type D.C. plans has been above 50% since 1999, a number which was below 22% in 1975 (Duca 10). As stated in an article from Money magazine, the new employee mantra is “Give me more choices, and let me manage them myself, thank you very much” (Smith and Kirwan). Employees’ understanding of financial markets may increase their acceptance of retirement risk, but

many experts find the behavior akin to over-confidence.

Research in behavioral economics shows that most employees managing their retirement portfolios via D.C. plans actually do not have sufficient knowledge to make complex investment decisions and, in the process, jeopardize their retirement security (Stabile 88). No other case study than the bankruptcy of ENRON explains this point better. ENRON, a giant in the energy sector, went through a major accounting scandal declaring bankruptcy in December 2001. Many ENRON employees at that time had contributed to what is known as Employee Stock Ownership Plans (ESOP), a type of D.C. plan where individuals buy the stocks of their own company at a discounted price (Kruse 224). Because of their familiarity with the company, they perceived ESOP as safer than other D.C. plans that invest money in the open market. However, this perception was due to an incorrect understanding of ENRON's financial standing. Overnight the stock price went from \$90 to \$1, wiping out the retirement savings of thousands of workers. Highlighting the tragedy in a Senate Subcommittee hearing on the case, Representative Greg Walden stressed on the fact that "too many workers saw their retirement vanish...[due to] many years of financial statements [being] misleading at best or downright fraudulent at worst." (US Cong. House 43). As evident, the scale of catastrophe to an employee's future economic security is immense in such events. The eagerness to manage retirement savings but a lack of understanding of the complexity associated with D.C. plans also shows up in a couple of other cases.

Lack of Financial Literacy

Employees want more control and display a desire to manage their retirement portfolios. However, they often do not understand the options presented to them or make decisions based on only past performance of a particular D.C. plan (DiCenzo 13). Many employees miscalculate the money they will require at retirement and make exiguous contributions to their D.C. plans (DiCenzo 7, Rus-

sell 78). In such cases, a lack of sound retirement strategy leads to insufficient savings in their retirement nest egg. Also, with market forces strongly influencing the retirement savings in D.C. plans, a situation of uncertain final savings amount is created. During a period of economic prosperity, many employees invest in plans that seem lucrative based on their short bull run, but as the financial market fluctuates, so do the retirement savings of millions of people (Russell 90-91). The current situation with D.C. plan proliferation means that the retirement security of a vast majority of American workers is dependent on

the retirement account. However, this feature comes with interest on the loan amount, tax implications, and penalties (Kronson 13). Employees usually take a loan against the retirement savings for education or make hardship withdrawals to deal with illness or death in the family. At a cursory examination, the option seems helpful, but a deeper analysis reveals the problem of reduced retirement savings (Villareal and Reeves 2). In the case of non-repayment of the loan, an employee faces the risk of having reduced or no savings in her retirement account. The biggest problem is the lack of restraint shown



markets being friendly at the time of their retirement. Any variation from the norm like that of the 2002 dot-com bubble burst, or the 2008-2010 financial crisis, plunges all the retirees into a crisis. The biggest advantage of D.C. plans is providing autonomy to the employee in planning her retirement. However, this requires substantial financial literacy to choose the right investment option. Such considerations are not always possible for employees, as Nobel Laureate Robert Merton argues, and hence, retirement security under D.C. plans becomes a betting game (Merton 8).

Just like insufficient understanding reduces the efficacy of investment control under D.C. plans, another advantage of a loan against a 401(k) account becomes a source of retirement insecurity in many cases. D.C. plans like 401(k) allow hardship/non-hardship withdrawals against

by some employees in making non-hardship/early withdrawals, which incur heavy penalties plus taxes. Such employees treat their retirement savings account as an emergency fund rather than insurance towards a safer retirement (Kronson 15, Sammer 45). Advantages like loans and withdrawals incentivize the shift from D.B. to D.C. plans. However, at the same time, they put the employee in a riskier position by making it possible to break the retirement nest egg prematurely.

Retirement Insecurity

The insufficiency of retirement savings, whether due to the inherent nature of D.C. plans, incomplete knowledge, or behavioral aspects, has researchers point to a retirement crisis in the United States (Ellis et al., Russell, Ghilarducci and James). Retirement studies in the past decade reveal a general inadequacy of sav-

ings amongst American workers of all age groups. Especially in households nearing retirement, 62% have retirement funds equal to only one times their annual income (Rhee and Boivie 1). The present situation has serious implications for the future of worker security. After a lifetime of work, most elderly people will be poor or near-poor in their retirement. This situation will strain the already depleting Social Security Trust Fund and put tremendous strain on “social safety net programs, from the Supplemental Nutrition Assistance Program to Medicaid” (Ghilarducci and James 5). Another aspect of the crisis is the personal costs to families with more and more parents depending on their children to provide long-term care. With rising costs of healthcare, rent, and childcare, eldercare will

2). One of the most striking results of the surveys is that 84% of Americans believe they may have to work well into their 70s, with some stating that they might never be able to retire (Parker et al. 46, Dickler). The sad state of affairs where the inability to retire looks like a real possibility, speaks volumes about the depth of the retirement crisis. The above data points are drops in the ocean of retirement troubles for Americans and reminiscent of concerns existing before 1935.

Return of Retirement Woes

In many ways, the current situation is a turn to American worries regarding dignified living and retirement that existed before and during the Great Depression. With mass migration to cities after the 1880s, people often worked well into their old age

of social insurance. With people living longer than before, savings done under D.C. plans often fail to provide for an entire lifetime. D.B. plans avoid this issue by risk pooling and maintaining their payout rate based on average longevity estimates. That means retirees expiring early pay for those who live longer (Russell 95). In a D.C. plan, individual savings is all the worker can count on. Financial products that generate an income stream using D.C. plan money use maximum longevity estimates. Hence, if a retiree does not have enough money in her retirement fund, she will see a tiny paycheck every month. Living poor in retirement is a real possibility due to these complexities (Broadbent et al. 28). With the D.B. to D.C. plan shift and longer lifespans, society has gone

**Many policy-makers and experts recognize the dire savings situation,
which the people echo in their thoughts on retirement security.**

further reduce the ability of young workers to contribute to D.C. plans (Ghilarducci and James 3, Parker et al. 45). Even congressional hearings on retirement crises have drawn similar concerns from Senators like Sherrod Brown: “Without retirement savings, aging parents become dependent on their working-age children, preventing those children from saving for their own retirement” (US Cong. Sen. Comm. on Fin. 2). Many policy-makers and experts recognize the dire savings situation, which the people echo in their thoughts on retirement security.

Various surveys capture the pessimism amongst American workers concerning their retirement. As per the BlackRock DC Pulse Survey of 2021, 76% of millennials and 68% of Generation Xers feel they will not have the same retirement income level as retirees of the previous generation (Escalent Inc. 45), while 40% of participants in Charles Schwab’s 2018 401(k) Survey voted that “Saving enough for a comfortable retirement” is the number one source of their financial stress (Logica Res.

to support an urban lifestyle. Work injuries were common amongst the elderly, decreasing life quality with every passing year (Fleming et al. 917). Because of health and physical constraints, many would drop out of the workforce, falling into poverty or becoming completely dependent on their children. With not much savings for their own retirement, the dependency added to the stress of the younger cohort of workers. The Great Depression only magnified the problem with everyone struggling to make even the living wage (Moen and Gratton 1). The ideas around ‘social security’ alleviated this situation by arguing for retirement pensions, which improved overall wellbeing and provided assurances of economic security to workers in all age segments. However, history is repeating itself with the current perilous retirement savings situation, and an inherent difference between D.B. and D.C. plans has only exacerbated it.

Longevity Risk

Deepening the retirement crisis is the longevity risk and the inability of D.C. plans to take full benefit

from benefits outliving the worker to the worker outliving her retirement savings. In a nutshell, D.C. plans, along with the longevity risk, distort the ideas around pension and contribution given by social insurance.

Conclusion

The shift from Defined Benefits to Defined Contributions due to political considerations, fracturing of the employer-employee social contract, and the new worker sensibilities started a new chapter in the history of retirement security in the U.S. The various advantages of D.C. plans also have the potential to derail the retirement of an individual, a fact often brushed under the carpet. It is no wonder then that an incessant march towards D.C. plans has created a dangerous over-reliance resulting in inadequate retirement savings. Just like in the depression era, a concerted effort from the government, organizations, and workers is the need of the hour to resolve the retirement crisis and safeguard the future of millions of Americans.

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References

- Abraham, Katharine. "Restructuring the Employment Relationship: The Growth of Market-Mediated Work Relationships." *New Developments in the Labor Market*, MIT Press, 1990, pp. 85–120. Print.
- Bakker, Alissa. "Generation Gap: How to Connect Boomers & Millennials." *Blankslate Partners Blog*, www.blankslatepartners.com/boomers-millennials-generation-gap/
- Bond, Tyler. *Why Pensions Matter*. National Public Pension Coalition, Mar. 2017, protectpensions.org/files/2017/03/CA_Why-Pensions-Matter.pdf
- Broadbent, John, et al. "The Shift from Defined Benefit to Defined Contribution Pension Plans - Implications for Asset Allocation and Risk Management." *Bank for International Settlements*, Dec. 2006, www.bis.org/publ/wgpapers/cgfs-27broadbent3.pdf
- Butrica, Barbara A., et al. "The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers." *Social Security Bulletin*, vol. 69, no. 3, 2009, www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html
- Cappelli, Peter, et al. *Change at Work*. Oxford University Press, 1997. EBSCOhost, search.ebscohost.com.stanford.idm.oclc.org/login.aspx?direct=true&db=nlebk&AN=53314&site=ehost-live
- Congressional Research Service. "A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector." *Congressional Research Service Reports*, 27 Dec. 2021, <https://crsreports.congress.gov/product/pdf/IF/IF12007>
- . "Pension Benefit Guaranty Corporation (PBGC): A Primer." *Congressional Research Service Reports*, 8 Jan. 2021, sgp.fas.org/crs/misc/95-118.pdf
- . "Worker Participation in Employer Pensions: Data in Brief." *Congressional Research Service Reports*, 23 Nov. 2021, sgp.fas.org/crs/misc/R43439.pdf
- DiCenzo, Jodi. "Behavioral Finance and Retirement Plan Contributions: How Participants Behave, and Prescriptive Solutions." *EBRI Issue Brief*, Washington, DC: Employee Benefit Research Institute, no. 301, Jan. 2007, ssrn.com/abstract=959002
- Dickler, Jessica. "41% of Americans say it's 'going to take a miracle' to be ready for retirement, report finds." *The New Road to Retirement*, CNBC, 14 Sep. 2021, <https://www.cnbc.com/2021/09/14/36percent-of-americans-say-they-wont-have-enough-to-retire-report-finds.html>
- Duca, John. *The Democratization of America's Capital Markets*. Economic and Financial Policy Review, issue 2, pp. 10–19, www.dallasfed.org/assets/documents/research/efr/2001/efr0102b.pdf
- Escalent Inc. 2021 BlackRock DC Pulse. BlackRock, March 2021, www.blackrock.com/institutions/en-us/insights/defined-contribution/dc-pulse-survey-2021#
- Fleming, Kevin, C., et al. "A Cultural and Economic History of Old Age in America." *Mayo Clinic Proceedings*, vol. 78, no. 7, July 2003, pp. 914–921, ocw.mit.edu/ocw/00005625-200307000-00020/HTML
- Ghilarducci, Teresa, and Tony James. *Rescuing Retirement*. Columbia University Press, 2018, pp. 1–42. Print.
- Healey, Thomas, et al. "Underfunded Public Pensions in the Pension Politics: Public Employee Retirement System Reform in Four States 47 United States: The Size of the Problem, the Obstacles to Reform and the Path Forward." *M-RCBG Faculty Working Paper*, Mossavar-Rhman Center for Business and Government, Apr. 2012, 34–35, www.hks.harvard.edu/centers/
- Hershbein, Brad, et al. "Major Decisions: Graduates' Earnings Growth and Debt Repayment." *Papers, The Hamilton Project*, 29 Sep. 2014, www.hamiltonproject.org/papers/major_decisions_graduates_earnings_growth_debt_repayment
- Ilele, John. "Dramatic DB to DC Shift, Graphically." *American Society of Pension Professionals and Actuaries*, 29 Dec. 2021, www.asppa-net.org/news/dramatic-db-dc-shift-graphically
- James Wooten. *The Employee Retirement Income Security Act of 1974: A Political History*. University of California Press, 2004. EBSCOhost, search.ebscohost.com.stanford.idm.oclc.org/login.aspx?direct=true&db=nlebk&AN=295128&site=ehost-live
- Kaplan, Richard L. "Enron, Pension Policy, and Social Security Privatization." *Arizona Law Review*, vol. 46, no. 1, 2004, p. 53–90. HeinOnline, www.arizonalawreview.org/pdf/46-1/46arizrev53.pdf
- Karahan, Fatih, et al. "Job Ladders and Careers." *Liberty Street Economics Blog*, Federal Reserve Bank of New York, 8 Oct. 2019, libertystreeteconomics.newyorkfed.org/2019/10/job-ladders-and-careers/
- Knoll, Melissa A.Z. "Behavioral and Psychological Aspects of the Retirement Decision." *Research, Statistics & Policy Analysis*, Social Security Administration Bulletin, vol. 71, no. 4, 2011, www.ssa.gov/policy/docs/ssb/v71n4/v71n4p15.pdf
- Kronson, Marc. "Employee Costs and Risks in 401(k) Plans." *Monthly Labor Review*, U.S. Bureau of Labor Statistics, Jun. 2000, www.bls.gov/opub/mlr/cwc/employee-costs-and-risks-in-401-k-plans.pdf
- Kruse, Douglas L. "Pension Substitution in the 1980s: Why the Shift Toward Defined Contribution Pension Plans?" *Working Paper Series*, National Bureau of Economic Research, no. 3882, Oct. 1991, pp. 218–241, doi:10.3386/w3882
- Logica Research. 2018 401(k) Participant Survey. Charles Schwab Corporation, Aug 2018, content.schwab.com/web/retail/public/about-schwab/Schwab_401k_Participant_Survey_deck_2018.pdf
- Lowenstein, Roger. "The Long, Sorry Tale of Pension Promises." *The Wall Street Journal*, 1 Oct. 2013, www.wsj.com/articles/the-long-sorry-tale-of-pension-promises
- McGuinn, Patrick. "Pension Politics: Public Employee Retirement System Reform in Four States." *Brown Center on Education Policy at Brookings*, Feb. 2014, pp. 4–7, www.brookings.edu/wp-content/uploads/2016/06/Pension-Politics_FINAL_225.pdf
- Merton, Robert C. "The Crisis in Retirement Planning." *Harvard Business Review*, nos. 7/8, July–August 2014, pp. 43–50, robertcmerton.com/wp-content/uploads/2017/08/The-Crisis-in-Retirement-Planning-HBR-2014-Merton.pdf
- Miller, Stephen. "2019 Salary Budgets Inch Upward Ever So Slightly." *Society for Human Resource Management*, Society for Human Resource Management, 16 Jul. 2018, www.shrm.org/resourcesandtools/hr-topics/compensation/pages/2019-salary-budgets-inch-upward.aspx
- Moen, Jon R., and Brian Gratton. "Tracking the majority: households, older workers, and retirement during the Great Depression." *J Gerontol B Psychol Sci Soc Sci*, Jan. 2000, pp. 28–32, doi:10.1093/geronb/55.1.s28.

Munnell, Alicia, et al. "Why have Defined Benefit Plans Survived in the Public Sector?" State and Local Pension Plans, Center for Retirement Research at Boston College, no. 2, Dec. 2007, crr.bc.edu/wp-content/uploads/2007/12/slp_2.pdf

---. "Why have Some States Introduced Defined Contribution Plans?" State and Local Pension Plans, Center for Retirement Research at Boston College, no. 3, Jan. 2008, crr.bc.edu/wp-content/uploads/2008/01/slp_3.pdf

National Conference on Public Employee Retirement Systems. "The Evolution of Public Pension Plans: Past, Present and Future." Research Publications, March 2003, ncpers.org/files/evolution_of_public_pensions_2d.pdf

Neocleous, Mark. "From Social to National Security: On the Fabrication of Economic Order." Security Dialogue, vol. 37, no. 3, Sept. 2006, pp. 363–384, doi:10.1177/0967010606069061.

Nuschler, Dawn, et al. "Social Security: Mandatory Coverage of New State and Local Government Employees." Congressional Research Service Reports, 25 Jul. 2011, www.teACHERPENSIONS.org/sites/default/files/CRS%202011%20Report.pdf

Parker, Kim, et al. "Retirement, Social Security and long-term care." Research Topics, Pew Research Center, 21 March 2019, www.pewresearch.org/social-trends/2019/03/21/retirement-social-security-and-long-term-care/

Patki, Dhiren. 2021. "Breaking the Implicit Contract: Using Pension Freezes to Study Lifetime Labor Supply." Federal Reserve Bank of Boston Research Department Working Papers, no. 2–17, doi:10.29412/res.wp.2021.07

Pension Review Board. "A Review of Defined Benefit, Defined Contribution, and Alternative Retirement Plans." Publications and Reports, Texas Pension Review Board, no. 12-001, May 2012, www.prb.texas.gov/txpen/wpcontent/uploads/2019/11/finaldbdcwhitepaper.pdf

Public Retirement Research Lab. "Long-Tenure Workers a Much Greater Force in Public-Sector Plans." Research: Trends in Public-Sector Employee Tenure, 21 May 2020, www.ebri.org/docs/default-source/prrl/study-snapshots-t/01-sst_tenure_21may2020.pdf

Rajnes, David. "An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans." EBRI Issue Brief, Washington, DC: Employee Benefit Research Institute, no. 249, Sep. 2002, papers.ssrn.com/sol3/papers.cfm?abstract_id=341100

Rhee, Nari, and Ilana Boivie. The Continuing Retirement Savings Crisis. National Institute on Retirement Security, 18 March 2015, doi:10.2139/ssrn.2785723

Russell, James W. Social Insecurity: 401(k)s and the Retirement Crisis. Beacon Press, 2014, pp. 76–101. Print.

Sammer, Joanne. "A Delicate Balancing Act." HR Magazine, Society for Human Resource Management, 1 Jan 2013, pp. 45–49, www.shrm.org/hr-today/news/hr-magazine/pages/0113-401k-loans-and-withdrawals.aspx

Samuels, Alana. "How the relationship between employers and workers changed." Los Angeles Times, 7 Apr. 2013, www.latimes.com/business/la-xpm-2013-apr-07-la-fi-mo-harsh-work-history-20130405-story.html

Smith, Kelly, and Roberta Kirwan. "America's Best Company Benefits." CNN Money Magazine, 1 Oct. 1999, money.cnn.com/magazines/moneymag/moneymag_archive/1999/10/01/266453/index.htm

Sollee, William L. "Cash or Deferred Arrangements (Section 401(k): Legal Issues and Plan Design." William & Mary Annual Tax Conference, 1983, scholarship.law.wm.edu/tax/534

Stabile, S.J. "The Behavior of Defined Contribution Plan Participants." New York University Law Review, vol. 77, no. 1, Apr. 2002, www.nyulawreview.org/issues/volume-77-number-1/the-behavior-of-defined-contribution-plan-participants/

United States Bureau of Labor Statistics. "Number of Jobs, Labor Market Experience, Marital Status, and Health: Results from a National Longitudinal Survey Summary." Economic News Release, 31 Aug. 2021, www.bls.gov/news.release/nlsoy.nr0.htm

United States, Congress, House of Representatives. Lessons Learned from Enron's Collapse: Auditing the Accounting Industry. Government Printing Office, 5 Feb 2002, www.govinfo.gov/app/details/CHRG-107hrg77986/context. 107th Congress, 2nd Session.

United States, Congress, Senate. Committee on Labor and Public Welfare. Private Welfare and Pension Plan Study: Hearings before Subcommittee on Labor. Government Publishing Office, 11 Aug. 1971, www.google.com/books/edition/_/-ZBU4HFMPkC?hl=en&sa=X&ved=2ahUKEwjS2MH0kr32AhXrm-AKHZcfCXEQ7_IDegQ-ICChAC. 92nd Congress, 1st Session.

United States, Congress, Senate. Committee on Finance. The Role of Social Security, Defined Benefits, And Private Retirement Accounts in the Face of the Retirement Crisis: Hearing Before the Subcommittee on Social Security, Pensions, And Family Policy of the Committee On Finance, Government Publishing Office, 18 Dec. 2013, <https://catalog.hathitrust.org/Record/102385841>. 113th Congress, 1st Session.

Villarreal, Pamela and Robert Reeves. "401(k) Loans = Retirement Insecurity." NCPA Brief Analysis, National Center for Policy Analysis, no. 615, 25 Apr. 2008, research.policyarchive.org/5830.pdf

Whitten, Leslie H. "Javits Aims to Protect Union Funds." Journal American, 2 Aug. 1965. Print



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Contributors

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Perry Karsen is a third-year MLA student and a former Stanford DCI Fellow (2019 cohort). His undergraduate degree is in the Biological Sciences, and he spent his forty-year career on the business side of biotechnology. Having minored in English as an undergraduate, he has always had a strong interest in the humanities, and his DCI experience reawakened his love of learning. Photography and the power of the photographic medium has intrigued him since days spent in the darkroom in high school and college. Perry was introduced to Paul Fusco's RFK portfolio in Professor Nemerov's 1960's Photography Continuing Studies course and was immediately captivated.

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