From: Davis, Ben  
Sent: Friday, January 10, 2014 5:30 PM  
To: Clark, JR  
Subject: Comments on affirmative action and tenure with respect to the law school accreditation standards review

The Hon. Solomon Oliver, Jr., Council Chairperson  
Barry A. Currier, Managing Director of Accreditation and Legal Education  
c/o JR Clark

Dear Judge Oliver and Mr. Currier,

These are comments I am submitting with regard to affirmative action and tenure proposals that you are examining, particularly with regard to the Chapter 4 proposed changes to the ABA accreditation standards.

Below is a link to an article in draft that is up at SSRN as of today about my experience in August 2012 at a True the Vote meeting in Worthington, Ohio about which I have written on the Society of American Law Teachers blog and presented on at Cardozo Law School November 5, 2012 – the day before the Presidential election. The article will appear in due course in the Cardozo Journal for Conflict Resolution Blog but they have allowed me to put it up at SSRN in this form. I also attach a .pdf of the article.

I share this article with the ABA CLEA as the intersection between my going to that ostensibly non-partisan meeting in my private capacity, the threat to my job as a law professor, and the affirmative action and tenure discussions are fairly obvious. Please note that I had prepared based on the above experience an amicus curiae on behalf of my son and myself to the US Supreme Court that became moot when the Court declined cert of the State of Ohio’s effort to overturn some of the pro-voting rights decisions of the 6th Circuit during the pre-Presidential election period.

As a longtime Ohio resident, strong supporter of the ABA over the past 15 years in my work with the Section of Dispute Resolution where I am a former Council Member, Co-chair of the Diversity Committee, and Liaison to the Council on Racial and Ethnic Diversity in the Educational Pipeline, I hope that this data point of reflection may assist you as you think about the merits of “flexibility” vs. “security of position” vs. “tenure.” It would be a dramatic and tragic mistake to eliminate tenure as I am certain the pressures that were placed on me (even though I was just attending in my private capacity as an ordinary citizen) would have led rapidly in the absence of tenure to successful pressure to eliminate my position here at the Law School.


Abstract
I thank the Cardozo Journal for Conflict Resolution for the opportunity to present at the November 5, 2012 Symposium, “Negotiating the Extremes: Impossible Political Dialogues in the 21st Century.” This article builds on my presentation about my experience at a voter integrity group named True the Vote meeting at its Ohio Summit on August 25, 2012 and subsequently. As I have reflected on that experience it seemed that it might be useful to examine that experience through four lenses. First, I tell the personal story. Next, I reframe the experience in terms of negotiation theory with regard to difficult
conversations. In making that reframing, it did occur to me that the negotiation theory analysis I was doing might be well informed by recent work on explicit bias, implicit bias and stereotype threat that could have been a second order frame around the negotiation. Third, given the positive and negative reactions to me in that space over that day and in subsequent events, I was drawn back again to Derrick Bell’s work on interest convergence theory. Fourth, with these three strands operating as the ordinary citizen experiencing a kind of dissociative moment that led to a certain galvanizing of my own activity, I was brought back to the work of Francesco Alberoni’s on how movements get started and in particular a person reaches what he terms the nascent state, seeks affinity with others and movement and institution were also relevant. Through these four lenses, I hope to assist reflection on a manner of thinking about negotiating extremes in settings of impossible political dialogue.

Hope this is of assistance. Thank you for your consideration of this matter.

Best,

Ben

Benjamin G. Davis
Associate Professor of Law
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2801 W. Bancroft Street
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On an Ordinary African-American Citizen Negotiating Voting Rights and Voter Intimidation in Ohio 2012

By Benjamin G. Davis, Associate Professor of Law, University of Toledo College of Law

Abstract

I thank the Cardozo Journal for Conflict Resolution for the opportunity to present at the November 5, 2012 Symposium, “Negotiating the Extremes: Impossible Political Dialogues in the 21st Century.” This article builds on my presentation about my experience at a voter integrity group named True the Vote meeting at its Ohio Summit on August 25, 2012 and subsequently. As I have reflected on that experience it seemed that it might be useful to examine that experience through four lenses. First, I tell the personal story. Next, I reframe the experience in terms of negotiation theory with regard to difficult conversations. In making that reframing, it did occur to me that the negotiation theory analysis I was doing might be well informed by recent work on explicit bias, implicit bias and stereotype threat that could have been a second order frame around the negotiation. Third, given the positive and negative reactions to me in that space over that day and in subsequent events, I was drawn back again to Derrick Bell’s work on interest convergence theory. Fourth, with these three strands operating as the ordinary citizen experiencing a kind of dissociative moment that led to a certain galvanizing of my own activity, I was brought back to the work of Francesco Alberoni’s on how movements get started and in particular a person reaches what he terms the nascent state, seeks affinity with others and movement and institution were also relevant. Through these four lenses, I hope to assist reflection on a manner of thinking about negotiating extremes in settings of impossible political dialogue.

I. Introduction

I thank the Cardozo Journal for Conflict Resolution for the opportunity to present at the November 5, 2012 Symposium, “Negotiating the Extremes: Impossible Political Dialogues in the 21st Century.” This article builds on my presentation
about my experience at a voter integrity group named True the Vote meeting at its Ohio Summit on August 25, 2012 and subsequently. As I have reflected on that experience it seemed that it might be useful to examine that experience through four lenses. First, I tell the personal story. Next, I reframe the experience in terms of negotiation theory with regard to difficult conversations. In making that reframing, it did occur to me that the negotiation theory analysis I was doing might be well informed by recent work on explicit bias, implicit bias and stereotype threat that could have been a second order frame around the negotiation. Third, given the positive and negative reactions to me in that space over that day and in subsequent events, I was drawn back again to Derrick Bell’s work on interest convergence theory. Fourth, with these three strands operating as the ordinary citizen experiencing a kind of dissociative moment that led to a certain galvanizing of my own activity, I was brought back to the work of Francesco Alberoni’s on how movements get started and in particular a person reaches what he terms the nascent state, seeks affinity with others and movement and institution were also relevant. Through these four lenses, I hope to assist reflection on a manner of thinking about negotiating extremes in settings of impossible political dialogue.

Part II of this paper provides a version of the events that happened at the public meeting. Part III looks at those events from the point of view of negotiation theory. Part IV adds to the negotiation theory vision a look at the events in terms of explicit bias, implicit bias and stereotype threat theory. Part V builds on the above to examine the events in terms of interest convergence theory. Part VI draws on the previous parts to understand the events as generating the nascent state in Alberoni’s work. Part VII is a summary and conclusion.

II. A version of the facts

The primary source for the discussion in this article is my experience in August 2012 at a True the Vote meeting and subsequently. I thought to put this section as an Annex to the article due to the focus of the other sections on more conventional theoretical analyses, but decided to keep this section here for two
reasons. First, the theoretical analyses would have little context or meaning without the presentation of the experience in this next section. Second, for posterity, reciting the events of a day in the life of an ordinary African-American citizen seeking to be civically engaged in Ohio provides an opportunity for those who read this years from now to contemplate what it must have been like at that time and in this place and to ask themselves what they would have done in similar circumstances.

A. Prior to the True the Vote August 25, 2012 Ohio Summit

As a private citizen, I became aware of a True the Vote Ohio Summit scheduled for Saturday, August 25, 2012 at the Holiday Inn in Worthington, Ohio by watching the Rachel Maddow Show on MSNBC on August 23, 2012.\(^1\) Several allegations of voter intimidation in other states by poll observers from this group were made in that presentation which piqued my interest.\(^2\) I know from training that a poll observer’s main tasks at the polling place are to 1) not talk to any voter and 2) refer problems one sees to the head judge at the polling place, and 3) check in with the organization that nominated you periodically and signal problems that are unresolved. So I was curious to see what was being taught people at this True the Vote Ohio Summit. I also noted that the program would include former Secretary of State Kenneth Blackwell (who ran the 2004 election debacle about which I had firsthand experience as a poll observer) and Secretary of State John Husted (who had done what appeared to be election related shenanigans recently\(^3\) and who was then running the Lucas County Board of Elections where I live in Toledo, due to the Democratic and Republican leaders being hopelessly deadlocked on a number of issues).\(^4\) Hearing allegations of voter

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\(^2\) Id.

\(^3\) Id.

intimidation in other states by this supposedly non-partisan group and having served as a poll observer at the debacle of the Ohio 2004 elections in Toledo in Lucas County in an inner city polling place and in the smoothly run 2008 elections, and intending to be a poll observer for the 2012 election, I decided to see what this group was about. I signed up online as requested using my private address and e-mail (as opposed to work address and e-mail) and indicated that I would pay the $20 entrance fee upon arrival at the venue. When my son agreed to accompany me that Saturday, I informed True the Vote of his participation and that I would pay for him upon arrival at the venue.

B. Arriving at the True the Vote Ohio Summit, August 25, 2012, Holiday Inn, Worthington, Ohio

Based on the reports, I was unsure about this group and the risk of violence by them so I decided to rent a car rather than use my own. Early that Saturday morning my son and I drove down from Toledo, Ohio to Worthington, Ohio (a suburb near the capital Columbus) arriving around 9:00 a.m. I signed in and paid the $20 for my son and myself, made my badge, and proceeded to sit down in a chair at a table alongside the left wall. The room was estimated to have about 90 people in it with one woman and me appearing to be the only people of color in the audience and the rest being middle-aged or older white people.

After the welcome introduction by Ms. Engelbrecht, head of the organization, the second speaker, was Anita Moncrief, a black woman formerly with Acorn who appeared to be a star in the voter integrity movement and who was True the Vote’s Senior Adviser. She made a long spirited speech at the beginning which made me uncomfortable as a 56 year old black man to hear from anyone.5 True


(“Late last month, Ms. Engelbrecht was in Columbus, Ohio, for a True the Vote workshop. About 90 people signed up for the event at a suburban Holiday Inn, where they listened to speeches and discussed how to challenge questionable voters, including 51,000 “nonexistent” people in just one county that True the Vote’s Ohio volunteers say are registered to vote.)
the Vote says it is nonpartisan and it seemed out of line with nonpartisanship distinctly seeming to target supposedly left-leaning organizations and denigrating black leaders as “race hustlers.” I am not sure whether it was the rally like tone of the presentation, the sheer volume of criticism of said organizations and black leaders, or the distance between my own understanding of the organizations and black leaders being denigrated and what was being said about them, or some level of pain at watching a black person believe the things that at a minimum were denigrating to these organizations and by extension to black people and people of goodwill (in my view) who supported at least some of the work of these organizations and black leaders. The speaker assured the crowd that what she was saying was not racist and called out those who would use that phrase to describe her vision which came in part from her experience working with the now-defunct ACORN. I, on the other hand, experienced what was being said as a long presentation that echoed the race-baiting that I had seen done in other settings such as by then Governor George Wallace in the 1960’s and in the 2012 and earlier campaigns with the twist that the protagonist making the speech was a black woman. She was loudly and warmly received by the crowd receiving a standing ovation.

When Ms. Moncrief opened the floor for questions, I raised my hand, she recognized me and I asked three questions to make sure I understood for what the organization stood: I) Are you in favor of student ID being acceptable identification in Texas (the organization leaders were from Texas and the inability for student ID’s to serve as identification had been raised in the media as a means to suppress the student vote and particularly black students in places like Prairie

During the meeting, Anita MonCrief, True the Vote’s senior adviser, unleashed her vitriol at what she said was a coalition of voter registration groups, accusing them of “doing voter fraud since at least the early ’90s,” she said.

“And these groups target minority areas. Why? Because it’s so much easier to go work in those areas where they say people have been forgotten or they don’t have a voice. Then, when anybody pays a little bit of attention to the fact that there’s a high level of fraud coming out of the African-American communities, they say: ‘Oh, you’re a racist. You don’t want black people to vote,’” said Ms. MonCrief, who is black. “Vote fraud deniers is what I call them.”)
View University)? 2) Are you in favor of weekend voting in Ohio (there had been an effort to reduce weekend and early voting in Ohio by the Secretary of State and this was widely seen as an effort to reduce black voter participation and in particular the Sunday go to the polls type efforts of black churches)? And 3) Are you in favor of race-baiting not being done in these kinds of meetings or in other meetings (This question allowing out my reaction to the race-baiting I had just thought I experienced and more broadly the use of race by both parties in the 2012 and earlier campaigns)?

After I asked my questions, the place seemed to explode. Security was called on me and I was asked to leave by the security guard and one of the True the Vote representatives (Ms. Pullen) who said I was disrupting the private meeting. Both the security guard and the True the Vote representative threatened to call the police if I did not leave. I said I had paid, Ms. Moncrief had invited questions, I had asked my questions to Ms. Moncrief, and I was awaiting hearing her answers. The security guard and Ms. Pullen of True the Vote kept talking at me asking me to leave. When the security guard put his hand on my sleeve, I told him to take his hands off me. I told them to feel free to call the police. While they talked at me and I responded I was trying to hear Ms. Moncrief’s answers who was speaking up front. Ms. Moncrief said emotions run high on these issues and that she would answer my questions. Ms. Pullen and the security guard immediately stepped away. Ms. Moncrief answered the race baiting question but did not answer the other two. I repeated the other two questions and she did not know the answer on those two. Then I sat quietly and listened to the rest of the questions.

C. The coffee break

Right after this incident, the leader of the organization Ms. Engelbrecht called for a coffee break and came over to me to answer my questions as did Ms. Moncrief. As to student identification, she explained that the reason gun licenses were acceptable but student ID’s were not acceptable was that the concealed carry gun license was a more rigorous process than student ID so less risk of fraud. With regard to weekend voting, she said that issue was related to military voting. We
shared stories about the deep meaning voting has for both of us and she and Ms. Moncrief gave me their cards in order to be in touch. I emphasized that for me what was important was for anyone who is eligible to vote to be able to vote. Ms. Pullen also came over and Ms. Engelbrecht and Ms. Pullen apologized for what had happened explaining that there had been disruptions at other meetings. I said I understood and appreciated the apologies. Internally, I was quite agitated by all I had experienced and felt it was now essential that I stay to hear the rest of the speakers and ask questions rather than be intimidated into leaving. My then 21 year old son, who had been out in the coffee area when all the turmoil happened, came over and asked me to calm down as he could hear my loud voice. I explained that I had spoken loud to get heard over the din of the ovation when questions were being asked. He said that a police officer had come to the building and that he had explained to the police officer what had happened. The officer had been sympathetic to me and had left. I thought that was quite something that my asking questions could lead to that and I was also pained that my son would have to plead the case of his 56 year old father to a police officer – a reversal of roles I thought in the normal course of a family’s life. But, I was happy not to be arrested. I exchanged pleasantries with a person at my table of the “Where are you from?” and “What do you do?” variety that appeared to be the typical conversations one has at such events and did not give a thought to what that person or others would do with that information (see below).

During the coffee break a 78 year old white man from Hocking County in Ohio (in the South Eastern Appalachian area) came up to me and said “God put you hear today!” with warmth and empathy in his eyes (that is how I perceived it in any event).\(^6\) I hugged him and said I appreciated his kind words which meant a great deal to me and helped me to step back from fight mode to a slightly more relaxed mode that I had had before the events.

D. Rest of the morning

After the coffee break, representatives of True the Vote proceeded to describe the training that they have done of poll observers. The morning training sessions

\(^6\) I later learned when he exchanged his card with me that he was a pastor.
on poll watching tracked with what I had received as training in 2004 and 2008. If their neutral training is of a great number of people registered with one party or the other, I asked whether the effect is to provide lots of poll watchers for one party as opposed to the other. The speaker on that noted that the first time around the parties tend to take people that are registered with their affiliation but that when they saw how good the True the Vote people were, parties of both persuasions had asked them to be poll watchers or even poll workers whatever the registration of the True the Vote poll watcher.

I learned also that they had been working for several months preparing voter roll challenges based on a computer program that pulls out “high number of registrations per address” as the criteria for selection. I worried whether the facially neutral rule in fact ends up targeting certain areas (read minority majority areas). They stated that they looked at tax appraisal lists and that made me think of majority/minority home ownership patterns influencing who gets challenged. A person might not be on the tax appraisal list as they reside there as a renter as opposed to a homeowner. I did not think through all the implications of their model. I was informed later that when the methodology was used in Texas, the challenges ended up being essentially in the district of Congressperson Sheila Jackson Lee who is a black woman so I am uncertain about whether the metric used is generating “hits” that are not also skewed toward one community.⁷

E. Early Afternoon

Former Secretary of State Kenneth Blackwell spoke about the 2004 election and countered the persistent allegations that he had engaged in efforts at voter suppression. He argued that issues of the weight of the paper on which voter registrations were allowed to be submitted were due to 1990’s federal mail laws, that the high voter turnout had been the cause of some precincts in minority areas having long lines and not his efforts and other points. He completed his speech and took no questions.

⁷ Id. (“In Houston, the group targeted the Congressional district represented by Sheila Jackson Lee, a Democrat who is black. Ms. Engelbrecht said the group settled on Ms. Lee’s district because thousands of addresses there housed six or more registered voters, which it took as an indication of inaccurate registrations. The methodology, which the group still uses, could disproportionately affect lower income families.”)
Tom Fitton, President of Judicial Watch, was the next speaker who detailed Judicial Watch’s efforts over the past three years with regard to voter integrity. Judicial Watch was going to file a lawsuit that week along with True the Vote against Ohio (which has a Republican Governor) to have the voter rolls purged BEFORE the elections arguing that the voter rolls being equal to 90 to 105 per cent of the adult population in 31 counties were a problem. He made comments about specific counties such as Cuyahoga County (in which Cleveland is located) that led to derisive laughter. The interaction appeared to be highly critical of the voter roll processes in an area with a significant black population. In the context of what I had experienced in the meeting, I distinctly felt that coded language was being used by all to stigmatize that county and the black population voting in that county. He said that the voter rolls should be more like 80 per cent (why 80 per cent not indicated) and so there were problems with the rolls in those counties. Judicial Watch provided some of the materials handed out at the meeting which I thumbed through. It struck me that under the heading “voter fraud” was a picture of a young black man wearing a hooded sweatshirt being assisted by two older black women – another coded message in an image.

When he took questions, I pointed out to him that the morning presentations on the training were similar to the training I had received in 2004 and 2008, but with Ken Blackwell and his speeches in the afternoon, the tone was turning from non-partisan to distinctly Republican. I reminded him and all of the 1868 law that had been passed to permit the challenging of voters in Ohio for having African blood. I said that in history the problem had never been with whites not having the vote but with minorities (maybe I said blacks) not being able to vote. I said from his description of what he was doing it looked to me that over the past three years Judicial Watch was working at suppressing the minority vote. He said that from what I had said, I did not understand what they do and went on to explain his position. Fitton received wild cheers from the crowd. Another question was asked, and he then he left.

F. Afternoon break
Stephanie Saul, a reporter from the New York Times with whom I had spoken briefly in the morning, caught up to me to do an interview at the afternoon break outside in the hall. As we talked in plain view of everyone, I was interrupted as a man and a woman objected to my view about what was being said. I responded to them about my experience in the 2004 election (when Ken Blackwell was Secretary of State) as a poll watcher. I told them about my 86 year old mom in New Jersey who had not had a Driver’s License since 1994. She would be able to vote in New Jersey, but what if she was in a state requiring ID (like the new Pennsylvania law recently passed). I asked them to imagine taking an 86 year old lady to the Department of Motor Vehicles. I told them that they had their truth which I respected and I had my truth which they should respect.

Ms. Moncrief interrupted the interview saying I was a plant of the Democrats and this was a coordinated effort between the New York Times and me. I objected to my son and I being called a plant – emphasizing I was a guy from Toledo here on my own. I said that if it is true I am a plant then that meant my son who was right there was a plant too (which was absurd), and told them all they really need to “chill out.” Ms. Moncrief said I was being manipulated by the New York Times and I said we all can be manipulated.

G. Late afternoon session

State Senator Seitz, who stepped in only since the night before at the last minute for the current Secretary of State John Husted, explained the last three years of voter machinations by Democrats and Republicans. He discussed the current state of Ohio law. At the questions and answers session, I suggested that the current law be changed. Under then current law, a poll worker was not allowed to give a voter information on where they should go if they were in the wrong polling place or in the wrong line in the right polling place – colloquially referred to as wrong church or right church but wrong pew (more than one precinct at a polling place). Rather than having such a rule, I asked about allowing a person in the right polling place to vote in any line (colloquially: right church, any pew). Ms. Engelbrecht said that she had seen that in Kansas where Kris Kobach is Secretary of State and it had worked very well with people talking to each other and calmly voting.
Ken Blackwell’s explanation of the complaints about minority precinct voting in the 2004 election was contradicted by State Senator Seitz. Seitz said the problem was not turnout but that there were people in the wrong line in the right or wrong polling place. He said much more but I am pointing out a couple of points Seitz mentioned. He spoke about weekend voting and it seemed his argument (overtime to be paid, Monday needing to prepare for Tuesday election day) did not seem persuasive to me, though it seemed persuasive to the people. He called the cost of paying overtime a kind of poll tax which seemed absurd to me. I mentioned that I had been in Lucas County in 2008 when there had been early voting and it was excellent and people should try it.

H. Other reports on the day – police, coon, anti-gay slurs, and wonderful people

As I noted above, my then 21 year old son informed me while I was there that in the morning, the police had been called and he had spoken to the officer out where the coffee was on my behalf. The police officer had been sympathetic to me and left. Subsequent to the August 25, 2012 True the Vote Ohio Summit event, I was informed that reliable sources had said that the 911 call to the police had been made by someone who was concerned for MY safety as they thought people in the room had guns.

My son also told me that within earshot of him out where the coffee was he had heard me called a coon and had heard people say anti-gay slurs (faggot) about me.

On the other hand, there were wonderful people came up to me, including the head of the organization. She and others said I asked good questions, apologized for what had happened (including Ms. Pullen the lady from True the Vote who was ready to call the police on me explaining they had had outbursts with expletives at other events). There were some who agreed with some of the points I made on technical things, and some who were generally very appreciative of me being there. One guy gave both my son and me a link to a Christian Black History space on youtube.com. I went there and started part of part I. The website’s approach was to go past what they claimed was the typical civil rights in
the 60’s approach to Black History to go back in the 1700’s to describe places where blacks and whites worked for justice together. The part I saw was about Benjamin Rush, Richard Allen, and Absalom Jones starting the African Methodist Episcopal Church in the late 1700’s as well as the 3/5 discussion on whether the Constitution was racist. 

It really meant a great deal to me when a 78 year old old white man from Hocking County in Southern Ohio who seemed from his card to be a pastor shook my hand and said things like “God has brought you hear today.” And “You are not a plant, you are here from the Master Planner” or things to that effect. It was balm in some tense moments and we hugged and exchanged e-mails along with a couple other people, Ms. Moncrief, and Ms. Engelbrecht head of True the Vote. Each of those persons who were warm to me is appreciated for their warmth even though I strongly disagreed with many things. That disagreement caused clear consternation for others in the room.

I. Normality AND Fear

There appeared to be a great deal of very palpable fear of me (as a black man it seemed) in some people, while others were very relaxed with me. I felt like if I said “Boo!” to some of those who feared me they would go into catatonic shock, requiring of me to be very self-aware navigating this space with so many people in fear of me. Being buffeted by these reactions was very weird – very weird. To make it clear that race was not the only thing of concern, there was a great deal of concern about foreigners getting to vote. As a person who had been a foreigner in France for 17 years it was quite something to hear the echo of those anti-foreign sentiments I had heard in France in the voice of other Americans.

Over the day, I asked tough questions, got illuminating answers and tried to keep the faith. It hurt to hear from my son that he had heard me called a coon and had heard anti-gay slurs out by the coffee.

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8 I appreciate the sentiment but have quibbles with the accuracy or completeness of the description of that history but those are not relevant to this article.
I was glad I went because I heard with my own ears and therefore could make up my own mind. As usual, things are both simpler and more complicated.

J. Returning to Toledo

Before I returned home on Saturday, August 25, 2012, an article entitled, “Liberal Professor Throws Fit At True the Vote Ohio Summit” \(^9\) was posted on the web with links at the True the Vote Facebook page. The article included a picture of me from my work website at a state university that meant the author had Googled me and taken the photo to adorn the disparaging article. By happenstance, my son was turning the corner near my University and I saw the Dean making a left turn in front of me. Under the theory, “be the first to tell your boss bad news” I sent him a heads up with the article that I had just found on the web.

When I arrived home, I found that an e-mail had been sent to my Dean from someone who had been there in which they objected to me. I also received on my work account (I again presume I was Googled) the following e-mail:

Begin: e-mail

From: Alan Mowery [mailto:(email)]

Sent: Sunday, August 26, 2012 5:20 PM

To: Davis, Ben

Subject: Your outrageous behavior

Your behavior toward Anita Moncrief yesterday, at the election integrity conference yesterday was outrageous. But just what I’d expect from a marxist who can’t argue his viewpoint without becoming a raving, rabid idiot.

We know that you on the left cannot argue your viewpoints rationally so your resort to whatever tactics you can to silence and

intimidate the opposition. The exact same tactics used by communists. Truth is irrelevant to marxists.

End e-mail

On Monday, August 27, 2012 I met with my Deans. I explained to them what had happened to me at the meeting including the slurs and they were satisfied and that was the end of the matter.

That same day, I also responded to Mr. Mowery with this e-mail:

Beginning of e-mail

From: Davis, Ben

Sent: Monday, August 27, 2012 4:39 PM

To: ‘Alan Mowery’

Subject: RE: Your outrageous behavior

Dear Mr. Mowery,

I went as a private citizen to the meeting, my behavior was absolutely appropriate, I am not a Marxist, I was not a raving, rabid idiot, you do not know whether I am on the left or right, the only one who was being sought to be silenced or intimidated was me when the police were called on me for no good reason. Those police tactics of the organizers are the ones of a police state not my actions as an ordinary citizen asking intelligent questions and awaiting answers. I have no comments on Marxist views on truth but would suggest you read the wonderful book of Hannah Arendt, The Origins of Totalitarianism who notes the similarities between totalitarianism of the right (fascism) and of the left (communism). I am not a totalitarian, I am an ordinary American citizen who is civically engaged. On Saturday, I had several interesting conversations with people in the room who were happy that I asked my questions, had great exchanges with people of True the Vote including Ms. Moncrief
for the most part once the dust settled. I even have Ms. Moncrief and Ms. Englerbreacht’s (sic) cards and intend as appropriate to continue dialogue with them. So, I regret to have to say this, you are wrong about me.

Please do not correspond anymore or enter contact with me anymore or else I will consider it harassment and will make a police report.

Best,

Ben Davis

End of e-mail

Around 1h00 am on August 28, 2012, I went to the True the Vote Facebook website and posted a long post explaining exactly what happened to me at the meeting.

Start post

I was at the meeting as a private citizen so the photo above from my work webpage and to refer to me in these articles based on my job title are totally inappropriate. Please take my work photo down. The characterization of my questions at that meeting and actions is completely false. Please note that the article omits to mention that as I completed my three questions to Ms. Moncrief and before she could respond, a security guard came to my seat and asked me to leave. He threatened me that he would call the police. I said I had paid my 20 dollars, we were in the question session and I awaited hearing the answers of Ms Moncrief. Ms. Pullen of TtV then also came over and asked me to leave as this was a private meeting. I again said I had paid my 20 dollars and was awaiting Ms Moncrief’s answers to my three questions. Ms Pullen said I was disrupting the meeting and invited me to leave or they would call the police. I said please call the police and when the security guard touched my arm I
told him to take his hands off of me. Ms Moncrief was speaking and because of these two people talking I could not hear her answers. I said that out loud and Ms Moncrief called them off and proceeded to answer my questions. When she answered only the one on race baiting at these political meetings, I repeated my two other questions as to 1) whether she was in favor of student ID being used in voter ID in Texas and 2) whether she was in favor of weekend voting in Ohio. She did not answer those. As to Ken Blackwell, I did not ask him a question as he did not take questions from the floor. As to the Judicial Watch speaker, given his speech and announced plans, I stand by my comment question that he seemed to be engaged these past three years in suppression of the minority vote. He disagreed and people applauded his answer – so be it.

To continue, in addition to the police being called, four disturbing things happened to my 21 year old son including he hearing me – his father – called a coon out at the coffee, him speaking to the police to keep his father from being arrested, my interview with the NYT person being interrupted by Ms Moncrief calling me (and by extension him) (sic) democratic plants and in league with the NYTimes reporter. My son also heard anti-gay slurs out at the coffee. These things are all offensive. Over the day I asked and got the answers to my questions and developed a cordial relationship with Ms Moncrief and Ms Engelbrecht and other TtV people. People came up to me and said they appreciated my questions, apologized for how I had been treated and were kind and supportive. I met some people with whom I exchanged email addresses as well as having the cards of Ms Moncrief and Ms Engelbrecht. My son remains in shock by what he saw happened to me. More in due course.

End post and update)

Two hours later I got up and noticed that my posting had disappeared and the article with my work website picture was still up under a new posting at the True
the Vote Facebook page.¹⁰ I then wrote a comment under the new article at the True the Vote Facebook page which is as follows:

Start quote

ARIO | Benjamin Davis I placed a long comment up here earlier this evening in which I explained exactly what happened to me on Saturday. I also stated that I had participated in the Ohio Summit in Worthington as a private citizen and it was inappropriate to use my picture from my work website as well as to refer to my work. I asked that this photo be taken down now. I am dismayed to see that my long post has been removed while this false article has been allowed to stay up. I ask the webmaster who deleted my long posts to repost them under this one with the apologies of true the vote. This is unprofessional behavior to do this and I reserve my rights with regard to all of these actions.

End quote

Later I learned informally that the posting had been the subject of discussions on the margins of the state university Board of Trustees meeting among some members of the trustees. I also learned that persons in the Administration had assured those trustees that the situation was more complicated than portrayed in the article and the matter appears to have died there.

K. Summary

This experience as a private citizen at what I now dare call an ostensibly nonpartisan “election protection” and “voter integrity” group meeting August 25, 2012 and subsequent events form the factual backdrop for the rest of this article. The immediate suspicion to which I was subjected, the request to leave the room under threat of the police being called, the distinct animus that I felt from a significant portion of those present, the interruption with hostile statements of an

¹⁰ My son was able to retrieve the post above that had been disappeared at True the Vote in less than two hours after I put it up early that morning.
unsolicited interview by the New York Times reporter present, the accusing of a private citizen by a True the Vote representative of being a “Democratic plant” were an appalling portent of reprisal to come. The experience of the later effort that day at intimidation with e-mails to my work e-mail and to the work e-mail of my supervisor was extremely demaying and an unmistakable threat. The posting of a link and text of a scurrilous blogpost which included my work photo taken from the internet on the website of the supposedly nonpartisan group was a further troubling event. The refusal of my immediate and simple request to take down the link or posting on the ostensibly non-partisan group’s website, together with the deleting of my comments in the open comment space by which I 1) objected to the treatment to which I was being subjected and 2) formally requested the taking down of the offending blogpost link was demaying. In the margins of a meeting of the University Board at which I was not a participant, the scurrilous blogpost formed part of the discussion. This characteristic effort to intimidate both at the meeting and at work formed part of my reality of the election experience in Ohio this past election cycle and has had a significant impact on me. At the same time, the supportive persons that I met over the course of the day were a balm, a measure of kindness that leavens the hard feelings that the effort at intimidation brought forth. The extremes of this experience appear to encapsulate the kind of experience sought to be the subject of the Symposium, “Negotiating the Extremes: Impossible Political Dialogues in the 21st Century.”

Part III looks at those events from the point of view of negotiation theory.

Working from the recital of an impossible political dialogue experience in Part II, Part III looks at that experience through the lens of negotiation theory to tease out to what extent negotiation theory aids or might have aided me in such a setting. The hope is to reframe the interactions as an exercise in (A) negotiating one’s presence in a hostile political space and also (B) negotiating one’s participation in such a space. The hope of this section is to help persons retain the willingness to engage even in impossible political dialogues as a means of deepening one’s own understanding and possibly influencing the understanding of others of the meaning of a given interaction of citizens in the campaign season.
A. Negotiating one’s presence.

Much like in classic contract theory where the acceptance is to be the mirror-image of the offer, it seemed essential to comply with the formal requirements of the offer to attend the meeting: register online and pay the $20 to go to this private meeting. Complying with these minimal formal requirements helped one to have a sense of both legitimacy in being there and entitlement to be as active a participant as was permitted in the format of the event. One interesting question when registering was whether to register as a private citizen or to register under the guise of one’s job as a law professor. It occurred to me that to invoke one’s job in the registration was a manner of both raising one’s profile in the event and constraining one’s role as an ordinary citizen. Registering as a law professor raised a concern that what I would be doing would be ascribed to my employer and, therefore, create potential issues for my employer (and through them for me) if I was perceived to do something detrimental to the image of that employer. By being careful to register only as an ordinary citizen, it helped to avert later issues when what occurred was brought to the attention of my employer. In no sense could I have been seen to have been invoking an employment status to give further weight to anything I was doing. Rather, what I was doing was merely being an ordinary citizen seeking information in the political campaign – a right of citizenship and not a right related to any specific employment status. So, probably the first lesson from the experience is to be clear about the role in which one is attending such a meeting. Invoking any status other than that of being an ordinary citizen is to risk being constrained by such a status in ways additional to the constraints of civility. Such an invocation of a special social status also would require one, confronted with incivility and hostility, to have to think both in terms of oneself as a private citizen and as the person in the social status role – requiring a careful internal negotiation that one has forced upon oneself by departing from attending as the basic ordinary private citizen. Moreover, as others attempt to ascribe other roles to you (for example, Democratic plant, Marxist, Communist, coon, faggot or whatever) the humility and power of the ordinary citizen role serve as at least a modest foil to such efforts at intimidation and denigration. It is a situation where the lowest common
denominator both provides a strength through its anti-elitism even though it may be perceived as weakness by those asserting power and authority over one in the meeting.

The power of the ordinary citizen vision of oneself was brought home to me in a discussion I had on March 25-26, 2007 with James Meredith the first African-American to enroll at the University of Mississippi back in 1962. Mr. Meredith emphasized to me that when he sought admission he did not seek admission as a black man, but rather he asserted his ordinary rights of citizenship as a citizen of the State of Mississippi and of the United States. It is the assertion of those rights of ordinary citizenship, as modest as they may seem to be, that anchor one’s presence to some degree as being entitled to the ordinary dignity accorded to citizenship, independent of race, gender, sexual orientation, national origin or color. It also is an assertion of a common American citizenship identity with those who seek to subordinate and denigrate as well as to those who are more open to discourse.

B. Negotiating one’s participation

Again, taking the cues from the format of the event, one is able to ascertain when audience participation in the form of asking questions was permitted. For those speakers who offered an opportunity to ask questions, I readily took that opportunity. For those that did not, I felt the decorous approach was not to ask questions. With hindsight, as former Secretary of State Ken Blackwell did not offer the possibility to ask questions, I regret not having asked whether he was willing to take questions – an act that would seem at least theoretically permissible in such a space. In the blogpost that attacked me, my lack of any response to him was argued as an example of my having been silenced by the presentation. To this day, I wonder if my decorum was only a mask for unease in that setting in further asserting myself. Put another way, it is possible that the sense of intimidation in the room led me to hesitate for fear that by asking such a question I would be seen as disruptive and provide ammunition to those who had

11 James Meredith, Robert Jackson Center, March 26, 2007 available at http://www.roberthjackson.org/the-center/events/event/?date_time_id=99&KeepThis=true&TB_iframe=true&width=600&height=400 (private conversation)
tried to exclude me earlier in the day. In a way, it comes back to the idea in such extreme spaces of each act that opens the discussion space being a double-edged sword for being viewed as disruptive. Pushing the process to seek to open up questioning of the former Secretary of State would have raised the risk of a grounds for expulsion. Suffering under an earlier threat of expulsion and not wanting to be expelled, in some sense I acquiesced to giving the former Secretary of State an opportunity to not have someone question his version of what happened in 2004. That silence, however, was an opportunity to be exploited to argue that I had been silenced – ascribing far too much to the Secretary of State’s speech and far too little to the open effort at intimidation in the space.

As opposed to a situation of opening the process to questions, complying with a process in which questions were invited also carried with it issues. Given the experience of what seemed to be race-baiting of a barely coded level by a black woman, being a black man asking difficult questions that challenged the prevailing ambience raised a risk that came to light quickly with the efforts to exclude me from the room. To the extent one felt intimidation in that space, the safest course of action would seem to be to not ask questions and sit silently. Yet, as an ordinary citizen who had paid for the right to be in that space and did have questions that seemed legitimate to him, the question one faces is whether that silence is in fact better. Here, the fear of retribution of some kind is balanced with the immense internal tension felt between what one is hearing and what one has come to believe about the nature of the matters under discussion. Silence does not relieve that tension, speaking may exacerbate the intimidation. What can negotiation theory suggest to us? It seems to me that one’s objective becomes the central concern – just as one’s objective in a classic negotiation. In being in such a space of impossible dialogues, if one is merely there to record, then the active participation would seem to compromise that process of being an observer. If one is there to actively learn, questioning forms an active aspect of learning as is demonstrated in the Socratic method. When questions are in fact invited, the extreme self-censoring of silence seems an acceptance of a subordinated status as an ordinary citizen absent some true or projected risk of which one is aware. Of course, if one has no questions, this discussion is moot.
But, if one has questions, overcoming the subordination to release the internal tension is one of the modest rights one can assert as an ordinary citizen in a campaign space. Whether one’s raised hand will be recognized, of course, is another aspect of this difficult space, but not raising one’s hand out of real or perceived fear is to not resist the ambient subordination efforts. Absent a role as a mere observer, the evaluation of whether it is opportune to interject questions falls on the citizen confronted with such an impossible dialogue. Put another way, absent those questions, this is not a dialogue but a monologue met by silence. It is not clear that negotiating such a situation will be successful without the willingness to engage.

Having a willingness to engage in the space of impossible dialogue, only gets one to the next issue of what types of questions to ask. Ad hominem attacks, for example, might be pleasant to do but they are not responsive to the speaker and would appear to raise the risk of being seen as disruptive and expulsion. Leaving to the side such ad hominem attacks on the speaker, then the formulation and delivery of the question become central. The manner of posing one’s question tells all those present about one’s reasonableness as an interlocutor in the space. In a way, it is a formal type of appeal to reasonableness in the rest of the audience and from the speaker in return hoping to have a reasoned dialogue. Here, if the objective is to get information that can be of assistance in evaluating the work of the group, it seems this appeal to reasonableness in questioning is the path that ensures engagement with one’s question.

Yet, one dilemma that one faces is the combination of reason and emotion that I felt as I listened to the speakers who appeared to be race-baiting. It was clear that the speakers were effectively appealing to emotions in the audience and were getting the sought after response to those appeals. On the other hand, the speakers were evoking profoundly negative emotions in me that were almost suffocating in their painfulness. One wonders whether acceding to a reasonableness standard (as defined in what way) in the face of emotional

\[\text{[12] I contrast what is objectively thought of as an ad hominem attack with what may be really a succinct and pithy critique of the thesis of the interlocutor. This intersection between subjective realities is discussed in a the later section on explicit bias, implicit bias, and stereotype threat.}\]
responses may be ceding the emotional space of communication to those who seek one’s subordination. It may also be self-destructive as bottling up one’s own emotional reaction in trying to frame questions in a reasoned manner may require internal contortions that are clearly not being felt by those seeking to silence one. In settings of impossible dialogues in which these internal and external pressures come to bear, I would think that the answer would be somewhere on a continuum related to the depth of one’s personal emotional response. While seeking to be decorous as a participant in civil discourse, to the extent one is under the impression that the discourse in fact one is experiencing is not so respectful but feels denigrating, it may simply be too much to expect oneself to exclude emotion from one’s response. Nor, I would dare say, should one be constrained to relegate one’s internal emotional state to that level in a completely unstructured space such as this kind of meeting where similar retention is not being done by others. It would seem naïve to think one could possibly separate the rational from the emotional sufficiently to mask one’s profoundly negative feelings. Moreover, masking itself may be inherently self-destructive. One is left with a sense that all one can do is do one’s best in trying to remain civil but also recognizing the depth of one’s emotional reaction to what one has heard. In some settings, the depth of the emotional reaction is so strong that one simply has to leave the event or leave the room to allow emotions to calm. The risk with such absence is that one loses the opportunity to ask a pertinent question while one gathers one’s emotions. Opportunities come by in moments and are fleeting. Seeing when an opportunity to inject one’s thoughts in the dialogue may be crucial to affecting the discussion in a given place or time. So, I tend to view the leaving of the room as a last resort where staying just feels untenable.

This discussion of reason and emotion also brings to the fore the concept of what the person considers is an appropriate exercise of their freedom of speech and association. One’s sense of one’s autonomy in such a difficult setting is anchored in the sense of the self. At the hears is a question of whether one is

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13 As compared to the formal constraints on dialogue in a courtroom or an arbitral tribunal, but not as much in a mediation space (at least in the caucusing space).
14 With this I am brought back to Franz Fanon, Black Skins, White Masks
willing to allow out in such a setting one’s emotions in some more or less raw form as part of questioning and willing to take the consequences. It seems this is a form of internal negotiation that a person does with themselves to determine the stance they wish to take and its impact on the portrayal of them by others and – at least if not more important – their portrayal of themselves to themselves (we might call this the “Looking oneself in the Mirror Afterward” balance).

When challenged in my participation and asked to leave, the appeal to the formal rules of participation (signup, pay money, and request for questions having occurred) was only one part of negotiation of one’s presence. A second significant component was to simply not get up – raising the burden for those who wished to remove one to being the physical removal of oneself. Appeals to the police authority as a form of intimidation can be directly countered by a willingness to have the police called – that an arbiter will be welcomed is not seen as threatening but simply disarms the threat. Moreover, highlighting that one is in fact responding to an invitation by the speaker who had sought questions was a means of diffusing the rawness of the interaction with security and placing the security personnel in a quandary as to whether they were being compliant with the requirements expressed by the hierarchy (the soliciting of questions). In a way, there was the security fear of the hierarchy that was met with a soliciting questions invitation from another part of the hierarchy. If Ms. Moncrief had said I was disruptive, I have no doubt that the security fear would have been predominant and the police called. My appeal to my complying with her hierarchical request as the speaker in the room for questions, seemed to have the effect of causing the security based rationale persons to hesitate. Ms. Moncrief’s acquiescence to answering my questions then completely overrode the security rationale (I was not in fact a security threat.) and thus unmasked the security rationale for what it was: a gross overreaction based on some unknown experiences that supposedly happened somewhere else in a similar meeting – an implicit bias reaction that was quickly repressed once allowed in the open to the light of day and shown for what it was.

The continual references to the common concern of voting integrity while at the same time asking, when permitted, fair but tough questions created an
opportunity to not be seen as disruptive and also to educate oneself and others in the space on alternative visions of the same facts. As emotions calmed, remaining calm and upbeat and appreciative of those persons who treated one with a minimum of respect and even warmth helped to solidify in the room the sense that all was a misunderstanding and fortunately we were able to get passed that and actually enjoy the discourse and learn from each other. In that sense, the process of shifting oneself from being perceived as an outsized outside threat to being an inquisitive but respectful interlocutor was the task all day to open the possibility of dialogue in what clearly started as an impossible situation. In sum a mix of principled negotiation (appealing to objective criteria such as voter integrity and its meaning, going to the balcony in the sense of taking the matter out of confrontation and more as making sure we complied with the process requirements that one accepted as opposed to being disruptive, and separating the people from the problem (accepting apologies graciously and framing questions in ways that were not ad hominem attacks) techniques helped defuse the situation and make for an excellent learning experience. At the same time a somewhat positional (literally refusing to move) standing on principle (I registered, paid and therefore am legitimately here and entitled to be here) helped to raise the costs of expulsion to too high levels for those who sought expulsion out of fear and were made to realize that in fact they were overreacting. None of the above required a denial of one’s self or principles, but it did require some quick thinking about how to express what one was doing in a manner that worked with those ostensibly in authority in the meeting place and their fear of also losing face in front of the gathered audience by their treatment of an African-American who complied with all formal rules. Their treatment would unmask implicit bias – a direct threat to their stated position of being about voter integrity as opposed to voter suppression.

**Part IV adds to the negotiation theory vision a look at the events in terms of explicit bias, implicit bias and stereotype threat theory.**

The tactical analysis of the negotiation theory vision in Part III captures the tactics one might use in such a setting of impossible dialogue. Underlying those tactics such as identifying one’s role, appealing to shared principle, managing the
interplay of emotional and rational views in crafting one’s interventions, all have their merit. It does seem that truly engaging in such a visceral experience calls upon what might be termed second order thinking in understanding the underlying frame in which the interactions are occurring in terms of the stated and unstated but possibly perceived implicit dynamics at work. To help bring out these aspects of such an impossible dialogue, I discuss in this section some of the concepts being derived from neuroscience and psychology with regard to explicit bias, implicit bias, and stereotype threat.

A. General discussion of explicit bias, implicit bias, and stereotype threat

An emerging area in neuroscience is the study of implicit bias and stereotype threat. The subject is of concern to the legal community generally. The American Bar Association Section of Litigation has partnered with the National Center for State Courts to address the issue in the judicial system. The American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline has deepened its efforts to understand how this affects achievement in the pipeline from K-12, college and law schools. The concepts are derived from neuroscience and psychology and refer to the process by which schemas (what might be called “mental shortcuts’ or “templates of knowledge”) develop in the brain that become implicit cognitions (things we do without thinking) and may become implicit social cognitions (things that guide our thinking about social traits). These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings

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that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge.

A hopefully helpful but neutral personal example of this is with regard to my name Benjamin G. Davis. On a sufficient number of occasions to make me conclude it is possible that this is an ambient implicit bias about me, I have been mistaken for the grandson of the famous World War II General Benjamin O. Davis, Jr. who led the Tuskegee Airmen. I am no relation, but on occasion I have heard comments along the lines of “Your grandfather would agree with that!” etc from people who could not possibly have known my maternal grandfather or paternal grandfather (who died in 1939). One theory I have had about my own life is that what success I have had may be attributable to a significant degree to persons thinking that I am the grandson of this famous general and having a favorable disposition (or implicit bias) toward me because of their belief. That favorable disposition might work even more for me simply because I never make reference to him (I have no reason to). That lack of flaunting him might be construed as modesty (“not flaunting his anointed heritage”) which could be perceived as endearing. Notice that in all of this, what I am doing is happening in ignorance of these implicit social cognitions that are occurring in the people around me. It is as if one is swimming in a sea of implicit social cognitions while living one’s life.

Explicit bias is described as stereotypes and attitudes that we expressly self-report on surveys, recognize, and embrace. Implicit bias is dissociated from explicit biases and not self-reported on surveys. Both forms of biases are related but are in fact being found to be different mental constructs. The manner of measuring implicit bias has been through the Implicit Association Test (IAT) which measures reaction times when sorting categories of pictures and words. The IAT measures the strength of associations between concepts (e.g. black people, gay people) and evaluations (e.g. good, bad) or stereotypes (e.g. athletic, clumsy). The main idea is that making a response is easier (therefore quicker) when closely related items share the same response key.¹⁷ Pervasive reaction time differences were found in

¹⁷ Project Implicit – https://iomplicit.harvard.edu/implicit/
every country tested and they were consistent with the general social hierarchies. In addition, social category may influence what sort of biases one is likely to have.

Consequences of these implicit biases have been seen in terms of frequency of callback interviews in Sweden, awkward body language in the presence of someone, friendliness of facial expressions, negative evaluations of ambiguous actions by an African-American, negative evaluations of confident, aggressive, ambitious women in certain hiring conditions, shooter bias – black vs. white in video games, and on and on.

The key feature of implicit bias is that the IAT scores appear to better predict behavior than explicit self-reports. In a sense this is suggesting how one presents oneself in self-reporting and how one seems to act in terms of implicit social cognitions are different mental constructs and that the implicit biases are more salient to suggesting one’s behavior than what one says. That being said, implicit bias is malleable and can be changed. Depending on a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes (such as listening to musicians behind a screen) are examples in which implicit bias has been made malleable.

Stereotype threat refers to one being at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. The research has shown that performance in academic contexts can be harmed by the awareness that one’s behaviors might be viewed by others through the lenses of race, gender, or sexual orientation in a number of domains including academics. Stereotype threat has been seen to lead to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Consistent exposure to stereotype threat can reduce the degree that individuals value the domain in question. Students may choose not to pursue the domain of study and, consequently, limit the range of professions that they can pursue. Research has shown that stereotype threat can harm the academic performance of any individual for whom the situation invokes a stereotype-based expectation of poor performance. In addition, within a stereotyped group, some
members may be more vulnerable to its negative consequences than others; factors such as the strength of one’s group identification or domain identification have been shown to be related to ones’ subsequent vulnerability to stereotype threat. Stereotype threat might interfere with performance by increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort. Many different means have been used to induce and to attenuate stereotype threat.

Examples of stereotype threat for any given person abound. For example, when in college I dressed in Goodwill hand me downs and road the subway for the most part blithely indifferent to any risks of violence. When some of my white friends commented about fears on the subway, I would counter with my relaxed attitude on the Boston subway. One of them pointed out that the people in the subway car might in fact be afraid of me – harkening to implicit bias ambient around me. From a free spirit one then starts to trim one sails a bit in that setting to avoid reactions or overreactions – a form of self-handicapping. Another example was when I worked in Togo. Being a person of modest means in the American environment, it was very difficult to come to terms with the idea that I was considered immensely rich by those with whom I was in contact because I was in fact earning enormously more than them in Togolese standards.

This is but a brief exegesis on explicit bias, implicit bias, and stereotype threat. It is presented to build on the prior section to introduce in the negotiation theory approach these concepts of implicit social cognitions that pervaded and I think made more complex the process of navigating the dialogue at the True the Vote meeting. For one thing each person there, under the logic of this arena of research, has their own explicit biases, implicit biases, and stereotype threats to navigate on race certainly but also along other axes of the social construction of the self.\(^\text{18}\) These in turn individual social cognitions are enhanced or attenuated by the ambient environment.

I am not able to know what was going on in the heads of the other people but I can think about their behaviors and what was going on with me. In that sense, and of this I am fully aware, their behaviors and my implicit social cognitions interacted in ways that suggest to me some burdens on negotiation theory derived from explicit bias, implicit bias, and stereotype threat.

First, there was the long presentation of Ms. Moncrief and others that explicitly used terms (race hustlers) that expressed a fierce disdain for certain black leaders. To the extent that I was aware of at least more nuanced perspectives on these black leaders, it was clear that the comments were attacking whatever positive attitudes I had internally (or implicitly) about those leaders. Moreover, the attacks on the black leaders that were explicit appeared to be thinly veiled attacks on the black population and other people I consider of goodwill for holding these people up as leaders. To the extent that I held these black leaders up as respectable and not solely race hustlers, one can see how this experience would be dissociative. I certainly felt my anger and emotion rising and, at the same time, acutely aware of the social construct ascribed to black men of the “angry black man” the process of stereotype threat on several levels seemed to come alive as I attempted to find a way to navigate the experience.

Beyond my experience, the explicit words used seem to meet a receptive audience. Put another way, the words appeared to comfort explicit bias expressed in enthusiastic support of the views by persons in the room (I do not remember in the room some specific statements by people in the audience – though I of course remember the reference to me as a coon and faggot out of my concrete example, I have been socially constructed as an African-American in the United States. I have a Hispanic (from Cuba) grandmother, at least one Irish great-grandfather, a Native-American (Cherokee) great grandmother, and Chinese and Native-American (Blackfoot) ancestors according to my family lore, in addition to my ancestors of African origin whose presence in the United States dates back to at least 1800. Coming to recognize and feel ownership of that diverse history as part of living the social construct and self-identification as an African-American has been one of the most interesting aspects of this life. Coming to understand these and other diverse cultures through working with people in international arbitration is one of the pleasures of that work. I am certain that several Americans (and other Nationals) in international arbitration are similarly socially constructed as being of one race or another as they are perceived on the international plane. Experiencing these social constructs in countries with different cultures and histories can be both a liberating and constraining experience as one comes to understand opportunities and limitations in the expectations across borders. The key appears to be related to both the positive and negative impacts of explicit bias, implicit bias, and stereotype threat discussed later.
earshot but within earshot of my son – but the enthusiasm of many may have been the best expression of call and response on explicit bias). But, borrowing from my own internal experience of the words, they also stoked implicit biases in all those in the room through the very negative images about these black leaders. The explicit words (even if not perjorative in the kind of blatantly offensive racist comment – though it seemed close) comforted negative stereotypes toward these black leaders and the black population within this predominantly white crowd. That these implicit biases were along racial lines but could just as well have been on a Democratic/Republican axis in a predominantly Republican space suggests the complexity of the underlying attitudes that I was experiencing.

The dilemma with this construct is that the space of what is explicit bias has a significant subjective component. What this means is that a person could be expressing what they perceive as a perfectly neutral evaluation of something and another person could experience those words as reflecting explicit bias. The truly remarkably perverse speaker would be one who can both express in a neutral manner and encourage implicit social cognitions against a target population in their audience. When another person challenges the statement as to its biased import, the speaker is able to retreat to an argument of formal neutrality that may be acceptable to the broader group of persons who share a common implicit bias. For example, having a black person say things denigrating black people frees those negative statements of their racialized nature for those who might share them but not wish to admit them for fear of being branded racist (and in other settings of being sexist, or homophobic, or on and on ). Yet, for a person who finds them profoundly revolting they are an expression of explicit bias whatever the color of the messenger. Such a person might be subordinated by others not sharing the same social construct asserting that they are too sensitive or “read race into everything.” It is this duality of expression and reaction that identify the interaction between the different personal definitions of what constitutes explicit
bias in expression and the degree of reaction to robust implicit social cognitions triggered by such expression.

When I asked my question and the effort was made to remove me from the room, the implicit biases went to another level I do believe. In that setting my behavior was to ask three tough questions with some passion. I was seen as disruptive and asked to leave. Clearly the reception of my questions as I sat there asking them was that these questions were experienced as a disruption, not as a sincere enquiry by an audience member. In this sense, I wonder whether my questions forced a confrontation between the often stated neutrality and non-partisanship of the meeting focused on the laudable goal of voter integrity, and threatened those believers in that goal by questioning the bona fides of their position. My questions become an attempt at unmasking and destabilizing the self-image of persons in the room by challenging the worldview that they had been so willing to accept. That I might be revealing a racist or subordinating strain in those views of black people was a challenge to the persons’ views of themselves as doing laudatory work. I was disrupting the ambience in a way that was intolerable initially for the participants and organizers. So I had to be squelched through removal of the protagonist of the alternative view of reality – that protagonist being me.

A more pithy vision of the threat of police action was that for the organizers a black man asking a tough question was equal to disturbing the peace and could not be tolerated and required the imposition of the risk of police. The effort to silence was palpable and oppressive for me, encouraging me to move into fight or flight mode and decide to stand and fight. That emotional response framed the manner in which I would exercise what skills I developed from negotiation theory to maintain myself in the room.

On the other hand, the efforts of empathy by some of the participants towards me seem to be an expression of both a kind of solidarity and a rejection of some of the words and conduct that they too may have experienced as biased and a shock. The sources for these actions of others cannot be known, but seemed to
be related as much to the visions these persons had of themselves as being fair-minded and even sharing a common religious faith. For the organizers, it appeared clear that their initial conduct defeated their purpose in the room in asserting the principled basis for their work on voter integrity, rather than partisan or racial animus (with race being a proxy for partisanship or vice versa). So, the repeated emphasis on the uniting principle of voter integrity and appeal to reason and logic provided a means for them to counteract whatever implicit biases that had emerged, and return them to whence they came. One aspect of this may have also been a regional phenomenon (implicit bias being expressed here by me) as the organizers came from Texas and had an implicit social cognition from their experience there about what the threat of calling the police was supposed to engender in an African-American man. When it did not have the desired effect, they were constrained to move to another level. I take this thought from my own experience when I move in 2000 from Paris, France to Fort Worth, Texas and—while riding with a black taxi driver soon after arriving there—asked how it was in Fort Worth. He said it was fine living there but watch out if you get on the wrong side of the law—suggesting a particular harshness for blacks. Whatever the truth of that statement, it suggests his social truth. Turning back to the meeting, the intimidating nature of the threat of police intervention and harsh reaction that would be felt in Texas (possibly leading one to expect almost ineluctably to be removed) was simply not so strong (even if it engendered fear) in Ohio. The fact that a policeman was called by a good Samaritan out of fear for the risk of what might happen to me with people with guns in the room, suggests that the actual appeal to the police made was protective rather than vindictive. Thus, the threat was neutralized and required the organizers to either escalate their violence (the security guard touching me) and discredit their work or deescalate into a more reasoned space (Ms. Moncrief saying she would answer my questions). Her showing of empathy for the passions around these topics and her stated willingness to answer my questions was a form of de-escalation. That de-escalation allowed for reassertion of the common thread of discourse of the meeting being about protecting voter integrity. The voter integrity trope then became an implicit positive shared social cognition through which to channel the emotions and expressions of divergent views.
This social science literature on explicit bias, implicit bias, and stereotype threat may provide a deeper second-order frame to help in determining the tactical choices of negotiation in such settings of what would on its surface be seen as a setting of impossible dialogue. This social science literature might help us to understand the comfort zones of the protagonists in such a setting and the means to provide de-biasing negotiation language so as to move from what could have been an impasse to at least a modicum of a breakthrough in the dialogue. In that regard, I cannot emphasize enough the sense of solidarity and true reciprocal social recognition as citizens that I experienced with some of the people in that audience over the course of the day, even if the experience was more difficult with others.

**Part V builds on the above to examine the events in terms of interest convergence theory.**

In addition to the paths of analysis derived from negotiation theory and social science theory of explicit bias, explicit bias and stereotype threat, a third lens through which this impossible dialogue might be reviewed is under the interest-convergence theory propounded by the late Professor Derrick Bell. As originally expressed, he posited that,

> “Although no such subordination is apparent in Brown, it is possible to discern in more recent school decisions the outline of a principle, applied without direct acknowledgment, that could serve as the positivistic expression of the neutral statement of general applicability sought by Professor Wechsler. Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after Brown, this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing

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effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.”

While recognizing that Bell was seeking to translate from judicial activity and we are speaking of a political meeting, Bell did note a source in political history as much as legal precedent that might give his interest convergence theory valence in this setting. Put simply, my active navigating of that True the Vote meeting might be seen as less related to any negotiation skill or able analysis of explicit bias, implicit bias, and stereotype threat on my part, but essentially based on what I was doing converging with the interest of whites in the room. At the heart of that convergence was my exploration of the process by which True the Vote went about its voter integrity efforts. It was primarily when I expressed a concern about racial animus or voter suppression that I became a threat to the self-image of sufficient numbers of whites in the room (who had been absolved of being perceived in that manner by the willing statements of the black speakers to which I took exception), caused a stir to repress. Whenever my questions were of a more technical nature about True the Vote policies – in a word, an inquiry on how to do this voter integrity work properly as opposed to a more frontal effort to attempt to “unmask” the True the Vote as a voter suppression entity – I could be tolerated in the space.

In this vision, around my negotiation tactics and social science sensibilities would be a structural constraint whose outer penumbra would be the tolerated space for threatening discourse to the whites in the room. Whites are, of course, not homogeneous so what this would mean is really a kind of aggregate of what was tolerable for the whites in that room as the width of acceptable discourse beyond which, sanction would be sought against me as a transgressor of the norms of political space or cultural sensibilities.

This aggregated vision of interest convergence might help to explain the aftermath situations where efforts to delegitimize me in my work were attempted

20 Id at 523
21 Obviously, these structural points I am raising apply in some other manner in other spaces where the dominant group may be of one or another social group and there is a person from outside the group. The white-black racial dynamic was the one explicitly and implicitly raised in this impossible dialogue.
by individuals through the blogposts, the silencing of my own posting on the True the Vote website, and the messages that went through my hierarchy at my state university up to the Board of Trustees within hours if not days of the True the Vote meeting. In these settings, the more personal views of some whites in the room that had been subsumed in the aggregate convergent views of the whites in the room were able to prosper in relative isolation. These views of my conduct found my presence in the intellectual space unacceptable and sought means to remove me from debate. Of course, that much of the activity happened on a website that was controlled by True the Vote also raises the specter that underlying the formal permission to continue in the space of the True the Vote meeting lay animus consistent with suppression of a threat that was successfully deconstructing their methodology.

If this interest convergence theory approach is the one that overarches impossible dialogues in the current American space, I must admit that it has limits. It has its limits as the individual citizen is not necessarily a purely American social construction. Thus the perimeter of acceptable discourse that may operate in a given American space at a given American time is merely an epiphenomenon. The exposure to other social constructs is likely to limit the valence of whatever current American social construction attempts to define interests. An example of this phenomenon was expressed to me by James Meredith when he explained that it was during his tour of duty in Japan after World War II. When he had Japanese people working for him was when he realized that southern racial segregation was not something ordained by God but merely a discrete American phenomenon created by men. This revelation helped him begin to see the possibilities of altering the trajectory of his life from what the interests at the time thought was “his place” to something bigger and richer. Fast forward to the present and the multiple sources of information even if one stays on American soil provide potential sources of alternative social constructs. Second, to the

23 James Meredith, Robert Jackson Center, March 26, 2007 available at http://www.roberthjackson.org/the-center/events/event/?date_time_id=99&KeepThis=true&TB_iframe=true&width=600&height=400 (private conversation)
extent the mechanism for reifying such interests from generation to generation perpetuate a constructed space of what is acceptable, they are also coming into contact and conflict with other constructed spaces of what is acceptable and in an accelerating manner. In this setting, methods of enforcing a world view are constantly under pressure from forces seeking to enforce alternative and contesting world views. More importantly, the individual citizen is able to access these competing worldviews on a daily basis in a manner that was unimaginable in its ease in the early 1950’s.

Another aspect of this problematic is how one comes to these definitions of interests that are to shape the space in which one lives. To the extent they are not imbibed as a coherent stable reality from birth – for example, due to overseas travel or other forms of geographic mobility in which one discerns different social constructs in different places – these interests about which convergence is predominant are not experienced as received wisdom but merely as (1) a form of someone’s truth about what is acceptable and (2) the ability of that someone to enforce compliance with them. In such a setting, the hierarchical underpinnings of these interests are unmasked notwithstanding efforts to impose them on everyone. The domestic challenges and international challenges that might have been seen at the time of Brown by only an elite seeking to set a tone for the rest of the country are opened to the comprehension of a more diverse group of persons. These persons experience these domestic and international challenges in their own construction and integrate them in their view of their interests. I recognize this openness can be manipulated by powerful and conscious forces to maintain a vision of interests that concords with the interest convergence theory of Bell, marginalizing and subordinating those who seek something different. But, in the absence of a monopoly on information that could enforce such a view, social meaning has a greater possibility of being not about just what middle and upper class whites hold dear.

Once one has taken that step and begun to think more transversally about American society within the context of alternative visions of how society can be
constructed based on direct experience around the world in which different spaces of freedom and alternative meanings of citizenship are perfectly acceptable, one sees that the marginalization and subordination inherent in the interest convergence theory are merely exercises of social power domestically rather than immutable realities. In a word, just as in the setting of social science one begins to see that there are opportunities for malleability – a possibility to break with the dominant interest if one is so willing to take such a step.

How one gets to that step is however a question that at is heart is about the capacity to coopt, dominate or subordinate competing visions of reality externally and within the individual. Put another way, if one has accepted the ascendance of a set of interests and measures one actions in terms of complying with or resisting those interests, one is somewhat defined by those interests. If, on the other hand, those interests are unmasked as mere social phenomenon that are malleable – even with difficulty – one may see different opportunities in developing negotiation tactics that go beyond social science constructs of bias and stereotype threat as one sees the transient nature of the content of such concepts across cultures and national histories even if these containers retain durability as structures explicating implicit social cognition. But, the next question that may arise is how one, in a meeting like the True the Vote meeting, proceeds to step out of the interest convergence constraint into another space.

**Part VI draws on the previous parts to understand the events as means of generating the nascent state in Alberoni’s work.**

In this Part VI, I attempt to further deepen the reflection on the True the Vote meeting through a further lens related to the contradictions experienced. On the one hand, one is negotiating one’s presence and participation on a tactical level. On the next level, one is operating with sensitivity to the constructs of explicit bias, implicit bias and stereotype threat that may underlie the reactions in that space. On the third level, whatever one is doing may be given its valence through the imposition of interests that would enhance you if one is convergent or marginalize and subordinate you if divergent. On this fourth level, given the availability of alternative visions of social constructs or direct experience of other
forms of social construction, one becomes aware of the mutability of the social structure in which one exists.

I tend to believe that a central aspect of the dynamic alteration of the social construct is in the interaction between Movements and Institutions as described by the Italian sociologist, Francesco Alberoni. More to the specific point is that the kind of dissociative experience had in the True the Vote meeting has at its heart the experience of a contradiction between what the internal self understands and what the external world is saying to one. The extent of such a contradiction may be modest or may appear fundamental. In my personal case, the animus being expressed toward black leaders and indirectly about the black population of Ohio were in contradiction with the admittedly complex experiences of black leaders and the black population that I had internalized. Coupled with this experience of contradiction was the experience of having been with people of all types of backgrounds and, more particularly, with European whites during my years abroad and childhood that were rich experiences that served as a countervailing experience of the white-black dynamic being played out in that room. Whether all were to some extent chained to this local American phenomenon as to what was acceptable, I was in a position to both relativize and dismiss the power of this social construct. The call from the international plane reminded me that these Constitutional dynamics within the American system and with all its complexity are – at their base – a process of internal law. Thus, citizenship is not just American citizenship or Ohio citizenship, but rather a construct of different dimensions depending where one is in the world. Participatory democracy also has this aspect of a margin of appreciation related to local social constructs that may seem similar but are not in fact similar.

Thus, beyond the American federalism dynamic of dual citizenship, one sees oneself as wearing a socially constructive American phenomenon of citizenship that is only one of many ways to be such an ordinary citizen. Once one slips one’s American knot and accepts the ability to think both on the domestic level and in

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24 See generally, the remarkable Francesco Alberoni, Movement and Institution (1977).
terms of the international plane, then one sees such a True the Vote experience as a very very narrow expression of what reality can be. To the extent that in such a setting one is then being pressured to conform, to borrow from above, the contradictions between this internal experience of the possibilities and this external experience of an effort to impose constraints becomes too much. Alberoni expressed that moment as experiencing depressive overload – an apt description of the experience of anomie and dissociation I felt after the True the Vote meeting. I felt I had confronted a kind of very old American violence in that setting and had done what I could to counter that violence. I had done what I could to counter that violence because its vision of the world was in such opposition with my vision of myself. Thus, the interests of one group of white people in one part of Ohio were only of marginal valence as compared to the rich diversity of experiences with whites and all kinds of people coming from so many different traditions from around the world and the country.

The imposition of a world view of voter integrity with an underlying stench of voter intimidation was seen as a peculiar to American phenomenon that had to be resisted and – more importantly – could be resisted. Thus, a process of moving beyond a depressive overload experience to one in which one gets an idea of what are the possibilities came to pass. This experience is described as the nascent state when an idea emerged. Part of that idea was to speak of this experience with others to that the burden of the contradictions experienced were shared rather than blocked off. One of the reasons I was overjoyed with the opportunity to speak at this Symposium soon after these events was that it gave me a chance to take stock of what had happened and to seek contact with others about that experience. Alberoni would call that the process of seeking affinity with others that is the precursor to the formation of a movement.

The True the Vote meeting then becomes seen as a moment of depressive overload in which the contradictions became too much and the face of an effort to delegitimize, marginalize, and subordinate me (and people like me) if we did not conform into extinction in the meeting and in its aftermath was revealed in all its violence. Understanding that idea of what I was up against was the protean recognition of that event and was the nascent state. Ever since, in my varied
work there has been an effort to combat by peaceful means that essentially
violent suppressive effort while trying to fashion the tools of negotiation theory,
social science theory, interest convergence theory, and Alberoni’s movement and
institution theory into a coherent path that draws on the domestic and
international experience to forge my clearer identity of the role or meaning of
what it is to be an American citizen.

Part of this is to both to recognize the social constructs that define me as an
African-American etc, but also to begin to perceive the extent to which these
kinds of definitional models are more related to the constructs of those around
me as compared to any inherent reality in these constructs. Much like Meredith,
it is a falling away of scales so that one sees oneself as one is rather than as a
series of reactions to the constructs that are around one. In this vision, because
of these constructs one is constrained to navigate these social constructs of
others to exist but one understands that many of the things experienced are
about them more than they are about any inherent archetypal quality in you.
And thus, by one’s choice one can grant these social constructs legitimacy or
illegitimacy from a perspective that is not bordered by the perception of the
changing interests of an American majority. In turn, one comes to a deeper
appreciation of the types of external bias, internal bias and stereotype threat with
which one is confronted. That in turn gives a deeper meaning to the tactics of
negotiation that are undertaken in successive environments.

However, behind these social constructs are institutions that have power. To the
extent that one intersects with those institutions they do react. But, that form of
reaction can take many forms that can be both positive (cooptation, new
synthesis) and negative (extinction, destruction). The essential point is to have a
heightened awareness of the parameters of one’s experience so as to navigate
even those types of what might be seen as impossible dialogues with aplomb.

Part VII is a summary and conclusion.

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25 Add Alberoni four here
What started as a story became a journey through negotiation theory, neuroscience and psychology, interest convergence theory, and sociology in the form of the work on movement and institutions. The end of the journey was to seek to both reinterpret the True the Vote meeting experience through these four lenses and to integrate these four lenses as a means of coming to a higher understanding of the meaning of these kinds of impossible dialogues.

My major conclusion from this long trajectory has brought me back to the classic situation in mediation of when the parties are in impasse. Impasse such as what was happening very early in my experience that August 25, 2012 morning may hold within it the seeds of breakthrough to a more textured analysis of one’s place in the world and how to move forward. Obviously one always faces the risk of false consciousness and nothing is linear, but the essence of the path described in this work is one of hope in men and women’s ability to recognize their common humanity and human dignity even as we work our way through the myriad conflicts of this too short existence. In that sense, it is a journey from the domain of domestic law civil rights structures to international law and its forms of articulation of standards for human dignity and then drawing from both of those deep wells to live and imagine a social space that is only bordered by one’s imagination as to how one can help humanity to progress.