

# Stanley Feingold



**Collected Writings  
(2000 to 2017)**

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<sup>1</sup> This entry is a forward by Prof. Feingold of remarks by Martin Luther King, Jr.

<sup>2</sup> This entry is a forward by Prof. Feingold of remarks by Bill Moyers.

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<sup>3</sup> This entry is a forward by Prof. Feingold of a *New Yorker* article by Hendrik Hertzberg.

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## Introduction

Stanley Feingold served as a Professor of Political Science (called “Government” in the days Stanley taught at C.C.N.Y.) He was an exceptional teacher and his students admired him enormously. He retained an intellectual/teaching relationship with his students from the 1950s and 1960s for over fifty years.

This archive, which consists of the emails that Prof. Feingold sent to his former students over the last 17 years, provides a marvelous analytical look at the problems of America in the last two decades, with the added benefit of a writing style that is elegant, easy to understand, and most importantly, optimistic and aspirational.

The archive is easily accessible and is a cache of incisive analysis and brilliant ideas for solutions. If you are researching modern political issues, we highly recommend the Feingold archive as a valuable resource. In order to traverse this electronic archive hold down the control key and move the cursor over the page number. A hand icon will appear. Left click on the mouse and it will take you to the chosen page.

Dated: New York, New York  
May 24, 2018

RONALD S. GOLDBRENNER ‘62  
PAUL B. BERGMAN ‘64  
ROBERT B. SAGINAW ‘61

## A Brief Biography of Stanley Feingold

Prof. Feingold's life was a testament to the positive public service values imbued by the City College. These are values which Prof. Feingold lived and exemplified for more than 65 years, values that he instilled in his thousands of students in New York City, New York State, our nation, and around the world.

Stanley Feingold was a product of the World War II era C.C.N.Y., Class of 1946. A man whose life work and achievements testify to the quality of the education he received at City and the public service ideals that the College fostered in him.

His contributions to the art and science of teaching have been heralded by the most important judges of such work, his students, his colleagues, and the administrators of the schools he served. Thousands of students benefited from his work, and so many of them continually testify, not just to his superior abilities but, more importantly, to the life-guiding, and inspiring impact of his work. He made us intellectually hungry, challenged our assumptions, and taught us analytic rigor and careful reasoning. He was to his students far more than a teacher; he was a mentor, a guide for our lives, and an inspiration to live our lives with integrity, intellectual honesty, and for so many of us, public service.

Prof. Feingold taught, lectured, and worked all over the world, but primarily at the City College and Westchester Community College. The testimonials of his students, and the litany of their contributions to society, proclaim his gifts as an educator, and the public benefit that has directly followed from his inspiring teaching. Prof. Feingold numbered among his many students a large group of the recipients of the Townsend Harris Award, including Anita Altman, Hon. Marjorie D. Fields, Sidney Davidoff, Joseph Forstadt, Barry Brett, Ralph Blumenthal, Joseph Berger, Clyde Haberman, Dr. Stanley Altman, Evelyn Jacobs Roth and Dan Dicker among others.

As an educator, he was an artist. Rather than engage in an exercise of transmitting information, he taught us how to approach a subject, the necessity of deep inquiry and thorough scholarship. Integral to his teaching was the inculcation of the ethics of interpersonal relations and the duties of citizenship. Prof. Feingold taught respect for all peoples long before it was popular and before the modern version took the stage. He taught the importance, the beauty, and the practical means of public service. All of this was conveyed as a natural component of his class, not an artificial add-on. Prof. Feingold never "taught," his students anything. He set the stage by which his students learned to learn on their own. He showed us the way to the paths that yield knowledge (research, analysis, problem solving). He encouraged his students to figure it out for themselves. He did all of this without yielding the slightest hint of his biases; his students never knew his actual political views. The devil never had a better advocate.

Prof. Feingold's efforts as a teacher did not end in the classroom. He was available to his students at virtually all hours of the day and night with personal help, he devoted himself to City with service in aid of extracurricular activities, and he was unstinting in his service to the faculty and administration of the College.

Prof. Feingold had a significant role in the greatest crisis that faced the City College as an institution in the last 75 years – the 1969 shut-down of the school by disaffected students. Prof. Feingold was nominated by the Faculty Senate to be one of four faculty members to negotiate for the College. At the risk of his own personal safety, he stepped up and helped bring about a peaceful resolution. Obviously, he had the confidence of the faculty, the administration and all the students, including those who were disaffected, and did not trust the “establishment.” The incident was memorialized in James Traub’s “City on a Hill: Testing the American Dream at City College.” (Addison-Wesley, 1994, pp. 51, 59-64 and 72-74).

Prof. Feingold’s work with his former students continued for more than 50 years. Several times a year Prof. Feingold met with 25 to 35 of us for lunch and a spirited discussion, usually in a conference room of a large New York City law firm, the office of one or another former student. Inspired learning can be a lifetime experience; all you needed was Stanley Feingold.

The fact that so many former students came to meet with Stanley after so many years is a testament to his impact, to his continued effectiveness, to their fondness for him, and to their recognition of his value. Stanley Feingold was the model of a life lived with a passionate dedication to public service. One need only ask any of his former students to confirm this view, a long list of students that includes gifted public servants --- legislators, judges, lawyers, physicians, journalists, educators, social science professionals, accountants, and others who have made significant contributions to the public good. Very much products of his C.C.N.Y. classroom, they created a scholarship to be given yearly to a student for the best political science paper. You have to earn the honor with good ole hard work. How do we continue/extend the ethic of hard work, of productive thought and analysis? The City College experience has managed that for so many of us

Prof. Feingold’s teaching philosophy, its impact on his students, and his decades of continuing an informal political science class, have been written up twice in the New York Times, and once recently in the C.C.N.Y. Alumni Magazine. The Times articles, by Joseph Berger, are reproduced below.

Stanley Feingold dedicated his life to educating people young and old. This is the highest form of public service. Stanley Feingold was the epitome of a successful graduate of the City College of New York, proving the College’s impact on its immediate and broader world. His gift as a teacher and his public service were made manifest in his academic accomplishments and in the enduring love and admiration of his students, which are magnified by their own contributions to society.



What Were the Allegations Regarding the Unfairness of Florida  
Voting and Vote Counting?  
What Were the Facts?  
December 15, 2000

I composed the following list of allegations and rebuttals in the midst of the long count, before George W. Bush became the president-select. (That is an accurate description of the outcome, isn't it?) I could now add rebuttals of the Supreme Court majority, but Justices Stevens, Souter, Ginsburg and Breyer have already done that. The allegations no longer matter, but the facts do.

What are the allegations regarding the unfairness of Florida voting and vote counting?

What are the facts?

The deadline for reporting the presidential vote was Tuesday, November 14. Florida law provides for manual recounting of ballots. It is unimaginable that a hand count could be completed within a week after Election Day.

A prompt reporting of the vote is necessary to avoid doubt as to the outcome.

Many states have much later dates for reporting the results. Florida requires that the electors be appointed by December 12. The Electoral College does not meet in each state capital until December 18 (the first Monday following the second Wednesday in December).

There will be a constitutional crisis if we don't know who the president is. We know who the president is: Bill Clinton. He will be president until January 20. The electoral vote will be counted on January 6. Electors meet in each state on December 18. The president-elect has no constitutional authority until he is sworn in on January 20.

Manual counting is unlawful. Hand counting is the oldest and commonest form of ballot counting.

Many states allow for hand counting. Texas law, signed by Governor Bush, gives priority to manual over machine counting.

Manual counting is less accurate than machine counting.

Machine counting of punched ballots is less accurate than manual counting when a voter has not completely punched through the hole. Examination of the ballot can indicate whether the voter has failed to completely punch through the hole for candidates for other offices.

Manual counting should be limited to ballots that are at least halfway punched through.

Election laws in other states require counting dimpled (dented but not perforated) ballots. Where a ballot has been dimpled for one candidate, it can be assumed that the voters intended to cast a vote for that candidate. Where a ballot has also been dimpled for candidates for other offices, the conclusion must be that the voter intended to vote for these candidates.

Voters whose ballots were not counted had a right not to cast a vote for president.

Of course they did, but the extraordinarily high number of uncounted ballots in counties with punch ballots provides a clear indication that the number of such ballots greatly exceeds the number of voters who intended not to vote for any presidential candidate.

The butterfly ballot was valid because it was adopted by a Democratic official in Palm Beach County.

It does not matter who adopted the butterfly ballot if its confusing nature deprives voters of a clear choice. It violates Florida law that specifies votes are cast to the right of the candidate's name. It violates fairness because a vote for second party candidate Gore required punching the third hole and a vote for minor party candidate Buchanan required punching the second hole. It is beyond reason that thousands of voters were unable to decide between Gore and Buchanan.

It is unfair to recount ballots only in predominantly Democratic counties. Republicans could have called for recounts in counties where they believed that their vote was undercounted. Gore supported a recount in all counties.

Manual ballot counting should proceed with clear and identical standards. Florida law does not establish clear standards, leaving it to the county election boards to determine the appropriate criteria. This was reflected in the Florida Supreme Court decision on November 21 that allowed the counties discretion in determining valid ballots.

Different standards of ballot counting violate the equal protection of the laws.

Florida law does not specify a single clear standard for counting ballots. It is more important to apply the same standard in casting votes. The greater difficulty and complexity of ballots in some counties and states leads to the denial of the vote to citizens in those areas. Congress should adopt a uniform national law regarding both casting and counting votes in the presidential election.

Democrats prevented counting overseas ballots received by November 17 that had no postmark.

It was Republican Florida Secretary of State Harris who told county election boards not to count overseas ballots without a postmark. Apparently several hundred overseas ballots were rejected for this reason. They should have been accepted.

A machine count provided the most reliable count of the Florida vote.

The most reliable count would be a revote limited to those who had voted on Election Day. In those counties where the result is in dispute, a revote would have provided a reasonably accurate count of the intentions of voters, especially if the difference between Nader's Election Day vote and his lower

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revote were subtracted from Gore's revote. We would then have confidence that the winning candidate should have won on Election Day. Gore supporters approved of a revote; Bush supporters did not. The reason is obvious: In a total vote count, Gore would almost certainly have won a clear plurality of votes in Florida.

Democracy in  
Twenty-first Century America  
April 1, 2001

IS A NEW MAJOR PARTY POSSIBLE?

Many Americans, on both the left and the right, are unhappy with the two major political parties and the presidential candidates that they choose. Is a third major party possible? Or does it have to be a two-party system? If it must be a two-party system, can one be a new party with new ideas?

GUARDIANS OF THE RULE OF LAW

The Supreme Court's 5-4 decision in Bush v. Gore (five for Bush, four for counting the votes) is the most egregious exercise of judicial usurpation of power by that court since its pro-slavery decision in the Dred Scott case in 1857. It will not soon recover from the disgrace it has brought upon itself.

EDUCATING OURSELVES ABOUT THE ELECTORAL COLLEGE

Everything you didn't think you needed to know about the Electoral College, and now that you saw what happened in last year's election, you're afraid of not knowing. This is what you should know -- and what we may be able to do to avoid another electoral travesty (tragedy?) like the one we just endured.

THE NEW JUDICIAL ASSAULT ON NATIONAL POWER

This Supreme Court has not been merely activist; it has sought to establish the supremacy of the Court by diminishing the constitutional powers of the national government. This is what it did when it declared unconstitutional, by the usual 5-4 vote, a statute designed to outlaw violence against women.

IS A NEW MAJOR PARTY POSSIBLE?

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If it must be a two-party system, can one be a new party with new ideas?

"The next time you are persuaded that the choice between the two major parties is between Tweedledee and Tweedledum, remember that the choice of a third party is Tweedledumber." Mickey Kedder Critics of major party presidential candidates have wryly reflected that the trouble is that both cannot lose. Incredibly, this time they have. Although George W. Bush finally (five weeks after Election Day) was awarded the presidency, he and Al Gore had already lost both the possibility of legitimacy in the eyes of much of the electorate and the ability to command bipartisan respect in an almost equally-divided Congress.

Yet, despite the agony and animosity, the two-party system has emerged unscathed. All the minor party nominees -- Nader, Buchanan, and the less well-remembered Natural

Law, Libertarian, Socialist Worker, and other candidates -- together received less than four percent of the total vote. Moreover, the closeness of the outcome and the conviction of the losing party that it was wrongly deprived of victory will galvanize both to compete even more vigorously in the congressional elections next year and the presidential election two years later.

Unhappiness with Gore and Bush was not limited to minor party voters. Millions unenthusiastically voted for one of them because they were the only candidates who could win. We cannot guess how many non-voters might have gone to the polls if they had been able to overcome their misgivings about both. Given this widespread public disappointment and similar disenchantment in recent elections, why don't third parties -- and fourth and fifth parties -- have any hope of winning? The answer is that the United States has a two-party system, and unless we understand why it does, what it means, and how it diminishes minor parties, still more new parties will inspire false hopes, waste dedicated energies, and affect results (if at all) only negatively.

The American party system is the result of neither choice nor chance. It was not consciously selected as the most desirable system. The Framers would rather have had no parties at all. James Madison called such combinations "factions," and he believed (mistakenly) that the Constitution made it difficult if not impossible for these alliances to obtain power. Yet, almost immediately after the new nation was established, some factions lined up with Adams and Hamilton as Federalists, supporting stronger central government, and others with Jefferson and Madison as Republicans, stressing the authority of the states.

The Republicans, later called Democratic Republicans, and still later Democrats, triumphed early, and governed without significant party opposition until the Whig party was organized to oppose what its organizers considered the arbitrary and tyrannical power of Andrew Jackson. By the mid-1850s, the threat of extending slavery into the new territories of Kansas and Nebraska divided the northern and southern wings of the Whig party and destroyed it. A new Republican party emerged as the political instrument of those opposed to the Democratic party's defense of slavery. It became the second party in local elections in the 1850s, finished second in the presidential election of 1856, and elected Lincoln to the presidency in 1860, aided by sharp divisions within the ruling Democratic party.

The displacement of the Whigs by the Republicans marks the only time in American political history when one major party succeeded another. From the late 1850s to the present day, the Republican and Democratic parties have controlled the presidency, the Congress, and nearly all state and local offices. Exceptions are rare: At the present time, independents are governors of Minnesota and Maine, a Socialist represents Vermont in the House of Representatives, and non-major party members hold a scattering of local offices. Some minor parties have persisted for decades, but few have had a measurable impact; most were quickly created and quickly faded.

As history demonstrates that the two-party system is not the product of deliberate design, the operation of the electoral system reveals that it is not a historical accident. On the contrary, it is an overwhelming mathematical probability that minor parties will have little impact, excepting only their unintended ability in a close election to negatively affect the outcome. The 435 members of the House of Representatives are chosen in districts that



each elect one member of that body. If a third party with appeal in many sections were to receive as much as ten percent of the vote throughout the country for its congressional candidates (no modern minor party has), it still would be unlikely to elect more than one or two (and perhaps no) representatives. Almost always the major party that gets more votes than the other wins disproportionately more seats, the second party wins disproportionately fewer seats, and minor parties win none. The same result occurs in the biennial election of one-third of the Senate. In the depths of the Great Depression in 1934 and 1936, the Progressive party in Wisconsin and the Farmer-Labor party in Minnesota succeeded in electing Senators and more than one or two Representatives, but neither had any success outside of its home state.

Just like the single-member district in House elections, the presidential election is really winner-take-all in the states. Each state has an electoral vote equal to the number of its members in both houses of Congress. All states have two Senators and a number of Representatives based on a population formula applied after each decennial census. The size of the House has been arbitrarily set at 435; there are one hundred Senators because there are fifty states, and the District of Columbia, the nation's capital, has been allotted three electoral votes, making for a total of 538 electoral votes. To be elected, the winning presidential candidate must receive a majority, that is, at least 270 electoral votes. But to win all of a state's electoral votes, it is necessary to receive only one vote more than any other single candidate, because the vote we cast is really for a slate of electors. Nebraska and Maine are exceptions, because they award two electoral votes to the candidate who receives a plurality of votes statewide, and give one to the candidate who wins each of the state's two congressional districts.

The major party candidate who does better in the nation almost always does better in most states, winning a disproportionately larger share of the electoral vote. In the forty-five presidential elections since the inauguration of widespread public participation, there are only four exceptions. In the presidential elections of 1824 and 1868, the candidate who received both a plurality of popular and electoral votes fell short of a majority of either, and political intervention decided the election differently. Only once before 2000, in 1888, has the winner of an electoral vote majority failed to win a popular vote plurality, and whether this should have been the correct result last year was and will continue to be strenuously debated.

If the second party almost always receives a far smaller percent of the electoral vote than of the popular vote, minor parties fare even worse. Only eight third party candidates have received more than ten percent of the vote. Three were ex-Presidents and two ran in 1860, when a seismic shift was taking place in the party system. Even the most successful are unlikely to win a plurality in any state, except a former president opposing his lackluster successor (Bull Moose Progressive Theodore Roosevelt in 1912), a prominent leader in his home state (Progressive LaFollette in Wisconsin in 1924), or a regional candidate whose candidacy is not truly national (States' Rights Democrat Thurmond in 1948 and American Independent George Wallace in 1968). Ross Perot in 1992, with 19 percent of the popular vote, did not win any electoral votes. Perot ran a second time and his vote was cut in half. Last year's presidential race is that rare election in which a minor party candidate, Ralph

Nader, influenced the outcome, ironically (but predictably) adverse to the interests of his Green party.

None of these mostly one-shot candidacies seriously raised the possibility that a third party will become a major party. By contrast, the new Republican party that became one of the two major parties in the 1850s had already enjoyed electoral success before winning the presidency, and it was prepared to fill the political vacuum caused by the disintegration of the Whig party. The ascent of the Republican party offers no comfort to modern minor parties that dream of a similar rise to power.

Apart from the electoral process, the two-party system reflects the fact that this may be the world's most heterogeneous society, in which the existence of many parties would be unstable and chaotic. Imagine that significant political factions created parties that uncompromisingly embodied their beliefs: "right to choose" (pro-abortion rights), "right to life" (anti-abortion), environmentalists, ACLU-inclined civil libertarians, creationists, socialists, laissez-faire capitalists, pro-guns, anti-guns, and the list goes on. In fact, there are small minor parties are founded on many of these views.

However, most important interest groups know that supporting a minor party would diminish their ability to influence public policy. The Christian Coalition identifies with the Republican party and environmentalist groups with the Democratic party because they know this increases the likelihood that they will influence the party's direction. This marks a change from a time when important interests thought it prudent not to put all their political eggs in one party's basket. Some wealthy interests still hedge their bets, but not the vast majority of African-Americans, unionists, anti-abortionists, school voucher advocates, Jews, homosexuals, and the tobacco, pharmaceutical and timber industries, among others. This strategy polarizes the major parties, but it doesn't make them irrelevant and it isn't conducive to the growth of a third party.

What if Nader had received five percent of the 2000 vote (instead of barely half as much) and earned federal funding for another run in the presidential election of 2004? Every environmentalist, economic egalitarian, and opponent of globalism enlisted among Nader's major party raiders would mean one less to influence the choice of a Democratic candidate more sympathetic to those views. The greater likelihood is that Nader's small vote and negative impact last year will lead to a smaller vote and less impact in 2004. A third party cannot grow unless a major party has become irrelevant. That this isn't true can be seen in the increasing ideological opposition of the Republicans and Democrats.

Even if they fail to achieve power, some minor parties hope that they will initiate proposals that may be adopted by a major party. The example most cited of such borrowing is that the Democrats borrowed the New Deal objectives from the Socialist party. In fact, Franklin D. Roosevelt was a pragmatist who would try something, and if it failed would try something else, "but above all," he said, "try something." It is hard to imagine the socialist roots of the National Recovery Administration, which allowed the largest corporations to write the rules of fair business practices, or of the Social Security plan that originally excluded millions of poorly-paid workers as well as all unemployed adults from its old-age insurance system. Whatever the liberal direction of these programs, Roosevelt's policies to combat the Great Depression were designed to save capitalism, not promote socialism, and

they did. No serious claim can be made that any enduring new political issues or approaches were authored by the presidential candidacies of Henry Wallace, J. Strom Thurmond, George Wallace, John Anderson, Ross Perot, or Ralph Nader. At most, they sought to focus attention on issues that they believed deserved more attention.

So why do minor parties persevere despite the fact that only once has a new party replaced a major party under circumstances that have no parallel in present-day American politics, and against the overwhelming mathematical likelihood that even a strong third party will not elect Representatives or win electoral votes? There are several reasons why they run, but most assume that those who support third parties lack a clear understanding of the nature of the electoral process.

One. Ignorant idealism. Their vision of a better America is so obvious to them that they believe it only requires adequate and impassioned explanation to win widespread public acceptance of their goals, despite constitutional obstacles and the electoral system.

Two. Messianic fanaticism. Only if matters get worse -- much worse -- can apocalyptic change take place. Faith in their utopian political order is untroubled by consideration of the long-term suffering that must be inflicted on society in order to radically reform it.

Three. Overweening vanity. For the would-be leader of the people who knows he will never be that leader, there is the lesser prize of becoming a spokesman for an alienated group and rallying support for a campaign in which distinctions are distractions and commitment to a movement or a manifesto is total.

Four. Fringe fellowship. Those whose extremist views are denied widespread respect can find solace in a small band of ardent followers who protect one another from the loneliness of their alienation from the political mainstream or its principal tributaries.

A few minor party candidates are malevolent, bent on wreaking havoc; some are mischievous, hoping to redirect a major party by contributing to its defeat; most are misguided, simply not understanding the futility of their effort. Perhaps this last category most accurately describes the nearly four million minor party voters last year who clung to the illusion of a party that short-circuits the political process, overcomes the institutional barriers, and brings about desired change. What's sad for those of us who share any of the values of one or another of these movements is that, with the best of intentions, they retard rather than advance progress toward their goals.

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This essay, titled "Is A New Major Party Possible?," originally appeared in Congress Monthly, January/February 2001. All of the contents of Democracy in Twentieth-Century America are by Stanley Feingold, unless otherwise specified. Comments, criticisms, and corrections are welcome at email Stanley Feingold.

#### GUARDIANS OF THE RULE OF LAW

The Supreme Court's 5-4 decision in Bush v. Gore (five for Bush, four for counting the votes) is the most egregious exercise of judicial usurpation of power by that court since



its pro-slavery decision in the Dred Scott case in 1857. It will not soon recover from the disgrace that it has brought upon itself as a consequence of legal reasoning that defies logic and denies long-held constitutional positions, in pursuit of motives that are so blatantly self-serving that judges who had any integrity would have recused themselves.

"This is what happens when, for the first time in modern history, a candidate resorts to lawsuits to try to overturn the outcome of an election for president. It is sad for Florida. It is sad for the nation. And it is sad for our democracy." James A. Baker III

It was Baker's candidate who brought the election to federal courts.

"With this decision, a collection of...activists has arbitrarily swept away thoughtfully designed statutes ensuring free and fair elections and replaced them with their own political opinions." House Majority Leader Tom DeLay, referring to the Florida Supreme Court decision allowing the hand count permitted by Florida law.

"The supreme court follows the election returns." Mr. Dooley, in Peter Finley Dunne, *Mr. Dooley's Opinions* (1900). What would Mr. Dooley have said one hundred years later when the election returns followed the Supreme Court?

A thoughtful friend who is not a lawyer asked me to explain what I meant when I wrote that "the loss of a safe harbor does not compel us to sink the ship of state." Although I wanted to wait a while before I wrote at any length about the Supreme Court's astounding decision in Bush v. Gore, I discovered that beyond defining "safe harbor," I had to explain why I believe the ship of state is in danger. So in characteristically professorial style, I've said much more than my friend wanted to know, but much less than my agony and anger want to express.

"Safe harbor" is the phrase that has been used in the post-election cases to refer to the so-called December 12 deadline for states to choose unchallenged electors. Of course, it is not really a deadline; It is a safe harbor in that, if a state selects its electors by that date, they cannot be subject to challenge by another slate. Perhaps Gore counsel David Boies, who made an eloquent argument for completing the hand count, overstated his case when he once remarked that this date was crucial. It isn't. As long as the electors are chosen by December 18, they can cast their votes on that date. As a matter of fact, there is no reason why electors cannot be chosen later, as they have been in electoral disputes. In 1960, Hawaii chose its electors at the end of the year. In 1873, an electoral commission awarded disputed electoral votes and the election to Rutherford B. Hayes on March 2, and he was sworn into office three days later.

To foreclose any effort to discover the intention of Florida's voters because they could not be counted by December 12 is the weakest imaginable reason to end the hand count. The Supreme Court's supreme chutzpah consists of the fact that they first called a halt to the hand count, which had gotten off to a rather brisk start. They then waited a weekend, heard arguments, and announced that it's now too late! It wasn't too late. That there still was time was the fear of the radical five Justices, who have spent much of their careers railing against judicial activism. (Has there ever been so blatant an instance of unbridled and unprecedented judicial activism?!) Of course, there was still time to discover

which of the two candidates had received more votes, even after disqualifying many ballots because their markings were unclear, other ballots because two votes were cast for president, and still other ballots because voters casting butterfly ballots had mistakenly voted for Buchanan instead of Gore. But the fearful five knew that, even with all those ballots discarded, Gore might still win.

They couldn't rely alone on the lack of time. They created a constitutional objection that voters were denied the equal protection of the laws. This denial of equal protection allegedly existed because different ballots were counted in different ways. The Supreme Court majority held that a precise standard is necessary and "the clear intent of the voter" is not a clear standard. Perhaps not, but "the clear intent of the voter" is precisely the standard that the Florida legislature adopted, and is, incidentally, the standard of many states, including Texas. It is not a criterion composed by the Florida Supreme Court. Perhaps the standard should be more precise, but what could the Florida Supreme Court do about it? If it had adopted a stricter standard, it would have been accused of legislating. If the vagueness of this standard is unacceptable, it is equally unacceptable in all the states that accept it.

To say that employing different standards of counting votes violates equal protection of the laws overlooks the fact that there are many different methods of casting votes in Florida, which require different standards. The real denial of equal protection of the laws consists of the fact that some methods of casting votes are very much more difficult than others. This is immediately apparent when we note that four and five times more ballots are discarded as not properly voted in counties that use punch card ballots than are discarded in counties that use other voting methods. As a political matter, it should be noted that the more difficult forms of vote casting are employed principally in those Florida counties that have a higher proportion of Democratic voters.

The 5-4 division in this case has existed for several years. The five (Rehnquist, Scalia, Thomas, O'Connor, Kennedy) have consistently struck down federal law as invading the reserved powers of the states. For example, they decided, by the usual 5-4 vote, to declare unconstitutional an act of Congress that outlawed domestic violence against women, even though most of Attorneys-General of the states urged Congress to adopt the law. They voted, 5-4 as usual, to invalidate an act of Congress that barred the possession of handguns near public schools. In every respect, the decision in Bush v. Gore is directly contrary to their professed judicial philosophy of supporting the reserved powers of the states in the Federal Constitution.

Every student of constitutional law knows as an axiom of judicial review that the U.S. Supreme Court does not -- or at least until the disputed presidential vote in 2000 did not -- accept what they used to call "political questions," fearing the Supreme Court's involvement in what Justice Frankfurter called "the political thicket." If you asked a large number of professors of constitutional law, or lawyers, or political scientists, the overwhelming majority would have said that the Supreme Court would never take this case. But they did. The opportunity to select the next president -- the right (very right) next president -- by a one-vote margin was a temptation that they could not resist.

But as much as they wanted to kill Gore's candidacy, the five Justices, motivated by a sense of propriety, or cowardice, or political calculation, wanted someone else to fire the gun

so they wrote this less-than-straightforward opinion returning the case to the Florida Supreme Court, saying it's up to that court, but that court is not allowed to formulate a rule for continuing and concluding the hand count, or do anything else but declare Gore's candidacy dead. And this opinion is "*per curiam*," which is used to indicate that no single Justice signed off on it, because it represents the view of the Court. Of course, in a case decided by the narrowest of margins, that is very misleading. Curiously, the so-called "swing" Justices, O'Connor and Kennedy, did not attach their names to any opinion, including the one that carried the names of the unholy trinity of Rehnquist, Scalia and Thomas.

Who are these guardians of the law who have the effrontery to substitute their judgment for that of the electorate? Chief Justice Rehnquist was accused long before he sat on the Supreme Court of attempting to intimidate voters in Arizona. (It's an old story, but a new version of it appears in the December 2, 2000 issue of the Pittsburgh Post-Gazette.) Justice Scalia's son is a member of the law firm of Theodore Olson, who argued the Bush case before the Supreme Court. Justice Thomas's wife was employed by the ultra-right Heritage Foundation to vet prospective office-holders in a Bush administration. When Justice O'Connor heard Dan Rather call Florida for Gore, she exclaimed, "This is terrible." Her husband explained to other guests at the election night party that his wife was upset because they wanted to retire to Arizona, and a Gore win meant they would have to wait another four years. (Two witnesses described this scene to Newsweek, reported by Evan Thomas and Michael Isikoff, "The Truth Behind the Pillars," in Newsweek, December 25, 2000-January 1, 2001.) Do you think these Justices were really listening to the arguments presented to them for continuing the hand count?

Commentators started to make much of the close division in Congress and the consequent need for compromise. What should not be overlooked is how much independence every president has in issuing executive orders, making foreign policy, choosing executive officers and influencing the direction of executive agencies, and (most relevant here) nominating members of the Supreme Court. For George Bush to have the opportunity to choose Justices in the mold of his proclaimed favorites, Scalia and Thomas, will be to ensure the ultra-conservative character of the Supreme Court perhaps for decades to come. When another issue of this magnitude comes before a future Court, if Bush has his way, that Court will come closer to unanimity in denying the most basic democratic principle of one person, one vote. It should be opposed.

A personal footnote. I realize that in the sixty years I have spent thinking, reading, talking, and teaching American politics, no other political event has so outraged me. This is more than an illegal action by a politician or a president. In the name of the rule of law, it is the rule by powerful partisan lawyers who put their political biases ahead of the most fundamental principles of law in a democratic republic.

I have not attempted a scholarly commentary because nothing I can say will improve upon the dissenting opinions of Justices Stevens, Souter, Ginsburg and Breyer. Each of the dissents refutes and shames the majority. The dissents constitute a series of brilliant lectures on the nature of the federal system, the value and practice of democracy, and the appropriate role of the judiciary. On that last point, I leave the last word to the senior Justice, John Paul

Stevens, who writes: "Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."

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### EDUCATING OURSELVES ABOUT THE ELECTORAL COLLEGE

Everything you didn't think you needed to know about the Electoral College, and now that you saw what happened in last year's election, you're afraid of not knowing. This is what you should know -- and what we may be able to do to avoid another electoral travesty (tragedy?) like the one we just endured.

"I have never been more struck by the good sense and the practical judgment of the Americans than in the manner in which they elude the numberless difficulties resulting from their Federal Constitution" Alexis de Tocqueville, *Democracy in America*, I, ch. 8

The authors of the Constitution did not believe that they were writing a sacred text that could not be altered. They saw their accomplishment as the necessary compromise of different views in order to create a central government. It is unlikely that those who believe that the Framers were demigods who composed the most divinely-inspired work since the Ten Commandments have ever read the debates in the Constitutional Convention.

No issue demonstrates more clearly the pragmatic nature of the Constitution's design than its method of electing a president. During nearly four months of debate, the delegates repeatedly considered how the president was to be elected. It was proposed that he should be chosen by the state governors, by popular election in districts, or by electors selected by the state legislatures. In considering and reconsidering the method of choice, the delegates were motivated by two objectives. One was to create a popular government that was not too popular, that is, did not represent the will of all the people. The electorate that existed in the states -- limited to propertied, white, male adults -- reflected the anti-democratic bias of the dominant class. Their other objective was to recognize that the federal system they were creating made it necessary to give the states a nearly equal share in choosing the nation's chief executive.

Twice the Convention adopted election by Congress. Two days after defeating a proposal to have the president chosen by an electoral college containing one to three electors chosen by each state legislature, they unanimously adopted it. The following week, they reconsidered that decision and returned to election by Congress. One exasperated delegate reflected, "We seem to be entirely at a loss."

Two weeks later, a draft Constitution incorporated election by Congress. Another month later, it was changed to election by an electoral college, with an unresolved election decided in the Senate. The electors, equal in number to each state's membership in the two houses of Congress, were presumed to be the ablest citizens, exercising their own best judgment. Almost at the Convention's end, the power to decide in the absence of an

electoral majority was given instead to the House of Representatives, with each state casting one vote. This power was taken seriously, because the members of the Convention did not anticipate the rise of political parties, and they expected that very much more often than not no single person would receive the votes of a majority of presidential electors.

This brief summary demonstrates how much doubt and division there was on the subject, and dispels any notion that the Electoral College was inevitable. Every time the Convention debated, decided, debated again, decided differently, and decided still again for the third, fourth and fifth time, it also considered the president's eligibility for reelection, and the term of office, deciding on seven years, affirming it twice, rejecting it, and then deciding on six, seven, and finally four years. Had the Convention considered the method of presidential election one more time, it very likely would have decided on still another method of election and term of office.

The compromise it finally decided on has been, with only two significant changes, the system we have used for fifty-four presidential elections. The first change occurred as a result of the election of 1800 when a majority of electors, each of whom cast two ballots, all voted for Thomas Jefferson and Aaron Burr, even though the Republican party that chose them intended to elect Jefferson president and Burr vice president. The election was thrown into the House of Representatives, in which each state delegation cast one vote, and a majority of House delegations were controlled by the repudiated Federalist party (whose candidate had been President John Adams). Alexander Hamilton, an influential Federalist leader although not a member of Congress, threw his support to Jefferson, and Jefferson was elected president on the 36th ballot. (Hamilton hated Jefferson, but he abominated Burr. Burr got his revenge by killing Hamilton in a duel.)

To prevent a recurrence, the Twelfth Amendment was adopted, calling for separate ballots for president and vice president. Instead of the runner-up being elected vice president, the vice president is someone chosen for the job. The problem is that there is no job. The vice president has virtually no constitutional power. He may preside over the Senate, which he very rarely does, and wait for tie votes, which rarely occur. Given his impotence in office, a vice presidential candidate has typically been chosen on the basis of political considerations unrelated to an assessment of the kind of president he might one day become.

The other significant change has been in the role of the public. A growing proportion of citizens (originally propertied white male adults) participate in choosing each state's electors by casting one vote, ostensibly for a candidate for president and a running-mate, but literally for a slate of electors. Each state party names a number of electors equal to that state's membership in the two houses of Congress. Minor parties endorsing a major party candidate simply nominate the same slate of electors as the major party. The consequence is that the slate of electors that receives more votes than any other in a state -- even if only one vote more -- is elected in its entirety. (Only Maine and Nebraska award the candidate with a statewide plurality two electoral votes, giving the other electoral votes to the winner in each congressional district. Neither state has thus far had to divide its electoral vote.)

It is also true that electors have on rare occasions cast their votes for someone other than the candidate to whom they were pledged. Although the electors are now the vestige of a once-critical power, a few electors have disregarded their commitment in states that do not legally bind the winning electors to support their party's candidate. Fortunately, faithless electors have never made a difference, and the mischief they might cause can be prevented by eliminating the electors and establishing an automatic electoral vote.

The grafting of a democratic process onto an elitist institution has created the possibility that a candidate could be elected with a majority of electoral votes while receiving fewer votes than an opponent. This first happened in 1824, when Andrew Jackson received both more popular and electoral votes than three opponents, but not an electoral majority. Electors pledged to Henry Clay threw their support to John Quincy Adams, and Adams won the presidency. Clay's reward was his appointment as Adams's Secretary of State.

The second time no candidate had a clear electoral majority was in 1876, when Democrat Samuel Tilden had a popular plurality but was one vote shy of an electoral majority, and a commission was created by Congress to decide who had won twenty disputed electoral votes in four states. The fifteen-member commission, consisting of five each chosen by the House, Senate and Supreme Court, contained eight Republicans and seven Democrats, and they voted eight to seven on straight party lines to give all the disputed electoral votes and victory to Republican candidate Rutherford B. Hayes.

There is a striking resemblance between the Hayes-Tilden election and the resolution of last year's election, that hinged on the determination of Florida's electoral vote, with the Supreme Court performing the function of the earlier electoral commission. (In view of the importance the Supreme Court placed last year on when the electors must be appointed, it should be noted that the disputed electoral votes were not awarded to Hayes until March 2, 1877, three days before his inauguration on March 5.)

The election of a president with fewer votes than an opponent was the result of a political deal in 1824, an electoral commission's party line vote in 1876, and a five-four vote of the Supreme Court to cut off a crucial vote count in 2000. Only once, in 1888, has a candidate with more votes, President Grover Cleveland, lost to a candidate with a clear electoral majority, Benjamin Harrison. Cleveland came back four years later to defeat Harrison, becoming the only president to serve non-consecutive terms.

Given the unsatisfactory outcome of elections in which the candidate with more votes loses, what can be said in favor of the Electoral College? Not much. The argument from inertia is that it's been around for more than two centuries. A better argument is that the electoral vote is generally more decisive than the popular vote, creating at least the impression of a mandate for the new president, even though the impression is a false one. In almost all elections, the party that wins two or three percent more of the popular vote is likely to win a larger majority of the electoral vote. It's simple probability theory. If the party vote in every state exactly mirrored the national vote, the party that won by the slimmest margin in the nation would win all the electoral votes. Of course that doesn't happen, but given the widespread if uneven division of the vote for the two major parties, the overwhelming probability is that a party that wins a reasonably decisive plurality of the

popular vote will win a much larger majority of the electoral vote. That doesn't hold in a very close election, as we learned in 2000.

A practical argument for the electoral vote is that disputed votes can be far more easily reexamined in a single state than throughout the nation. Even given the scare tactics of Republicans in 2000 that they were ready to question close votes in Oregon, Wisconsin, and New Mexico in the event that Gore carried Florida by a narrow margin, the fact is that we were not considering a recount of the vote throughout the nation. Even in Florida, the focus was on a few counties in which there were allegations of miscounting.

A subtler issue is the extent to which abolishing the Electoral College would call into question the whole issue of constitutional federalism. It certainly seems outmoded with respect to the loyalty of citizens. We freely move from state to state, and immediately become citizens of whichever state we live in. Although national power has grown, the states retain significant powers, as well as equal representation in the Senate, which has legislative power equal to that of the House of Representatives, and is solely responsible for confirming presidential appointments and ratifying treaties. However, the constitutional equality of the states in the Senate does not justify the constitutional inequality of citizens in voting for the president of the nation.

Can we establish "one person, one vote" for the presidency? Any change in the way in which we elect the president would require a constitutional amendment, requiring the approval of two-thirds of both houses of Congress and ratification by three-fourths (38) of the states. Many less populous states and the Senators who represent them would look upon elimination of the Electoral College as diminishing the power of their states.

If the obstacles to eliminating the electoral vote are probably insurmountable, altering its "winner-take-all" character must be assessed as merely very difficult. This can be achieved by dividing the electoral vote of a state between the leading candidates or by giving each congressional district one electoral vote with two at-large for the candidate who has a plurality in the state, as Maine and Nebraska now direct. Neither change would guarantee the election of the candidate with the most votes. For example, the proportional division of the electoral vote in each state would have resulted in Nixon's victory over Kennedy in 1960. Nevertheless, if such a reform had been in effect in that election and in last year's, the rewards for political corruption and conspiracy would be much less.

Almost any rational division of the electoral vote of the states would have avoided the grotesque result in last year's election, where extraordinary political and extra-judicial means were employed to prevent a full count in accordance with Florida law, in order to award George W. Bush twenty-five tainted electoral votes and the narrowest electoral majority against Al Gore, who had more than a half-million vote plurality in the nation, and very likely a plurality in Florida.

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## THE NEW JUDICIAL ASSAULT ON NATIONAL POWER

This Supreme Court has not been merely activist; it has sought to establish the supremacy of the Court by diminishing the constitutional powers of the national government. Where the Warren Court's activism was confined to equal protection issues, the Rehnquist Court, mostly in 5-4 decisions, has all but ended federal review of state criminal cases, disowned affirmative action, and denied Congress the authority to act in areas justified by its delegated and implied powers. (Can this be the same Court that last year denied a state's right to determine and apply its laws in Bush v. Gore?)

The spirit of Justice Joseph Bradley sits on this Supreme Court, a belief reinforced by that court's decision last year to overturn the 1996 Violence Against Women Act. After the disputed presidential election of 1876, Bradley cast the decisive vote on the otherwise equally-divided electoral commission, resulting in the election of Rutherford B. Hayes. Hayes's election marked the end of the military occupation of the South and the restoration of white supremacy there.

The Supreme Court affirmed this decisive movement away from racial equality with Justice Bradley's opinion in the Civil Rights Cases (1883) declaring that the Civil Rights Act of 1875 exceeded Congress's power under the Fourteenth Amendment and that the equal protection clause permitted federal regulation of only state action and not private behavior. Justice Bradley again strengthened state sovereignty in Hays v. Louisiana (1890), in which he wrote for the court that states may not be sued in federal court by their own citizens.

These decisions have become enshrined in our constitutional law, and no serious effort has ever been made to reverse them. Later Courts chipped away at both by a more expansive view of civil rights and the adoption of a federal standard of conspiracy when states violated civil rights. However, a five-member majority in 1999 (Alden v. Maine) reaffirmed the state immunity rule and revitalized the equal protection limits of the Civil Rights Cases, which really limit the protection of civil rights.

To complete its restoration of state sovereignty, the Court has had to conclude that the federal government may not abridge powers reserved to the states by the Tenth Amendment. This process began in US v. Lopez (1995), where a narrow 5-4 majority struck down an act of Congress that prohibited the possession of guns in or near schools. The Court's opinion noted the absence of substantial evidence demonstrating the impact of gun possession upon interstate commerce. Congress learned a lesson, or so it thought. Its passage of the 1996 Violence Against Women Act, declaring various categories of sexual assault to be federal crimes, was preceded by four years of hearings, eight reports by congressional committees on gender bias, and studies submitted by task forces in 21 states.

The volumes of evidence Congress collected reached appalling conclusions: Four women die every day as a result of domestic violence (the legal euphemism for assault and murder by husbands and lovers), more than a half-million rapes and sexual assaults are reported annually, and many times more are unreported (to say nothing of episodes of stalking and verbal abuse) because of women's embarrassment and shame, their fear of retaliation by the offending male, who may still reside in the same household, and their recognition that the judicial system is biased against their rights, because it has too often failed to acknowledge that there are uniquely women's rights. That the states were aware of



their failure and the gravity of the issue is evident in the fact that the attorneys-general of 36 states filed an amicus brief in support of the petitioners. None of this mattered. The same 5-4 majority that decided *Lopez* concluded last year in *U.S. v. Morrison* that the suppression of gender-related crime in the states is solely within the police power reserved to the states and that the equal protection clause may be employed only to prohibit state, not private, conduct.

What the Supreme Court began in *Lopez* and concluded in *Morrison* is to reinstate a judge-made standard of federalism and reaffirm a judge-made standard of civil rights. Its federalism standard, the existence of a fixed body of reserved state power, had been the basis for striking down national social legislation in past reform eras. When a 5-4 majority in *Hammer v. Dagenhart* (1918) declared unconstitutional a congressional act barring the interstate transportation of goods manufactured by child labor, it stated that Congress's power "was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution." The same reasoning enabled the Court in the 1930s to strike down the National Recovery Act, the Agricultural Adjustment Act, and other major New Deal measures, undermining the most extensive social reform ever undertaken in the United States.

Only the political threat posed by President Roosevelt's ill-fated plan to enlarge its size, Roosevelt's selection of five new Justices in his second term, and his reelection to a third term persuaded the Supreme Court to do an about-face in 1941 (*U.S. v. Darby*) when it unanimously upheld a federal minimum wage law and reduced the Tenth Amendment, in Justice Harlan Fiske Stone's approving phrase, to "a truism that all is retained which has not been surrendered."

Those are harsh words for states' rights, but the only ones justified by a reading of the Constitution. Although the federal government is limited to enumerated powers, they are stated in general terms in order that they may be exercised wherever and however Congress deems it "necessary and proper" to employ them. The only constitutional restraint is found in the prohibitions of the Constitution, particularly the Bill of Rights.

The judicial success, since *Brown v. Board of Education* voided school segregation in 1954, of legislation providing civil rights protection for all races against private action suggests that a similar standard could be employed to extend civil rights protection to all women. But the idea that women should enjoy constitutional protection equal to that of male citizens is not likely to be embraced by this Supreme Court. The other principle embraced by the Rehnquist Court is the principle of the Civil Rights Cases, that the equal protection clause secures federal protection of rights only against state action, and not against private conduct. The Court's anti-civil rights decision in the Civil Rights Cases has never been overturned, despite Justice John Marshall Harlan's eloquent dissent that the substance and spirit of the Thirteenth and Fourteenth Amendments "have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished."

Chief Justice John Marshall put it succinctly and definitively in *McCulloch v. Maryland* (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not

prohibited, but consist with the letter and spirit of the Constitution, are constitutional." In short, the Tenth Amendment can reserve to the states only the powers not constitutionally exercised by the national government.

The other principle embraced by the Rehnquist Court is the principle of the Civil Rights Cases, that the equal protection clause secures federal protection of rights only against state action, and not against private conduct. The Court's anti-civil rights decision in the Civil Rights Cases has never been overturned, despite Justice John Marshall Harlan's eloquent dissent that the substance and spirit of the Thirteenth and Fourteenth Amendments "have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished." The post-Brown judicial success of legislation providing civil rights protection for all races against private action suggests that a similar standard could be employed to extend civil rights guarantees to all women. But the idea that women should enjoy constitutional protection equal to that of men is not likely to be embraced by this Supreme Court.

Justice Bradley's spirit will not soon be exorcised. His view of sex rights was expressed in a concurring opinion in Bradwell v. Illinois (1873), upholding a state's right to bar a woman from the practice of law, contrary to both Illinois state law allowing any adult person of good character to practice law and the Fourteenth Amendment's equal protection of all citizens. Bradley wrote: "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

The present Court's majority is too contemporary to express such sentiments and too careful to concede that its denial of the most basic women's rights is even more reactionary.

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This essay, with the title, "Supreme Court Takes a Big Step Backward," appeared in slightly modified form in the National Law Journal, June 5, 2000. All of the contents of *Democracy in Twentieth-Century America* are by Stanley Feingold, except if otherwise specified. Comments, criticisms, and corrections are welcome at email Stanley Feingold.

Israel/Palestine  
January 16, 2002

Some hard, sad questions regarding the Israeli-Palestinian conflict.

I care deeply and sorrowfully about the declining prospects for peace in Israel. I care about the Israelis because I am the son of Jewish parents who fled persecution in Czarist Russia. I care about the Israelis because I am an American who recognizes that Israel has been America's only certain ally in the Middle East. I care about the Israelis because I am a democrat who believes that Israel has striven to be the sole democracy in a region where it is surrounded by monarchies, theocracies, and tyrannies. But most of all I care about the Israelis because I am a human being who deplores the needless slaughter of innocent people. And that is why I also care about the Arab Palestinians.

The questions that confront Israel have hardly changed over several decades. What has changed is that, because of the continuing loss of Israeli and Palestinian lives, both Palestinian radicals and Israeli hard-liners have become more numerous and more entrenched in their determination to prevail, whatever the cost. Nevertheless, it remains useful to ask what the alternatives are from which Israel must choose and what the consequences are of choosing each of them.

Does continuation of the conflict hurt Israel or the Palestinians more? Without a peaceful resolution, Palestinian militants will continue to blow up Israelis and themselves on public buses, Israel will retaliate by bombing Arab places in which they believe terrorists may be sheltered, the Palestinians will respond by exploding car bombs near crowded Israeli markets, Israel will proceed to raze houses in Palestinian villages, and on, and on, as deaths multiply, and the bereaved on both sides cry out for vengeance. If the despair of the Palestinians deepens, as it must if the conflict continues, it is almost certain that more will be won over by the fanatics who preach the morality of suicide missions and by their conviction that they have nothing to lose because they have already lost everything.

Should Israel extend full citizenship and voting rights to all inhabitants of the territories under Israeli rule? The birth rate among Israeli Moslems is higher than among Israeli Jews. If Israel includes the occupied territories, Israel confronts these unpalatable choices: provide equal citizenship to the growing proportion of Palestinians, deprive them of citizenship rights and Israel of the claim to be a democracy, or forcibly expel Palestinians from the country.

Can Israel expel the Palestinians? The consequences of attempting to expel all Palestinians would be appalling. The very attempt to do so would precipitate the bitterest political division among Israelis, provoke the violent opposition of Palestinians within Israel, and prompt universal condemnation by other nations. And it would not succeed. That Israel can point to the de facto expulsion of Jews from some Arab states overlooks differences in magnitude, as well as the crucial distinction that Israel proclaims that it is a democratic nation and the Arab nations are not.

Did the Palestinian authority reject a fair offer to create a Palestinian state? Israel continued to build new settlements after the Oslo agreement in 1993. There are probably

nearly 250,000 settlers now in the occupied territory. What might have been acceptable before the Intifada – Clinton’s proposal that Israel would keep five percent of the West Bank – may be unacceptable after the bloodshed of recent years. No offer can succeed that falls far short of ending the new settlements and turning over the entire area occupied since 1967 to a new Palestine. No offer can succeed that fails to give the Palestinians the same control over their resources and security that Jewish settlers enjoy in the settlements that they established in the occupied territories. What then-Prime Minister Barak proposed fell short on both counts. Nevertheless, it certainly constituted a serious basis for beginning serious sustained discussion that might have led to an ultimate resolution. Instead, it was unconditionally rejected.

Why did Arafat reject the Israeli offer? Arafat is a leader without power and without a state in which to exercise authority. He does not command the loyalty of militant terrorist groups that attempt to destroy Israel even if they destroy themselves. Nor does he retain the support of others who are giving up hope and may make common cause with the fanatics. Under increasingly difficult circumstances, he cannot guarantee the security that Israel has failed to achieve until now.

Is peace possible? Yes, but only under extraordinary circumstances. This is one of those grim times when the prospects for peace in Israel look only a little better than the prospects for an end to Arab anti-Semitism. Remote as the possibility is, we must promote it for the sake of human morality, the survival of Israel, and a decline of terrorism. Last year nearly 350 distinguished Israeli intellectuals, academics, and others signed a petition calling for international intervention to end Israel’s present policies. The petition stated in part: “Israel acts as a sovereign that has relinquished all legal and moral responsibilities to protect the Palestinian population under its jurisdiction. We acknowledge the complexity of a situation in which it is often difficult to distinguish between legitimate acts of Palestinian resistance and unacceptable acts of Palestinian terror and between legitimate defensive Israeli policy and acts of state terror. But the complexity of this situation can neither diminish our responsibility nor silence our voice. It is our moral obligation as Israeli citizens to express our solidarity with the Palestinian struggle for freedom and to do everything possible to protect the Palestinian population living in the occupied territories....Specifically, we call for an immediate international intervention to stop the killing and wounding of human beings who are exercising their elementary right to claim political freedom.” International intervention may be a very slim hope, but it appears to be our only present hope for peace and justice in the Middle East.

Iraq  
April 12, 2003

Sporadic fighting continues in Iraq, but the war has been won. No rational person could ever have doubted the outcome, but grave doubts must now be raised as to the real reasons why we invaded Iraq. President Bush offered us successively (and sometimes concurrently) four reasons. We may now test them.

The first reason, offered almost from the time the United States government began what it termed a war against terrorism, was that Iraq had important links to Al Qaeda and the war on terrorism. The available evidence demonstrates a gulf between the religious fanaticism of Al Qaeda and the secular dictatorship of Saddam Hussein that could only be bridged by the common enmity of the United States. Try as the Bush administration did (and it tried very hard), it was unable to establish any credible link.

A second reason was that Iraq constituted a threat to the security of the United States. Whatever the basis of such a fear, the inability of Iraq to mount serious opposition to the American-British-Canadian invasion utterly refutes that view. Third-world countries would not have done much more poorly.

A third reason was that Saddam Hussein was a brutal tyrant who had slaughtered many Iraqis. This has never been in doubt, although we have not often pointed out that the United States looked the other way when these murders took place during Iraq's decade-long war with Iran when it was receiving American military and economic aid. Of course, if we are to wage war against brutal regimes, our leading trading partner (China) and Arab ally (Saudi Arabia) have earned higher places on this dishonor roll.

A fourth reason was that Iraq violated United Nations resolutions to destroy its weapons of mass destruction, defined as surely including significant stockpiles of chemical and biological weapons, and possibly nuclear weapons. The United Nations inspectors did not find these weapons, they were not used against the invading armies, and as of the time I write, we have not found them.

So why did we invade Iraq? It is difficult find reasons in the consequences of our victory. The United States has forfeited virtually all of the enormous goodwill and support that it received throughout the world after the horror of 9-11. To casually shrug off the world's reaction with barbs directed at France and the UN is to be guilty of a new kind of isolationism that does not retreat from the world but advances with little regard for the rest of the world. This is consistent with our refusal to cooperate with the International Court of Justice, the anti-mines treaty, the Kyoto treaty, and other international agreements. International cooperation means cooperation on our terms.

We are morally obliged to invest tens of billions of dollars, not to mention the long-term commitment of American armed forces, to revive Iraq's shattered economy and to create a representative political system. No one can calculate the cost or length of time of this commitment. Our failure to fulfill it will be even more costly.

It is unthinkable that Dubya wanted to correct Poppy's mistake and seek vengeance for the attack on his father's life. It is unthinkable that America's insatiable appetite for oil could have driven us to take over what we have been told is the world's third-largest source of oil. It is unthinkable that the uncompetitive contracts and profits for Bechtel, Halliburton and other American corporations could have inspired the war.

But I cannot help thinking the unthinkable in believing that this war has served an important domestic purpose. The war on Iraq and our long-term postwar obligations there, taken together with the 2001 tax cuts and those likely to be adopted this year, make impossible in the foreseeable future federal enactment of social and economic policies that would make America a more just and democratic society.

It hasn't been an easy task to transform the United States in a little more than two years from a prosperous domestic economy with a huge budget surplus that made far-reaching reforms seem possible to a declining economy and a growing record deficit for years to come that not only make it impossible to initiate new social programs, but render us unable to implement existing commitments. Despite the president's promise, we will leave millions of children behind, as well as millions of poor and elderly people. The tax cuts will shield the wealthiest Americans from economic hardship. It is difficult to calculate which is greater: the already vast and growing gap between rich Americans and the rest of us, or the gap between the president's glowing rhetoric and the injustice and inequality of his policies.

For more than two millennia, the phrase Pyrrhic victory has meant winning when suffering even greater losses than the loser. Unless the United States decisively reverses its course in domestic and foreign policy, a Bush victory will be even more devastating.

## Spending Discipline July 19, 2003

Every so often a new phrase enters political discourse, or an old one acquires new meaning. Sometimes the phrase becomes a code word for political convictions that are better left unspecified, like “law and order” or “southern strategy.” Sometimes it is a positive-sounding slogan that glosses over complex ethical issues, like “right to life” and “right to choose,” or “affirmative action” and “color-blind Constitution.” President George W. Bush has adopted such a phrase, “spending discipline,” which neatly covers a host of issues. It is worth examining what “spending discipline” means for Mr. Bush, because it spells out the direction and consequences of this administration.

“Spending discipline” means immense tax cuts for the wealthiest Americans (a very unlikely stimulus for economic recovery, except for the increased sale of imported goods), reducing federal revenues to the lowest share of the gross domestic product since at least 1959 and creating the largest government deficit in the history of the world.

“Spending discipline” means economic policies that have cost the nation two-and-a-half million jobs in two-and-a-half years, an unequaled and unenviable record. (Herbert Hoover was the last president who left office with fewer people employed than when he entered the presidency.)

“Spending discipline” means business owners may deduct up to \$100,000 for the cost of a vehicle if it weighs at least 6000 pounds and, incidentally, increases both our dependence on Arab oil and the pollution of the environment. (Do I hear a chorus of skeptical hummers?)

“Spending discipline” means spending \$4 billion a month or more (count on it being much more), apart from the cost in American lives, for the indeterminate future in support of a military occupation based upon deliberate deceit and ignorant “intelligence.” (Having eliminated a regime that apparently did not constitute a threat to American security may have cost us dearly in world opinion, but it certainly has improved the security of Halliburton, Bechtel, and the major oil companies.)

“Spending discipline” means not investing in education (leaving most children behind), health care (keeping the U.S. the only industrial nation without a comprehensive system of medical coverage), environmental protection, and infrastructure (all of which, economists have calculated, would produce jobs and a higher standard of living for the great majority of Americans).

Of course, pointing out that the foreign and domestic policies of this administration make the rich richer and most Americans poorer is condemned as “class warfare.” Grover Norquist, the president of Americans for Tax Reform, has said what’s on the mind of an administration that would bushwhack the rest of us: “I don’t want to abolish government. I simply want to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub.”

Max Cleland  
October 2, 2003

Dear City Colleague,

In case you missed this full-page advertisement in The New York Times on September 30. It expresses my sentiments more eloquently and with more authority than I could have. The sponsors of the ad urged readers to send copies to others. I do too.

Stanley

The author, former U.S. Senator Max Cleland, volunteered for duty in Vietnam where he lost both of his legs and his right arm in a grenade explosion. He headed the Veterans Administration in the Carter administration and was elected to the U.S. Senate in 1996. In 2002, Cleland lost his bid for reelection when his opponent ran attack ads that questioned his patriotism and featured photos of Osama bin Laden and Saddam Hussein. He has received numerous awards for his bravery and service including the military's Silver Star for Gallantry in Action. When the Reserve Officers' Association named Cleland its "Minute Man of the Year" for his work in the Senate, he joined past Presidents Bush, Reagan and Ford in receiving the association's highest honor. Currently, Max Cleland is a distinguished adjunct professor at American University's Washington Semester Program. This commentary first appeared in the Atlanta Journal-Constitution.

**Welcome to Vietnam, Mr. President. Sorry you didn't go when you had the chance: Max Cleland**

The president of the United States decides to go to war against a nation led by a brutal dictator supported by one-party rule. That dictator has made war on his neighbors. The president decides this is a threat to the United States. In his campaign for president he gives no indication of wanting to go to war. In fact, he decries the overextension of American military might and says other nations must do more. However, unbeknownst to the American public, the president's own Pentagon advisers have already cooked up a plan to go to war. All they are looking for is an excuse.

Based on faulty intelligence, cherry-picked information is fed to Congress and the American people. The president goes on national television to make the case for war, using as part of the rationale an incident that never happened. Congress buys the bait — hook, line and sinker— and passes a resolution giving the president the authority to use "all necessary means" to prosecute the war.

The war is started with an air and ground attack. Initially there is optimism. The president says we are winning. The cocky, self-assured secretary of defense says we are winning. As a matter of fact, the secretary of defense promises the troops will be home soon.

However, the truth on the ground that the soldiers face in the war is different than the political policy that sent them there. They face increased opposition from a determined enemy. They are surprised by terrorist attacks, village assassinations, increasing casualties and growing anti-American sentiment. They find themselves bogged down in a guerrilla



land war, unable to move forward and unable to disengage because there are no allies to turn the war over to.

There is no plan B. There is no exit strategy. Military morale declines. The president's popularity sinks and the American people are increasingly frustrated by the cost of blood and treasure poured into a never-ending war.

Sound familiar? It does to me.

The president was Lyndon Johnson. The cocky, self-assured secretary of defense was Robert McNamara. The congressional resolution was the Gulf of Tonkin resolution. The war was the war that I, U.S. Senators John Kerry, Chuck Hagel and John McCain and 3 1/2 million other Americans of our generation were caught up in. It was the scene of America's longest war. It was also the locale of the most frustrating outcome of any war this nation has ever fought.

Unfortunately, the people who drove the engine to get into the war in Iraq never served in Vietnam. Not the president. Not the vice president. Not the secretary of defense. Not the deputy secretary of defense. Too bad. They could have learned some lessons:

- Don't underestimate the enemy. The enemy always has one option you cannot control. He always has the option to die. This is especially true if you are dealing with true believers and guerillas fighting for their version of reality, whether political or religious. They are what Tom Friedman of The New York Times calls the "nondeterrables." If those non-deterrables are already in their country, they will be able to wait you out until you go home.

- If the enemy adopts a "hit-and-run" strategy designed to inflict maximum casualties on you, you may win every battle, but (as Walter Lippmann once said about Vietnam) you can't win the war.

- If you adopt a strategy of not just preemptive strike but also preemptive war, you own the aftermath. You better plan for it. You better have an exit strategy because you cannot stay there indefinitely unless you make it the 51st state.

- If you do stay an extended period of time, you then become an occupier, not a liberator. That feeds the enemy against you.

- If you adopt the strategy of preemptive war, your intelligence must be not just "darn good," as the president has said; it must be "bulletproof," as Defense Secretary Donald Rumsfeld claimed the administration's was against Saddam Hussein. Anything short of that saps credibility.

- If you want to know what is really going on in the war, ask the troops on the ground, not the policy-makers in Washington.

- In a democracy, instead of truth being the first casualty in war, it should be the first cause of war. It is the only way the Congress and the American people can cope with getting through it. As credibility is strained, support for the war and support for the troops go

downhill. Continued loss of credibility drains troop morale, the media become more suspicious, the public becomes more incredulous and Congress is reduced to hearings and investigations.

Instead of learning the lessons of Vietnam, where all of the above happened, the president, the vice president, the secretary of defense and the deputy secretary of defense have gotten this country into a disaster in the desert.

They attacked a country that had not attacked us. They did so on intelligence that was faulty, misrepresented and highly questionable.

A key piece of that intelligence was an outright lie that the White House put into the president's State of the Union speech. These officials have overextended the American military, including the National Guard and the Reserve, and have expanded the U.S. Army to the breaking point.

A quarter of a million troops are committed to the Iraq war theater, most of them bogged down in Baghdad. Morale is declining and casualties continue to increase.

In addition to the human cost, the war in dollars costs \$1 billion a week, adding to the additional burden of an already depressed economy.

The president has declared "major combat over" and sent a message to every terrorist, "Bring them on." As a result, he has lost more people in his war than his father did in his and there is no end in sight.

Military commanders are left with extended tours of duty for servicemen and women who were told long ago they were going home. We are keeping American forces on the ground, where they have become sitting ducks in a shooting gallery for every terrorist in the Middle East.

Welcome to Vietnam, Mr. President. Sorry you didn't go when you had the chance.

Arguing the World  
October 14, 2003

To my City Colleagues:

I can't remember how many years ago it was. Several times that year, Les Fraidstern (I hope I have your name right) came up to my office on the third floor of Wagner Hall, and sheepishly wondered if he had been too harsh that morning in criticizing me or his fellow students. Each time, I assured Les that he had gone far but never too far. We would all be back at it a couple of days later in a non-verbal assaults-barred pursuit of truth and understanding.

Most students knew the rules of the game. As long as we kept talking, nothing short of obscenity would be censored. I – and I hoped students in the class – would be sharply critical of irrelevance, but never inveigh against irreverence. In fact, I believed (and still believe) that intellectual irreverence was the hallmark of our classes and the benchmark by which we judged ourselves. Despite the scarcity of women in what was then an almost all-male bastion, there was no shortage of passion.

I knew that my reprinting of Max Cleland's essay would arouse spirited commentary, but there was no response for a week after sending it to you. I didn't look at my mail for about three days at the end of last week, so that when I did, I was taken aback by the volume and vehemence of your responses to Cleland and to one another.

I can no longer play devil's advocate because I am no longer in front of a classroom. (It was easy to tell students that whatever you say, you're wrong, because I'm going to defend the other side.) I am now only one of a number of people who come together because we share a City College background, and continue to meet because all of us are greatly concerned about our country and the world, informed by the reading and thinking and learning we have done during the intervening years, and eager to express our considered judgments to one another. (And, not incidentally, we like the company we keep.) Consequently, try as I may, my deeply felt convictions are bound to color any effort I make to sound judicious and fair – but that won't stop me from trying.

Invective has not been the monopoly of one side in the debates on terrorism, Iraq, America's role in the world, the future of Israel and the Arab world, the causes of our economic malaise, or the social policies that will best serve the nation. Holier-than-thou attitudes are unmerited on all sides. Personally, I am not interested in the private lives of public figures unless either their private behavior has a significant effect on their conduct of public affairs or they are hypocrites who engage in the very conduct which they criticize in others. Any other kind of reference to personal behavior is an *ad hominem* attack. Name-calling doesn't add to our understanding, whether it's comparing Gerry Walpin to Trent Lott or Max Cleland to Tokyo Rose. When you're that far over the top, you've missed your target.

I have no doubt that George W. Bush is "hated" by some liberals, despised by others, and simply disagreed with by still others. Is that something new or different? I think we all know enough American history to remember the charges made against every important political figure in our past. There is enough recorded invective directed against Adams,

Jefferson, Jackson, Lincoln, Franklin D. Roosevelt, and every other president to fill many large books.

How should we characterize the feeling expressed by so many against Bill Clinton except as hatred? I disliked his personal crude conduct with women as much as almost all Americans, but the entire investigation of Clinton's sex life, culminating in the Starr report, remains for me as tasteless as the president's behavior. One need not believe anything good about Clinton to recognize that the eight-year campaign against the trivial Whitewater deal and Clinton's sexual conduct was motivated by hatred. We aren't going to curb the intensity of conviction. Instead, we should focus on the rationality of the arguments that are being made.

Historical analogies deserve close analysis to demonstrate their relevance. There may be valid reasons why America should wage war against a dictatorship that, if left unchecked, would seek to conquer much of the world, but it is a proposition that should be presented with adequate attention to what that dictator has said he would do (as in *Mein Kampf*), what the dictatorship has done (in unchallenged aggression against other nations), and what it is now doing to further its expansionist goals.

Even if the comparison were valid, it rewrites history to posit this as the reason why America waged war against Iraq. It was waged because Iraq had weapons of mass destruction (which we have not found), because it was purchasing material to produce more such weapons (which not only was untrue, our government knew it was untrue), and because there were clear links between Saddam Hussein and Al Qaeda (of which we had no evidence; on the contrary, there was evidence that the secular dictatorship of Saddam Hussein and the religious fanatics of Al Qaeda viewed one another as enemies). I know that it is so hard for individuals, and must be so much harder for nations, to simply say we were wrong.

As distinct from American self-interest, a case can be made why America should wage war against a tyrannical regime that oppresses its own people and brutally punishes those who speak out against it. This is an argument based on morality, and it requires not only persuasive evidence of tyranny (which exists abundantly), but also consideration of how we will wage war against even greater tyrannies, an equal moral obligation to refrain from cooperation with and support of other tyrannies, and the practical consideration of whether we have the physical strength to assume this responsibility by ourselves.

I have a lifelong attachment to the idea of democracy -- an attachment which I know all of us share -- but it does the advocacy of democracy no service to fail to consider what are the preconditions of its existence, whether those considerations exist in Iraq or other places, and whether democracy can be imposed by or under the direction of another nation. I am not suggesting an answer to these difficult questions. I believe that we have not undertaken the most elementary examination of them, and that it is reckless to preach or proclaim democracy until we have seriously studied and reached clear conclusions about the national soil in which we want it implanted and what we can do and what the native population must do to achieve it.

Those who reject both defenses of war are obliged to spell out how they would conduct our foreign relations. It does not follow that the only alternative to a war based on

self-interest (which should be proven) or a war based on morality (which needs to be spelled out) is isolationism, the neglect of American security, or the abandonment of Israel and other American allies. But it isn't enough for critics of American foreign policy today to refute the case for war; it is necessary to demonstrate that American foreign policy requires international cooperation, nuclear disarmament, acting as an honest broker for peace, domestic policies that decrease economic dependency on other nations, and not extending support to nations that threaten the peace and security of the world.

I happen to think that all of these policies are necessary. It is for me unarguable that we have dissipated the outpouring of good will and support that we received from the rest of the world after 9/11, and not even the richest and most powerful nation in the world can afford that loss. I also believe -- and this is arguable, and should be vigorously argued by those who disagree -- that the domestic policies of this administration have increased economic disparities, threatened our constitutional civil liberties, and weakened our national security, and that these consequences are undesirable, dangerous, and reversible.

I expect that those of you who disagree with what I have written will think me senile or stupid or worse. I wish you weren't too polite to say so, because I do learn from our disagreements (even when disagreements can become momentarily disagreeable). Now, as all those many years ago when we first considered the fate of America and the world, my belief in democratic debate, and I hope yours, defends your right to be wrong.

No Representation Without Taxation  
October 13, 2004

**“No Representation Without Taxation.”** No, I haven’t accidentally transposed the nouns. I meant what I wrote, that there is no honest representation without adequate taxation. It might be recalled that, in the evolution of popularly elected legislatures, the British House of Commons did not become dominant until it had won the power of taxation.

I recognize that this is not a slogan that will summon revolutionaries to the barricades. It does not even express a position that is likely to be expressed during the course of the presidential debates. Nevertheless, it states a truth that is overlooked (when not categorically denied) by candidates who pander to the prejudices of those who want government to serve their interests without acknowledging that the enactment of public policy comes with a bill that must be paid.

Libertarians, wanting the least government or, if possible, no government at all, are at least honest on this point. Grover Norquist, an outspoken critic of all government, would shrink it “down to the size where we can drown it in the bathtub.” That, if it is imaginable, would eliminate taxation. By contrast, most people who inveigh against the evils of taxation are intellectually dishonest insofar as they, at the same time, support the role of government in providing domestic and international security, building roads, subsidizing scientific research, paying for education and social services, and fulfilling other functions that Americans believe they want and that private enterprise cannot provide. There is no free lunch.

Governments, like people, go into debt when they spend more than they earn. The more that the American government goes into debt, the greater will be the share of taxation that will do nothing except pay interest on the national debt, without buying anything of value. The only alternative to that onerous tax burden would be for the next generation to allow it to grow so high that it would result in the unwillingness of individuals and nations to invest in the United States or buy U.S. securities, which would lead to certain economic disaster.

While President Bush continues to charge that liberals like nothing better than to tax and spend, his administration has adopted the economically suicidal policy of taxing less and spending more, creating the largest debt in our nation’s history. Huge tax cuts have been given to the richest Americans at the same time that the government has undertaken the greatest increase in expenditures to deal with national security. Instead of all Americans sharing the human and economic costs of war, sacrifice has been largely limited to the less privileged families for whom service in the armed forces is one of the few economic options available. The most prosperous Americans have learned that, for them, there is gain without pain.

President Bush would make permanent the huge tax cuts that were adopted in his first term while continuing to enlarge a three trillion dollar deficit in his second. Senator Kerry would roll back the tax cuts for persons earning over \$200,000, while cutting middle-

income taxes and creating costly new domestic programs. Of course, Senator Kerry will not repeat Walter Mondale's mistake of telling the truth to the American people when, as a candidate for president in 1984, Mondale said, "Let's tell the truth. Mr. Reagan will raise taxes, and so will I. He won't tell you. I just did." No candidate since has told the truth. Instead, George H. W. Bush in 1988 famously said, "Read my lips. No new taxes." It wasn't true.

The truth is that America's national defense requires the inspection of containers, the dissemination of accurate lists of dangerous foreigners, and the development of a unified security system, and taxes would be required to pay for such measures. The truth is that the wealthiest country the world has ever known is the only advanced industrial nation without a comprehensive system of health insurance, and taxes would be required to pay for it. The truth is that many nations achieve a higher standard of literacy and scientific education than the United States, and taxes would be required to raise us to their level. The truth is that the provision of government-sponsored child care would make an enormous difference in closing the economic gap between poor parents and the rest of us, and taxes would be required to provide it. The truth is that nearly every industrial nation in the world has a much higher rate of taxation than the United States, including some that have living standards as high as ours.

The harshest economic truth that we appear to be unwilling to face is that, according to Peter Peterson, chairman of the Council on Foreign Relations and former Secretary of Commerce in the Nixon administration, the United States has more than \$45 trillion in unfunded obligations, including the payment of Social Security to citizens who retire in the future. The money collected from employees and employers has not been saved in the fictitious lock box to which candidates have often referred, but has been spent to pay other costs of government. The unfunded sum (that is, the I.O.U.s we owe ourselves) is close to the entire worth of the United States. If this country were a business, it would have to consider declaring bankruptcy. It is a reckless and immoral betrayal of trust to continue to cut taxes and increase our indebtedness.

Perhaps one day a major party will nominate a presidential candidate who has the compassion to advocate the policies we need to make all Americans safer, healthier, better educated, and economically secure, and the courage to acknowledge that programs to achieve those ends entail costs that must be paid with taxes. Oliver Wendell Holmes, Jr. observed that "taxes are what we pay for civilized society." It is not too high a price to pay.

My Personal Political Reflections on November 3, 2004  
November 4, 2004

**My personal political reflections on November 3, 2004.**

I like to believe that I can face reality, even when it hurts. This election will have repercussions for many years to come and I – all of us – must live with them. The tax cuts that were enacted during the past four years are likely to be made permanent and will have consequences that are not likely to be altered in the near future. The selection of one or two or three new Supreme Court Justices will shape the content of American constitutional law for decades. And I'm not going to be around if and when future change occurs.

Many years ago at City College, a Jewish student ran breathlessly up to me as I was passing the Morris Raphael Cohen Library to excitedly tell me what he considered to be shocking news, namely that, for the first time, "They're going to issue a Christmas stamp." Whereupon, I promptly responded, "If you can't join 'em, lick 'em." I recalled my pun today because the original cliché appears applicable to my present plight: I can't lick them, so why don't I join them?

Who are they? "Compassionate conservatives" they aren't, and George W. Bush was well enough aware of that to shelve his 2000 campaign slogan for most of the past four years. (I am pleased that I will be able to refer to him in the next four years as elected President George W. Bush – unless we learn that there was subtler and more sophisticated corruption of the voting process than in 2000.) The point is that Bush didn't govern as a conservative. A conservative wants to preserve the best of the past, like the environment. A conservative doesn't want to engage in international conflicts whose cost and hoped-for outcome cannot be estimated. A conservative wants less government at less cost, subscribing to the view that "that government governs best that governs least." That kind of conservatism was exemplified by Ronald Reagan, whose mantra was "government is not the solution; it's the problem." Carried to its extreme, conservatism is Grover Norquist's ambition to reduce government to so little that it can be flushed down the toilet.

These conservative tenets are not shared by the presidency of George W. Bush, which has taken a huge surplus and, in the course of two years, converted it into the largest deficit in the nation's history. Conservatism is not a hallmark of the first administration in American history to cut taxes in wartime. Conservatism is not the position of a government that wants to incorporate its moral convictions into civil law.

A compassionate conservative government this isn't; a rationally reactionary government it is. I want to make my contribution to it to learn how it works. Economically, making the tax cuts permanent will ensure in perpetuity the increasingly wide gap between the haves and have-nots in American society. Investment income now pays a much smaller proportion in taxes than labor income, because we want to encourage investment. It's only a small step from there to adopting a flat tax, with one rate for all. Better yet would be the abolition of the income tax and substitution of a sales tax, so people pay taxes on what they spend (provided they spend it in the U.S., which is where people of modest means spend all of their income.) As for the accumulating debt, Alexander Hamilton wrote that a national



debt is a national blessing. (He had some qualification about “excessive,” but who knows how much is excessive?) We are thus blessing our children and our children’s children.

Morally, we should not shrink from adopting the strictest moral codes for ourselves and our fellow Americans. If morality has its foundation in religion, it is immoral to outlaw prayer or the teaching of creationism in schools. It won’t take more than a couple of Scalia and Thomas clones to reverse *Roe v. Wade*, thus allowing the states to once again outlaw abortion. But we shouldn’t be moral cowards this time. If someone hires another person to commit murder, the instigator is equally guilty. Doctors or (soon once again) back-alley abortionists don’t engage in this activity on a whim; they are contracted to do it. The most guilty party in this crime is the pregnant woman, and we should not shelter her from imprisonment for her crime. But why stop here? A couple more Scalias and Thomases will make for a solid moral majority to overthrow *Griswold v. Connecticut*, the case in which the Supreme Court invented a right of privacy, thus forbidding the states from barring the sale of contraceptives.

Legally, we want to keep the Constitution precisely as it was written (apart from exceptional exceptions, such as barring the right of same-sex marriage). If the original construction of the Constitution was good enough for the Framers, it ought to be good enough for us. Liberals have falsely held that the Constitution bars a governmental role in religion because the First Amendment states that Congress shall make no law “respecting” an establishment of religion, but in this country, religion should not be respected; it should be upheld as something far more honorable. In the same way, liberals distort the Constitution when they quote the initial superfluous words of the Second Amendment, when all we need to hear is that “the right to keep and bear arms shall not be infringed.” Liberals further seek to confound strict constructionism by questioning the constitutional basis for such true reactionary legal principles as the right of contract (which the Supreme Court used to reject the socialist belief that denied workers the right to freely negotiate to work more hours for less pay) or the time-honored recognition that corporations are persons within the meaning of the Fourteenth Amendment’s equal protection clause. To deny these free enterprise principles is tantamount to saying that natural law isn’t law because it isn’t in the Constitution.

Civily (that is, concerning the relations of citizens with one another and with the state), we must recognize that the United States has always been ready to sacrifice personal liberty for the public safety. Former President Theodore Roosevelt expressed a common sentiment: “He who is not with us, absolutely and without reserve of any kind, is against us, and should be treated as an enemy alien.” And so we have, with the Alien and Sedition Acts of 1798 and 1799, President Lincoln’s suspension of the writ of habeas corpus during the Civil War, the Espionage and Sedition Acts and the prosecution of socialists and anarchists in World War I, the House Committee on Un-American Activities created in 1937, the forcible wartime relocation from the west coast of American citizens of Japanese ancestry, the Loyalty Oaths, Loyalty Boards, and the Attorney General’s list of subversive organizations during the Cold War, the McCarran Internal Security Act of 1950, and Senator Joseph McCarthy’s Permanent Investigating Subcommittee of the Senate Committee on Government Operations. What President Bush has done in urging adoption of the USA Patriot Act of 2001 and the warrantless holding of persons incommunicado in the American

prison in Guantanamo, Cuba, is completely consistent with our history. When Attorney General A. Mitchell Palmer in 1920 conducted the raids that led to the deportation without hearings of alleged radical immigrants, the Washington Post expressed a sentiment widely shared then and now by patriotic Americans: “This is no time for hairsplitting over infringements of liberty.”

Politically, we should remind ourselves that the authors of the Constitution disparaged the radical idea of democracy, denied the vote to women, non-Caucasians, and property less white men, and created an elaborate system of separation of powers and checks and balances in order to ensure that majorities would not be able to impose their will on the rest of us. Stability is assured by the ability of state legislatures to redraw congressional and state legislative districts after each census in order to ensure that the party in power remains in power. Nothing in the Constitution forbade Texas from redistricting a second time in 2003 when the 2001 districting did not produce the desired results. It is enough that we keep people contented in their belief that they are engaging in a free election to choose a member of the House of Representatives.

Internationally, the United States has always stood alone, whether in the isolation that marked America’s staying outside of the League of Nations between the two World Wars or in the imperialism of America’s forays into Latin America, Vietnam or Iraq without reference to international law, treaties, or relations with other nations. Barry Goldwater put it this way almost four decades ago, ““I don’t give a tinker’s damn what the rest of the world thinks about the United States, as long as we keep strong militarily.” It is a sentiment that President Bush, Vice President Cheney, and presumably most Americans would express today.

“The American way of life” is implicitly different from any other way. President Ronald Reagan put it this way: “Think for a moment how special it is to be an American. Can we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe free?” When presidents and other public figures end an address with “God bless America,” it is with the sincere conviction that God does. We are Number One, we’re the best, God blesses America. That sentiment, without which no candidate for president can make a political address, bears thought. If God blesses America, he surely doesn’t bless our enemies, or else the prayer would be pointless.

With characteristic succinctness, President Calvin Coolidge said in 1924, upon signing a law restricting immigration, “America must be kept American.” It is a sentiment that most Americans share. The courage of the present administration is demonstrated in how it is prepared to go further, in order to make the whole world American, or at least that portion of it in which we have vital interests.

In Praise of Martin Luther King, Jr.  
January 18, 2005\*

I'm writing this on the day we set aside to remember Martin Luther King. It has occurred to me that in making a national holiday in honor of this moral, democratic and courageous man, we have not only sanctified him; we have also sanitized him. Throughout his career, he faced more opposition -- and not only from the white South -- than we care to remember, and in his last years, that opposition included many who had been his allies in the civil rights movement. He knew the price he had to pay for linking the Vietnam War and what it meant with the cause of racial equality. Of course, it caused the irreparable break with President Johnson. I read this speech again today because it illuminates the issues of his day and I believe it sheds light on some of the burning issues of this day as well. If you have the opportunity to do so, I recommend that you read or reread it. I know that it's a long speech, but it's been a long war, and the non-violent war that King waged is not nearly over.

**Beyond Vietnam: A Time to Break Silence**

A speech delivered by Dr. Martin Luther King, Jr., on April 4, 1967, at a meeting of Clergy and Laity Concerned at Riverside Church in New York City.

I come to this magnificent house of worship tonight because my conscience leaves me no other choice. I join with you in this meeting because I am in deepest agreement with the aims and work of the organization which has brought us together: Clergy and Laymen Concerned about Vietnam. The recent statement of your executive committee are the sentiments of my own heart and I found myself in full accord when I read its opening lines: "A time comes when silence is betrayal." That time has come for us in relation to Vietnam.

The truth of these words is beyond doubt but the mission to which they call us is a most difficult one. Even when pressed by the demands of inner truth, men do not easily assume the task of opposing their government's policy, especially in time of war. Nor does the human spirit move without great difficulty against all the apathy of conformist thought within one's own bosom and in the surrounding world. Moreover when the issues at hand seem as perplexed as they often do in the case of this dreadful conflict we are always on the verge of being mesmerized by uncertainty; but we must move on.

Some of us who have already begun to break the silence of the night have found that the calling to speak is often a vocation of agony, but we must speak. We must speak with all the humility that is appropriate to our limited vision, but we must speak. And we must rejoice as well, for surely this is the first time in our nation's history that a significant number of its religious leaders have chosen to move beyond the prophesying of smooth patriotism to the high grounds of a firm dissent based upon the mandates of conscience and the reading of history. Perhaps a new spirit is rising among us. If it is, let us trace its movement well and pray that our own inner being may be sensitive to its guidance, for we are deeply in need of a new way beyond the darkness that seems so close around us.

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\* This entry is a forward by Prof. Feingold of remarks by Martin Luther King, Jr.

Over the past two years, as I have moved to break the betrayal of my own silences and to speak from the burnings of my own heart, as I have called for radical departures from the destruction of Vietnam, many persons have questioned me about the wisdom of my path. At the heart of their concerns this query has often loomed large and loud: Why are you speaking about war, Dr. King? Why are you joining the voices of dissent? Peace and civil rights don't mix, they say. Aren't you hurting the cause of your people, they ask?

And when I hear them, though I often understand the source of their concern, I am nevertheless greatly saddened, for such questions mean that the inquirers have not really known me, my commitment or my calling. Indeed, their questions suggest that they do not know the world in which they live. In the light of such tragic misunderstandings, I deem it of signal importance to try to state clearly, and I trust concisely, why I believe that the path from Dexter Avenue Baptist Church -- the church in Montgomery, Alabama, where I began my pastorate -- leads clearly to this sanctuary tonight. I come to this platform tonight to make a passionate plea to my beloved nation. This speech is not addressed to Hanoi or to the National Liberation Front. It is not addressed to China or to Russia.

Nor is it an attempt to overlook the ambiguity of the total situation and the need for a collective solution to the tragedy of Vietnam. Neither is it an attempt to make North Vietnam or the National Liberation Front paragons of virtue, nor to overlook the role they can play in a successful resolution of the problem. While they both may have justifiable reason to be suspicious of the good faith of the United States, life and history give eloquent testimony to the fact that conflicts are never resolved without trustful give and take on both sides. Tonight, however, I wish not to speak with Hanoi and the NLF, but rather to my fellow Americans, who, with me, bear the greatest responsibility in ending a conflict that has exacted a heavy price on both continents.

Since I am a preacher by trade, I suppose it is not surprising that I have seven major reasons for bringing Vietnam into the field of my moral vision. There is at the outset a very obvious and almost facile connection between the war in Vietnam and the struggle I, and others, have been waging in America. A few years ago there was a shining moment in that struggle. It seemed as if there was a real promise of hope for the poor -- both black and white -- through the poverty program. There were experiments, hopes, new beginnings. Then came the buildup in Vietnam and I watched the program broken and eviscerated as if it were some idle political plaything of a society gone mad on war, and I knew that America would never invest the necessary funds or energies in rehabilitation of its poor so long as adventures like Vietnam continued to draw men and skills and money like some demonic destructive suction tube. So I was increasingly compelled to see the war as an enemy of the poor and to attack it as such.

Perhaps the more tragic recognition of reality took place when it became clear to me that the war was doing far more than devastating the hopes of the poor at home. It was sending their sons and their brothers and their husbands to fight and to die in extraordinarily high proportions relative to the rest of the population. We were taking the black young men who had been crippled by our society and sending them eight thousand miles away to guarantee liberties in Southeast Asia which they had not found in southwest Georgia and East Harlem.

So we have been repeatedly faced with the cruel irony of watching Negro and white boys on TV screens as they kill and die together for a nation that has been unable to seat them together in the same schools. So we watch them in brutal solidarity burning the huts of a poor village, but we realize that they would never live on the same block in Detroit. I could not be silent in the face of such cruel manipulation of the poor.

My third reason moves to an even deeper level of awareness, for it grows out of my experience in the ghettos of the North over the last three years -- especially the last three summers. As I have walked among the desperate, rejected and angry young men I have told them that Molotov cocktails and rifles would not solve their problems. I have tried to offer them my deepest compassion while maintaining my conviction that social change comes most meaningfully through nonviolent action. But they asked -- and rightly so -- what about Vietnam? They asked if our own nation wasn't using massive doses of violence to solve its problems, to bring about the changes it wanted. Their questions hit home, and I knew that I could never again raise my voice against the violence of the oppressed in the ghettos without having first spoken clearly to the greatest purveyor of violence in the world today -- my own government. For the sake of those boys, for the sake of this government, for the sake of hundreds of thousands trembling under our violence, I cannot be silent.

For those who ask the question, "Aren't you a civil rights leader?" and thereby mean to exclude me from the movement for peace, I have this further answer. In 1957 when a group of us formed the Southern Christian Leadership Conference, we chose as our motto: "To save the soul of America." We were convinced that we could not limit our vision to certain rights for black people, but instead affirmed the conviction that America would never be free or saved from itself unless the descendants of its slaves were loosed completely from the shackles they still wear. In a way we were agreeing with Langston Hughes, that black bard of Harlem, who had written earlier: O, yes, I say it plain, America never was America to me, And yet I swear this oath-- America will be!

Now, it should be incandescently clear that no one who has any concern for the integrity and life of America today can ignore the present war. If America's soul becomes totally poisoned, part of the autopsy must read Vietnam. It can never be saved so long as it destroys the deepest hopes of men the world over. So it is that those of us who are yet determined that America will be are led down the path of protest and dissent, working for the health of our land.

As if the weight of such a commitment to the life and health of America were not enough, another burden of responsibility was placed upon me in 1964; and I cannot forget that the Nobel Prize for Peace was also a commission -- a commission to work harder than I had ever worked before for "the brotherhood of man." This is a calling that takes me beyond national allegiances, but even if it were not present I would yet have to live with the meaning of my commitment to the ministry of Jesus Christ. To me the relationship of this ministry to the making of peace is so obvious that I sometimes marvel at those who ask me why I am speaking against the war.

Could it be that they do not know that the good news was meant for all men -- for Communist and capitalist, for their children and ours, for black and for white, for revolutionary and conservative? Have they forgotten that my ministry is in obedience to the

one who loved his enemies so fully that he died for them? What then can I say to the "Vietcong" or to Castro or to Mao as a faithful minister of this one? Can I threaten them with death or must I not share with them my life?

Finally, as I try to delineate for you and for myself the road that leads from Montgomery to this place I would have offered all that was most valid if I simply said that I must be true to my conviction that I share with all men the calling to be a son of the living God. Beyond the calling of race or nation or creed is this vocation of sonship and brotherhood, and because I believe that the Father is deeply concerned especially for his suffering and helpless and outcast children, I come tonight to speak for them.

This I believe to be the privilege and the burden of all of us who deem ourselves bound by allegiances and loyalties which are broader and deeper than nationalism and which go beyond our nation's self-defined goals and positions. We are called to speak for the weak, for the voiceless, for victims of our nation and for those it calls enemy, for no document from human hands can make these humans any less our brothers.

And as I ponder the madness of Vietnam and search within myself for ways to understand and respond to compassion my mind goes constantly to the people of that peninsula. I speak now not of the soldiers of each side, not of the junta in Saigon, but simply of the people who have been living under the curse of war for almost three continuous decades now. I think of them too because it is clear to me that there will be no meaningful solution there until some attempt is made to know them and hear their broken cries.

They must see Americans as strange liberators. The Vietnamese people proclaimed their own independence in 1945 after a combined French and Japanese occupation, and before the Communist revolution in China. They were led by Ho Chi Minh. Even though they quoted the American Declaration of Independence in their own document of freedom, we refused to recognize them. Instead, we decided to support France in its reconquest of her former colony. Our government felt then that the Vietnamese people were not "ready" for independence, and we again fell victim to the deadly Western arrogance that has poisoned the international atmosphere for so long. With that tragic decision we rejected a revolutionary government seeking self-determination, and a government that had been established not by China (for whom the Vietnamese have no great love) but by clearly indigenous forces that included some Communists. For the peasants this new government meant real land reform, one of the most important needs in their lives.

For nine years following 1945 we denied the people of Vietnam the right of independence. For nine years we vigorously supported the French in their abortive effort to recolonize Vietnam. Before the end of the war we were meeting eighty percent of the French war costs. Even before the French were defeated at Dien Bien Phu, they began to despair of the reckless action, but we did not. We encouraged them with our huge financial and military supplies to continue the war even after they had lost the will. Soon we would be paying almost the full costs of this tragic attempt at recolonization.

After the French were defeated it looked as if independence and land reform would come again through the Geneva agreements. But instead there came the United States,

determined that Ho should not unify the temporarily divided nation, and the peasants watched again as we supported one of the most vicious modern dictators -- our chosen man, Premier Diem. The peasants watched and cringed as Diem ruthlessly routed out all opposition, supported their extortionist landlords and refused even to discuss reunification with the north.

The peasants watched as all this was presided over by U.S. influence and then by increasing numbers of U.S. troops who came to help quell the insurgency that Diem's methods had aroused. When Diem was overthrown they may have been happy, but the long line of military dictatorships seemed to offer no real change -- especially in terms of their need for land and peace.

The only change came from America as we increased our troop commitments in support of governments which were singularly corrupt, inept and without popular support. All the while the people read our leaflets and received regular promises of peace and democracy -- and land reform. Now they languish under our bombs and consider us -- not their fellow Vietnamese -- the real enemy. They move sadly and apathetically as we herd them off the land of their fathers into concentration camps where minimal social needs are rarely met. They know they must move or be destroyed by our bombs. So they go -- primarily women and children and the aged.

They watch as we poison their water, as we kill a million acres of their crops. They must weep as the bulldozers roar through their areas preparing to destroy the precious trees. They wander into the hospitals, with at least twenty casualties from American firepower for one "Vietcong"-inflicted injury. So far we may have killed a million of them -- mostly children. They wander into the towns and see thousands of the children, homeless, without clothes, running in packs on the streets like animals. They see the children, degraded by our soldiers as they beg for food. They see the children selling their sisters to our soldiers, soliciting for their mothers.

What do the peasants think as we ally ourselves with the landlords and as we refuse to put any action into our many words concerning land reform? What do they think as we test our latest weapons on them, just as the Germans tested out new medicine and new tortures in the concentration camps of Europe? Where are the roots of the independent Vietnam we claim to be building? Is it among these voiceless ones?

We have destroyed their two most cherished institutions: the family and the village. We have destroyed their land and their crops. We have cooperated in the crushing of the nation's only non-Communist revolutionary political force -- the unified Buddhist church. We have supported the enemies of the peasants of Saigon. We have corrupted their women and children and killed their men. What liberators?

Now there is little left to build on -- save bitterness. Soon the only solid physical foundations remaining will be found at our military bases and in the concrete of the concentration camps we call fortified hamlets. The peasants may well wonder if we plan to build our new Vietnam on such grounds as these? Could we blame them for such thoughts? We must speak for them and raise the questions they cannot raise. These too are our brothers.

Perhaps the more difficult but no less necessary task is to speak for those who have been designated as our enemies. What of the National Liberation Front -- that strangely anonymous group we call VC or Communists? What must they think of us in America when they realize that we permitted the repression and cruelty of Diem which helped to bring them into being as a resistance group in the south? What do they think of our condoning the violence which led to their own taking up of arms? How can they believe in our integrity when now we speak of "aggression from the north" as if there were nothing more essential to the war? How can they trust us when now we charge them with violence after the murderous reign of Diem and charge them with violence while we pour every new weapon of death into their land? Surely we must understand their feelings even if we do not condone their actions. Surely we must see that the men we supported pressed them to their violence. Surely we must see that our own computerized plans of destruction simply dwarf their greatest acts.

How do they judge us when our officials know that their membership is less than twenty-five percent Communist and yet insist on giving them the blanket name? What must they be thinking when they know that we are aware of their control of major sections of Vietnam and yet we appear ready to allow national elections in which this highly organized political parallel government will have no part? They ask how we can speak of free elections when the Saigon press is censored and controlled by the military junta. And they are surely right to wonder what kind of new government we plan to help form without them -- the only party in real touch with the peasants. They question our political goals and they deny the reality of a peace settlement from which they will be excluded. Their questions are frighteningly relevant. Is our nation planning to build on political myth again and then shore it up with the power of new violence?

Here is the true meaning and value of compassion and nonviolence when it helps us to see the enemy's point of view, to hear his questions, to know his assessment of ourselves. For from his view we may indeed see the basic weaknesses of our own condition, and if we are mature, we may learn and grow and profit from the wisdom of the brothers who are called the opposition. So, too, with Hanoi. In the north, where our bombs now pummel the land, and our mines endanger the waterways, we are met by a deep but understandable mistrust. To speak for them is to explain this lack of confidence in Western words, and especially their distrust of American intentions now.

In Hanoi are the men who led the nation to independence against the Japanese and the French, the men who sought membership in the French commonwealth and were betrayed by the weakness of Paris and the willfulness of the colonial armies. It was they who led a second struggle against French domination at tremendous costs, and then were persuaded to give up the land they controlled between the thirteenth and seventeenth parallel as a temporary measure at Geneva. After 1954 they watched us conspire with Diem to prevent elections which would have surely brought Ho Chi Minh to power over a united Vietnam, and they realized they had been betrayed again.

When we ask why they do not leap to negotiate, these things must be remembered. Also it must be clear that the leaders of Hanoi considered the presence of American troops in support of the Diem regime to have been the initial military breach of the Geneva



agreements concerning foreign troops, and they remind us that they did not begin to send in any large number of supplies or men until American forces had moved into the tens of thousands.

Hanoi remembers how our leaders refused to tell us the truth about the earlier North Vietnamese overtures for peace, how the president claimed that none existed when they had clearly been made. Ho Chi Minh has watched as America has spoken of peace and built up its forces, and now he has surely heard of the increasing international rumors of American plans for an invasion of the north. He knows the bombing and shelling and mining we are doing are part of traditional pre-invasion strategy. Perhaps only his sense of humor and of irony can save him when he hears the most powerful nation of the world speaking of aggression as it drops thousands of bombs on a poor weak nation more than eight thousand miles away from its shores.

At this point I should make it clear that while I have tried in these last few minutes to give a voice to the voiceless on Vietnam and to understand the arguments of those who are called enemy, I am as deeply concerned about our troops there as anything else. For it occurs to me that what we are submitting them to in Vietnam is not simply the brutalizing process that goes on in any war where armies face each other and seek to destroy. We are adding cynicism to the process of death, for they must know after a short period there that none of the things we claim to be fighting for are really involved. Before long they must know that their government has sent them into a struggle among Vietnamese, and the more sophisticated surely realize that we are on the side of the wealthy and the secure while we create hell for the poor.

Somehow this madness must cease. We must stop now. I speak as a child of God and brother to the suffering poor of Vietnam. I speak for those whose land is being laid waste, whose homes are being destroyed, whose culture is being subverted. I speak for the poor of America who are paying the double price of smashed hopes at home and death and corruption in Vietnam. I speak as a citizen of the world, for the world as it stands aghast at the path we have taken. I speak as an American to the leaders of my own nation. The great initiative in this war is ours. The initiative to stop it must be ours.

This is the message of the great Buddhist leaders of Vietnam. Recently one of them wrote these words: "Each day the war goes on the hatred increases in the heart of the Vietnamese and in the hearts of those of humanitarian instinct. The Americans are forcing even their friends into becoming their enemies. It is curious that the Americans, who calculate so carefully on the possibilities of military victory, do not realize that in the process they are incurring deep psychological and political defeat. The image of America will never again be the image of revolution, freedom and democracy, but the image of violence and militarism."

If we continue, there will be no doubt in my mind and in the mind of the world that we have no honorable intentions in Vietnam. It will become clear that our minimal expectation is to occupy it as an American colony and men will not refrain from thinking that our maximum hope is to goad China into a war so that we may bomb her nuclear installations. If we do not stop our war against the people of Vietnam immediately the world will be left with no other alternative than to see this as some horribly clumsy and

deadly game we have decided to play. The world now demands a maturity of America that we may not be able to achieve. It demands that we admit that we have been wrong from the beginning of our adventure in Vietnam, that we have been detrimental to the life of the Vietnamese people. The situation is one in which we must be ready to turn sharply from our present ways.

In order to atone for our sins and errors in Vietnam, we should take the initiative in bringing a halt to this tragic war. I would like to suggest five concrete things that our government should do immediately to begin the long and difficult process of extricating ourselves from this nightmarish conflict:

1. End all bombing in North and South Vietnam.
2. Declare a unilateral cease-fire in the hope that such action will create the atmosphere for negotiation.
3. Take immediate steps to prevent other battlegrounds in Southeast Asia by curtailing our military buildup in Thailand and our interference in Laos.
4. Realistically accept the fact that the National Liberation Front has substantial support in South Vietnam and must thereby play a role in any meaningful negotiations and in any future Vietnam government.
5. Set a date that we will remove all foreign troops from Vietnam in accordance with the 1954 Geneva agreement. Part of our ongoing commitment might well express itself in an offer to grant asylum to any Vietnamese who fears for his life under a new regime which included the Liberation Front. Then we must make what reparations we can for the damage we have done. We must provide the medical aid that is badly needed, making it available in this country if necessary. Meanwhile we in the churches and synagogues have a continuing task while we urge our government to disengage itself from a disgraceful commitment. We must continue to raise our voices if our nation persists in its perverse ways in Vietnam. We must be prepared to match actions with words by seeking out every creative means of protest possible.

As we counsel young men concerning military service we must clarify for them our nation's role in Vietnam and challenge them with the alternative of conscientious objection. I am pleased to say that this is the path now being chosen by more than seventy students at my own alma mater, Morehouse College, and I recommend it to all who find the American course in Vietnam a dishonorable and unjust one. Moreover I would encourage all ministers of draft age to give up their ministerial exemptions and seek status as conscientious objectors. These are the times for real choices and not false ones. We are at the moment when our lives must be placed on the line if our nation is to survive its own folly. Every man of humane convictions must decide on the protest that best suits his convictions, but we must all protest.

There is something seductively tempting about stopping there and sending us all off on what in some circles has become a popular crusade against the war in Vietnam. I say we must enter the struggle, but I wish to go on now to say something even more disturbing.

The war in Vietnam is but a symptom of a far deeper malady within the American spirit, and if we ignore this sobering reality we will find ourselves organizing clergy- and laymen-concerned committees for the next generation. They will be concerned about Guatemala and Peru. They will be concerned about Thailand and Cambodia. They will be concerned about Mozambique and South Africa. We will be marching for these and a dozen other names and attending rallies without end unless there is a significant and profound change in American life and policy. Such thoughts take us beyond Vietnam, but not beyond our calling as sons of the living God.

In 1957 a sensitive American official overseas said that it seemed to him that our nation was on the wrong side of a world revolution. During the past ten years we have seen emerge a pattern of suppression which now has justified the presence of U.S. military "advisors" in Venezuela. This need to maintain social stability for our investments accounts for the counter-revolutionary action of American forces in Guatemala. It tells why American helicopters are being used against guerrillas in Colombia and why American napalm and green beret forces have already been active against rebels in Peru. It is with such activity in mind that the words of the late John F. Kennedy come back to haunt us. Five years ago he said, "Those who make peaceful revolution impossible will make violent revolution inevitable."

Increasingly, by choice or by accident, this is the role our nation has taken -- the role of those who make peaceful revolution impossible by refusing to give up the privileges and the pleasures that come from the immense profits of overseas investment. I am convinced that if we are to get on the right side of the world revolution, we as a nation must undergo a radical revolution of values. We must rapidly begin the shift from a "thing-oriented" society to a "person-oriented" society. When machines and computers, profit motives and property rights are considered more important than people, the giant triplets of racism, materialism, and militarism are incapable of being conquered.

A true revolution of values will soon cause us to question the fairness and justice of many of our past and present policies. On the one hand we are called to play the good Samaritan on life's roadside; but that will be only an initial act. One day we must come to see that the whole Jericho road must be transformed so that men and women will not be constantly beaten and robbed as they make their journey on life's highway. True compassion is more than flinging a coin to a beggar; it is not haphazard and superficial. It comes to see that an edifice which produces beggars needs restructuring.

A true revolution of values will soon look uneasily on the glaring contrast of poverty and wealth. With righteous indignation, it will look across the seas and see individual capitalists of the West investing huge sums of money in Asia, Africa and South America, only to take the profits out with no concern for the social betterment of the countries, and say: "This is not just." It will look at our alliance with the landed gentry of Latin America and say: "This is not just." The Western arrogance of feeling that it has everything to teach others and nothing to learn from them is not just. A true revolution of values will lay hands on the world order and say of war: "This way of settling differences is not just." This business of burning human beings with napalm, of filling our nation's homes with orphans and widows, of injecting poisonous drugs of hate into veins of people normally humane, of sending men

home from dark and bloody battlefields physically handicapped and psychologically deranged, cannot be reconciled with wisdom, justice and love. A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death.

America, the richest and most powerful nation in the world, can well lead the way in this revolution of values. There is nothing, except a tragic death wish, to prevent us from reordering our priorities, so that the pursuit of peace will take precedence over the pursuit of war. There is nothing to keep us from molding a recalcitrant status quo with bruised hands until we have fashioned it into a brotherhood.

This kind of positive revolution of values is our best defense against communism. War is not the answer. Communism will never be defeated by the use of atomic bombs or nuclear weapons. Let us not join those who shout war and through their misguided passions urge the United States to relinquish its participation in the United Nations. These are days which demand wise restraint and calm reasonableness. We must not call everyone a Communist or an appeaser who advocates the seating of Red China in the United Nations and who recognizes that hate and hysteria are not the final answers to the problem of these turbulent days. We must not engage in a negative anti-communism, but rather in a positive thrust for democracy, realizing that our greatest defense against communism is to take offensive action in behalf of justice. We must with positive action seek to remove those conditions of poverty, insecurity and injustice which are the fertile soil in which the seed of communism grows and develops.

These are revolutionary times. All over the globe men are revolting against old systems of exploitation and oppression and out of the wombs of a frail world new systems of justice and equality are being born. The shirtless and barefoot people of the land are rising up as never before. "The people who sat in darkness have seen a great light." We in the West must support these revolutions. It is a sad fact that, because of comfort, complacency, a morbid fear of communism, and our proneness to adjust to injustice, the Western nations that initiated so much of the revolutionary spirit of the modern world have now become the arch anti-revolutionaries. This has driven many to feel that only Marxism has the revolutionary spirit. Therefore, communism is a judgment against our failure to make democracy real and follow through on the revolutions we initiated.

Our only hope today lies in our ability to recapture the revolutionary spirit and go out into a sometimes hostile world declaring eternal hostility to poverty, racism, and militarism. With this powerful commitment we shall boldly challenge the status quo and unjust mores and thereby speed the day when "every valley shall be exalted, and every mountain and hill shall be made low, and the crooked shall be made straight and the rough places plain." A genuine revolution of values means in the final analysis that our loyalties must become ecumenical rather than sectional. Every nation must now develop an overriding loyalty to mankind as a whole in order to preserve the best in their individual societies.

This call for a world-wide fellowship that lifts neighborly concern beyond one's tribe, race, class and nation is in reality a call for an all-embracing and unconditional love for all men. This oft misunderstood and misinterpreted concept -- so readily dismissed by the Nietzsches of the world as a weak and cowardly force -- has now become an absolute

necessity for the survival of man. When I speak of love I am not speaking of some sentimental and weak response. I am speaking of that force which all of the great religions have seen as the supreme unifying principle of life. Love is somehow the key that unlocks the door which leads to ultimate reality. This Hindu-Moslem-Christian-Jewish-Buddhist belief about ultimate reality is beautifully summed up in the first epistle of Saint John: Let us love one another; for love is God and everyone that loveth is born of God and knoweth God. He that loveth not knoweth not God; for God is love. If we love one another God dwelleth in us, and his love is perfected in us.

Let us hope that this spirit will become the order of the day. We can no longer afford to worship the god of hate or bow before the altar of retaliation. The oceans of history are made turbulent by the ever-rising tides of hate. History is cluttered with the wreckage of nations and individuals that pursued this self-defeating path of hate. As Arnold Toynbee says : "Love is the ultimate force that makes for the saving choice of life and good against the damning choice of death and evil. Therefore the first hope in our inventory must be the hope that love is going to have the last word."

We are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history there is such a thing as being too late. Procrastination is still the thief of time. Life often leaves us standing bare, naked and dejected with a lost opportunity. The "tide in the affairs of men" does not remain at the flood; it ebbs. We may cry out desperately for time to pause in her passage, but time is deaf to every plea and rushes on. Over the bleached bones and jumbled residue of numerous civilizations are written the pathetic words: "Too late." There is an invisible book of life that faithfully records our vigilance or our neglect. "The moving finger writes, and having writ moves on..." We still have a choice today; nonviolent coexistence or violent co-annihilation.

We must move past indecision to action. We must find new ways to speak for peace in Vietnam and justice throughout the developing world -- a world that borders on our doors. If we do not act we shall surely be dragged down the long dark and shameful corridors of time reserved for those who possess power without compassion, might without morality, and strength without sight. Now let us begin. Now let us rededicate ourselves to the long and bitter -- but beautiful -- struggle for a new world. This is the calling of the sons of God, and our brothers wait eagerly for our response. Shall we say the odds are too great? Shall we tell them the struggle is too hard? Will our message be that the forces of American life militate against their arrival as full men, and we send our deepest regrets? Or will there be another message, of longing, of hope, of solidarity with their yearnings, of commitment to their cause, whatever the cost? The choice is ours, and though we might prefer it otherwise we must choose in this crucial moment of human history.

It may be churlish not to express gratitude for the belated concern for the survival of Social Security by those who for seventy years have not been conspicuous among its admirers. We are being assaulted with confusing statistics, unfounded predictions and outright lies to support reforms that, if adopted, will surely destroy Social Security. The truth is that Social Security is not in crisis, that the most pessimistic forecasts show no shortfall for forty or more years, and that more optimistic forecasts (by the Congressional Budget Office and the Social Security Trust Fund itself) anticipate no crisis in the foreseeable future. By contrast, what President Bush proposes will jeopardize retirement income for millions who literally count on Social Security to live.

**What has Social Security achieved?** In the 1950s, 35% of Americans over 65 lived in poverty, while the figure now is 10%, thanks to Social Security. Most of the 47 million recipients -- retirees, dependents, under-age disabled, and survivors of deceased workers -- count on it. For a 65-year-old retiring today, the average monthly payment is \$1184, for two-thirds of retirees Social Security represents most of their income, and for seven million it is all the income they have on which to live. For seventy years, Social Security has been America's most successful and most compassionate entitlement program.

**What did conservatives think of it when it was adopted and what do they think of it now?** The Hearst newspapers in 1935 had front-page cartoons depicting a man wearing a chain and dog tag. Henry Ford predicted that workers would be unable to change their jobs or move to another address. Alf Landon, the Republican 1936 presidential candidate, characterized it as "a cruel hoax." They haven't ever given up. Barry Goldwater, the Republican 1964 presidential candidate, urged that it be repealed. Economist Milton Friedman called it an unjustifiable incursion on personal liberty. David Stockman, Reagan's director of the Office of Management and Budget, called it a "monster," predicting it would precipitate "the most devastating bankruptcy in history." The same scare tactics are used today by the Bush administration and the Alliance for Worker Retirement Security, a front organization created by the National Association of Manufacturers.

**How has Social Security changed?** Coverage, taxes and payments have increased. In 1983, the payroll tax went up from 10.16 to 12.4%, and the retirement age will gradually increase from 65 to 67. It's now 65½. It has always been a moderately progressive system, with wage-earners at the bottom receiving a proportionately higher return on their investment than wage-earners at the top.

**How well-financed is it now and how well-financed will it be in the future?** Social Security has always had lower operating expenses than comparable private pension systems. The current payroll tax this year will earn \$180 billion more than the pension system will pay out. The Social Security Trust Fund's less *optimistic* forecast is that in 2028 it will have to begin to draw upon its surplus, which is now \$1.8 trillion, and will be worth \$3.5 trillion in 2028. The Trust Fund's less optimistic forecast is that the surplus will run out in 2042, when its income will cover 73% of its payout. This prediction is based on a decline in increased productivity from the recent 2% level to 1.6%, and a decline in immigration from

the recent 0.387% level to 0.22%. The Trust Fund's more optimistic forecast (based upon an annual productivity increase of 1.9%, still less than the present rate) requires no benefit cuts or payroll tax increase for 75 years. The non-partisan Congressional Budget Office, whose growth assumptions have been consistently much more accurate than those of the Trust Fund, predicts that the surplus will last at least until 2052, and any serious future shortfall will be beyond the 75 years which the system tries to forecast. Of course, no one knows our actual future population, productivity, immigration, wages, work life, or life span.

**Why does Bush propose private retirement investment funds?** Higher wage-earners will elect them, creating an impossible-to-correct shortfall in the Trust Fund surplus for the less prosperous remaining workers and retirees who remain in the system. (The lowest estimate is that this changeover will cost over \$2 trillion. Where is that money coming from?) Take these worker contributions out and the Trust Fund will quickly run out of money to pay current retirees and it will end the hope of future pensions. Comptroller General David Walker recently said (December 4, 2004): "The creation of private accounts for Social Security will not deal with the solvency and sustainability of the Social Security fund." Our most distinguished public economists, Pete Peterson, Robert Rubin, and Paul Volcker, and former Senators Sam Nunn, Bob Kerrey and Warren Rudman have all signed a statement warning that the increasing debt caused by the Bush plan would lead to higher interest rates, rising inflation, a falling dollar, and no conviction that the U.S. will pay back its new debt in 50 years.

**How do they propose to sell this hoax?** We are told that the trust fund holds paper I.O.U.s, not real money. (Your stocks, pension and house deed are also paper.) The "paper" that the Trust Fund holds is Treasury Bonds. Nothing is safer, certainly not individual stock investments. Try to imagine what would have happened if small pension investors had diverted their contributions to the stock market and the dot.com boom went bust as they were retiring. Remedies are available ***if we need them fifty or more years from now*** to pay for Social Security without increasing the national debt. Of course, we could afford more comprehensive social insurance now, if we were to raise the \$90,000 cap on payroll taxes, adopt a fossil fuel consumption tax, compel General Electric and other corporations to pay their fair share of taxes on their profits, and roll back the huge tax cuts that have been created for the wealthiest Americans in the past four years.

**Why do they want to do this?** Do the brokers and bankers need to bring people with little or no discretionary income back into the market? Do they think that this will make us all think like conservative capitalists? Has the gulf between well-off and less-well-off Americans not widened enough? When did they develop this phony concern for people of limited means? And when will this be revealed for the hypocritical act it is? They have no shame.

George W. Bush  
April 9, 2005

The administration of George W. Bush has a self-serving label for each of its major public policies. The inheritance tax became a death tax; opposition to abortion became “the right to life” (except in capital punishment convictions or the bombing of civilian populations); “creationism” became “intelligent design,” and so on. I propose to stop beating around the Bush presidency and to call it by its proper name.

The name Bush gave to his presidency, less often heard now than when it became the slogan of his first campaign, was “compassionate conservatism.” My dictionary defines compassion as “deep awareness of the suffering of another coupled with the wish to relieve it.” The question that remains is: Compassion for whom? People whose pensions were wiped out by crooked CEOs and CFOs? Workers earning a minimum wage that is worth no more than the minimum wage was worth forty years ago? Poor people who cannot afford the cost of needed medicine? Children in poor school districts in poor states whose education is grossly underfunded? Persons held in detention in Guantanamo for years without access to a lawyer or family members, and who have never been charged with a crime? People who, because they have lost their jobs, have fallen deeply into debt, must now pay credit card interest rates that were once considered usury and may no longer be able to declare bankruptcy? Victims of serious illnesses who might benefit from medical breakthroughs in stem cell research? These are only part of a much longer list for which the conclusion must be: none of the above.

We cannot avoid using labels as convenient devices for grouping similar views, but we disparage true American conservatives by characterizing this Bush administration as conservative. It is not. It has done everything it could within its ability (and much beyond its constitutional power) to undo long-established features of American law, politics, and society. It is reactionary, and if it weren’t ashamed of what it is, it would recognize itself as such.

Reactionary, adj. Characterized by reaction, especially opposition to progress or liberalism; extremely conservative.

Reactionary, n. An opponent of progress or liberalism; an extreme conservative.

*The American Heritage Dictionary of the English Language, Third Edition.*

I have the temerity to suggest that this dictionary definition is inadequate. A conservative conserves, that is, keeps what exists. The only sense in which the phrase “extreme conservative” would make sense would be to state that everything that is should be kept, that nothing should be discarded. I can’t image a conservative who fits that description. In practical usage, the “extreme” part of the definition refers to the desire to go back beyond much long-established usage. A radical wants to bring about great (i.e., radical, often unprecedented) change, and as soon as possible. A reactionary wants to turn the clock – and the calendar – back. In this sense, the administration of George W. Bush is the most



reactionary since the nineteenth century. (By contrast, the presidencies of McKinley, Harding, Coolidge, and Hoover were conservative.)

The administration of George W. Bush would if it could undo the achievements of the Sherman and Clayton Antitrust Acts, the conservation of natural resources that had been uninterrupted and expanded from the presidency of Theodore Roosevelt, the governmental and educational adoption of biological science, the Fair Labor Standards Act establishing meaningful standards of minimum wages and maximum hours of work, the Social Security Administration setting a guaranteed retirement pension, the unequivocal understanding of the primacy of national power in the federal system found in the elastic and supremacy clauses of the Constitution first stated by Chief Justice Marshall for a unanimous court in *McCulloch v. Maryland* and reaffirmed for a unanimous court in *Wickard v. Filburn* in 1942, the civil rights movement and the legal safeguards that it spawned, the judicial definition of impermissible entanglement of church and state most clearly enunciated in *Lemon v. Kurtzman*, the advisory and fiscal roles of Congress in the shaping of foreign policy, international covenants for the treatment of foreign prisoners, long-standing alliances with other nations and the high regard in which people throughout the world have held the United States, the revelation of the public papers of long-retired presidents excepting only the most sensitive documents, and the enactment of a progressive federal tax policy that, if it may fail to modestly diminish the gap between wealth and poverty, does not increase it.

Please note that I am not advancing my belief that these constitutional, legal, and policy positions are desirable (I believe that they are), but I am arguing that each one of these long-established policies has been or is being systematically undermined or abandoned by this administration, without benefit of change in the Constitution, the law, or the perception of public opinion.

Does the Bush administration have a political mandate to do this? Most of this dismissal and dismantling of long-standing public policy and constitutional interpretation was accomplished in the first four years by a president who received fewer votes than his opponent, and whose selection by a 5-4 majority of the U.S. Supreme Court (five for Bush, four for finishing the counting of the votes) violated basic constitutional principles. The present U.S. Senate, consisting of 55 Republicans, 44 Democrats, and 1 Independent, was elected by thirds in 2000, 2002 and 2004. More votes were cast for Democratic than Republican candidates for the Senate, but the Republican majority is due to the fact that the least populous states have the same number of Senators as the most populous, creating an extraordinary underrepresentation for important demographic groups. Gerrymandering accounts for the increase in Republican House seats after the 2000 Census. Without the unusual re-districting in Texas that was explicitly designed to eliminate Democratic Representatives, the Republicans would have lost, not gained, seats in the 2004 election. There is no discernible Republican -- or Democratic -- majority in the United States, and there certainly is no mandate to preserve or expand the constitutional, legal, political, and social changes to which the Bush administration has been dedicated.

My Last (e-mail) On This Reactionary Administration  
May 4, 2005

Dear family, friends and colleagues:

You may discard this if you think that you have probably heard it all before. You probably have.

I have lived through many changes in American government and society, but I never dreamed that we would endure so reactionary, greedy and anti-democratic an administration as this. I promise to spare you further fulminations on this subject, but I ask you to read the following extracts from an address that Bill Moyers gave at New York University a little less than a year ago. Although it tells you nothing that you don't already know, it presents a vivid picture of the gross and growing inequality in American society. If you believe, as I do, that it is all sadly true, I hope that you will not despair, but will engage in renewed effort to restore – dare I say it? – morality and decency to our government.

**Bill Moyers, excerpt from an address at New York University, June 3, 2004.**

Nothing seems to embarrass the political class in Washington today. Not the fact that more children are growing up in poverty in America than in any other industrial nation; not the fact that millions of workers are actually making less money today in real dollars than they did twenty years ago; not the fact that working people are putting in longer and longer hours and still falling behind; not the fact that while we have the most advanced medical care in the world, nearly 44 million Americans – eight out of ten of them in working families – are uninsured and cannot get the basic care they need.

Astonishing as it seems, no one in official Washington seems embarrassed by the fact that the gap between rich and poor is greater than it's been in 50 years – the worst inequality among all western nations. Or that we are experiencing a shift in poverty. For years it was said those people down there at the bottom were single, jobless mothers. For years they were told work, education, and marriage is how they move up the economic ladder. But poverty is showing up where we didn't expect it – among families that include two parents, a worker, and a head of the household with more than a high school education. These are the newly poor. Our political, financial and business class expects them to climb out of poverty on an escalator moving downward....

I don't have to tell you that a profound transformation is occurring in America: the balance between wealth and the commonwealth is being upended. By design. Deliberately. We have been subjected to what the Commonwealth Foundation calls “a fanatical drive to dismantle the political institutions, the legal and statutory canons, and the intellectual and cultural frameworks that have shaped public responsibility for social harms arising from the excesses of private power.” From land, water and other natural resources, to media and the broadcast and digital spectrums, to scientific discovery and medical breakthroughs, and to politics itself, a broad range of the American commons is undergoing a powerful shift toward private and corporate control. And with little public debate.

Indeed, what passes for ‘political debate’ in this country has become a cynical charade behind which the real business goes on –the not-so-scrupulous business of getting and

keeping power in order to divide up the spoils. We could have seen this coming if we had followed the money. The veteran Washington reporter, Elizabeth Drew, says “the greatest change in Washington over the past twenty-five years – in its culture, in the way it does business and the ever-burgeoning amount of business transactions that go on here – has been in the preoccupation with money.”

Jeffrey Birnbaum, who covered Washington for nearly twenty years for the Wall Street Journal, put it more strongly: “[campaign cash] has flooded over the gunwales of the ship of state and threatens to sink the entire vessel. Political donations determine the course and speed of many government actions that deeply affect our daily lives.” Politics is suffocating from the stranglehold of money. During his brief campaign in 2000, before he was ambushed by the dirty tricks of the religious right in South Carolina and big money from George W. Bush’s wealthy elites, John McCain said elections today are nothing less than an “influence peddling scheme in which both parties compete to stay in office by selling the country to the highest bidder.”

Small wonder that with the exception of people like John McCain and Russ Feingold, official Washington no longer finds anything wrong with a democracy dominated by the people with money. Hit the pause button here, and recall Roger Tamraz. He’s the wealthy oilman who paid \$300,000 to get a private meeting in the White House with President Clinton; he wanted help in securing a big pipeline in central Asia. This got him called before congressional hearings on the financial excesses of the 1996 campaign. If you watched the hearings on C-Span you heard him say he didn’t think he had done anything out of the ordinary. When they pressed him he told the senators: “Look, when it comes to money and politics, you make the rules. I’m just playing by your rules.” One senator then asked if Tamraz had registered and voted. And he was blunt in his reply: “No, senator, I think money’s a bit more (important) than the vote.”

So what does this come down to, practically? Here is one accounting:

“When powerful interests shower Washington with millions in campaign contributions, they often get what they want. But it’s ordinary citizens and firms that pay the price and most of them never see it coming. This is what happens if you don’t contribute to their campaigns or spend generously on lobbying. You pick up a disproportionate share of America’s tax bill. You pay higher prices for a broad range of products from peanuts to prescriptions. You pay taxes that others in a similar situation have been excused from paying. You’re compelled to abide by laws while others are granted immunity from them. You must pay debts that you incur while others do not. You’re barred from writing off on your tax returns some of the money spent on necessities while others deduct the cost of their entertainment. You must run your business by one set of rules, while the government creates another set for your competitors. In contrast, the fortunate few who contribute to the right politicians and hire the right lobbyists enjoy all the benefits of their special status. Make a bad business deal; the government bails them out. If they want to hire workers at below market wages, the government provides the

means to do so. If they want more time to pay their debts, the government gives them an extension. If they want immunity from certain laws, the government gives it. If they want to ignore rules their competition must comply with, the government gives its approval. If they want to kill legislation that is intended for the public, it gets killed.”

I’m not quoting from Karl Marx’s *Das Kapital* or Mao’s *Little Red Book*. I’m quoting *Time* magazine. *Time*’s premier investigative journalists – Donald Bartlett and James Steele – concluded in a series last year that America now has “government for the few at the expense of the many.” Economic inequality begets political inequality, and vice versa.... It’s why we’re losing the balance between wealth and the commonwealth. It’s why we can’t put things right. And it is the single most destructive force tearing at the soul of democracy.

Hear the great justice Learned Hand on this: “If we are to keep our democracy, there must be one commandment: ‘*Thou shalt not ration justice.*’ ” Learned Hand was a prophet of democracy. The rich have the right to buy more homes than anyone else. They have the right to buy more cars than anyone else, more gizmos than anyone else, more clothes and vacations than anyone else. *But they do not have the right to buy more democracy than anyone else.*

I know, I know: this sounds very much like a call for class war. But the class war was declared a generation ago, in a powerful paperback polemic by William Simon, who was soon to be Secretary of the Treasury. He called on the financial and business class, in effect, to take back the power and privileges they had lost in the depression and new deal. They got the message, and soon they began a stealthy class war against the rest of society and the principles of our democracy. They set out to trash the social contract, to cut their workforces and wages, to scour the globe in search of cheap labor, and to shred the social safety net that was supposed to protect people from hardships beyond their control. Business Week put it bluntly at the time: “Some people will obviously have to do with less.... it will be a bitter pill for many Americans to swallow the idea of doing with less so that big business can have more.”

The middle class and working poor are told that what’s happening to them is the consequence of Adam Smith’s “Invisible Hand”. This is a lie. What’s happening to them is the direct consequence of corporate activism, intellectual propaganda, the rise of a religious orthodoxy that in its hunger for government subsidies has made an idol of power, and a string of political decisions favoring the powerful and the privileged who bought the political system right out from under us.

To create the intellectual framework for this takeover of public policy they funded conservative think tanks – The Heritage Foundation, the Hoover Institution, and the American Enterprise Institute – that churned out study after study advocating their agenda. To put political muscle behind these ideas they created a formidable political machine. One of the few journalists to cover the issues of class – Thomas Edsall of *The Washington Post* – wrote: “During the 1970s, business refined its ability to act as a class, submerging competitive instincts in favor of joint, cooperate action in the legislative area.” Big business political action committees flooded the political arena with a deluge of dollars. And they built alliances with the religious right – Jerry Falwell’s Moral Majority and Pat Robertson’s

Christian Coalition – who mounted a cultural war providing a smokescreen for the class war, hiding the economic plunder of the very people who were enlisted as foot soldiers in the cause of privilege....

Look at the spoils of victory: Over the past three years, they've pushed through \$2 trillion dollars in tax cuts – almost all tilted towards the wealthiest people in the country. Cuts in taxes on the largest incomes. Cuts in taxes on investment income. And cuts in taxes on huge inheritances. More than half of the benefits are going to the wealthiest one percent. You could call it trickle-down economics, except that the only thing that trickled down was a sea of red ink in our state and local governments, forcing them to cut services for and raise taxes on middle class working America. Now the Congressional Budget Office forecasts deficits totaling \$2.75 trillion over the next ten years. These deficits have been part of their strategy.

Some of you will remember that Senator Daniel Patrick Moynihan tried to warn us twenty years ago, when he predicted that President Ronald Reagan's real strategy was to force the government to cut domestic social programs by fostering federal deficits of historic dimensions. Reagan's own budget director, David Stockman, admitted as such. Now the leading rightwing political strategist, Grover Norquist, says the goal is to "starve the beast" – with trillions of dollars in deficits resulting from trillions of dollars in tax cuts, until the United States Government is so anemic and anorexic it can be drowned in the bathtub.

There's no question about it: The corporate conservatives and their allies in the political and religious right are achieving a vast transformation of American life that only they understand because they are its advocates, its architects, and its beneficiaries. In creating the greatest economic inequality in the advanced world, they have saddled our nation, our states, and our cities and counties with structural deficits that will last until our children's children are ready for retirement, and they are systematically stripping government of all its functions except rewarding the rich and waging war. And they are proud of what they have done to our economy and our society.

If instead of practicing journalism I was writing for Saturday Night Live, I couldn't have made up the things that this crew have been saying. The president's chief economic adviser says shipping technical and professional jobs overseas is good for the economy. The president's Council of Economic Advisers report that hamburger chefs in fast food restaurants can be considered manufacturing workers. The president's Federal Reserve Chairman says that the tax cuts may force cutbacks in social security – but hey, we should make the tax cuts permanent anyway. The president's Labor Secretary says it doesn't matter if job growth has stalled because "the stock market is the ultimate arbiter."

You just can't make this stuff up. You have to hear it to believe it. This may be the first class war in history where the victims will die laughing. But what they are doing to middle class and working Americans – and to the workings of American democracy – is no laughing matter. Go on line and read the transcripts of Enron traders in the energy crisis four years ago, discussing how they were manipulating the California power market in telephone calls in which they gloat about ripping off "those poor grandmothers." Read how they talk about political contributions to politicians like "Kenny Boy" Lay's best friend George W. Bush. Go on line and read how Citigroup has been fined \$70 Million for abuses

in loans to low-income, high risk borrowers – the largest penalty ever imposed by the Federal Reserve. A few clicks later, you can find the story of how a subsidiary of the corporate computer giant NEC has been fined over \$20 million after pleading guilty to corruption in a federal plan to bring Internet access to poor schools and libraries. And this, the story says, is just one piece of a nationwide scheme to rip off the government and the poor.

Let's face the reality: If ripping off the public trust; if distributing tax breaks to the wealthy at the expense of the poor; if driving the country into deficits deliberately to starve social benefits; if requiring states to balance their budgets on the backs of the poor; if squeezing the wages of workers until the labor force resembles a nation of serfs – if this isn't class war, what is? It's un-American. It's unpatriotic. And it's wrong.

All The News That's Fit To Print Briefly  
May 10, 2005

Who has time to read about everything in the news? I've just received my first e-mail from Harper's Weekly, and in the few minutes it took to read it, I found it amusing, appalling, informative, hilarious, scandalous, and a humbling reminder of how futile the effort is to make sense of the world. And think of the hours you can save not watching CNN, Fox, MSNBC, and the other so-called "news" stations. If you're interested, sign up at [join-harpers-weekly@pluto.sparklist.com](mailto:join-harpers-weekly@pluto.sparklist.com).

A papyrologist at Oxford University announced that new techniques in spectral imaging, which make it possible to decipher previously illegible ink on papyrus fragments, have yielded parts of a lost tragedy by Sophocles, a novel by Lucian, and an epic poem by Archilochos; researchers also applied the technique to third- and fourth-century manuscripts of the Revelation of Saint John and discovered that the number of the beast, contrary to popular belief, is 616, the area code of Grand Rapids, Michigan. A Washington woman found a snake with legs, locusts plagued Bangladesh, and Zimbabwe was at risk of famine. More than 100,000 Americans were working at home answering customer-service phone calls. In Iraq, two F/A-18 Hornet jets collided in mid-air, a suicide bomber killed sixty people at a police-recruitment center, and at least forty-seven people were killed in bombings and gun attacks. Fourteen bodies, clad in white robes, were found in shallow graves, and Saddam Hussein's nephew was arrested. President George W. Bush announced the capture of a "major facilitator and chief planner for the Al Qaeda network." The captured man turned out to be a mid-level Al Qaeda operative named Abu Faraj al-Libbi. "He used to make the coffee and do the photocopying," said a former associate. Nevada Senator Harry Reid said Bush was a loser, while Virginia Representative Jim Moran described Bush as someone who does not read books, who surrounds himself with sycophants, and who has his ass kissed by Dick Cheney.

A second case of polio was reported in Indonesia, and an outbreak of meningitis in India killed fifteen. In Peru a bus fell nearly 1,000 feet into a ravine, killing forty. A Providence, Rhode Island, man attacked a goose and stomped its goslings to death, and two swans were stabbed to death in the Bronx. Vietnam decided to vaccinate 600,000 birds for avian flu. Turkey banned four porn channels from its satellite TV network, Texas lawmakers were trying to stop sexy cheerleading, and Norway declared striptease an art form. A study showed that babies have favorite colors, and they like brown the least. "Brown might mean dirt," said a researcher. IBM announced that it would fire up to 13,000 employees in Europe and the United States. It was the 60th anniversary of VE Day. The German ambassador to London called on Britain to change its attitude towards Germany. "They continue to see us as Nazis," he said, "as if they have to refight the battles every evening." Around three thousand neo-Nazis rallied in Berlin. President Bush attended a display of Soviet pageantry in Russia. An online casino bought the pope's old Volkswagen for \$244,800, and in Chicago a vandal painted the words "big lie" over a stain on a roadside wall that many people believe is an apparition of the Virgin Mary; onlookers wept as a road crew covered the stain with brown paint.

The Department of Homeland Security announced that it had wasted a great deal of money and needed much more. U.S. Attorney General Alberto Gonzales said that most of the allegations of abuse by detainees in Iraq, Afghanistan, and Guantanamo Bay do not meet his definition of torture. The United States was sending prisoners to Uzbekistan so that they could be tortured more fully. In Uzbekistan the most common torture techniques are beating and asphyxiation with a gas mask; however, victims can also have their genitals shocked, their toenails plucked out, and they can be boiled to death. It was revealed that soon after September 11, 2001, the CIA sent a team of agents to Afghanistan with orders to "capture Bin Laden, kill him, and bring his head back in a box." Spain gave 700,000 illegal immigrants amnesty, and Faure Gnassingbe, the son of the former president of Togo, was named president of Togo. Eighteen thousand five hundred people have fled Togo as a result of election violence. A secret British memo from July 2002, summarizing a meeting between Tony Blair and his security advisors, was made public. The memo implied that President Bush had already made up his mind to go to war in Iraq, despite his claims to the contrary, and that intelligence and facts about Iraq would be "fixed around the policy." Eighty-eight members of Congress signed a letter, written by Representative John Conyers of Michigan, calling for an inquiry into the memo. "This should not," wrote Conyers, "be allowed to fall down the memory hole during wall-to-wall coverage of the Michael Jackson trial and a runaway bride." It was revealed that the runaway bride had once shoplifted. Two grenades went off outside the British consulate in New York City, damaging a flower planter, and Tony Blair won another term as Prime Minister. England's Prince Harry entered the Army. The Mayor of Spokane, Washington, an opponent of gay rights, was accused of being a pedophile; he insisted that he cruised the Internet only for men of legal age. Ave Maria University, a Catholic college founded by the retired CEO of Domino's Pizza, graduated its first class and gave an honorary degree to L. Paul Bremer, who told the assembled graduates that Muslim extremists were against the separation of church and state. A Baptist church in North Carolina booted out nine of its members for being Democrats, and a seventeen-year-old woman was thrown out of her village in India after her stomach swelled up; villagers believed she was carrying the "devil's child," but the swelling turned out to be a 33-pound tumor the size of five fetuses. The Kansas state school board began four days of hearings on how to teach the origin of life; all of the witnesses in the hearing were opposed to teaching evolution. Twelve new moons were discovered orbiting Saturn. In Victoria, British Columbia, a man was barred from a civic meeting because he was dressed as a giant piece of feces named "Mr. Floatie," and in San Francisco, twelve penguins died of chlamydia. The FDA announced that men who have had gay sex in the last five years will not be eligible to donate sperm anonymously, and a college student in New Jersey unearthed an 1888 interview with Walt Whitman in which Whitman gave advice to young men pursuing a career in literature. "First, don't write poetry," he said. "Second ditto; third ditto."



## Guardians of the Rule of Law

July 22, 2005

The Supreme Court's 5-4 decision in *Bush v. Gore* (five for Bush, four for counting the votes) is the most egregious exercise of judicial usurpation of power by that court since its pro-slavery decision in the Dred Scott case in 1857. It will not soon recover from the disgrace that it has brought upon itself as a consequence of legal reasoning that defies logic and denies long-held constitutional positions, in pursuit of motives that are so blatantly self-serving that judges who had any integrity would have recused themselves.

"This is what happens when, for the first time in modern history, a candidate resorts to lawsuits to try to overturn the outcome of an election for president. It is sad for Florida. It is sad for the nation. And it is sad for our democracy." James A. Baker III  
It was Baker's candidate who brought the election to federal courts.

"With this decision, a collection of...activists has arbitrarily swept away thoughtfully designed statutes ensuring free and fair elections and replaced them with their own political opinions." House Majority Leader Tom DeLay, referring to the Florida Supreme Court decision allowing the hand count permitted by Florida law.

"Th' supreme court follows th' iliction returns." Mr. Dooley, in Peter Finley Dunne, *Mr. Dooley's Opinions* (1900). What would Mr. Dooley have said one hundred years later when the election returns followed the Supreme Court?

A thoughtful friend who is not a lawyer asked me to explain what I meant when I wrote that "the loss of a safe harbor does not compel us to sink the ship of state." Although I wanted to wait a while before I wrote at any length about the Supreme Court's astounding decision in *Bush v. Gore*, I discovered that beyond defining "safe harbor," I had to explain why I believe the ship of state is in danger. So in characteristically professorial style, I've said much more than my friend wanted to know, but much less than my agony and anger want to express.

"Safe harbor" is the phrase that has been used in the post-election cases to refer to the so-called December 12 deadline for states to choose unchallenged electors. Of course, it is not really a deadline; it is a safe harbor in that, if a state selects its electors by that date, they cannot be subject to challenge by another state. Perhaps Gore counsel David Boies, who made an eloquent argument for completing the hand count, overstated his case when he once remarked that this date was crucial. It isn't. As long as the electors are chosen by December 18, they can cast their votes on that date. As a matter of fact, there is no reason why electors cannot be chosen later, as they have been in electoral disputes. In 1960, Hawaii chose its electors at the end of the year. In 1873, an electoral commission awarded disputed electoral votes and the election to Rutherford B. Hayes on March 2, and he was sworn into office three days later.

To foreclose any effort to discover the intention of Florida's voters because they could not be counted by December 12 is the weakest imaginable reason to end the hand count. The Supreme Court's supreme chutzpah consists of the fact that they first called a halt to the hand count, which had gotten off to a rather brisk start. They then waited a weekend, heard arguments, and announced that it's now too late! It wasn't too late. That there still was time was the fear of the radical five Justices, who have spent much of their careers railing against judicial activism. (Has there ever been so blatant an instance of unbridled and unprecedented judicial activism?!) Of course, there was still time to discover which of the two candidates had received more votes, even after disqualifying many ballots because their markings were unclear, other ballots because two votes were cast for president, and still other ballots because voters casting butterfly ballots had mistakenly voted for Buchanan instead of Gore. But the fearful five knew that, even with all those ballots discarded, Gore might still win.

They couldn't rely alone on the lack of time. They created a constitutional objection that voters were denied the equal protection of the laws. This denial of equal protection allegedly existed because different ballots were counted in different ways. The Supreme Court majority held that a precise standard is necessary and "the clear intent of the voter" is not a clear standard. Perhaps not, but "the clear intent of the voter" is precisely the standard that the Florida legislature adopted, and is, incidentally, the standard of many states, including Texas. It is not a criterion composed by the Florida Supreme Court. Perhaps the standard should be more precise, but what could the Florida Supreme Court do about it? If it had adopted a stricter standard, it would have been accused of legislating. If the vagueness of this standard is unacceptable, it is equally unacceptable in all the states that accept it.

To say that employing different standards of counting votes violates equal protection of the laws overlooks the fact that there are many different methods of casting votes in Florida, which require different standards. The real denial of equal protection of the laws consists of the fact that some methods of casting votes are very much more difficult than others. This is immediately apparent when we note that four and five times more ballots are discarded as not properly voted in counties that use punch card ballots than are discarded in counties that use other voting methods. As a political matter, it should be noted that the more difficult forms of vote casting are employed principally in those Florida counties that have a higher proportion of Democratic voters.

The 5-4 division in this case has existed for several years. The five (Rehnquist, Scalia, Thomas, O'Connor, Kennedy) have consistently struck down federal law as invading the reserved powers of the states. For example, they decided, by the usual 5-4 vote, to declare unconstitutional an act of Congress that outlawed domestic violence against women, even though most of Attorneys-General of the states urged Congress to adopt the law. They voted, 5-4 as usual, to invalidate an act of Congress that barred the possession of handguns near public schools. In every respect, the decision in *Bush v. Gore* is directly contrary to their professed judicial philosophy of supporting the reserved powers of the states in the Federal Constitution.

Every student of constitutional law knows as an axiom of judicial review that the U.S. Supreme Court does not — or at least until the disputed presidential vote in 2000 did not — accept what they used to call "political questions," fearing the Supreme Court's involvement in what Justice Frankfurter called "the political thicket." If you asked a large number of professors of constitutional law, or lawyers, or political scientists, the overwhelming majority would have said that the Supreme Court would never take this case. But they did. The opportunity to select the next president — the right (very right) next president — by a one-vote margin was a temptation that they could not resist.

But as much as they wanted to kill Gore's candidacy, the five Justices, motivated by a sense of propriety, or cowardice, or political calculation, wanted someone else to fire the gun so they wrote this less-than-straightforward opinion returning the case to the Florida Supreme Court, saying it's up to that court, but that court is not allowed to formulate a rule for continuing and concluding the hand count, or do anything else but declare Gore's candidacy dead. And this opinion is "per curiam," which is used to indicate that no single Justice signed off on it, because it represents the view of the Court. Of course, in a case decided by the narrowest of margins, that is very misleading. Curiously, the so-called "swing" Justices, O'Connor and Kennedy, did not attach their names to any opinion, including the one that carried the names of the unholy trinity of Rehnquist, Scalia and Thomas.

Who are these guardians of the law who have the effrontery to substitute their judgment for that of the electorate? Chief Justice Rehnquist was accused long before he sat on the Supreme Court of attempting to intimidate voters in Arizona. (It's an old story, but a new version of it appears in the December 2, 2000 issue of the *Pittsburgh Post-Gazette*.) Justice Scalia's son is a member of the law firm of Theodore Olson, who argued the Bush case before the Supreme Court. Justice Thomas's wife was employed by the ultra-right Heritage Foundation to vet prospective office-holders in a Bush administration. When Justice O'Connor heard Dan Rather call Florida for Gore, she exclaimed, "This is terrible." Her husband explained to other guests at the election night party that his wife was upset because they wanted to retire to Arizona, and a Gore win meant they would have to wait another four years. (Two witnesses described this scene to *Newsweek*, reported by Evan Thomas and Michael Isikoff, "The Truth Behind the Pillars," in *Newsweek*, December 25, 2000-January 1, 2001.) Do you think these Justices were really listening to the arguments presented to them for continuing the hand count?

Commentators started to make much of the close division in Congress and the consequent need for compromise. What should not be overlooked is how much independence every president has in issuing executive orders, making foreign policy, choosing executive officers and influencing the direction of executive agencies, and (most relevant here) nominating members of the Supreme Court. For George Bush to have the opportunity to choose Justices in the mold of his proclaimed favorites, Scalia and Thomas, will be to ensure the ultra-conservative character of the Supreme Court perhaps for decades to come. When another issue of this magnitude comes before a future Court, if Bush has his way, that Court will come closer to unanimity in denying the most basic democratic principle of one person, one vote. It should be opposed.

A personal footnote. I realize that in the sixty years I have spent thinking, reading, talking, and teaching American politics, no other political event has so outraged me. This is more than an illegal action by a politician or a president. In the name of the rule of law, it is the rule by powerful partisan lawyers who put their political biases ahead of the most fundamental principles of law in a democratic republic.

I have not attempted a scholarly commentary because nothing I can say will improve upon the dissenting opinions of Justices Stevens, Souter, Ginsburg and Breyer. Each of the dissents refutes and shames the majority. The dissents constitute a series of brilliant lectures on the nature of the federal system, the value and practice of democracy, and the appropriate role of the judiciary. On that last point, I leave the last word to the senior Justice, John Paul Stevens, who writes: "Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."

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All of the contents of Democracy in Twentieth-Century America are by Stanley Feingold, unless otherwise specified. Comments, criticisms, and corrections are welcome at [email Stanley Feingold](mailto:email Stanley Feingold).

America at War  
October 18, 2005

This evening I watched the American Experience television documentary, *Two Days in October*. It's based on David Maraniss's *They Marched Into Sunlight*, a book in which he juxtaposed events on two days in October 1967: a battle in Vietnam in which American troops were ambushed and slaughtered and a protest at the University of Wisconsin, in which students protested the recruiting of future employees by Dow Chemical, the manufacturer of napalm. (Maraniss was a freshman at the university at that time.) General Westmoreland and the American press reported the battle as an American victory; the surviving soldiers characterized it as an ill-advised American attack which resulted in a massacre. University of Wisconsin students, unarmed and huddled together in a single university building, were prosecuted for attacking the police, who entered armed and armored, beating and bloodying the defenseless students.

The television documentary, which includes some remarkable contemporary footage and recent interviews with survivors of both events, moved me greatly, and moved me to think. For all the vast differences between the American invasions of Vietnam and Iraq, some elements are strikingly similar. Then and now, we have no explanation that can withstand objective examination as to why we engaged in these wars. Then and now, we have no idea as to how to extricate ourselves with honor, because these are wars that cannot be won. Then and now, Americans who fight, and often die or are maimed, cannot confidently tell their enemies from their allies, and injure and kill and uncounted thousands of innocent people. Then and now, the government acts as if those who dissent are traitors, instead of the loyal opposition without which a free country abandons its freedom. Then and now, we lose the good opinion of people of good will throughout the world. Then and now, the government lies about the causes of the war and the prospects for victory.

Most PBS stations will present this eighty-minute film again several times on Friday, October 21.



## Iraq and the Mid-Term Elections

November 11, 2011

Dear City Colleagues,

I thought that I would find it useful to sum up my thoughts on Iraq and the mid-term elections before Monday's lunch. Some of my observations are truisms, but no less true for that. Some are bound to elicit strong objections, such as my conclusions that there can be no honorable plan to end America's involvement in Iraq, that the United States should reinstitute universal conscription, that the conservative coalition has fallen far short of becoming a majority movement, and that we engage in practices that deliberately inhibit or prevent democracy, including denying voting rights to two million citizens who have completed prison sentences.

My joy at the outcome of the election and the unmistakable message it delivers on Iraq is tempered by the realization that many more will die before this conflict ends. When it does end, we can be certain that those who continue to support it will tell us (as we may recall being told by those who up to its humiliating end justified America's war in Vietnam) that we failed only because we didn't persevere at the cost of sacrificing still more lives of innocent civilians and soldiers.

Stanley

### THE WAR

**There is no Democratic plan to end the war in Iraq and there cannot be.** The power to wage war rests with the President. Only the President determines access to diplomatic and military intelligence. Only the President creates the international and war policy of the Departments of State and Defense. Despite his power, it has been clear from the outset of the American invasion of Iraq that the President did not have a plan as to how to conduct it or how to end it.

**Some problems have no solution, only ultimate resolution after the passage of much time and the loss of many lives. Extricating ourselves from Iraq is such a problem.** This is because there can be no adequate redress for

invading Iraq for reasons that had no basis in fact, whether because of abysmal ignorance (the President and his advisors were misinformed regarding Iraq's arms programs and didn't understand that Saddam Hussein and militant Islam had irreconcilable differences) or deliberate design (they exaggerated rumors, lied when their claims were contradicted by evidence, and planned the invasion long before 9/11).

**Calling America's military engagement in Iraq a war is a misnomer.** If it was a war against Saddam Hussein, the war was won long ago. By contrast, the "war" against terror will not be won by armies any more than the "war" on drugs. In war, the enemy must have a definable presence. Will America have won when the last Iraqi stops opposing the American military forces? That will not happen. Sooner or later, the United States will simply decide to withdraw its forces and leave.

**There can be no doubt that the United States will leave Iraq without an end to hostilities.** When it does, violence may increase because the Iraqi government has neither the ability nor the will to curb it. On the other hand, it is possible that violence may decrease because both Sunnis and Shias are both engaged in violence against the American presence. The only consequence that is certain to follow our withdrawal is that fewer Americans will continue to die or be maimed.

**Leaving Iraq means physically and politically leaving Iraq to the Iraqis or separate Shiite, Sunni and Kurdish states,** voiding American-made contracts for Iraq's reconstruction, abandoning prior claims to the Iraqi oilfields except insofar as agreements are negotiated later with Iraqi governments, compensating Iraq for the destruction and loss of life caused by the American occupation, and extending humanitarian assistance as requested by a sovereign government or governments.

**The cost of America's invasion of Iraq is incalculable.** It has increased the national debt, encouraged corruption and vast profits for a small number of privileged corporations and persons, decreased the possibility of national legislation to improve the health and well-being of Americans, and created hostility toward the U.S. by people throughout the world who had looked to America to set a democratic and compassionate example in creating a better and more peaceful world.

**War crimes should be prosecuted.** American corporations and individuals who stole money, lied about contracts fulfilled, and otherwise profited illegally from funds appropriated for the American invasion should be subject to investigation and prosecution and, upon conviction, subject to the harshest penalties the law allows. Government officers who deliberately suppressed intelligence that went counter to the unproved claims of the Bush Administration should be prosecuted.

**The United States must not go to war without the broad support of the American people and not continue to wage war without their continued support.** The President must know that the American people understand and subscribe to the justification for war and are committed to sacrifice for its successful conclusion.

**In a democracy, no young adult should be exempt from compulsory national service.** Whatever John Kerry said or intended to say, the American armed forces who have served so long and risked so much in Iraq do not represent a democratic cross-section of able-bodied adult Americans. An American Army should.

## THE ELECTION

**The conservative coalition is an uneasy alliance.** It resulted from the racial realignment that followed *Brown v. Board of Education* and the Civil Rights and Voting Rights Acts, the resurgence of the moralist right after *Roe v. Wade* and social changes including the women's rights and homosexual rights movements, and the transformation of economic power from fiscal conservatism to the unchecked accumulation of corporate power that has increased government indebtedness, public corruption, and an unprecedented economic gap between a wealthy minority and the majority of working Americans. This realignment was anticipated by Goldwater's presidential candidacy in 1968, accelerated by Reagan's election in 1980, and consolidated by the right-wing Contract on America in 1994

**Voter behavior does not support the conclusion that the United States has a conservative majority.** In three of the last four presidential elections, Clinton twice defeated conservative candidates and Gore, despite a half-million vote plurality, was denied victory by the shameless tactics that overruled his Florida majority. The outgoing Republican 55-45 Senate majority obscures the fact that the one hundred Democratic Senate candidates in the last three elections (2000, 2002 and 2004) outpolled their Republican rivals, and that majority has increased in the just-concluded election in which the Democrats regained a Senate majority. The equal representation of states in the Senate created a bias in favor of the party dominant in rural areas, but it did not create a majority party. Paradoxically, the Republican defeat in this election leaves the conservative coalition more powerful within the party, while it leaves the party far less powerful within the nation.

**Elections should not be decided by those who draw legislative district lines.** It is indefensible to gerrymander districts to eliminate competition. It is indefensible to draw districts to defend the seats of incumbents (usually of both parties, except in Texas). The Supreme Court has upheld both practices. Several mathematical formulas would assure impartiality in redistricting. Much better would be the creation of multi-member districts in which voters cast a single transferable vote, assuring a House of Representatives that accurately mirrors voter preference. Although Congress requires single-member districts, the Constitution does not.

**Democratic elections encourage, if they do not require, the participation of all adult citizens.** IDs, registration, residence requirements, long ballots, complicated voting procedures, and limited midweek voting hours all inhibit participation. It is morally questionable whether prisoners who lose their liberty should lose their citizenship rights. It is indefensible that voting rights are not automatically restored along with other rights when an individual has completed a prison sentence. The consequence of these and other barriers is that the United States has a lower voter turnout than other nations that have long boasted of having free elections.



## What Went Wrong in Iraq? August 5, 2007

Why did we invade Iraq? President Bush, Vice President Cheney, Secretary of State Powell, and Secretary of Defense Rumsfeld repeatedly stated and professed to provide proof that Iraq had nuclear, chemical and biological weapons of mass destruction. This was false. Such WMDs that Iraq had possessed were destroyed years earlier. Iraq's alleged effort to buy fuel for nuclear weapons was based on a discredited forgery. United Nations inspectors found no evidence of any efforts to establish new weapons programs.

President Bush and others purported to provide "proof" that Iraq was closely allied to Al Qaeda in the 9/11 attack upon the United States. This too was false. Fifteen of the nineteen hijackers came from Saudi Arabia; none from Iraq. No evidence links the hijackers with Iraq. Alleged meetings between Iraqi and Qaeda representatives never took place, nor was there any cooperation between them. On the contrary, Saddam Hussein, a secular dictator, and Al Qaeda, a religiously fanatical movement, were antagonistic to one another.

President Bush stated and purported to provide proof, that Iraq was planning aggression directed toward its neighbors and the United States. This also was false. Iraq's dictatorial government continued to behave brutally toward its domestic critics and minorities, but engaged in no aggressive action abroad after its defeat and retreat from Kuwait after the 1991 war. There is literally no evidence that Iraq was either planning or in a position to engage in aggression abroad.

Let us assume that every one of the cited errors was a mistake in judgment and not a deliberate deception. A democratic nation does not have the right to engage in war that might result in the loss of tens of thousands of lives (which this war has) based on a single basic mistake, let alone a series of mistakes that utterly disregarded warnings and corrections. Given the abundant evidence rebutting these claims, that continue to be repeated by President Bush and Vice President Cheney to the present day, most American and world opinion has concluded that the Bush Administration was motivated by goals that disregarded reason and truth.

How did we believe that we would win? President Bush and members of his Administration predicted that we would be greeted by the Iraqis as liberators and that flowers would be strewn in the path of American tanks. They were wrong. Military victory was greeted by widespread looting (which American forces did virtually nothing to stop), and improvised explosive devices (IEDs) were and continue to be placed in the path of American tanks, resulting in a majority of the more than 3600 American military deaths suffered thus far.

President Bush and his Administration believed that peace and security could be achieved with an undersized and underequipped volunteer army. They were wrong. Inadequate armor on tanks resulted in the needless loss of many lives. The regular armed forces and National Guard members who never imagined they're ever going to war have been sent back for repeated and extended tours of duty. When Army Chief of Staff Eric Shinseki told Congress before the war began that not enough troops were being sent to Iraq,



he was publicly derided by Defense Secretary Rumsfeld. When it became evident that Shinseki was right, Rumsfeld alibied that you go to war with the army you have. He was reckless. If you start a war, you shouldn't do it until you have the army you need.

President Bush and his Administration believed that debaathification (that is, the removal of members of Saddam Hussein's ruling Baath party) in the Iraqi army and police forces would result in loyalty to a successor regime. They were wrong. Debaathification led former Baathists to ally themselves with other enemies of the occupation, and left the new government without effective internal security.

Rumsfeld also famously said "stuff happens," which is the verbal equivalent of responding to unhappy unexpected consequences with a shrug of the shoulders. It is the solemn responsibility of the nation's leaders to anticipate and prepare for the widest range of stuff that may happen before it engages in a war of its choosing.

How do we plan to get out? President Bush sought to create a government that genuinely unifies the mutually suspicious and often hostile Shia, Sunni and Kurdish populations. It has not happened. He sought to create a successful central government in free elections, first under American-sponsored puppets with no credible base of support in Iraq, and finally under the leadership of Nouri al-Maliki. Understandably, the feeble Iraqi government is responsive to internal interests that are not sympathetic to American intervention. There has been little progress toward creation of a multi-sectarian state.

The failure of the United States to understand internal conflicts, provide security and protect borders resulted in the easy entry of members of Al Qaeda (conspicuously absent prior to the American invasion) and other forces bent upon increasing chaos, encouraging anti-American sentiment, and fomenting civil war and lawlessness throughout Iraq.

What is the reality? America is hated in Iraq as being anti-Muslim because of its occupation and its ignorance and disregard of Muslim customs and beliefs. It is impossible to calculate the emotional and political consequences of the callous brutality of Abu Ghraib, the extradition of Muslims (who the United States refuses to acknowledge to be prisoners or war protected by the Geneva Conventions) to unknown prisons in undisclosed countries, where their harsh treatment will not risk examination by American courts, the accidental or criminal acts of American servicemen who kill innocent civilians, and the ignorance and insensitivity of much American behavior, as in a photograph of American servicemen sitting in a Muslim mosque wearing their combat boots.

Investigative journalists estimate that the followers of Al Qaeda constitute between five and ten percent of the insurgent forces, although they represent a larger proportion of those who engage in the most successful violent opposition to the American occupation. No one can know the consequences of total American withdrawal. Partial or piecemeal withdrawal is unacceptable, because the vulnerability of American forces would be increased and the symbolic negative significance of the American presence would not be reduced. No credence should be given to the predictions of those who have until now been wrong about everything connected with the causes and consequences of the American occupation. Some responsible scholars are persuaded that things will get worse – not better – as long as resentment of America's presence continues to be felt.

Why have we failed? When Osama bin Laden was believed to be cornered in Afghanistan, we deployed our military forces there to the war we were beginning in Iraq, making easier his escape into Pakistan. We betrayed our most cherished ideals in the humiliating treatment of prisoners in Abu Ghraib and the brutal actions of servicemen in widely publicized incidents of promiscuous slaughter of Iraqi soldiers and civilians. When General Antonio Taguba released his detailed report recounting the complicity of government officials in imposing abusive interrogation policies at Abu Ghraib, he was mocked and shunned by the Pentagon and forced to retire early. We violated the basic precepts of habeas corpus and international law in denying legal counsel to prisoners in Guantanamo and elsewhere, and subjecting them to humiliating treatment and torture. We have turned our backs on Iraqis who risked their lives working with the American occupation forces, but have been denied immigration into the United States. In all these respects, we have alienated millions of people throughout the world who once held the United States in the highest regard for its love of liberty and justice.

What can we do? We can get out. Whenever the United States finally decides to leave Iraq, defenders of our failed policies will declare: If only we had stayed.... (This is what they said when we left Vietnam.) But if we stay, and thousands more Americans and tens of thousands more Iraqis die, the invaders would still proclaim that they would succeed if only.... The truth is that the sooner we leave, the sooner we reduce the killing and maiming of Americans, as well as the distrust of America which now extends to most people in most nations. The sooner we leave, the sooner we can participate in international efforts to promote peace and security in the Middle East. The sooner we leave, the sooner we can divert hundreds of billions of dollars from the conduct of an unending war that enriches private corporations and corrupt foreign politicians, to be used to fight poverty and disease in the United States and throughout the world. The sooner we leave, the sooner the United States can regain its place of pride among the free and liberty-loving nations of the world.

## Can Congress Validate the President's Use of Warrantless Wiretapping?

August 11, 2007

On August 4, before adjourning for a month-long recess, Congress quickly ratified, 60-28 in the Senate and 227-183 in the House, President Bush's once-secret program (which had been exposed by The New York Times in December 2005) to allow the National Security Agency to eavesdrop without obtaining a court warrant on telephone and e-mail conversations between people in the United States and "a person reasonably believed to be located outside the United States." The Bush Administration has assured us that we need have no fears regarding this ambiguity. Attorney General Alberto Gonzales, who can now issue surveillance orders without judicial approval, but cannot remember meetings he has attended or the subjects discussed, is required by the new statute to report "incidents of noncompliance."

The requirement that one of the parties is "reasonably believed" to be outside the U.S. implies the assumption that at least one person whose communication is being intercepted is not a U.S. citizen. Of course, this may not be true. It doesn't matter. The Constitution contains no claim that the government may violate the rights of non-citizens or, for that matter, deny non-citizens due process of law or incarcerate them indefinitely without charges, trial, legal representation, and the presentation of evidence. American citizenship is not a prerequisite for the enjoyment of basic rights in the United States.

Congress's rubber-stamping of the President's long-standing independent policy, bearing the Orwellian title of the Protect America Act of 2007, may have been in response to the possibility that several federal courts might conclude that the NSA's surveillance program violated the Foreign Intelligence Surveillance Act. (As a political compromise, the new law expires in six months, a curiously brief period in which to protect America, which was adopted to appease some of the doubting Democrats.)

For all practical purposes, the NSA can now intercept your communications at any time and without court approval. Based on American history and human nature, nothing can be more certain than that zealous spying will invade private protected speech and conduct. The Senate Judiciary Committee has repeatedly requested the Bush Administration to provide legal justification for its warrantless wiretapping program, most recently subpoenaing the National Security Agency, Justice Department, White House, and Office of the Vice President for information, setting August 20 as the return date for the subpoenas. No federal officials have as yet responded.

To allow the government to invade our privacy without a demonstration in court of a vital security need is to denigrate the right of privacy. The fact that this right is not mentioned in the Constitution is a bogus argument against it. Neither are the right of marriage, the right to vote, political parties, judicial review, and other rights and institutions that we consider fundamental in American government.

In 1890, the Harvard Law Review published an essay, "The Right to Privacy," by Samuel D. Warren and Louis D. Brandeis, that became the classic statement of privacy as a fundamental right. Of course, Warren and Brandeis could not then imagine the importance

of what was then the recently-invented telephone or of computer communications a century later. Nevertheless, their claim for a right of privacy remains valid for present-day communications. These very brief extracts demonstrate the tone and relevance of the article:

“The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others....The protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone....The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality....

“We must...conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and...the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection.”

Thirty-eight years later, now-Justice Louis Brandeis applied the doctrine to the interception of telephone messages: “The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them on any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.”

The right of privacy was finally acknowledged in 1965, when the Supreme Court struck down a Connecticut law prohibiting the possession, sale and distribution of contraceptives to married couples. Justice Douglas’s opinion for the Court awkwardly placed the right in the “penumbras” and “emanations” of a number of Bill of Rights guarantees. Justice Goldberg relied in part on the Ninth Amendment’s reference to “other rights retained by the people.” Justice Harlan argued that the liberty clause of the Fourteenth Amendment barred state conduct inconsistent with a government based “on the concept of ordered liberty.” It is clear that the Fourth Amendment’s prohibition of “unreasonable searches and seizures” was prompted by the opposition to warrantless searches conducted in the colonies by the British Empire.

Two years later, the Supreme Court concluded that the Fourth Amendment’s prohibition of “unreasonable searches and seizures” applied to electronic surveillance as well as physical searches. In 1972, the Court held that the Fourth Amendment required a court order for domestic surveillance. The right of privacy has become so well established that it is difficult to imagine any present public figure, except for never-Justice Robert Bork, denying that the American people possess that right.

Were a Justice Brandeis sitting on the Supreme Court today, one can imagine how he would characterize the improper interception of computer and telephone communications. According to a report issued by the Administrative Office of the United States Courts, state and federal courts authorized 1773 interceptions of wire, oral, and electronic communications in 2005. Only one application was denied by the courts. It was revealed in 2005 that the National Security Agency had purchased over 1.9 trillion call-detail records of phone calls made after September 11, 2001. The almost-certain result of the Protect America Act will be an accelerating invasion of the right of privacy.

The right to privacy, as formulated by Warren and Brandeis and later incorporated into constitutional principle, does not deny the right of the government to obtain a valid court warrant in support of a vital national interest. It rejects the unprincipled and indiscriminate use of warrantless wiretapping and surreptitious recording of private conversations in which this Administration has long engaged. Those who continue to believe in the right of privacy must condemn the cowardice of Congress in legislating its support for the continued unguarded interception of private communications without a court order. What was unconstitutional when undertaken by President Bush remains unconstitutional when condoned by Congress.

## Are Suspected Terrorists Entitled to "Due Process of Law"?

August 17, 2007

On August 16, Jose Padilla was found guilty, along with two co-defendants, of conspiracy to "murder, kidnap and maim" people in a foreign country. All three could be sentenced to prison for life. The case of Jose Padilla was brought to public attention by a number of events beginning more than five years ago.

Padilla was a native American citizen, arrested on May 2002, taken a month later to the Navy military brig in South Carolina, kept without human contact, lights, clock or a mirror, and interrogated without an attorney for another twenty-one months before he was permitted to speak to counsel, and retained in the brig for another twenty-two months before being transferred to a civilian prison in Miami, where he made his first court appearance on January 12, 2006. The extraordinary length of time between his arrest and court appearance is a gross violation of the fundamental right of habeas corpus (literally "to have a body"), that is, to bring a party before a judge or court in order to prevent the state from keeping an individual in unlawful restraint.

When Padilla was apprehended at O'Hare International Airport in Chicago upon ending a flight that began in Pakistan, he was carrying a small amount of money, a cell phone and e-mail addresses for Al-Qaeda operatives. President Bush had him designated as an "enemy combatant" and Attorney General John Ashcroft disclosed that he was suspected of planning to detonate a radioactive "dirty bomb" in an American city. More than a year and a half after he was detained, the Second Circuit Court of Appeals in New York ordered his release from military custody and permitted the government, if it chose, to try him in a civilian court. That ruling was suspended when the Bush Administration appealed to the U.S. Supreme Court.

A half-year later (more than two years after his arrest), the Justice Department released details about alleged admissions Padilla had made during interrogations about his involvement with top Al-Qaeda leaders, including the "dirty bomb" plan and another plot to fill apartments in high-rise buildings with natural gas and detonate them using timers. Nearly another eighteen months later, Padilla was added to an existing indictment in Miami claiming that he was part of a North American terror support cell that conspired to "murder, kidnap and maim" people overseas. No mention was made of the "dirty bomb" plot or any other earlier allegations. Fourth U.S. Circuit Court of Appeals Judge J. Michael Luttig criticized the Administration for using one set of facts to justify holding Padilla without charges and another set to persuade a Florida grand jury to indict him. The Supreme Court later overruled the Fourth Circuit and allowed the military to transfer Padilla to face the new criminal charges.

After a three month trial and one day of jury deliberations, Padilla, along with his co-defendants, was found guilty of the charges brought against them. During the trial, Padilla's lawyers unsuccessfully sought to have him declared incompetent to stand trial because of the consequences of torture he had suffered in the military brig. All evidence concerning his military confinement was barred from the trial, as was any reference to the "dirty bomb" accusations. The government said that it had received the information by questioning other

terrorism suspects abroad, and federal rules of evidence prohibit or limit the use of information obtained during such interrogations.

Padilla's co-defendants were two men of Middle Eastern descent, one of whom he had met before. The three were charged with belonging to a terrorism support cell that provided money, recruits and supplies to Islamic extremists. The government had recorded voluminous messages in which his co-conspirators were charged with using code words to assist in supporting violent jihad. Padilla did not participate in any of these messages. The government also played wiretapped calls in which the two co-conspirators discussed a television interview with Osama bin Laden. There was no evidence that Padilla had seen or discussed the interview. Tying Padilla along with the other two men, inextricably linked him with them, but the only evidence linking Padilla to Al Qaeda was his name and six fingerprints on an application to attend an Al Qaeda training camp in Afghanistan in 2000.

Nothing in this summary account of the incarceration, interrogation or trial of Jose Padilla is offered in his defense. On the record, Padilla was a dangerous man. He had been a member of a street gang, was implicated in a murder when he was 13 and confined as a juvenile offender, and was later arrested in Florida in a road-rage shooting incident and spent a year in a Florida jail. It is plausible, if not conclusively proven, that his closeness to Al Qaeda signified a willingness to engage in acts of murder, kidnapping and maiming others. It is possible, although no evidence to this effect has been introduced into any court of law, that Padilla participated in a plot to set off a "dirty bomb." It is possible that he was capable of the most horrendous terrorist acts against innocent people.

If all this were true, the question would remain: Has justice been done? Can a suspected criminal receive justice if he is without human contact or light or basic information in a military prison? Can a suspected criminal receive justice if he has no access to legal counsel for two years? Can a suspected criminal receive justice if his allegations of abusive treatment are barred from his trial because the results of illegal interrogations conducted in prison may not be introduced into evidence? Can a suspected criminal receive justice if he is incarcerated for five years on charges regarding which no evidence has been introduced and that are totally discarded when he is brought to trial?

The Fifth Amendment to the U.S. Constitution states that no one (citizen or non-citizen) shall "be deprived of life, liberty, or property, without due process of law." The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and be informed of nature and cause of the accusation;...and to have the assistance of counsel for his defense." There are no exceptions to these rights.

The rule of law does not apply less to the worst of men than it does to the best. Whatever the extent of Padilla's guilt, justice has not been done.

## Does the Primary System Choose the Best Candidates?

August 25, 2007

Who is the best (that is, the strongest) candidate for either major party to nominate? That's easy. It's the candidate who will appeal most successfully to the party's unswerving supporters, to those voters who are often – but not necessarily – inclined to support that party, to independent voters who boast of voting for the person not the party, and to new voters. That candidate is not necessarily the single most popular potential candidate of the party, but one who is, if not a first choice, an acceptable choice for the largest number of prospective voters. To put it briefly – but watch out for the double negative – the best candidate is the party's least unacceptable candidate.

In 1972, the first year in which the modern primary-caucus system of presidential nomination was decisive, Senator George McGovern won the Democratic nomination because he had won more delegates than any other candidate. In fact, former Vice President Hubert Humphrey, who narrowly lost the 1968 election to Richard Nixon, received slightly more primary votes than McGovern (68,000 more out of a total primary vote of 16 million), but had the support of fewer elected delegates. Each received marginally more than one-quarter of the primary votes.

The rational question the Democratic Party should have asked was which potential candidate would be most likely to maximize the party's support in the election? It is not a reflection on McGovern's integrity, intelligence or experience to observe that, in the light of his being perceived as a very liberal, lesser known and uncharismatic Senator, he was not that candidate. As McGovern himself observed after his defeat, the worst any Democratic presidential candidate has ever suffered, "I wanted to run for president in the worst possible way – and I did." Based on Humphrey's strong run four years earlier under adverse circumstances (the chaos at the 1968 Democratic convention was evidence of a bitterly divided party), he was likely to be a much more popular candidate.

It might have been worse. Until the attempted assassination of Alabama Governor George Wallace on May 15, which resulted in crippling him and removing him from the race, he had decisively won the southern states of Florida, Tennessee and North Carolina, finishing second to McGovern in Wisconsin and second to Humphrey in Pennsylvania, Indiana and West Virginia. The day after the shooting, Wallace won the Michigan and Maryland primaries. At that point, Wallace was well ahead of his rivals. Despite his incapacity, he continued to poll at least twenty percent of the primary vote in three of the four remaining primaries. It is not difficult to imagine, had Wallace not been shot, that he would have had a significant plurality of both votes cast and delegates elected when the Democrats convened their convention. He would then have been the single most popular candidate, but it is unarguable that he, who had been elected Governor on the slogan "Segregation Now, Segregation Tomorrow, and Segregation Forever," could not be nominated, unless the Democrats were willing to commit political suicide.

In 1976, Gerald Ford, who had succeeded to the presidency upon the resignation of Richard Nixon, won the Republican nomination with 53 percent of the primary vote, compared with California Governor Ronald Reagan's 46 percent. Incumbency was decisive in Ford's winning the nomination, but his unconditional pardon of Nixon was probably



decisive in his losing the election. Jimmy Carter, originally a little-known candidate, won 39 percent of the Democratic primary vote in a field without strong opponents and failed to win a primary majority outside of the south and near-south until the last primary day in June. Under the circumstances, Reagan, a less unacceptable candidate than Ford, would have been a likely winner if he had been nominated.

In 1980, liberal Massachusetts Senator Ted Kennedy sought to take the nomination away from President Carter. It soon became apparent that the tragedy at Chappaquiddick was as fatal to his chances as Carter's reputation as a weak president was fatal to his. It is very likely that Reagan would have defeated any Democrat, but it is almost certain that a number of leading Democrats would have fared better than Carter.

It isn't only losing candidates who demonstrate the failure to choose the best candidate. In 1991, thanks to the ease with which the United States won the Gulf war, President George H.W. Bush's popularity reached a record high. He looked unbeatable in 1992. One by one, the leading Democrats declined to compete for their party's nomination. These included Governors Bruce Babbitt of Arizona and Mario Cuomo of New York, Senators Al Gore, Sam Nunn and Paul Simon, Representative Richard Gephardt, and the Reverend Jesse Jackson. All had national reputations and figured in speculation regarding their party's nomination. When they bowed out, the field contained five candidates who may be fairly characterized as the B team: a little-known radical populist Senator (Tom Harkin); an anti-charismatic moderate Senator without a power base (Bob Kerrey); a former Senator who had been ill, looked ill and was still ill, although he lied about his medical condition, and who prescribed unpopular glum remedies for what ailed the United States (Paul Tsongas); a former California Governor widely caricatured as Governor Moonbeam (Jerry Brown), and the long-time and long-running Governor of a poor and small state who, alone among the candidates, had spent the time and money to organize a campaign for the long haul (Bill Clinton).

When Clinton was battered by charges of draft-dodging and marital infidelity on the eve of the first primary in New Hampshire, and later performed poorly in the early non-Southern primaries, none of his rivals had either the financial resources or popular support to capture the lead, and it was too late for a stronger candidate to enter the race. It is futile to speculate as to which of the party leaders who had earlier declined to run would have been the strongest candidate, but several would almost certainly have been stronger.

Now, more than a year before the presidential election of 2008, public opinion polls reveal that the front-runners for their party's nomination are Democrat Hillary Clinton and Republican Rudolph Giuliani. Yet, among the leading candidates of both parties, it is likely that Clinton and Giuliani will confront the most opposition and skepticism among party regulars and others inclined to vote for that party.

Clinton's unfavorable rating in the electorate is approximately equal to her favorable rating. This is due to her critical role in sidetracking universal single payer health insurance in 1993-94, principled antipathy to having a husband and wife both serve as President (as much as opposition to a father and son, but that was not the choice of the Democrats), the negative reaction of many likely Democratic voters to Clinton's personality, and the largely unexpressed reluctance of many voters to elect a woman. A very large number of voters

have a similar unexpressed reluctance to support an African-American candidate. The primary difference is that a large proportion of voters who are reluctant to support a woman are inclined to support a Democrat, while a much smaller proportion of voters who are reluctant to support a black candidate are likely to support a Democrat. If Clinton is nominated, loyal Democrats are likely to suppress their doubts and vote for her, but critical independents are less certain to do so.

Republican partisans will exploit the potential weaknesses of their rivals, including Romney's Mormonism and McCain's departures from party orthodoxy on campaign reform and immigration. However, Giuliani's vulnerabilities are likely to prove to be more critical, including liberal positions on abortion and gay marriage, his three marriages and informing his second wife in a press conference of his intent to divorce her, his alienation from his children, and increasing criticism of his public conduct after 9/11, the very event which made him a major national political figure. At least until he becomes an announced candidate, Fred Thompson may be the least unacceptable Republican. Of course, if Clinton and Giuliani are both nominated, they won't both lose, any more than both Nixon and McGovern could lose in 1972. But many voters will confront an unhappy choice.

The flaw revealed in this, the tenth election in which the presidential candidates will have been chosen by the primary-caucus system, is that the unrepresentative voters who participate in the process choose the one candidate they most favor (and who may win the nomination with only a small plurality of the primary vote), and not the candidate who has the widest support within the party, let alone in the general electorate. It isn't the only flaw of the primary system, but it significant enough to undermine any pretense that the process reflects the public's will.

Is a Vice President Necessary?  
September 1, 2007

The thought must occur to President Bush's harshest critics that, as unpopular as he is, even they fear the possibility of his departure before the end of his second term. There cannot be many Americans who might consider removing Bush who would be pleased by the prospect of replacing him with Vice President Cheney.

It isn't a unique situation. President Richard Nixon was deeply embroiled in the Watergate scandal shortly after his reelection in 1972, but those who most condemned his shameful behavior feared that, if he were removed from office, Vice President Spiro Agnew would become the president. (The authors of the Constitution had not clearly indicated that, in such circumstances, the vice president would succeed to the title of president, but John Tyler, the first vice president whose president died one month after taking office, had himself sworn in, and every succeeding vice president has done the same.) Fortunately for Nixon's critics, Agnew resigned nine months into his second term in an agreement that allowed him to escape trial on charges of having committed bribery, extortion, and tax evasion during his tenure as governor of Maryland. This cleared the way for the congressional inquiry into Nixon's unlawful conduct that led to his resignation less than a year later. Imagine that Nixon had left office before Agnew, and this ignorant, bigoted and corrupt man, chosen as Nixon's running-mate because he had delivered his state's support to Nixon at a crucial point in the 1968 nomination campaign, had become President of the United States.

In the same fashion, imagine if President George H.W. Bush had departed from the presidency and been replaced by Vice President Dan Quayle, a choice of a running-mate that shocked even Bush's supporters. Quayle was an amiable, ill-prepared and under-equipped Senator who is best-remembered two decades later for his misspelling of "potato" (he told a student to add an "e") and a number of verbal gaffes, perhaps most famously his reference to the United Negro College Fund slogan, "A mind is a terrible thing to waste," as "What a waste it is to lose one's mind or not having a mind is being wasteful. How true that is."

Today a very unpopular President Bush has an even more unpopular Vice President Dick Cheney. When Congress was examining President Nixon's role in the Watergate break-in, a business associate reported that Cheney said (and Cheney has never denied saying it), that Watergate was "a political ploy by the president's enemies." His support for unchecked executive power was later on the public record when, as a member of Congress, he opposed congressional investigation of possible abuses of power in the Iran-Contra scandal and commended Colonel Oliver North as "the most effective and impressive witness certainly this committee has heard."

As Vice President, Cheney has repeatedly stated that Saddam Hussein was involved in 9/11, that terrorist Abu Musab al Zarqawi established an Al Qaeda operation in Iraq, and made other claims that have been totally refuted; he persuaded President Bush to sign an order denying foreign terrorism suspects access to any military or civilian court (without informing either Secretary of State Powell or National Security Adviser Rice); he advocated "robust interrogation" of suspects, a code phrase for torture; he refused to tell Congress

whom he had met to develop energy policy; he has refused to respond to a subpoena from a congressional committee, and offered the far-fetched claim (abandoned after widespread ridicule) that he was not an “entity within the executive branch.”

Of course, if he were not vice president, Cheney could make all of these unfounded (literally anti-republican and anti-democratic) claims, and President Bush could, as he has, adopt them as his own. However, because he is vice president, if President Bush was removed from office, Cheney would become president. It is beyond argument that neither Agnew nor Quayle nor Cheney would have received serious consideration as a presidential candidate. On the evidence of their political backgrounds, Agnew and Quayle would have been major embarrassments as President of the United States and Cheney would be an unmitigated disaster. His arrogance, obdurateness, passion for secrecy, and disrespect for the clear mandates of the Constitution would inspire unending constitutional crises.

Once upon a time, the vice presidency was a position that inspired ridicule. Mr. Dooley, Finley Peter Dunne’s famous fictional politician, observed: “Th’ presidency is th’ highest office in th’ gift iv th’ people. Th’ vice-presidency is th’ next highest an’ th’ lowest, It isn’t a crime exactly. Ye can’t be sent to jail f’r it, but it’s a kind iv a disgrace. It’s like writin’ anonymous letters.” In a similar humorous and derogatory spirit, the office was lampooned in the Pulitzer Prize-winning musical *Of Thee I Sing*, when Vice President Alexander P. Throttlebottom discovers that his sole constitutional power is to preside over the U.S. Senate, in which he cannot introduce legislation or speak, but can cast tie-breaking votes, which don’t occur once in the average vice president’s career.

The vice presidency is no longer a laughing matter. All four nineteenth century vice presidents who succeeded to the presidency upon the death of the president had been at odds with the presidents under whom they served, and all failed to be nominated in their own right before the next election. By contrast, four of five vice presidents who succeeded upon the death of a president in the twentieth century were subsequently elected in their own right. The fifth, Gerald Ford, who succeeded on the resignation of President Nixon, failed to be elected, in large part because of the blanket pardon he had given to Nixon. Altogether, the five 20th-century vice presidents who succeeded to the office served (including four elected terms, to which they would not have been elected if they had not been first elevated to the presidency) for a little more than 22 years and ten months, very nearly a quarter of a century.

In addition, other elections have been critically influenced by an earlier president’s choice of a running-mate. VP Nixon lost in 1960 but won twice in 1968 and 1972. Former VP Mondale lost in 1984, VP Bush won in 1988, and VP Gore was denied his victory in 2000. The presidential election of 2008 will be only the third election since 1900 in which neither an incumbent president nor a present or past vice president is a major party candidate.

The argument that an incumbent vice president is better prepared to assume the presidency is often untrue.

John Tyler, the first vice president to succeed on the death of an elected president, provides an instructive lesson. One month after his inauguration in 1841, President William

Henry Harrison died and Tyler became president, opposed to most of Harrison's policies and reviled for the next four years by the party that had elected him. Theodore Roosevelt, almost certainly the most highly regarded president who succeeded on the death of a president, became vice president because the death of President William McKinley's first vice president gave Republican New York State boss Thomas Platt the opportunity to get rid of Roosevelt as the state's governor by having him "kicked upstairs" to the vice presidency, where he would never be heard from again. Of course, those who got rid of Roosevelt did not anticipate McKinley's assassination six months into his second term, when Roosevelt became the president and profoundly reshaped the politics of his party and the nation.

Dick Cheney to the contrary notwithstanding, vice presidents have rarely been the confidante of the president. When Harry Truman was sworn in as president immediately after the death of President Franklin D. Roosevelt, Secretary of War Henry Stimson took him into a corner to tell him about the atomic bomb. Before that, no one had thought it important to tell the vice president.

There has to be a better way. Suppose a sudden vacancy occurred in the presidency. That day the members of Congress could either quickly convene or be polled. On the first or second ballot, a new president could be chosen. If a majority of the 535 members of Congress were of the same party as the departed president, they would choose a leader of that party, more often than not one who would have declined selection as vice president in our present system. If a majority of the members of Congress were not of the president's party, they would opt for a change, very possibly choosing their party's defeated presidential candidate.

Presidential candidates often make this choice of a running-mate at the very last moment in a national convention, sometimes as a quid pro quo for convention support or as a concession to their opponents in the party. We don't choose a president in order for him to choose his successor, but that is what so often occurs. There has to be a better way, and that way would involve the elimination of the office of vice president.

Does Ronald Reagan Have a Conservative Heir?  
September 7, 2007

Ronald Reagan's election in 1980 marked the beginning of an extraordinary change in American politics, made evident by sharper ideological differences between the leadership of the major parties than had been seen since before the presidency of Franklin D. Roosevelt. The one-sidedness of the 1932 Democratic triumph ushered in an era of one-party dominance that resulted in their control of the House of Representatives for fifty-eight and of the Senate for fifty-two of the next sixty-two years and five consecutive presidential victories before losing to an unbeatable war hero.

This was achieved initially as a result of the Democratic Party's remarkable ability to hold together the most disparate interests. Southern white supremacists were there because they had been there since Lincoln "freed the slaves." Twentieth-century working-class immigrants were there because there was no congenial home for them in a Republican Party whose leaders represented capitalist power and a laissez-faire philosophy epitomized in Calvin Coolidge's observation that the business of government is business. Black Americans were there because they were ignored by the party that had ended slavery and they responded to the New Deal's egalitarianism.

Republicans recognized that they had to make a broader appeal and, in choosing presidential nominees, they reached beyond conservative ideologues to nominate New York Governor Thomas E. Dewey (twice) and former Democrat Wendell Willkie before winning the presidency with General Dwight D. Eisenhower, whose domestic political leanings were largely unknown. Eisenhower was the candidate of the liberal internationalist wing of the party, barely and bitterly winning the nomination in 1952 against Ohio Senator Robert A. Taft, an authentic and beloved conservative widely known as Mr. Republican.

This shift toward more moderate Republican presidential candidates was reflected in efforts to broaden the party base, in order to make it more cross-sectional and multi-factional. Nevertheless, the Democratic Party remained more liberal, despite the power of conservative southerners who chaired most of the major congressional committees, and the Republican Party remained more conservative, despite the presence of eastern internationalists and middle-western LaFollette populists. The Democrats did a better job of keeping their coalition than the Republicans did of creating theirs, as was evident in the civil rights controversies, when both the leading advocates and leading opponents of racial equality were in the Democratic Party.

After Vice President Richard Nixon's close defeat in 1960, conservatives captured enough Republican Party state organizations to nominate Arizona Senator Barry Goldwater, who, true to his promise to offer "a choice, not an echo," championed the reduced size of government, repeal of the graduated income tax, an end to federal aid to education, and voluntary Social Security. Goldwater had written *The Conscience of a Conservative*, and he became the embodiment of that conscience.

In retrospect, Goldwater's overwhelming defeat (equaled only by Democrat George McGovern's loss eight years later) can be seen as the birth pangs of a new conservative

alliance. Goldwater won only his home state of Arizona and the five southern states with the greatest proportion of black citizens, the states in which the issue of race was most important. The Solid South of a century after the Civil War was solid no more. The change begun by the Supreme Court's 1954 decision in *Brown v. Board of Education* outlawing segregated public education was accelerated by passage of the Civil Rights Act in 1964 and the Voting Rights Act in 1965. The political landscape was decisively altered by school busing, forced school integration, affirmative action in higher education and hiring, white flight, race riots, and the perception of increased street crime. The enduring political consequence has been that no Democratic presidential candidate since Lyndon Johnson in 1964 has received a majority of white votes.

Despite the existence of laws inspired by religious beliefs (Sunday closing laws, prohibiting the mailing of immoral material, criminalization of birth control information and devices, and the insertion of "under God" into the Pledge of Allegiance), religious political influence abated after the 1925 Scopes "monkey trial," in which a young science teacher was convicted for teaching evolutionary theory. It was a pyrrhic victory for religious orthodoxy because the public reaction was a political defeat for the public teaching of religious doctrine.

Religious moral conviction reemerged as a political force in 1965 when the United States Supreme Court upheld the right of married couples to obtain contraceptives. In 1973 in *Roe v. Wade*, the Supreme Court went further in recognizing a woman's right to an abortion, inspiring a powerful grass-roots movement that has ever since aspired to reverse this decision by the selection of Supreme Court Justices who are likely to vote to overturn *Roe* or, short of that, limit the permissible period or methods of abortions.

The new mobilization of religious and racial conservatism became allied with the economic conservatism of business protectionism, laissez-faire government, and fiscal conservatism to reshape the Republican Party. It needed a candidate who would articulate this new conservative coalition, and it found him in Ronald Reagan. Reagan was identified with opposition to abortion, obscenity and pornography; respect for the flag and support for school prayer, and certain and severe punishment for violent crimes. Reagan's presidency accompanied – and perhaps inspired – the revival of religious fundamentalism and equating American patriotism with Republican conservatism.

It is only peripherally relevant to this alliance symbolized by Reagan that his behavior was not nearly as conservative as his rhetoric. He frequently invoked God, but was not a churchgoer. He had been a populist before he became a conservative and, as president, he supported raising Social Security taxes rather than cutting benefits. In 1964, he characterized Medicare as socialized medicine, but Medicare spending increased by more than ten percent in each year of his presidency. He promised to decrease the size of government; it increased. He promised to cut the budget; it grew larger. He promised to decrease entitlements; in office, he supported vast increases. He promised to abolish two Cabinet departments; they were retained and another was created. He promised to outlaw abortion; nothing happened. Nevertheless, the symbolic reality was that Reagan made most Americans feel good about themselves and their country, and conservatives believed that they had an ally in the White House.

The conservative coalition could not feel a similar comradeship with Reagan's vice president and successor, George H. W. Bush, who was defeated after one term, in part because of the bitterness of economic conservatives at his betrayal of his pledge of "no new taxes." But they had captured the party machinery and, aided by Democratic President Bill Clinton's political ineptitude and neglect of the party organization, succeeded in winning control of Congress in 1994, holding it for the last six years of the Clinton presidency and the first six of George W. Bush, the truest conservative to occupy the White House in the lifetime of anyone now living.

Even in victory, insecurity was apparent in the now-powerful conservative coalition. Where earlier conventions featured major addresses by staunch conservatives, in 2004 the most prominent speakers included John McCain, Arnold Schwarzenegger and Rudolph Giuliani. It can be dismissed as window-dressing, but it was clearly designed to entice more customers into the store. The reason was that the existence of a new conservative majority had not yet been established.

Al Gore outpolled Bush in 2000 and the party vote that year for the House was almost a dead heat, with little more than one vote in every thousand separating them. Four years later, the Republican margin of victory for House candidates was less than three votes in every thousand votes cast. Democrats received more votes than Republicans in the one hundred Senate races from 2000 to 2004 or 2002 to 2006. Republican control of Congress was due more to gerrymandering in the House and its dominance in the rural, less populous states than to greater popular support.

Is the confidence of the conservative coalition in the rightness (take it either way) of their cause diminishing? Their three leading aspirants for the 2008 presidential nomination are a former Governor of ultra-liberal Massachusetts, a former Mayor of New York City (neither of which any Republican can hope to win), and a distinguished Senator whose complex public record ranges from excoriating President Bush to embracing his most controversial policies. Fred Thompson has finally announced his candidacy as the savior of the conservative cause. Better known as a television and movie actor than as an eight-year Senator, his conservative credentials are modest compared with the records of many past and present Governors and members of Congress.

In order to win the nomination, each of these four leading candidates must now vow that he is the most authentic heir to Reagan Republicanism without identifying himself too closely with the current president, and then, to win the election, he must radically moderate his positions to win the support of a much broader electorate. Reagan could preach in 1980 that it was "morning in America." Is it possible that it is now much later in the day – perhaps too late for his conservatism?



Does The President or The General Decide How  
or Whether to Prosecute War?  
September 15, 2007

It is difficult to imagine a precedent for the buildup to and presentation of what President Bush called “the Petraeus report” (there has been no formal report, simply the general’s testimony) before House and Senate committees on the status of America’s war in Iraq. General Petraeus has been in charge of American forces in Iraq one half-year into the so-called “surge,” in which 30,000 additional troops had been added to the 130,000 already engaged in Iraq. President Bush’s prime-time address after the general’s two days of testimony invoked the general so often, one might have concluded that he was referring to the delivery of a new sacred text.

In fact, there was nothing new or unanticipated in the general’s testimony. That could not come as a surprise. A commanding general on active service does not rebut or qualify his president’s optimistic prognosis. If he did, he would be removed, as President Lincoln removed General George McClellan as commander of the Army of the Potomac, because of his failure to engage the Confederate Army and win the Civil War.

Similarly, when a general takes actions that contradict the president’s behavior, he will be removed. President Harry S Truman relieved General Douglas MacArthur of his command for insubordination when he issued an unauthorized statement threatening to expand the Korean war into China if it resisted, while the president was preparing to engage North Korea and China in peace negotiations. MacArthur’s independence led to the loss of many American lives. (These events are retold in David Halberstam’s posthumous *The Coldest Winter: America and the Korean War*, excerpted in “MacArthur’s Grand Illusion,” in the October 2007 issue of *Vanity Fair*.) General Omar Bradley expressed the prevalent military as well as political sentiment when he said that General MacArthur’s action “would have involved us in the wrong war in the wrong place at the wrong time against the wrong enemy.”

Disagreement is not the only inappropriate behavior for a general. It is also undesirable for a general to allow himself to become (albeit at the president’s instigation) a spokesperson for what is, after all, the president’s partisan politics. No longer simply a general, then-Secretary of State Colin Powell remained for the American public the general above politics and the Bush Administration’s most credible spokesperson when he was prevailed upon to address the United Nations to justify what would subsequently be America’s unilateral invasion of Iraq. Virtually no assertions of “facts” were true in Powell’s presentation of the doubtful and untruthful “evidence” supporting Iraq’s close alliance with Al Qaeda, possession of weapons of mass destruction, and intention to employ those weapons against the United States. Nevertheless, the authority of General Powell’s endorsement seemed credible to a public that would have been skeptical if these claims had come from another spokesperson.

That was the position that General Petraeus put himself into when just weeks before the 2004 presidential election, *The Washington Post* published an op-ed piece by him. Ever the optimist, General Petraeus saw “tangible progress” in Iraqi security forces, enabling

“Iraqis to shoulder more of the load for their own security.” Petraeus detailed military victories and the increased capacity of the police forces. Regrettably, General Petraeus has not enjoyed the military success that the president and he have both implied that he has had. Sectarian warfare has escalated in areas under his command. His efforts at reaching political agreements have failed, as have the efforts of others. The loss of billions of dollars of Iraqi weapons have led to a major criminal investigation of Army mismanagement. Despite the general’s praise, recent reports recommend that the police should be disbanded because of their dismal failure to improve security.

Three years later, in his long-anticipated evaluation of the “surge,” the general once again has said that some progress had been made on the ground, adding that there were fewer fatalities in some areas in recent months [but didn’t count Sunnis killing Sunnis, Shias killing Shias, or assassination by being shot in the front of the head as distinct from the rear], and that some tribal groups that once used their weapons to kill Americans had entered into agreement with the Americans to use their new American-supplied weapons to kill insurgents. In passing, the president and general have acknowledged that no progress had been made to create a unified government in the devastated country. Most revealing of the limits of military judgment was the answer General Petraeus couldn’t give when asked whether America is safer. He confessed that he has not entertained that question.

It is appropriate that a general should echo the military judgment of the president, if he agrees with it. What is deliberately deceitful is the president’s pretense that he will be guided by the conclusions of his generals, as Bush stated one month before the general came home: “Troop levels will be decided by our commanders on the ground, not by political figures in Washington, D.C.” He couldn’t wait for General Petraeus’s testimony and flew to a secret desert air base 120 miles from Baghdad to declare that the surge is working. Of course, he already knew the general’s conclusion, because when Bush disagrees with a general, the general is removed or retired.

**What did generals think of the invasion?** General Eric Shinseki, then Army Chief of Staff, asked by a Senate committee to estimate the number of ground troops necessary to support the invasion of Iraq, replied “several hundred thousand.” Defense Secretary Rumsfeld and Deputy Defense Secretary Wolfowitz immediately declared that was “wildly off the mark.” Shinseki soon retired. Commander-in-Chief United States Central Command General John Abizaid has since said that Shinseki’s estimate was correct. General Bernard Trainor has described a willfully self-deluding planning process. General William Odom, former director of the National Security Agency, has said that the American invasion of Iraq might be the worse strategic mistake in American history.

**What did generals think of America’s conduct in Iraq?** General Antonio Taguba, charged with reporting on the documented horrors and humiliations suffered by prisoners at Abu Ghraib (which provided the terrorists with their most persuasive recruitment tool) concluded that the crimes deserved severe punishment. Instead, the Department of Defense punished only the lowest-ranking soldiers and General Taguba was exiled to a Pentagon desk job and early retirement. CENTCOM General Anthony Zinni, later Bush’s special envoy to the Middle East, has stated: “In the lead up to the Iraq war and its later conduct, I saw at a minimum, true dereliction, negligence and irresponsibility; at

worst, lying, incompetence and corruption.” Our mistakes, Zinni argues, include denying priority to the war on Al Qaeda in Afghanistan, disbanding the Iraqi army, and deBaathifying the police. The result of our ill-advised unilateral aggressive intervention, General Zinni concluded, is that “we are now being viewed as the modern crusaders, as the modern colonial power in this part of the world.”

**Did the generals think that the “surge” was desirable?** When General Abizaid was pressed this past November by Senator John McCain on the need for an increased U.S. military presence, he replied: “Senator McCain, I met with every divisional commander, General [George] Casey, the core commander, General [Martin] Dempsey [head of the Multi-National Security Transition Command in Iraq], we all talked together. And I said, in your professional opinion, if we were to bring in more American troops now, does it add considerably to our ability to achieve success in Iraq? And they all said no. And the reason is because we want the Iraqis to do more. It is easy for the Iraqis to rely upon us to do this work. I believe that more American forces prevent the Iraqis from doing more, from taking more responsibility for their own future.”

**What did generals think of the civilian strategists of the war?** General Paul Eaton, who helped revive the Iraqi army, described Rumsfeld as “incompetent strategically, operationally and tactically.” General John Batiste, commander of an infantry division in Iraq, turned down a promotion and a tour in Iraq as the second-ranking military officer, and chose to retire rather than continue to work for Rumsfeld. In 2006, according to a Military Times poll, almost 60 percent of the members of the United States Armed Forces do not believe that the civilians in the Pentagon had their “best interests at heart.”

Each month of the surge so far has cost \$10 billion and the lives of one hundred American troops. Senator McCain warns that withdrawal would increase “the potential for genocide, wider war, spiraling oil prices and the perception of strategic American defeat.” Those grim consequences may occur. But it is the responsibility of President Bush, not of his generals, to clearly spell out when and under what circumstances the risk of these dire consequences of American withdrawal would be reduced. Absent President Bush’s clear analysis and projection of America’s future prospects in Iraq, his unstated cynical answer is that this is his legacy to a future Administration.

POSTSCRIPT: Does the President or the General  
Decide Whether and How to Wage War?  
September 19, 2007

MoveOn's sharp criticism of General Petraeus (calling him General Betray Us) is a stupid tactic and a completely false assessment of moral and military responsibility. This clumsy personal attack permits defenders of the Iraq war to deflect criticism of its conception and conduct and focus on a misguided attempt at character assassination. General Petraeus is neither the savior President Bush has represented him as being nor is he the subversive officer MoveOn has portrayed. He is simply the general President Bush has settled on to be the spokesman for his failed policies. The war is Bush's war. The false rationale for invading Iraq was accepted by President Bush. The grievous errors committed in the conduct of the war were the responsibility of the Commander-in-Chief, President Bush, who had the power to reverse errors. He did not. The loss of American prestige and good-will throughout the world is the consequence of policies pursued by President Bush. The absence of an exit strategy results from an inability to assess alternatives or face reality by President Bush.

Similarly, any charge that lays responsibility for America's greatest foreign policy failure upon Vice President Cheney or former Defense Secretary Rumsfeld or the proselytizers for American hegemony ignores the fundamental fact that none of the grievous errors could have taken place without the action of President Bush. It is even more inexcusable to blame the general who was eager or willing to carry out the president's orders. What President Truman reminded himself of in the Oval Office has not changed. The buck stops there.

Will Healthcare Be the Primary Domestic Issue in the 2008 Election?  
September 22, 2007

Americans are aware of the paradox that, although the United States has the most sophisticated and innovative medical establishment in the world, more than one-quarter of all Americans derive very little benefit from it. At least forty-five million people in the United States have no health insurance and another forty million cannot count on enough coverage to provide for appropriate treatment in the event of a major disease or long-term care. President George W. Bush, with his curious form of compassionate conservatism, has pointed out that the emergency wards of hospitals are open to all. He has not pointed out that many emergency wards have closed because hospitals cannot afford them, that the cost of emergency treatment is far greater than timely and regular medical care, and that emergency treatment is often too late to be of value.

The present congressional consideration of health care for children has reminded the president that he is not only a compassionate conservative; he is also a fiscal conservative, despite the fact that, since taking office, he has turned a great surplus into the greatest indebtedness in American history, several times setting records for the biggest single yearly dollar increase in the debt. Nevertheless, despite the harsh criticism by former Federal Reserve Board Chairman Alan Greenspan, that Bush has betrayed conservatism, he plans to stem the tide of borrowing that has, on average, exceeded \$500 billion a year by threatening to veto a children's health insurance bill that would provide coverage for an additional four million children (beyond the 6.6 million already covered) at an additional cost of only \$35 billion over five years. If Congress passes the bill and Bush vetoes it, health care for children will provide the centerpiece for what the Democrats will seek to make the defining domestic issue in the 2008 election.

On September 20, five leading Democrats – Joseph Biden, Hillary Clinton, Christopher Dodd, John Edwards, and Bill Richardson (Barack Obama was invited, but declined) – participated, with Judy Woodruff as moderator, in a wide-ranging ninety-minute discussion of health care. It was less confrontational than other public discussions in which the Democratic candidates have participated, but it was more informative because it was thoughtful and reasonably detailed. While there were a few not-so-subtle thrusts directed by one candidate at another, it was clear that all five believe in national health coverage, although they differ as to how it can be achieved.

Apparently, some doctors share that conviction. In 2004, in a physician-sponsored random sample of Massachusetts doctors, 63.5 percent of the 904 responding doctors believed a single-payer plan provided the best care for most people, 25.8 percent chose a fee-for-service system, and 10.7 percent selected managed care. Although many respondents doubted that most of their physician colleagues would support a single-payer system, most agreed that government has a responsibility to ensure the provision of medical care, it would be worth giving up some income to reduce paperwork, insurance firms should not play a major role in health care delivery, and they would prefer to work under a salary system. Of course, this may not reflect national preferences among doctors, but each of these changes could play an important role in a national health insurance system.

Earlier this year, John Edwards was the first Democrat to propose a detailed health care plan. One idea appears to have caught on with other Democratic aspirants. Edwards and his leading rivals agree that the American people should have the same health plan as members of Congress, which includes unlimited doctor visits, no deductibles and no co-payments, at a cost of \$35 a month. Edwards has now gone further, promising legislation that would end the health insurance of the president and Congress in six months if they fail to adopt a comparable program for all Americans. Edwards would also minimize, if not eliminate, the role (and the profits) of insurance companies.

Barack Obama has also offered a detailed plan which would insure all children and require employers to share the costs of insuring workers, but would not mandate insurance for everyone. Hillary Clinton's new plan would require it. Clinton would offer the equivalent of the congressional plan as one option, but she opposes the creation of a federal agency to achieve this objective. None of her rivals has taken Clinton to task for her commission's 1994 recommendation to President Bill Clinton of a complex proposal that no one seemed to understand, except for its clear rejection of the single payer plan that had been favored in 1992-93 by many Democratic leaders in Congress.

The various plans sometimes differ or are unclear as to the extent to which individuals could buy coverage, employers would contribute, or the national government would underwrite the costs. When the Democratic candidates speculate as to the cost (often estimated at \$100 billion or more), they tend to agree that a large part of this could be paid by repealing the income tax cuts on incomes above \$200,000 enacted in the Bush presidency. Edwards would go further and increase the tax on investment income to the rate on earned income. Several candidates propose efficiencies in the health and tax systems that would serve to cut the cost of health care.

All of this stands in sharp contrast with the positions of the leading Republicans. Rudolph Giuliani predicts that the various Democratic plans would increase taxes and decrease the amount and quality of patient care (for example, increasing the waiting time to obtain an appointment). Giuliani advocates a \$7500 tax deduction per taxpayer to defray insurance costs and tax credits for poor workers to supplement Medicaid and employer contributions. John McCain would go further than some of his Republican rivals, favoring prescription drug coverage for the elderly and expanded children's coverage. Mitt Romney would offer incentives for the states to expand affordable coverage, condemning the Democratic proposals as "European-style socialized medicine." The other Republican hopefuls (Fred Thompson, Sam Brownback, Mike Huckabee, Ron Paul, and Duncan Hunter) all voice variations of "market-based solutions" and "market-driven expansion" of affordable coverage to express their opposition to any government-run program, let alone guaranteed universal coverage.

Numerous statistics demonstrate that far less prosperous countries have far better health records. The United States ranks seventeenth in the percentage of one-year-old children who are fully immunized against polio. China and Brazil both rank ahead of the U.S. in this regard. Many countries, including Jordan and Egypt, have lower rates of low birth-rate babies than the U.S. Shockingly, but not surprisingly, these figures reflect the fact

that, among industrialized nations, the United States has the highest percentage of children living below the poverty line.

The World Health Organization (WHO) of the United Nations has often pointed out that the United States ranks behind other industrial nations in what the WHO calls “healthy life expectancy.” All of these and other health statistics show a wide disparity along racial and ethnic lines, with blacks and Hispanics overrepresented among the least privileged populations. Dr. Ashish Jha of the Harvard School of Public Health has testified that surgeons are very much less likely to offer bypass surgery to black men than to white men who have had a heart attack similar to that suffered by President Bill Clinton.

“Socialized medicine” is a phrase that critics will employ and advocates will shun. Rational examination discloses that, by other names, socialization of public benefits have a place -- an honored place -- in American public policy. Free public education is the oldest example. More than seventy years ago, critics railed against adoption of the Social Security Act, which provides an assured old-age income to almost all older Americans. Medicare is Social Security’s logical extension, in that it extends health care beyond the recipient’s ability to pay. Scare tactics, such as condemnation of reform as “socialism” without a rational analysis of what particular reforms do or fail to do, will not dispose of the challenge, not if the American people believe, as evidence increasingly indicates they do believe, that the government has a role to play in the protection of health and the provision of essential health services.

The candidates are obliged to answer these questions. Where does universal health coverage exist and how well does it work? Does the quality of health care and its cost decline or improve under a government-mandated health care program? Is it compatible with private medical insurance? Does it require the regulation of pharmaceutical companies and drug prices? What is most remarkable is that this debate in the United States will take place, if it takes place, decades after it was resolved in other industrial countries. And that also raises the question as to why the richest country in the world, with its unparalleled medical research and resources, has come so late to this issue.

What Are American Soldiers Doing in Iraq?  
September 29, 2007

*Seven American soldiers serving in Iraq wrote the following op-ed piece that appeared in The New York Times on August 19, 2007. I recently reread it and urge everyone to do so. Only one salient fact has changed since they wrote it.*

**The War As We Saw It** by Buddhika Jayamaha, Wesley D. Smith, Jeremy Roebuck, Omar Mora, Edward Sandmeier, Yance T. Gray and Jeremy A. Murphy

Viewed from Iraq at the tail end of a 15-month deployment, the political debate in Washington is indeed surreal. Counterinsurgency is, by definition, a competition between insurgents and counterinsurgents for the control and support of a population. To believe that Americans, with an occupying force that long ago outlived its reluctant welcome, can win over a recalcitrant local population and win this counterinsurgency is far-fetched. As responsible infantrymen and noncommissioned officers with the 82nd Airborne Division soon heading back home, we are skeptical of recent press coverage portraying the conflict as increasingly manageable and feel it has neglected the mounting civil, political and social unrest we see every day. (Obviously, these are our personal views and should not be seen as official within our chain of command.)

The claim that we are increasingly in control of the battlefields in Iraq is an assessment arrived at through a flawed, American-centered framework. Yes, we are militarily superior, but our successes are offset by failures elsewhere. What soldiers call the "battle space" remains the same, with changes only at the margins. It is crowded with actors who do not fit neatly into boxes: Sunni extremists, Al Qaeda terrorists, Shiite militiamen, criminals and armed tribes. This situation is made more complex by the questionable loyalties and Janus-faced role of the Iraqi police and Iraqi Army, which have been trained and armed at United States taxpayers' expense.

A few nights ago, for example, we witnessed the death of one American soldier and the critical wounding of two others when a lethal armor-piercing explosive was detonated between an Iraqi Army checkpoint and a police one. Local Iraqis readily testified to American investigators that Iraqi police and Army officers escorted the triggermen and helped plant the bomb. These civilians highlighted their own predicament: had they informed the Americans of the bomb before the incident, the Iraqi Army, the police or the local Shiite militia would have killed their families.

As many grunts will tell you, this is a near-routine event. Reports that a majority of Iraqi Army commanders are now reliable partners can be considered only misleading rhetoric. The truth is that battalion commanders, even if well meaning, have little to no influence over the thousands of obstinate men under them, in an incoherent chain of command, who are really loyal only to their militias.

Similarly, Sunnis, who have been underrepresented in the new Iraqi armed forces, now find themselves forming militias, sometimes with our tacit support. Sunnis recognize that the best guarantee they may have against Shiite militias and the Shiite-dominated



government is to form their own armed bands. We arm them to aid in our fight against Al Qaeda.

However, while creating proxies is essential in winning a counterinsurgency, it requires that the proxies are loyal to the center that we claim to support. Armed Sunni tribes have indeed become effective surrogates, but the enduring question is where their loyalties would lie in our absence. The Iraqi government finds itself working at cross purposes with us on this issue because it is justifiably fearful that Sunni militias will turn on it should the Americans leave.

In short, we operate in a bewildering context of determined enemies and questionable allies, one where the balance of forces on the ground remains entirely unclear. (In the course of writing this article, this fact became all too clear: one of us, Staff Sergeant Murphy, an Army Ranger and reconnaissance team leader, was shot in the head during a "time-sensitive target acquisition mission" on Aug. 12; he is expected to survive and is being flown to a military hospital in the United States.) While we have the will and the resources to fight in this context, we are effectively hamstrung because realities on the ground require measures we will always refuse - namely, the widespread use of lethal and brutal force.

Given the situation, it is important not to assess security from an American-centered perspective. The ability of, say, American observers to safely walk down the streets of formerly violent towns is not a resounding indicator of security. What matters is the experience of the local citizenry and the future of our counterinsurgency. When we take this view, we see that a vast majority of Iraqis feel increasingly insecure and view us as an occupation force that has failed to produce normalcy after four years and is increasingly unlikely to do so as we continue to arm each warring side.

Coupling our military strategy to an insistence that the Iraqis meet political benchmarks for reconciliation is also unhelpful. The morass in the government has fueled impatience and confusion while providing no semblance of security to average Iraqis. Leaders are far from arriving at a lasting political settlement. This should not be surprising, since a lasting political solution will not be possible while the military situation remains in constant flux.

The Iraqi government is run by the main coalition partners of the Shiite-dominated United Iraqi Alliance, with Kurds as minority members. The Shiite clerical establishment formed the alliance to make sure its people did not succumb to the same mistake as in 1920: rebelling against the occupying Western force (then the British) and losing what they believed was their inherent right to rule Iraq as the majority. The qualified and reluctant welcome we received from the Shiites since the invasion has to be seen in that historical context. They saw in us something useful for the moment.

Now that moment is passing, as the Shiites have achieved what they believe is rightfully theirs. Their next task is to figure out how best to consolidate the gains, because reconciliation without consolidation risks losing it all. Washington's insistence that the Iraqis correct the three gravest mistakes we made - de-Baathification, the dismantling of the Iraqi Army and the creation of a loose federalist system of government - places us at cross purposes with the government we have committed to support.

Political reconciliation in Iraq will occur, but not at our insistence or in ways that meet our benchmarks. It will happen on Iraqi terms when the reality on the battlefield is congruent with that in the political sphere. There will be no magnanimous solutions that please every party the way we expect, and there will be winners and losers. The choice we have left is to decide which side we will take. Trying to please every party in the conflict - as we do now - will only ensure we are hated by all in the long run.

At the same time, the most important front in the counterinsurgency, improving basic social and economic conditions, is the one on which we have failed most miserably. Two million Iraqis are in refugee camps in bordering countries. Close to two million more are internally displaced and now fill many urban slums. Cities lack regular electricity, telephone services and sanitation. "Lucky" Iraqis live in gated communities barricaded with concrete blast walls that provide them with a sense of communal claustrophobia rather than any sense of security we would consider normal.

In a lawless environment where men with guns rule the streets, engaging in the banalities of life has become a death-defying act. Four years into our occupation, we have failed on every promise, while we have substituted Baath Party tyranny with a tyranny of Islamist, militia and criminal violence. When the primary preoccupation of average Iraqis is when and how they are likely to be killed, we can hardly feel smug as we hand out care packages. As an Iraqi man told us a few days ago with deep resignation, "We need security, not free food."

In the end, we need to recognize that our presence may have released Iraqis from the grip of a tyrant, but that it has also robbed them of their self-respect. They will soon realize that the best way to regain dignity is to call us what we are - an army of occupation - and force our withdrawal.

Until that happens, it would be prudent for us to increasingly let Iraqis take center stage in all matters, to come up with a nuanced policy in which we assist them from the margins but let them resolve their differences as they see fit. This suggestion is not meant to be defeatist, but rather to highlight our pursuit of incompatible policies to absurd ends without recognizing the incongruities.

We need not talk about our morale. As committed soldiers, we will see this mission through.

*They will not all "see this mission through." Even before the article was published, Staff Sergeant Jeremy A. Murphy was shot in the head on August 12, and suffered a severe brain trauma. He is expected to survive. On September 10, Sergeant Omar Mora and Staff Sergeant Yance T. Gray and five other Americans were killed when the five-ton truck in which they were riding overturned. What are American soldiers doing in Iraq? Dying.*

## Must America Employ War Profiteers and Mercenaries in Iraq?

October 6, 2007

The United States is engaged in an undeclared war (the longest in American history) against an unnamed enemy (terrorism neither identifies whom we are fighting nor the meaning of victory), by means that do not affect most Americans, but will produce great profits for private contractors and great indebtedness for future generations.

This indictment demands demonstration. The war in Iraq is an undeclared war: American entry into World War II was based on the last congressional declaration of war, although the Constitution requires it. It is the longest war: It is now four-and-a-half years, and there is no end in sight. The enemy is unnamed: Al Qaeda was not even in Iraq when America invaded that country in March 2003, and the enemy now consists mostly of unnamed nationalists, insurgents and terrorists, whose ranks are subject to augmentation or diminution at any time, and with none of whom America can sign a treaty ending the war.

It once would have seemed unimaginable that a war of this magnitude, of such great cost to the United States, and involving such great loss of life to combatants and innocent civilians, could be waged without having an impact on the lives of most Americans, but it is clear that apart from the high cost of gasoline (insofar as it is related to the war), the overwhelming majority of Americans are personally untouched, neither knowing anyone in the armed forces nor being asked to make any sacrifice for the cost and conduct of the war.

The real cost now exceeds one trillion dollars. No one can guess how much greater it will be by the time the United States leaves Iran. To whom is that money going? The answer is that never in American history have private corporations profited so greatly or corruptly from the performance of tasks that until now were considered the responsibilities of the armed forces. Most non-combat roles, and the use of armed security forces, have been outsourced to 630 private companies work for the United States in Iraq, employing approximately as many persons as are there in the American military.

Of necessity, some of these are Iraqi firms, employing non-American personnel, because they have knowledge and linguistic skills which the American armed forces do not possess. However, the vast majority of contracts, dollars spent, and personnel employed are American civilian contractors who are subject to virtually no oversight or accountability for how and how much they spend or how much they profit.

The most famous or infamous of American contractors (but far from the largest) is Blackwater U.S.A., which provides security forces for the U.S. State Department, and is not subject to supervision or control by the U.S. Department of Defense. Blackwater, a company that contributes heavily to the Republican Party, was hired (as have other contractors) without competitive bidding. The notoriety of Blackwater derives from documented instances (described by American and Iraqi eyewitnesses) in which Blackwater employees have opened fire and killed unarmed Iraqis without provocation. As of this writing, Blackwater security guards and other personnel have been involved in 195 shooting incidents since 2005. In at least two cases, Blackwater, with the approval of its employer, the

State Department, made cash payments to family members of its victims who complained, and it has sought to cover up other cases.

Last year on Christmas eve, a Blackwater employee, while drunk, killed a bodyguard for one of Iraq's two vice presidents. Blackwater, with the help of the State Department, spirited the assailant out of Iraq within 36 hours. More than nine months have passed, and no charges have yet been brought against the assailant. Many other charges against these guards have been made by Iraqi and American military officers. Until now, they have been immune from prosecution in Iraqi courts and protected by agencies of the American government from effective prosecution in the United States.

Given the cost in human lives, it might be callous to consider the economic cost, but for the fact that the war has been a source of great wealth for those to whom the United States has outsourced much of the cost. A single example, typical of arrangements with other companies, will indicate how wasteful it has been for the United States and how very profitable it has been for the companies and individuals who have received these contracts.

Blackwater pays an individual security guard \$600 a day (that comes to \$180,000 a year), which is four or five times the income the security guard received when he was a member of the American military. (He also benefits from having armored cars that are safer than Army vehicles.) To the security guard's salary, Blackwater adds a 36% markup (for a total of \$815 a day) plus overhead and costs in Iraq, including insurance, room and board, travel, weapons, ammunition, vehicles, office space, and equipment. This bill goes to Regency Hotel, a Kuwaiti company, that tacks on the cost of its buying vehicles and weapons, plus a profit for itself, and sends an invoice to ESS, a German food services company that cooks meals for the troops. Regency has billed ESS a price of \$1500 per man per day, but it has told Blackwater it was charging \$1200, giving it a substantial secret profit. ESS adds on its costs and profit, and sends its bill to Halliburton, which also adds overhead and profit, and presents its bill to the Pentagon. The United States has no contract with ESS, which will not provide any information to the government or the relevant congressional committees.

Halliburton's contract is an open-ended "cost-plus" contract to supply the U.S. armed forces with food, laundry, and other necessities. Cost-plus means the United States pays Halliburton all of its expenses (that is everything it spends and everything it pays to its subcontractors) plus 2% profit on top. The more it spends, the greater the profit it makes. Henry Bunting, a former Halliburton purchasing officer, has stated, "There is no incentive for KBR (Kellogg, Brown & Root, a Halliburton subsidiary) or their subs to try to reduce costs. No matter what it costs, KRB gets one hundred percent back, plus overhead, plus their profit." Up to this point, the Army has committed \$7.2 billion on a single contract with Halliburton. The Defense Contract Audit Agency recently stated that Halliburton could not document 42% of a \$4 billion invoice in March 2007. Among other charges, it stated that Halliburton billed the government for up to three times as many meals as it served.

Halliburton has failed to respond to repeated requests for detailed information regarding its costs and profits.

Employers and former employers are discouraged from becoming whistleblowers. Blackwater does as other American contractors in Iraq do. It makes individual contractors sign confidentiality agreements that compel them to pay Blackwater \$250,000 in instant damages if they violate their contract by publicly discussing the details of their agreements or work.

What then is the real cost of a security guard? A sergeant (the former rank of many private security guards) would receive around \$38,000 a year in base pay and housing and subsistence allowances. This does not reflect additional costs for health and retirement benefits. When a private security guard is killed, even though he may be an American citizen, the U.S. government is not responsible for his burial, death benefits, or payment to his survivors. We save money, but it is doubtful if, even in the long run, it constitutes a saving for the United States.

The advantage to outsourcing personnel is entirely political. The United States can pretend that it is conducting war with fewer soldiers, not needing to call up more regular troops, National Guard and reserves. Of course, General Shinseki and other military leaders were correct, before and after we invaded Iraq, when they insisted that the U.S. needed at least twice as many uniformed soldiers than we had sent to Iraq.

We have euphemisms to describe them, but there can be no mistake that the individuals who take high-risk, high-paying jobs are mercenaries, and their employers, who are not held unaccountable for their greed, crimes and cover-ups, are war profiteers. Any veneer of idealism or unselfish motive has been stripped away. We should answer a single question regarding how America conducts war: Are we willing to continue to outsource both the supplying of necessary resources and the actual waging of war by armed persons not wearing military uniforms, or should we create a military force fully capable of defending itself? The name of the alternative to what we are now doing strikes panic in the hearts of those who want to continue to prosecute this war, those who want to start a new war against Iran, those who want America to be prepared for a future war, and most voters contemplating the next election. That name is: conscription.

How Was Al Gore Denied the Victory He Had Won  
in the 2000 Presidential Election?  
October 15, 2007

**As soon as I heard that Al Gore had won a Nobel Peace Prize, I could not help recalling the prize he had won but which was denied him: the American presidency. We should not forget how much America lost in that election. Every fact in this brief account can be verified in detail. We can't put the past behind us because we are living with its awful consequences.**

Vice President Al Gore had a more than half-million vote plurality over Texas Governor George W. Bush, but victory depended on which candidate won Florida's electoral votes. In the early Florida vote count after Election Day in 2000, the official difference between them was less than three-hundredths of one percent (0.0299) of the total, and the Florida Election Code required an automatic recount in every one of the state's 67 counties if the margin of victory is less than one-half of one percent. It never took place. Two weeks after the election, the Florida Supreme Court unanimously ruled that hand counts must be included in the vote totals. Every possible obstacle was placed in the path of conducting such a count. Texas, the state of which Bush was governor, required that all punch-card ballots should be counted where a chad (the piece punched out by the voter) is not completely detached, with the overriding concern being the "clearly ascertainable intent of the voter." But that was not the intent of those who acted on behalf of candidate Bush.

The strategy of the Bush camp was to prevent a full recount before December 12, after which date Florida could avoid a challenge by another slate of electors, should the complete vote reveal that Gore had in fact won. The tactics employed were to stall, delay, object, and terminate the vote counts that had been undertaken in order to prevent a full recount before that date. When Secretary of State Harris declared Bush the victor without a recount, the Florida Supreme Court extended the vote count deadline. The Republican-controlled Florida legislature was called into special session to appoint electors pledged to Bush.

On December 8, the Florida Supreme Court ordered an immediate manual recount of all ballots on which no vote had been machine-recorded. On the next day, shortly after the Miami-Dade County manual count resumed, the Supreme Court halted the hand count. It heard arguments the following day (December 10), waited a weekend, and on December 12 announced it was now too late to conclude the count. As much as the 5-4 Supreme Court majority wanted to shoot down Gore's candidacy, they wanted someone else to fire the shot. Whether motivated by propriety or cowardice or political calculation, they wrote an opinion returning the case to the Florida Supreme Court, but the Florida court was not allowed to formulate a rule for continuing and concluding the hand count, or to do anything except declare that Gore's candidacy was dead. The following day, Gore conceded defeat. This shameless stealing of the election after the votes were cast was exceeded only by the tactics employed to manipulate the voting itself.

**Voters were denied the opportunity to cast their votes.** Evidence demonstrates that the names of black voters were removed from registration rolls, voting sites were moved

without notification, ballot boxes were uncollected, polling places were understaffed, language assistance was denied, and voting machines were unreliable. Secretary of State Harris, without competitive bidding, hired a private company to compile lists of convicted felons who should be barred from the polls. Many on the lists were innocent people who had names that sounded like those of convicted felons (no effort was made to check the names against Social Security numbers), many had been convicted only of lesser crimes (a misdemeanor conviction does not involve losing the right to vote), and thousands had been convicted and served time in the thirty-seven states that restore citizenship rights. Jeb Bush and Harris both testified under oath that the verification of the felon lists was neither their responsibility nor that of the company that compiled the lists. A University of Minnesota study estimated that if 80 percent of those unfairly barred from voting had voted, this would have resulted in more than 35,000 more votes for Gore and 4000 for Bush.

**Voters who were not helped when they should have been.** Although Florida law allows disabled voters to have another person assist them, ballots were disallowed from elderly or disabled voters whose signatures did not match the old originals.

**Illegal voters and others were helped who should not have been.** The Seminole County elections supervisor allowed the Republicans two weeks to make corrections and resubmissions on thousands of absentee ballots. In Martin County, Republicans were allowed to add identification numbers to application forms for absentee ballots and to remove applications from the elections supervisor's office. In addition, The Miami Herald found that ineligible voters were allowed to sign in at polls where they were not registered.

**Voters were unconstitutionally misled.** As required by law, the local newspaper in Duval County printed a sample ballot. It stated that voters should vote on every page, but the names of the presidential candidates were printed on two pages. Voters who followed that instruction cast voided ballots. Thirty percent of the undercounted ballots in Duval County were cast in heavily black precincts that voted ten-to-one for Gore. As a consequence of this two-page presidential ballot and the improper instructions that accompanied it, Duval County discarded more than three times as many ballots in 2000 (26,909) as it had in 1996 (7762).

In Palm Beach County, the so-called butterfly ballot listed candidates' names on facing left-hand and right-hand pages. The major party candidates were listed on the left-hand page, with Bush first and Gore second. Patrick Buchanan was listed first among the minor party candidates on the right-hand page. Voters had to punch a hole in a middle column that combined the lists, alternating names of candidates from the left and right. This meant that Bush, first on the left was first in the center, while Buchanan was listed next, and Gore, who was second on the left in the list of candidates, was third in the center column where voters made their choice. A voter could reasonably assume that the candidate listed second would appear second in the order in which they voted. In that way thousands of Palm Beach County voters who intended to vote for Gore mistakenly voted for Buchanan.

This ballot format violated Florida law that clearly specifies that votes must be cast to the right of the candidate's name. It also violated common sense in requiring that a vote for the second candidate on the ballot (Gore) meant punching the third hole, and a vote for a

candidate much lower on the ballot (Buchanan) meant punching the second hole. Because many voters recognized their error, they punched two holes, invalidating their ballots.

Buchanan received one-fifth (19.6 percent) of the Palm Beach vote, compared with one-twentieth (5.4 percent) in 1996, when the butterfly ballot was not used. It takes a leap of faithlessness to believe that Buchanan received his greatest support in a precinct consisting of a Jewish old age home with Holocaust survivors, who until that election had despised Buchanan. To his credit, Buchanan publicly stated his belief that these voters had not intended to vote for him. Analyses indicate that he received between 2000 and 3000 votes that had been intended for Gore, vastly more than Bush's official victory margin of 537 votes.

**The votes of many voters were not recorded through no fault of their own.**

One-third of all Florida voters lived in punch-card counties with a high proportion of low-income, minority, and first-time voters, in which it was nearly three times as likely that their ballots would be rejected as would the ballots of voters in counties using optical systems. (An inventor of the punch-card machine testified as to its unreliability.) Dimpled ballots, that is, punch-card ballots in which an indentation has been made but there is no visible hole, were counted in Texas, Illinois, Massachusetts and other states, but not in Florida. It is not surprising that Palm Beach County with its butterfly ballot and Duval County with its improper instructions to voters, and both with all the problems associated with punch-card voting, had thirty-one percent of the uncounted ballots, even though they cast only twelve percent of the statewide vote.

**There were voters whose intentions were clear but whose votes were never counted.** Thousands of voters indicated their preference of a candidate in the normal fashion and then wrote in the name of the same candidate in the place reserved for write-in votes. (This could not occur when voting on optical scanners.) Whether due to oversight or ignorance, these voters had not followed instructions, but their intentions were unmistakable. Whatever form the voting procedure takes, it is not designed to be an intelligence test or anything but an expression of the voter's intention. Voters who emphasize and underline their choice of candidate by both punching a ballot and writing in the same candidate's name have made the most unmistakable demonstration of their intention. Had the overvotes been counted, Gore would have received many times more votes than were necessary to overcome Bush's official lead.

In retrospect, it is evident that the media exit polls on Election Day that called Florida for Gore were correct, because they reported the intentions of the voters who went to the polls and who believed that they had cast valid ballots. The National Opinion Research Center of the University of Chicago was hired by a consortium consisting of The New York Times, Washington Post, Wall Street Journal, and other newspapers to undertake a first count of approximately 120,000 overvotes (where voters appeared to have made two choices, even if both were for the same candidate) and 60,000 undervotes (where the machine count had not revealed the voter's choice).

The consortium calculated eight ways of counting disputed punch-card votes – correctly marked paper ballots, full punches, poorly marked paper ballots, chads detached at three corners, chads detached at two corners, chads detached at only one corner, dimpled



ballots with sunlight, or only dimples — and concluded that *Gore would have won the Florida vote by every one of the eight methods*. Of course, no examination after the fact could take into account the thousands of voters who had mistakenly voted for Buchanan instead of Gore, the thousands who compounded their mistake by voting for both Buchanan and Gore, and the would-be voters who had been turned away from the polls or were discouraged from voting because of intimidation or the improper appearance of their names on lists of felons barred from voting.

Judicial involvement and determination of the result represented an unconstitutional intervention in the political process, because it violated the Electoral Count Act. That Act, adopted to prevent a repetition of the misguided judicial involvement in the election of 1876, states that Congress is the primary body to resolve any lingering contention after the states have tried to settle electoral disputes. It is an authority that was never given to the courts.

Who were the Justices who so egregiously made it impossible to ascertain the true will of Florida voter, acted contrary to their long-proclaimed deference to states' rights, and awarded the election to the candidate who had lost the vote? During the 1986 hearings on William Rehnquist's nomination as Chief Justice, five witnesses testified that Rehnquist had harassed black and Latino voters at Arizona polling places in 1962, demanding to know if they were "qualified to vote." Justice Antonin Scalia's son was a member of the law firm of Theodore Olson, who argued the Bush case before the Supreme Court. Justice Clarence Thomas's wife was employed by the ultra-conservative Heritage Foundation to vet prospective office-holders in a future Bush administration. When Justice Sandra Day O'Connor heard Dan Rather call Florida for Gore on CBS, she exclaimed, "This is terrible." Her husband explained to other guests at the election night party they were attending that his wife was upset because they wanted to retire to Arizona, and a Gore win meant that they would have to wait at least another four years. These facts demonstrate not illegal conduct, but indifference to avoiding the appearance of impropriety, which would have led them to remove themselves from consideration of the case.

Gore would have won Florida and the election had there been an immediate recount in every one of Florida's 67 counties or just a revote in Palm Beach County. An unprecedented political juggernaut was rolled out to ensure that this would not happen. It employed the political power and resources of Governor Jeb Bush, the presidential candidate's brother, who recruited his own political operatives and volunteers to move into disputed counties; James Baker, the Bush family's *consigliere*, who masterminded the teams of lawyers and political operatives who engaged in "spontaneous demonstrations," including a window-pounding protest that succeeded in halting the Miami-Dade County recount (many participants were rewarded with appointments in the Bush administration); Secretary of State Katherine Harris, co-chair of George W. Bush's Florida campaign, who was prepared to change the rules and interpret the results as proved necessary in order to insure Bush's election; the Florida House of Representatives, which voted on party lines to appoint electors pledged to George W. Bush, irrespective of how the recounts turned out, and the Florida Senate, which was prepared to cast a similar vote if the U.S. Supreme Court had not resolved the election in Bush's favor, and finally the five predictable members of that Court.

The most fundamental elements of an American presidential election include the right of all qualified citizens to cast a vote, an accurate count of all discernible votes, and the awarding of a state's electoral votes to the candidate whose slate of electors received the most votes. None of those conditions were met in Florida in 2000. The great pleasure that most Americans feel upon Gore's winning the Nobel Peace Prize must be tempered by our awareness that a corrupt coalition denied him the presidency after winning the election. There are banana republics that conduct more honest elections than the United States did in 2000. It was the first time that Al Gore taught us an inconvenient truth.

Mitt Romney and the First Amendment  
December 8, 2007

Mitt Romney's speech on December 5, 2007 in defense of his Mormon religion mentioned Mormon once and never cited the name of Romney's church, the Church of Latter Day Saints. His avoidance of his religion was signaled in the title he gave to the speech, "Faith in America." It turned out to be something else, an address on Romney's faith in Faiths, but not all Faiths, and certainly no faith at all in those who have no Faith.

The exclusion of those who did not profess a belief in religion was made clear at the outset, when Romney said "Freedom requires religion just as religion requires freedom." The first part of that sentence is prejudicial, because it leaves non-believers unfree. The second part of that sentence is preposterous because it ignores all intolerant faiths, including the state religions that Romney criticizes later in his speech as "theocratic tyranny."

Romney stated "I believe in my Mormon faith and I endeavor to live by it," an expression of belief that surely requires at least a simple statement of how it differs from other faiths, yet his only profession of religious belief is that "Jesus Christ is the Son of God and the Savior of mankind." That belief encompasses Christians as well as Mormons, including the Evangelical Christians who will participate in large numbers in the Iowa caucuses, but excludes Jews, Muslims, Buddhists, Hindus, and members of other faiths that do not acknowledge the divinity of Jesus, as well as atheists, agnostics and other non-believers. It must also trouble millions of Christians who believe in a genuine separation of church and state.

Anyone who suggests parallels with John F. Kennedy's 1960 speech on his religion and the presidency has not read or does not remember what Kennedy said. Kennedy said "I believe in an America where the separation of church and state is absolute,...where no church or church school is granted any public funds or political preference;... where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials." He opposed diplomatic relations with the Vatican, aid to parochial schools, and other government support of organized religion. His was a categorical denial of the role of religion in government.

By contrast, Romney finds a necessary linking of church and state. Citing abolition, civil rights and the right to life itself, Romney makes a sweeping claim that "no movement of conscience can succeed in America that cannot speak to the convictions of religious people." Unquestionably, the abolition and civil rights movements have required the support of religious as well as non-religious people. It is also true that the strongest opponents of the abolition and civil rights movements have included religious as well as non-religious people.

To make the point that the United States is founded in religion, Romney says "We are a nation 'Under God.'...We should acknowledge the Creator as did the founders – in ceremony as in word." He cites God on our currency and in the pledge of allegiance, ignoring the absence of God, the Creator or Jesus in the American Constitution, as well as the explicit constitutional prohibition of any religious test for any office or public trust. Romney is also wrong about the place of "under God" in the United States. To cite one

example, the original pledge was written in 1892 by a socialist, Francis Bellamy, and it did not contain the words “under God” until Congress put them in it in 1954.

As for the moral implications of Romney’s political views, in a single Republican presidential debate, he opposed ever raising taxes, refused to define torture or waterboarding, and said of persons who have been held for as long as six years at Guantanamo: “I want to make sure that these people are kept at Guantanamo and not given legal representation in this country.” Millions of Americans, both religious and non-religious, will characterize these positions as immoral.

In contrast to Kennedy’s endorsement of the separationist views of Thomas Jefferson, James Madison and other outspoken founders of the United States, Romney believes that government and religion are inextricably bound together in ways that receive no support in the Constitution or the debates preceding its adoption. Given America’s heterogeneous political climate, it is probably unavoidable that all of the leading candidates for the presidency in 2008 arouse the hostility of many citizens who do not share what they perceive to be the candidate’s core values. Among them, Mitt Romney has the dubious and dangerous distinction of being the most divisive.

Did Romney Defend His Religious Beliefs  
or Deny The Rights of Non-Believers?  
December 13, 2007

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What Do We Do When Values Collide in Deciding  
Controversial Public Policy Issues?  
December 15, 2007

While most public policy issues are easily viewed from a liberal or conservative perspective, any rational person must acknowledge that there are opposing moral views involved in some of the most controversial issues America confronts today. Such moral conflicts should be dealt with in thinking about the use of torture in interrogating terrorist suspects, providing the best health care for all people, and determining the appropriate limits of legal immigration. I think that we should be most critical of people, including politicians, who do not seriously consider and attempt to counter the moral convictions of those who come down on the other side of each of these issues.

One: Torture. When legal techniques fail to elicit information regarding terrorist plans, should the United States employ criminal interrogation techniques, including waterboarding (simulated drowning), when these methods may produce information that will enable us to disrupt terrorist plans and prevent terrorist actions?

John Kiriakou spent 14 years at the CIA, including a tour in Pakistan from 1998 to 2004. He was involved in the capture of Abu Zubaydah, an Al Qaeda militant, and was one of the first to interrogate him. The initial questioning bore no fruit, so waterboarding and other exceedingly harsh methods were applied. Kiriakou states that new or severe interrogation techniques were never applied without the approval of superior officers. Because Kiriakou was on his way to another assignment after the initial interrogations of Abu Zubaydah, his recounting of events after that point is based on classified cables and private communications with his colleagues. (Kiriakou says that he did not know that the interrogations was taped, and disagrees with the decision to scrap them. The faces of CIA interrogators could have been blurred to protect their identity.) Although Kiriakou's recent public account omits details regarding the method of waterboarding, he has confirmed that the simulated drowning of Abu Zubaydah lasted 35 seconds. Before waterboarding, this Al Qaeda operative was "defiant and uncooperative"; afterward he was compliant and provided valuable information. Kiriakou's conclusions are that waterboarding is torture; it worked in the case of Abu Zubaydah, and it "probably saved lives." He also believes it is no longer necessary.

Waterboarding is torture. It is contrary to the Geneva Conventions and American law. Its use by the United States justifies the use of criminal methods by other nations against American nationals. It may lead prisoners to provide false information in order to appease their interrogators. And yet, as Kiriakou asserts was the case in with Abu Zubaydah, it may lead the prisoner to reveal information that will result in the saving of lives. Is it then justified?

Two: Health care. Optimal health care coverage can provide the highest practical level of medical care for all Americans. This can be achieved by barring independent medical practice for the benefit of people prepared to pay the additional cost for extraordinary treatment. Should the United States underwrite a health care system that provides extensive universal medical insurance, setting limits for those who are prepared to pay for more?

Any system of public health insurance must have finite limits. As generous as the nation might be in preventing and treating disease and ill health and however advanced medical science has become, some treatments will be so expensive, risky or rare that their coverage cannot be justified. Medical science seeks to alleviate and cure both common and rare medical conditions, but there comes a point at which choices must be made. American society cannot afford to employ limited medical resources in order to treat every adverse condition of every person.

There are always experimental and costly treatments that are available only to those prepared to pay the price. To the extent that society offers that option, it restricts the employment of medical resources for less costly treatments for a larger population. This option exists in America's present system of health care and in every socialized system such as Great Britain's in which doctors and patients can choose between public and private coverage. It would not exist in a genuinely socialized scheme of universal single-payer coverage. Should the United States subscribe to the utilitarian principle of "the greatest good for the greatest number," knowing that carried to its logical extent this principle would deny the right of those who could afford it to buy even greater medical support for themselves?

Three: Immigration. For millions of impoverished people in Central and South America, the United States holds out hope for a better life. The millions of illegal immigrants already here pose challenges to the American economy, the ability of educational and medical institutions to serve them, and the nation's social coherence. Should we attempt to compel those already here to leave? How can we keep millions more from gaining entry?

From its founding, the United States has represented to the rest of the world a haven for "your tired, your poor, your homeless masses yearning to breathe free." Geographically, its vast borders provide access for those with the cash or courage to seek entry. We are all (so-called Native Americans included) immigrants or the their offspring. Today's immigrants perform the crop-picking, dishwashing, and taxi-driving jobs that those of us long-settled here do not want. Nearly all illegal immigrants obey the laws in every other way and seek to adapt to American values.

At the same time, illegal immigrants unwittingly change established communities, increase the strain on local resources (including an increased cost of English-language education), and are prepared to work longer for less pay, challenging the living standards of unskilled American citizens. Nations must have the right to protect themselves against invasions, even invasions by unarmed hordes. What can we do? At what cost can unwanted aliens be expelled? How long and how high would the wall have to be that would succeed in keeping them out? Or should the United States welcome and not resist the entry of anyone who wishes to come here, short of permitting the entry of criminals, carriers of contagious diseases and those who would immediately become wards of the state? Beyond such considerations, may we draw a line? Where do we draw a line? And how do we draw the line?



Letter to Friends and City Colleagues  
January 26, 2008

From Stanley Feingold <thinkingoutloud@stanleyfeingold.com>  
Date 2008/01/26 Sat PM 07:21:38 EST  
To stanleyfeingold@stanleyfeingold.com  
Subject

If you don't share my hope for a more egalitarian and socially compassionate America, don't bother reading this. But read it if you believe that the choice of a presidential candidate can make a difference in narrowing the gap between rich and poor and that ours can become a fairer country for all races, creeds, classes and interests.

January 26, 2008

Dear Friends and City Colleagues,

I know that other progressives who seek a genuinely liberal Democratic Party are as appalled (but not surprised) as I at the lengths to which the Clintons and their surrogates are prepared to go to win. I reject the notion that the former president is a surrogate (playing Agnew to her Nixon); they are joined together at the hip. If they win the nomination, it will be a stain on the Democratic Party that will last longer than the stain on that dress. *He* pushed NAFTA, without protection for wages, the environment, and civil rights, through Congress. NAFTA has done more economic harm to working-class Americans than the Bush tax cuts for the wealthiest Americans. *They* opposed the enactment of single-payer national health insurance for two years before they came up with their cockamamie plan that no one understood. *They* alienated Marion Wright Edelman, setting back for years the hope of establishing national child care.

Of course, a Clinton presidency was far better than the alternatives of choosing Bush Senior and Dole, but America can and should do better than reelecting the Clintons. What's even worse to contemplate is that renominating them would be so divisive that a Republican who opposes progressive taxation and progressive legislation (that's every one of the potential Republican candidates) could be elected. (Every conservative hopes that the Clintons win the Democratic nomination.) Read Bob Herbert's op-ed piece in today's Times, which I reprint below, in awareness that his sentiments are shared by millions of other disappointed Americans.

Stanley Feingold

**Questions for the Clintons / Bob Herbert / *The New York Times*, January 26, 2008**

Charleston, S.C. Joseph P. Riley Jr. has been mayor of this historic and often tense city since the mid-1970s. He's a Democrat, highly respected and has worked diligently to heal racial wounds that have festered in some cases for hundreds of years. He has endorsed Barack Obama in today's Democratic primary. But what struck me during an interview in his quiet office in an exquisitely restored City Hall was not the fact of the endorsement, but the manner in which the mayor expressed it.

He went out of his way to praise the Democratic field, including some of the candidates who have dropped out, like Senators Joseph Biden and Chris Dodd. He talked about his fondness for Bill and Hillary Clinton and said: "It's tough when you have to choose between friends."

The mayor's thoughtful, respectful, generous assessment of the field echoed the tone that had prevailed until recently in the Democratic primary campaign. That welcome tone has been lost, undermined by a deliberate injection of ugliness, and it would be very difficult to make the case that the Clintons have not been primarily to blame.

Bill Clinton, in his over-the-top advocacy of his wife's candidacy, has at times sounded like a man who's gone off his medication. And some of the Clinton surrogates have been flat-out reprehensible.

Andrew Young, for instance.

This week, while making the remarkable accusation that the Obama camp was responsible for raising the race issue, Mr. Clinton mentioned Andrew Young as someone who would bear that out. It was an extremely unfortunate reference.

Here's what Mr. Young, who is black and a former ambassador to the United Nations, had to say last month in an interview posted online: "Bill is every bit as black as Barack. He's probably gone with more black women than Barack."

He then went on to make disgusting comments about the way that Bill and Hillary Clinton defended themselves years ago against the fallout from the former president's womanizing. That's coming from the Clinton camp!

And then there was Bob Kerrey, the former senator and another Clinton supporter, who slimed up the campaign with the following comments: "It's probably not something that appeals to him, but I like the fact that his name is Barack Hussein Obama, and that his father was a Muslim and that his paternal grandmother is a Muslim. There's a billion people on the planet that are Muslims, and I think that experience is a big deal."

Pressing the point, Mr. Kerrey told CNN's John King: "I've watched the blogs try to say that you can't trust him because he spent a little bit of time in a secular madrassa. I feel quite the opposite." Get it?

Let's start with the fact that Mr. Obama never attended a madrassa, and that there is no such thing as a secular madrassa. A madrassa is a religious school. Beyond that, the idea is to not-so-slyly feed the current frenzy, on the Internet and elsewhere, that Senator Obama is a Muslim, and thus potentially (in the eyes of many voters) an enemy of the United States. Mr. Obama is not a Muslim. He's a Christian. And if he were a Muslim, it would not be a legitimate reason for attacking his candidacy.

The Clinton camp knows what it's doing, and its slimy maneuvers have been working. Bob Kerrey apologized and Andrew Young said at the time of his comment that he was just fooling around. But the damage to Senator Obama has been real, and so have the benefits to Senator Clinton of these and other lowlife tactics.

Consider, for example, the following Web posting (misspellings and all) from a mainstream news blog on Jan. 13: "omg people get a grip. Can you imagine calling our president barak hussien obama ... I cant, I pray no one would be disrespectful enough to put this man in our whitehouse."

Mr. Obama's campaign was always going to be difficult, and the climb is even steeper now. There is no reason to feel sorry for him. He's a politician out of Chicago who must have known that campaigns often degenerate into demolition derbies.

Still, it's legitimate to ask, given the destructive developments of the last few weeks, whether the Clintons are capable of being anything but divisive. The electorate seems more polarized now than it was just a few weeks ago, and the Clintons have seemed positively gleeful in that atmosphere.



It makes one wonder whether they have any understanding or regard for the corrosive long-term effects — on their party and the nation — of pitting people bitterly and unnecessarily against one another.

What kind of people are the Clintons? What role will Bill Clinton play in a new Clinton White House? Can they look beyond winning to a wounded nation's need for healing and unifying?

These are questions that need to be answered. Stay tuned.

Has The Primary Process Proved Its Merit in 2008?  
February 24, 2008

Over the last nine presidential elections, the primary-caucus method of nominating candidates has often failed to choose each party's strongest candidate. The major parties knew the system was flawed, leading to different methods of nomination and allocation of delegates between the two parties and among the states. Frustrated by the ability of factions unallied with the party organization to win the nominations of George McGovern in 1972 and Jimmy Carter in 1976, the Democrats in 1984 created superdelegates, who are members of Congress and other party leaders not bound to any candidate, but more likely to support the establishment choice against insurgents. What would happen if the superdelegates influence the choice of a nominee other than the plurality winner in the primaries? Until now, the superdelegates have been superfluous delegates, because they have not influenced the party's nomination.

The rationale for the primary system is that it increases the public's role in the process. Nevertheless, close to one-half of all voting-age citizens failed to vote in presidential elections. For most Americans, the presidential primary was one more election (and a difficult one to understand) in a nation which has more elections and fewer voters in relation to population than other industrial democracies.

The percentage of adult citizens voting in recent national elections has been well over 80 percent in West Germany, New Zealand, and France, over 75 in Canada, Great Britain, and Japan, and just barely 50 percent in the U.S. Other representative governments do not conduct elections to choose candidates. Critics argue that, to increase turnout, we should deal with the causes of non-voting, not increase the number of elections in which a large proportion of the electorate will not participate. In the nine presidential elections since reform, the highest turnout was 55.3 percent of potential voters in 1992, the lowest 49 percent in 1996. By contrast, turnout was never below 60 percent in the five previous elections.

For the party in power, the primary process has until now been little more than a reaffirmation of the power of the governing party's hierarchy. In the nine elections since the primary reforms, every presidential candidate of the party in power has been either the incumbent or his vice president. For the party out of power, the nomination was often won by a candidate with a minority of primary votes. McGovern received barely 25 percent in 1972 (the first election in which the primaries determined the choice of the candidates), Carter 39 percent in 1976, Mondale 38 percent in 1984, and Dukakis 43 percent in 1988. Even those figures exaggerate their primary support, because they include larger proportions after other contenders left the race. Even incumbents sometimes barely eked out a majority. Ford received 53 percent in the 1976 primaries and Carter 51 percent in 1980, almost certain signs that they faced defeat in the election.

Primary voters tend to vote for their first choice, not necessarily their party's best choice. That would be not the single most popular candidate but the one least unacceptable to the party faithful, independents, and dissident members of the other party. At its best, the old-fashioned conventions of party leaders and office-holders achieved that, because they

wanted nothing so much as a winner. By contrast, the primary system reflected the judgment of a small proportion of the electorate from a few atypical states, required vast amounts of money to finance a campaign, made more difficult the candidacy of experienced members of Congress, diminished the importance of the party organization greatly reduced the relevance of the national convention, and has been repeatedly reformed by party commissions in election years without making it more likely to result in the selection of the strongest candidate within each party.

These are powerful arguments against the method of presidential nomination employed in the past nine elections, except for the fact that they seem contradicted by this year's nomination process. Neither party had an obvious successor, the field seemed -- or over time came to seem -- wide open and narrowed only as voters expressed their preferences, both parties will nominate an incumbent Senator (leading to only the third election in which a sitting Senator is elected as president), and the candidates have aroused strong support among voters who have not played a prominent role in the past.

It is almost certain that, in the absence of the primary system, the Republican Party would have chosen someone other than Senator John McCain, whose opposition to George W. Bush in 2000, support for campaign reform, and lack of support within the party's congressional leadership would have doomed his candidacy. It is probable that several Governors, ex-Governors and other members of Congress would have competed for both parties' nomination. The groundswell of support for Obama would never have taken place, and he most certainly would not have been chosen as the Democratic candidate.

The primary process has had unprecedented success in inspiring participation and choosing highly regarded candidates. Barring some unexpected event, the turnout this November is likely to far exceed that of recent elections, and this is entirely attributable to the campaign that has been waged until now. The flaws remain. The process takes place too long before the election. The amount of money it takes to compete is obscene and violates a basic premise of the democratic process. The ordering of the primaries and caucuses is arbitrary, creating unforeseen and irrational advantages for one or another candidate. And yet...this time very capable candidates have emerged.

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There remains at this writing a small possibility that the primary process can fail. If, despite a national Obama plurality in primary and caucus votes and elected delegates, Clinton decisively wins the Texas and Ohio primaries, and then wins the Democratic nomination by winning the support of a sufficient number of superdelegates, including a strategy of seating the now-barred Florida and Michigan delegates, the Democrats will bitterly divide, possibly leading to their defeat in the presidential election, and almost certainly leading to radical reform in the nomination process.

## Does Experience Matter in Electing a President?

February 26, 2008

If Americans really want a chief executive whose experience and leadership have been clearly demonstrated, we should abandon the constitutional separation of powers and adopt parliamentary government. Parliamentary party leaders who become prime ministers generally have exercised party leadership for a number of years before acquiring the power to govern.

The American system is very unlikely to choose leaders with comparable experience. In fact, national experience has proven to be more of a liability than an asset. Governors have been elected far more frequently than congressional leaders. The last twelve presidential elections are instructive: In three, a present or former governor defeated an incumbent president. In four, the losing candidate was a Senator; in three more the loser was a former Senator now serving as Vice President, and in still another a former Senator who had previously served as Vice President. In only one of the past twelve elections has the losing candidate not served in national office.

In the most remote of these elections, 1960, Senator John Kennedy was elected against Vice President and former Senator Richard Nixon, and it was only the second time in American history that a sitting Senator was elected President. It is an understatement to state that neither was a party leader. Kennedy, seriously but secretly ailing, had no real Senate record. The first Senator ever directly elected as president was Warren Harding in 1920, a nonentity utterly without power or influence in Congress. Ironically, when a desperate Republican Party nominated Senate majority leader Robert Dole in 1996, he resigned from the Senate in order to run, and went on to suffer a staggering defeat.

When the Republicans had the opportunity in 1952 to choose a national leader so identified with party ideals that Senator Robert Taft was affectionately dubbed “Mr. Republican,” it chose instead to nominate General Dwight Eisenhower, whose party affiliation was unknown to the public until shortly before his selection. The Democrats passed by their incumbent vice president, Alben Barkley, Senate leader Robert Russell, and well-known Senator Estes Kefauver to choose little-known Governor Adlai Stevenson. When the Republicans did choose nationally-known Senator Barry Goldwater in 1964, he suffered the worst defeat of any presidential candidate in the party’s history.

The most successful candidates in the recent past have been unemployed politicians (Nixon, Carter, Reagan), a vice president best known at the time for being “out of the loop” on the Iran-Contra crisis (Bush I), the governor of a very poor state (Clinton) and the governor of a state which has the constitutionally least powerful governor (Bush II). There were national leaders in all of those elections who would have come to the presidency with impressive experience. They were not chosen.

Clearly, neither much-experienced maverick Senator McCain, less experienced Senator Clinton nor little experienced Senator Obama is a Senate leader. A half-dozen or more members of the Senate in both parties have earned leadership roles, but none will be

their party's nominee. (Connecticut Senator Chris Dodd, who sought to be the Democratic candidate, is an example.)

What does experience tell us about a future president? The truth is that experience doesn't tell us much about how the next president will exercise legislative leadership, share or usurp power, perceive and promote America's place in the world, and respond to unanticipated events. In 1933, Franklin Delano Roosevelt took office without any clear idea of how he would cope with the deepening economic depression. What he did was begin a "hundred days" of frantic activity to provide short-term relief for the jobless and minimally regulate business. (In fact, the long-term effects of the National Industrial Recovery Act and the Agricultural Adjustment Act were to concentrate industry and agriculture, not to make them more competitive.) For years (until the beginning of World War II in Europe), FDR's policies did not reverse the Depression, but they did revive hope. They came to represent the beginning of the very modest American not-quite-welfare state. Most recently, Texas Governor George W. Bush's bipartisan cooperation with Democratic state legislators was an experience later contradicted by his presidency. In 2008, John McCain's candidacy of staying the course in Iran is, whether he wishes it or not, a reaffirmation of the Bush presidency: Respite. Hillary Clinton's candidacy of thirty-five years of experience, whether she wishes it or not, a revival of the New Democratic liberalism of her husband's presidency: Adspice. Barack Obama's candidacy of articulating rarely expressed hope, is – and he wishes it to be – a platform of promise: Prospice. As of this date, this may be an election, like FDR's in 1932 and Kennedy's in 1960, in which hope wins. It succeeded politically and psychologically in Roosevelt's presidency and was aborted in Kennedy's (although it survived in the JFK legend). As has been often true in the past, promises may not be fulfilled, but it now appears likely that most voters will find the alternatives to be much more unpromising.



“Recount” May Require Rethinking  
May 23, 2008

I have been looking forward to seeing the HBO broadcast of "Recount," a dramatization of the resolution of Florida's 2000 presidential vote, but if Alessandra Stanley's review in this morning's *Times* correctly describes the teleplay's conclusion, a serious correction must be made. (It appears this Sunday at 9 p.m. on HBO.) Ms. Stanley writes: "'Recount' does not claim that Mr. Gore was robbed of the presidency. In 2001, painstaking post-mortems of the Florida count, one by *The New York Times* and another by a consortium of newspapers concluded that Mr. Bush would have come out slightly ahead, even if all the votes counted throughout the state had been retallied. But both studies also issued caveats about the varying standards used in different counties to count and reject ballots, including late-arriving votes from abroad, noting that had they been included and counted accurately and by the same standard, they probably would have given Mr. Gore the edge."

This conclusion is based on the front-page headline in *The New York Times* on November 12, 2001, reporting the results of a study by a newspaper consortium (which included the *Times*) stating: "Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote." The consortium study was, as Ms. Stanley puts it, painstaking, but the headline in the *Times* was not, and too many readers didn't take the pains to read the accompanying story. This headline misled readers into thinking that the study had confirmed Bush's victory. It implied a result that was not borne out by two full pages of analysis.

Who would have won in an honest count? No examination after the event can count the thousands of Palm Beach County voters who mistakenly voted for Buchanan instead of Gore on the so-called butterfly ballot, the thousands who sought to correct their mistake by voting for both Buchanan and Gore and consequently invalidated their ballots, or voters who were turned away from the polls or discouraged from coming to the polls because of intimidation or the improper appearance of their names on lists of felons barred from voting.

Fortunately, It was necessary only to examine the punch-card ballots that were cast but were not counted. This was possible because Florida's Sunshine Law allowed anyone to look at the six million ballots held by county election supervisors, and that is what the National Opinion Research Center of the University of Chicago did on behalf of a consortium consisting of *The New York Times*, *Washington Post*, *Wall Street Journal*, *Associated Press*, CNN, the Tribune company (owner of the *Los Angeles Times*, the *Chicago Tribune*, and several Florida newspapers), *Palm Beach Post*, and *St. Petersburg Times*. It engaged in what was not a "recount," but a first count of approximately 120,000 overvotes (where voters appeared to have made two choices, even if both were for the same candidate) and 60,000 undervotes (where the machine count had not revealed a choice), but had not been included in Bush's official plurality of 537 votes.

The National Opinion Research Center calculated eight ways of counting disputed punch-card votes – correctly marked paper ballots, full punches, poorly marked paper ballots, chads detached at three corners, chads detached at two corners, chads detached at

only one corner, dimpled ballots with sunlight, or only dimples -- and it concluded that Gore would have won the Florida vote by every one of the eight methods. Against all of these inclusive vote counts by which Gore was the winner, Bush would have been the winner only in a restrictive four-county recount requested by the Democratic Party that violated the explicit requirements of Florida law that called for a complete count and recount.

The incontestable conclusion is that, had the Supreme Court permitted a total recount by any or all of the eight exhaustive criteria examined by the media consortium, Gore's victory in Florida and the nation could have been easily completed in time for certification before Congress counted the electoral vote. Contrary to *The New York Times* and other misleading headlines and the impressions of those who did not read beyond the headlines, the report of the newspaper consortium requires the inescapable conclusion that, in aborting such a count, five Supreme Court Justices did cast the deciding vote.

## Obama Takes Office and Promptly Begins to Change It January 27, 2009

During the long primary and general election campaign, Barack Obama displayed several qualities that explain both how he generated support and how he plans to govern. There was his eloquence, first observed by most of us a little over four years ago when, at the invitation of presidential candidate John Kerry, he delivered the keynote address at the Democratic National Convention. Overnight Obama became a party leader, not a black leader but a national leader.

It was foolish for Hillary Clinton and John McCain to disparage Obama's oratorical talents, with respect to both what he said and how he said it. To do so was to overlook the power of Franklin D. Roosevelt in assuaging the fears and raising the hopes of Americans in the Great Depression and the power of Winston Churchill in inspiring the British people when the possibility of a Nazi victory was most real and the fate of the free world seemed to hang in the balance.

The 2004 keynote address displayed Obama's style in the context of his strategy, which was to reject the division between red America and blue America and, by implication, between white America and black America. It worked, overcoming doubts and prejudices that had made it impossible until then to conceive of the nomination of a black man. (That Obama was half-black and half-white was easily overlooked in a country in which the Supreme Court affirmed a century ago that a man of one-eighth African ancestry was "colored," and not entitled to sit in a railroad train's car reserved for white people.)

Obama's strategy worked despite attacks on his association with the minister of his church, who had made incendiary remarks about white domination and black repression. It worked despite the widely-held assumption that white Americans might no longer voice, but would continue to vote, their racial prejudices. When it became necessary, he succeeded in confronting the issue of race without relinquishing his claim to be a nonracial candidate in an address in which he denounced black and white bigotry and defused the racist sentiments directed at him.

Since his election, Obama's politics of inclusion have continued in his appointment of his principal Democratic rival as Secretary of State, retention of Bush's Secretary of Defense, hosting a dinner for his Republican opponent on the eve of his own inauguration, and choosing an invocation speaker with whom he disagreed on controversial social issues. Despite a large Democratic majority in both houses of Congress, Obama clearly intends to reach out to Republicans and independents for support of some of his controversial programs.

Critics who opposed his candidacy have counseled that he should govern from the center. They should be reminded that Obama was elected president with nine-and-a-half million more votes than John McCain, with more than twice as many electoral votes, a great Democratic majority in the House of Representatives, just shy of a filibuster-proof two-thirds majority in Senate, and an unmistakable mood in the country to undo insofar as possible the Bush Administration policies that have cost America lives, wealth, prestige and

goodwill. By contrast, George W. Bush became the unelected president eight years ago upon a 5-4 decision of the Supreme Court, with half-a-million fewer votes than Al Gore. Bush entered office as if he had been elected with a mandate to govern as the most conservative president of modern times. I do not recall that any of his prominent conservative supporters cautioned him to govern from the middle.

No previous president has done so much so quickly to spell out what he hopes to be the tone of his presidency. Obama's statements and actions on Guantanamo, terrorism and domestic issues have captured the most public attention, but nothing else he has said or done will be more important in the long run than his bold commitment to open government and an end to unconstrained executive power. On his first day in office, President Obama said: "Transparency and the rule of law will be the touchstones of this presidency." That sentence states that he believes in such liberal principles as the right of the people to know and the constitutional separation of powers. The insidious accusations that Barack Obama was a Muslim or a socialist have been refuted, but those who shamelessly propagated those views must shudder to think that Barack Obama may aspire to be the most liberal president in modern American history.

Three actions proclaimed the sharpest contrast with the secrecy and unconstrained executive power of the Bush administration and set a new standard for open government. One was to reverse the policy that encouraged government agencies to deny requests for information and public records under the Freedom of Information Act. He said, "Starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information, but those who seek to make it known."

A second action established unprecedented limits on the employment and access of lobbyists.

Officials will be barred from lobbying their former colleagues "as long as I am president." He barred former lobbyists from working for agencies they had lobbied within the past two years and officials must recuse themselves from issues they had dealt with in that time. An exception to each of these rules became immediately apparent. (William Lynn, Obama's choice to be Deputy Secretary of Defense designee, had been a former lobbyist for defense contractor Raytheon, and would be given a waiver, William V. Corr, Obama's nominee to be Deputy Secretary of Health and Human Services, an official with the Campaign for Tobacco-Free Kids, had lobbied for stricter tobacco regulations, and would recuse himself from tobacco issues.) The promise was that exceptions would be exceptional.

Obama effectively repealed Bush's Executive Order 13233 that allowed former presidents and their heirs to claim executive privilege in an effort to keep presidential records and documents from public exposure, undermining the 1978 Presidential Records Act that had declared that presidential papers belong to the American people. Under Bush's order, distant heirs and later presidents could continue to suppress public knowledge of what transpired in an earlier presidency. When the House of Representatives voted in 2007 to restore the Presidential Records Act, President Bush threatened to veto any new law that overturned his executive order.

If Obama's action to restore the people's ownership of presidential papers is given effective legal power, there will be far fewer secrets when future presidents leave office, and those that remain will have to be clearly justified when challenged. Supreme Court Justice Louis Brandeis said that "sunlight is the best disinfectant." Without it, no meaningful democracy can exist. We can already begin to see the sun coming through.

**A personal note.** I have adopted a new e-mail address. My choice of left@stanleyfeingold.com sounds as if I were coming out of the other-than-conservative closet. For decades, 'conservative' and 'Right' have been respectable and 'liberal' and 'Left' were often uttered as if they were shameful and un-American. Henry Clay, unsuccessful in several efforts to become president, had proclaimed that he would rather be right than be president. Later conservatives boasted that they could be Right *and* president. After all, Right suggests Rights, and is the English equivalent of *droit*, which translates as something to which one has a legal right. We commend someone who is a leader's right-hand man. Alas, Left linguistically has no such distinguished pedigree. It derives from the Old English *lyft*, which translates as weak or useless. Worse, it translates in Latin languages as sinister. The left-handed ten to fifteen percent of people do not need to be told how unfairly they are treated. Despite this bias, we have elected Truman, Ford, Reagan, Bush I, Clinton and Obama, all lefties. (Even the losers are often left-handed: Gore, Perot and McCain.

In reality, the political distinction between Left and Right depends on the time and place. The Supreme Court's present four most conservative justices, more often than not joined by the somewhat less conservative Kennedy, are much less right-wing than the justices caricatured as the Nine Old Men when Franklin Roosevelt assumed the presidency. Similarly, today's more liberal Justices are unlikely to be judged as left or liberal as former Justices Brandeis, Brennan, Douglas or Warren. Left I am (but not left-handed), and it's nice to know that I haven't been left behind. Those who know me know that I will listen to opposing views, and that I will read and seriously consider all comments, criticisms, and corrections that are left@stanleyfeingold.com.

On the Death of Laissez Faire  
(even though it never really existed)  
February 3, 2009

I would not be so bold as to offer the following elementary observations on economics, were it not for my having once again confirmed a long-held belief that the legendary dismal science was not qualified to be called a science and that its uniquely American form has grown more dismal. Because it has profoundly influenced public policy and judicial interpretation for most of our history, I found it useful for decades to have my students in American political thought read and examine what many economists treated as the semi-sacred texts of Friedrich von Hayek (for his influence, despite the fact that he was not an American) and Milton Friedman.

My students also read Edward Bellamy and socialist advocates of an American utopia, but economic egalitarianism rarely moderated (let alone prevailed over) the doctrines of free enterprise and market theory, despite the adoption of legislation restricting trusts, permitting union organization, and prescribing wages and conditions of employment. The present crisis may or may not deepen, but it is leading more Americans to closely reexamine the most fundamental tenets of the economic system that the United States long ago embraced.

This country has endured depressions and panics before, but what is happening now is more momentous than another financial crisis. The present crisis is unique in that it has led bankers, brokers and other powerful financial interests to contradict the almost religious faith they have professed in laissez-faire economics and to plead for public assistance. Late last year, they had the gall to ask for untold financial relief with no conditions regarding its use or repayment. The American government, assured that the sky would fall if it didn't quickly acquiesce, was hoodwinked into providing it. There is no evidence that the billions of dollars that financial institutions have been given have had any impact upon the economic crises they were intended to ameliorate. (I wonder if my bank will extend the same courtesy to me when I ask for a loan.)

We have learned that financial institutions, after receiving huge government handouts to stave off bankruptcy, continue to fly executive jets, sponsor sports events, subsidize excursions, and give generous bonuses – and they are surprised by the public's appalled reaction. The reason they don't get it is because they have always gotten away with it.

After sober reflection upon what we had done, millions of Americans have begun to realize that the economists who were confidently using new exotic terms that the rest of us didn't understand also didn't understand them, that the money managers, financial advisers and self-proclaimed gurus to whom we listened were sometimes crooked, often greedy, and almost always as ignorant as the rest of us. We learned that the "laws" of laissez-faire economics that had for so long shaped so much American public policy weren't laws at all, but the preferences of wealthy groups that had succeeded in presenting the interests of a particular prosperous class as if they were objective principles that were also in the best interests of all Americans.

The market theory of American capitalism that cherished the self-governing, self-correcting, eternal laws of supply and demand was a myth long before such recent manipulations as the way in which Enron created artificial scarcities and obscene profits in energy markets and the speculation by which financial institutions (yes, financial institutions, not the oil companies) more recently increased the price of gasoline at the pump despite the fact that supply was up and demand was down.

These and the bubbles that burst in real estate and the stock market are contemporary examples of the “irrational exuberance” promoted by economic manipulations far older than the Dutch tulip panic of 1636. Is there really a moral difference between the profits pocketed by the operators of massive Ponzi schemes and the profits received by those who succeeded in persuading investors to buy houses they could not afford or stocks that they knew (or should have known) to be poor or speculative investments?

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My consideration of what has recently happened is focused on American laissez-faire capitalism because it is different from other capitalist systems, although other nations are profoundly affected by the economic power of the United States. No other capitalist nation has been as committed as the United States to a belief in the operation of self-correcting market forces. Whatever euphemisms are employed to hide the reality, the simple truth is that the taxation of individual and business income, patent laws, subsidies, and public policies that encourage, regulate or restrict free markets – most of which have been enacted to protect private capitalist enterprise -- contradict laissez-faire and market theory.

The principal difference between American laissez-faire capitalism and the mixed capitalist-socialist economies of other nations is that other private enterprise economic systems recognize that they must contain regulations and restraints, floors and ceilings, equitable taxation, universal benefits, and certain public enterprises that are engaged in promoting the common wealth and not private profit. In short, their economies are far from laissez faire.

The American bias against regulation of any kind has never been better expressed than in Ronald Reagan’s succinct and sweeping proclamation, “Government is not the solution to our problem, government is the problem.” Less true words regarding the economy have never been spoken. Taken literally, a bias against government (that is, regulation of any kind) is an argument on behalf of anarchism, based on the insupportable conviction that people will always act rationally in defense of their best interests and that the perceived self-interest of individuals will correspond to the best interests of the whole society.

Rational individuals cannot believe in laissez-faire doctrine, because they recognize that every compromise of the theory constitutes a rejection of it. This does not imply an end to capitalism of every kind (any more than the failure of Soviet communism constituted an end to every kind of social intervention), because we have always practiced impure theories of capitalism that fall far short of the laissez-faire model, and all rational economic theories value rewarding scientific, physical, artistic and intellectual creativity, initiative, energy and hard work.

Of course, apart from the truest and purest libertarians (has anyone ever met any?), no defender of capitalism really believes in laissez-faire. If Reagan really did, what was he doing for the eight years when he appeared to be occupying the role of Head of the Government of the United States? George W. Bush came closer than any modern president to representing the interests of laissez-faire capitalism, but government policy under Bush did not leave private enterprise alone, but instead contributed to its power and profits.

The failure of the American model is also partly attributable to the unsustainable promise of perpetual growth. For the first time in recent memory, the economy has sharply declined and we have no idea how much further it will decline. What tends to be overlooked is that the economic growth of recent years resulted in an extraordinary increase in wealth for a minority, very modest or no growth for most Americans, and real economic decline for tens of millions of Americans at the bottom of the economic ladder, a much larger number than those who had experienced the fabulous growth.

The almost wholly unregulated widening of the gap between prosperous and poor Americans has been accelerated by taxing investment income at a much lower rate than wage income, legislated methods of tax avoidance, and a credit system that does not define usury, permitting lenders to double or triple the interest rate for debtors who are in arrears, turning their difficulty in making payments into the impossibility of doing so, thus leading to their sinking into bankruptcy, foreclosure of their homes, and poverty. Lenders profit, but the Gross Domestic Product hides how grossly it is distributed.

Apart from revealing the increasing inequality of wealth that has been taking place in the United States, the present economic crisis exposes a fundamental flaw in capitalism's dependence upon the impossible and immoral objective of unending growth. We have only now become aware of the finite natural resources that wealthy economies are depleting at an alarming rate, that emerging economies demand more of for themselves, and that poor economies desperately need for survival.

The United States has not been exempt from the damage caused by the ever-increasing exploitation of natural resources. More Americans die from air pollution than from breast cancer and prostate cancer combined. The United States emits several times more carbon dioxide (the primary global warming gas) than the other rich industrialized nations. In short, profligate economic growth is killing us. If illimitable growth is seen as the essential fuel of American capitalism, capitalism would be doomed, but it isn't.

American prosperity can survive and thrive if we consume more wisely (without depleting the earth's resources) and more justly (leaving enough for the rest of humanity). Estimates suggest that the natural resources of three Earths would be exhausted if the rest of the world had a gross domestic product equal to that of the United States. In fact, the richest fifth of the world possess more than eighty percent of the wealth, while the poorest fifth have one percent.

According to Jeffrey D. Sachs, *Common Wealth: Economics for a Crowded Planet*, at least \$30 billion must be invested every year in sustainable technologies to meet critical needs in energy, food, water, and climate change. This reality rebukes laissez-faire capitalism's quest for endless growth as immoral, impossible, and contributing to greater



inequality. A rising tide will not lift leaky boats or those who cannot afford a boat. It must be obvious that private investment lacks the profit motive to address many of these issues, and only public policies can promote many urgent public needs. That is possible only in an economic system that encourages private enterprise without diminishing the legitimate and achievable needs of all people.

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To achieve such a national and world economy requires consideration of many factors beyond individual self-interest. In 1925, John Maynard Keynes published a short essay that has always impressed me for its balance between individual and social interest. A critical paragraph reads:

Let us clear from the ground the metaphysical or general principles upon which, from time to time, laissez-faire has been founded. It is not true that individuals possess a prescriptive 'natural liberty' in their economic activities. There is no 'compact' conferring perpetual rights on those who Have or on those who Acquire. The world is not so governed from above that private and social interest always coincide. It is not managed here below that in practice they coincide. It is not a correct deduction from the principles of economics that enlightened self-interest always operates in the public interest. Nor is it true that self-interest generally is enlightened; more often individuals acting separately to promote their own ends are too ignorant or too weak to attain even these. Experience does not show that individuals, when they make up a social unit, are always less clear-sighted than when they act separately.

Nothing in the modern history of capitalism supports a contrary conclusion. Everything that has happened in the present financial, business and housing crisis confirms it.

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The stimulus package proposed by President-elect Obama and the explicit promise of more far-reaching programs of government innovation and regulation go far beyond anything the American government has done before. Almost uniquely among modern nations, it has never adopted a scheme of universal health insurance and it spends less than ten percent of the cost of elementary and secondary education.

Undeterred by the prospect of making unprecedented deficits vastly larger in the conviction that only appropriate public investment will provide immediate and long-term relief from a deepening depression (as well as an equally important belief in the social desirability of such reforms), the federal government will seek to repair the crumbling infrastructure of public buildings, roads, bridges, and parks, create clean, safe and less expensive domestic energy, extend affordable health care to everyone, adopt anti-poverty strategies that provide work for all able-bodied adults, and assist the states in meeting traditional obligations which the less prosperous states are unable to meet. Merely to enumerate these categories constitutes a recognition of both the very limited relevance of

laissez-faire theory in meeting these challenges and the essential role that only the national government must play.

Once adopted and implemented, the innovative measures that work well are likely to become fixed and immutable practices of the government, much as the once-unprecedented programs of old age Social Security, wages and hours legislation, unemployment insurance, the guarantee of basic civil rights, and Medicare and Medicaid became in the past hundred years. The powerful interests that have until now successfully resisted social and economic reform must shudder at the prospect of something like universal health insurance, labor union organization unhindered by corporate intimidation, federal aid to elementary and secondary education that more nearly equalizes educational opportunity, and the elimination of wasteful pork-barrel projects. Only the intellectual and moral bankruptcy of laissez faire theory has created a political environment in which the enactment of these policies can be widely seen as vital to the nation's economic and social well-being.

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The most obvious difference between American capitalism and the much greater regulated capitalism in other nations has been the far greater disparity in income and wealth between the rich and the poor in the United States as compared with other economies. In 2005, the total household income of the most prosperous one-hundredth of one percent (0.01%) of American households was greater than the total income received by the bottom twenty percent of households whose income was under \$17,000. Without even taking into account the fact that the poorest households had far more dependents and often needed two workers to create their meager income, this meant that 11,000 Americans had an average income more than five thousand times greater than that of twenty-five million others. (These figures come from the nonpartisan Congressional Budget Office.) Not since the earliest days of unfettered industrial consolidation has any capitalist nation experienced such a vast income disparity between its wealthiest and poorest citizens.

And that gap keeps growing. Taking inflation into account, in the quarter-century since the election of Ronald Reagan in 1980, the rich became richer (the bottom half of the top one percent averaged a 105 percent increase in income), the richer became even richer (the next highest four-tenths of the top one percent gained more than 161 percent), the still richer became still richer (the top one-tenth of one percent averaged 294 percent in added income), and the very richest (the 11,000 households cited earlier) averaged \$35,500,000, 384 percent more than twenty-five years earlier.

Incredibly, the very richest also pay a lower share of their income in federal taxes than the merely rich, because they get nearly half of their income from capital gains (income from stocks, bonds, and other assets), which are taxed at 15 percent, less than half of the current top 35 percent tax rate on income from work. Most Americans have barely benefited from economic growth. According to the Congressional Budget Office, the average income of the middle twenty per cent rose 15 percent, which comes to much less than one percent each year. The income gap is greatly exceeded by the growing gap in personal wealth. The rich do get richer.

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If a corporation or a bank or any other private economic interest is too big to fail it is too big to be compatible with an economic system that preaches free enterprise and market theory. If any institution requires the financial protection of the government, it should be subject to financial control by the government. This time the failure is already so steep and so widespread that Americans have noted the obscene profits obtained by experts who didn't know or care about the consequences of their advice to investors as long as they received immediate rewards and the outright corruptness of financial manipulators and the public servants whom they bought. The domestic intellectual struggle of the next few years will be waged between those who abandon failed doctrines and those who would, in Louis Lapham's phrase, restore "the Potemkin village of this country's borrowed prosperity."

We now know that the financial gurus who told us that we had to pay the bailout bill didn't know what they were talking about. More than half of the original \$750 billion has been spent and we haven't seen any results and didn't even require that the bankers and brokers provide an accounting of how much they spent and what they spent it for. Try to explain to a reasonably intelligent American that stock brokers, money managers and accountants, whose job it is to assess the expertise that goes into investment and the accuracy of the financial figures that reveal profits and losses, couldn't discover a Ponzi scheme when they confronted one. That failure has to be more than ignorance; it has to be a deliberate neglect of responsibility that deserves criminal prosecution. Shouldn't that apply to the professionals who placed or urged their clients to place their savings in such schemes? Doesn't such behavior constitute a willful violation of the "due diligence" for which their clients and customers paid them?

Is anybody being prosecuted? Are ill-gotten gains being confiscated? Are bankers, brokers and others being compelled to return the bonuses and other rewards they received for the bogus profits that they didn't earn? Are they being fired for incompetence, if not for worse? Far from such deserved penalties, many are earning – oops, receiving – more money than ever, and some will continue to receive bonuses, presumably based on their having succeeded in persuaded more gullible customers in placing their life's savings in their fraudulent schemes.

These financial professionals may not have been the most deceitful manipulators, but they succeeded in extracting money from their clients on the assumption that they knew what they were doing when they didn't, and they knew they didn't. The shocking truth is that, if any members of the financial community had the knowledge and courage to publicly expose the fundamental failure of the system before the financial system began to crumble, they would certainly have lost their jobs. (This sad story is told with some details in "The End of the Financial World as We Know It," by Michael Lewis and David Einhorn, in The New York Times, January 6, 2009.)

The development of American capitalism has been punctuated by periodic panics marked by the widespread foreclosures of homes, bank failures, the bursting of speculative bubbles, sharp declines in industry, employment, retailing, and agriculture, and a lack of confidence in the currency. The Enron scandal once more demonstrated that some public officials are corruptible, but it takes two to tangle public and private interests. While initiatives by public officials are not unknown (Illinois Governor Rod Blagojevich provides

the most conspicuous recent example), the more usual pattern is for private interests seeking benefits to approach the public officials.

Before Enron's corrupt practices were revealed, before the company failed, and before its top officials were convicted of federal crimes, Vice President Dick Cheney gave Enron executives exclusive and secret influence over national energy policy, Enron contributed to John Ashcroft's unsuccessful 2000 Senatorial campaign, Chief presidential advisor Karl Rove was a major Enron stockholder when he met with Enron chair Ken Lay to discuss Enron's problems with federal regulators, Commodity Futures Chair Wendy Gramm (wife of Senator Phil Gramm) succeeded in exempting Enron from federal oversight before being appointed to Enron's board of directors, Former Montana Governor Marc Racicot was Enron's Washington lobbyist before he was named Republican National Chairman, Lawrence B. Lindsey was an Enron consultant before becoming a leading Bush economic advisor, United States Trade Representative Robert Zoellick served on Enron's advisory council, Alberto Gonzalez worked at Vinson & Elkins, the Houston law firm that represented Enron and signed off on Enron's accounting schemes, Don Evans was Bush's chief campaign fundraiser and later Secretary of Commerce and accepted Enron's campaign contributions, and other close associations can be cited. Can anyone believe that these personal and financial ties did not contribute to Enron's success in making corrupt fortunes and having the government overlook its criminal behavior for such a long time?

Even less government would mean less corruption, because Enron's shocking manipulation of the energy market would have been even less restrained. The alternative, of course, is better government, less susceptible to corruption and more vigilant in protecting and extending the public interest. That means an end to the illusion of *laissez faire*, and that is where we are now.

**THE OBAMA AGENDA.** No president has laid out more clearly or more quickly what he wanted to achieve in his presidency than President Obama has in his first sixty-six days in office. What will he get and how will he get it?

**Was President Obama wise to seek bipartisan support for his stimulus package?** In the end, after many meetings, only three Republican Senators voted for the stimulus package that provided increased unemployment benefits, health care subsidies, state aid, and public works, and increased unemployment benefits. Obama's outreach was good politics, but his uncompromising stance was good government. On his record, it's hard to doubt Obama's sincerity in wanting broad bipartisan support, but the evidence of history is against it. In 1935, more than forty percent of the House of Representatives voted to recommit the Social Security bill to committee, which would have effectively killed it. After last year's defeat of every New England Republican Representative, today's House is less likely than ever to respond to appeals by a liberal Democratic president. The democratic process is by its nature partisan, and bipartisanship denies that real differences exist or pretends they don't really matter.

**What has Congress accomplished?** Beyond the stimulus package, the Ledbetter Fair Pay Act has restored the right of workers to challenge wage discrimination of which they had been previously unaware. (A 5-4 Supreme Court decision had declared that a worker must file a discrimination claim within 180 days of a company's initial decision to pay a worker (usually a woman) less than it pays someone else (usually a man) doing the same job, even though the underpaid worker could not have known the other worker's pay.) The State Children's Health Insurance Program law provides four million children with health insurance they did not previously have.

**Do the president's proposals risk a Senate filibuster?** Given the likelihood that Al Franken will be given the now-vacant Minnesota Senate seat, 57 Democrats, joined by the two Independents, will be only one vote shy of the sixty votes necessary to prevent a filibuster. In any event, a filibuster can be prevented by using the budgetary process by which a majority vote can adopt fiscal policy in the Senate, a procedure the Republicans frequently used in the Bush presidency. (Yes, it takes that kind of parliamentary maneuvering for a mere majority to prevail in the Senate.)

**How has President Obama advanced his objectives through his executive powers?** He issued an executive order permitting scientific study of embryonic stem cells (that would otherwise be destroyed) in the search for better treatments of diabetes, Parkinson's, heart disease, spinal-cord injuries, and other disabilities. He has also issued a memorandum requiring that scientific data should not be distorted or concealed to serve a political agenda. Obama is sending more troops into Afghanistan and has adopted a policy there and in Pakistan to root out the Taliban. He has ordered the closing of the American prison in Guantanamo Bay and limited barred certain interrogation techniques.

**How will President Obama deal with charges that the Bush Administration committed or condoned torture?** The International Committee of the Red Cross recently released a “Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody,” a chilling account of how the U.S. sponsored or tolerated torture in the extraordinary rendition, imprisonment and interrogation of persons who were never indicted or tried for any crime. It verifies the charges that torture often produces false confessions (to avoid future punishment), undermines the possibility of rendering justice (because courts will reject evidence so obtained), and violates human rights. Anyone who still believes President Bush’s claim that the United States has not engaged in torture should read the ICRC report (on the Internet) or Mark Danner’s analysis of it in the April 9, 2009 issue of *The New York Review of Books*. Although Obama has condemned torture, he has not yet made clear whether he intends to vigorously prosecute those who could be charged with committing or condoning torture, or pursue a policy of unpunished public exposure (as with a Truth and Reconciliation Commission), or put the past behind us so that the nation can move on to more immediate crises.

**Is Obama attempting to do too much?** Congress adopted a \$787 *billion* stimulus package and the president proposed a budget exceeding \$3.5 *trillion*. (To some extent, this represents the president’s honesty in not placing military and other expenditures in supplementary appropriations that are outside the budget.) In response to the criticism that he is spreading government’s resources too thin, Obama’s response is that the need for government action is greater than ever: American health care costs that are twice as much per capita as in other advanced nations have contributed to the economic distress of domestic business, yet Americans have a lower life expectancy and poorer maternal and childhood medical care than many countries; the United States is increasingly dependent upon imported oil, and its students are outperformed in science and other disciplines in some countries in which public education is nationally financed, by contrast with the U.S., in which states and local communities bear more than ninety percent of the cost.

**Is the Obama program radical?** Yes. Obama’s proposals are a radical departure from previous practice, but is he radical enough? For now, he favors retaining financial power, subject to regulation, in the same institutions that got us into the present mess. It remains to be seen whether he changes if the crisis worsens. Obama’s manner and approach are moderate, but he believes that the escalating gap between the highest incomes and most Americans is unjustified and the existence of so many poor people in this wealthy nation is immoral. Perhaps in his heart of hearts he believes in a near-equality of income. Perhaps not. Being the person he is, he doesn’t entertain the question. He finds it sufficient to point out that the nation prospered when the wealthy made only twenty times more than the working class, not the two hundred to four hundred times and more that today separates the rich and the rest of us.

**If enacted, will these policies change America?** Of course. Some programs will improve what we have, such as rebuilding our roads, bridges, parks, and schools. Other programs will more nearly equalize opportunity, when all children are able to benefit from a superior pre-K to technical school and university education, as well as a high standard of health care and a cleaner and safer environment achieved by the near-elimination of fossil fuels.

**Does this Administration mark a movement to big government?** The overriding change sought by Obama's recovery plan and domestic proposals is the abandonment of an ideological choice between government and private enterprise. Consumerism and inventive and artistic creativity are better served by private enterprise; areas that benefit from uniformity (mail) or universal access (roads), or are not profitable (public transit) are better served by government; some private activities are better unregulated (creative arts), and some should be regulated (product safety and working conditions). We live neither in an anarchic laissez-faire world nor a state-controlled dictatorship; ours is a mixed economy in which have the ability to make democratic pragmatic choices as to whether a desirable economic activity should be public or private, regulated or unregulated by the state. The relationship between the banking system and the national government has already changed and is likely to change more. Almost surely, the relationship between the food and drug industries and the national government will change in the near future.

The opening sentence of Jeff Madrick's *The Case for Big Government* (Princeton, 2009) is: "It is conventional wisdom in America today that high levels of taxes and government spending diminish America's prosperity." Much of this short book persuasively refutes this view and proposes an agenda that incorporates higher (but fairer) taxes, bigger (and more responsive) government, and free (but regulated) enterprise. Liberals should read it because it spells out liberal objectives that they are likely to embrace. Conservatives should read it because, apart from objecting to the changes, they will argue that they would lead to an unconstitutional national expansion of power.

**Would these changes alter the constitutional balance between federal and state power?** More government means more national power. When the new programs are adopted and challenged in the courts, as they will be, the argument will be that the national government is usurping powers reserved to the states. This Supreme Court, consisting of four conservatives, four moderates, and Anthony Kennedy in the middle, will be asked to contradict Chief Justice John Marshall's rule in 1819 in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." That construction will ultimately prevail.

**What will be the impact on democracy of the changes brought about by this administration?** Nothing Obama has thus far proposed deals directly with gerrymandering and the existence of so many noncompetitive districts in the House of Representatives or the legislative procedures which undermine majority rule in the Senate, or the disproportionate influence of lobbyists and money in shaping the law and influencing its administration. Nothing any president proposes will correct the undemocratic unfairness of California's 37 million residents having no more Senate representation than Wyoming's half-million. The adoption of laws that make voting easier and fairer will still leave us some distance from one person with one vote equal to any other person, but they can narrow that distance.

**How is Obama likely to respond to the compromises that even a Democratic Party congressional majority is certain to adopt?** This president who is bent upon getting most of what he is asking for from a Congress in which his party has strong majorities will not compromise away critical parts of his proposals. He has not used his calm manner to hide his populist determination. He has demonstrated his willingness to reach out to the public in press conferences, speeches outside Washington, and even appearances on popular television programs. He has said: "I didn't come here to do the same thing we've been doing or take small steps forward. I came to provide the sweeping change that this country demanded when it went to the polls in November." There is every reason to believe that he means it.

**A postscript. Whatever happened to the campaign argument by Obama's rivals in both parties that he lacked the experience to be an effective president "from day one"?** The argument was ludicrous. Presidents with a great deal of experience who lacked essential personal qualities have failed. What a president needs is not any specific kind of experience, but knowledge in many areas of public policy, the intellect to understand the available choices and consequences, the personality, temperament and persuasiveness that will win good will from the public and Congress, and the ability to shape programs that will advance what he believes are desirable goals. Some experienced presidents have lacked one or more of these qualities. Barack Obama has demonstrated that he possesses them. What remains to be seen is the extent to which Americans and the Congress share his goals and whether they can be achieved.



## How Has The Conservative Coalition That Took Over The Republican Party Failed May 7, 2009

How has the conservative coalition that took over the Republican Party failed, while the economic conservatives in the Senate continue to exercise great power?

“America’s major parties are cross-sectional and multi-factional.” I don’t imagine that I ever taught a political parties course in the 1950s and ‘60s without speaking that line. Despite the fact that the Democratic balance of power then was more liberal and the Republican balance of power was more conservative, I wanted to refute the mistaken belief that the Democratic Party was *the* liberal party and the Republican Party was *the* conservative party. There were many influential conservatives among the Democrats and many influential liberals among the Republicans. Republican presidential candidates Willkie in 1940, Dewey in 1944 and 1948, and Eisenhower in 1952 and 1956 were not the choice of the conservative wing of their party. When conservative Senator Robert Taft, affectionately dubbed Mr. Republican, sought his party’s nomination after it had lost five consecutive presidential elections, he was turned down for a third time in 1952, because the party’s strongest conservative supporters wanted a winner (General Eisenhower) more than they wanted an ideological ally.

The Democratic Party was more liberal, but the opposition of conservative Democrats to FDR’s New Deal in the 1930s and Lyndon Johnson’s Great Society in the 1960s sharply limited the achievements of both. Although a minority in their party, liberal Republicans introduced such progressive bills as the Norris-LaGuardia Act, which in 1932 outlawed contracts that had allowed employers to prevent employees from joining a labor union, and barred federal courts from issuing injunctions to prevent unions from striking, picketing or boycotting. Without this law, the industrial trade unions and pro-labor legislation of the 1930s would not have been possible. Its sponsors were George Norris, a Republican Senator from Nebraska who was also a principal proponent of the Tennessee Valley Authority, which secured cheap electric power for millions of poor southerners, and Fiorello LaGuardia, a Republican Representative who became a progressive three-term Mayor of New York City.

As for the most divisive political issue of the ‘50s and ‘60s, it is only necessary to ask two questions: Which party contained the strongest supporters of civil rights legislation, and which contained the most powerful opponents of those laws? The answer to both questions is the dominant Democratic Party, supported both by urban liberals and Southern segregationists. It was clear in those decades that the differences within the parties were often greater than the differences between them.

In 1964, Barry Goldwater became the first unabashedly conservative Republican presidential candidate since Herbert Hoover’s failed bid for reelection in 1932. Although Goldwater suffered a devastating defeat (receiving only 38.5 percent of the vote), his candidacy anticipated the later development of a Republican conservative coalition, in which fiscal conservatives (low taxes and less government) were joined by racial conservatives (after *Brown v. Board of Education* led to desegregated schools, and the Civil Rights and Voting Rights Acts produced a vast increase in non-white political participation) and moral

conservatives (after *Roe v. Wade* removed legal restrictions on abortions and the women's lib movement led to greater economic and sexual equality).

Ronald Reagan became the symbol of this new conservatism with his election in 1980 and reelection in 1984, even though he did little to advance its goals. Reagan's victory owed much to his personality, President Jimmy Carter's unpopularity, concern for Americans held hostage in Iran, and the economic hardships caused by high inflation and gas shortages. The presidential election of Reagan's Vice President, George H.W. Bush in 1988 owed less to Bush's appeal than to Democratic nominee Michael Dukakis's lack of appeal even for the most partisan Democrats. The conservative impact of the Reagan and Bush elections has been exaggerated because of the weak opponents they faced, despite which they did not succeed in winning control of both houses of Congress until 1994.

The growing unpopularity of Bush II's presidency shattered the conservative coalition in the congressional election of 2006 and dissolved it in 2008. In that year's presidential election, Senator John McCain was the least ideological of the possible Republican candidates, but he hewed closer to the party line than he had in the recent past. That the doctrinaire adherents of a conservative coalition could subsequently fault McCain for not being conservative enough is evidence that they would rather be right, far right, than elect a president.

The attempt to create an unequivocally conservative party left the Democratic Party as the party of everyone else, the haven of all liberals, most moderates, and those conservatives who were unwilling to engage in racial, cultural and sexual battles that they did not share or appeared to have been largely resolved. This is evident in the recent switch of moderate Republican Senator Arlen Specter to the Democratic Party. A Republican Party that is no longer multi-factional can no longer be cross-sectional, as is evident in its near-disappearance in the Northeast and Far West.

Just as when, in the 1960s, the legislative struggle over civil rights was carried on largely in the Democratic Party, so today the conflict over expanding government intervention in health, education, and energy policy is being decided by whether the president and party leadership can win broad support from more conservative members. Their task will be formidable, as was demonstrated by the Senate's failure to adopt an amendment to the Helping Families Save Their Homes Act that would have allowed bankruptcy judges to modify mortgage terms for struggling homeowners. Twelve Democrats joined all of the Senate Republicans in opposing the amendment.

The Democratic liberal leadership will not overlook the fact that the intraparty opposition to reform comes now as in the past principally from Senators who represent less populous states. Excepting recent convert Arlen Specter, the eleven other Democratic Senators who voted against assisting homeowners confronting the loss of their homes represent nine states that together have less than 6.2 percent of the nation's population. Nevertheless, as long as it takes sixty Senators to prevent a filibuster and adopt a liberal law, conservatives will seek to muster the forty-one votes they need to defeat it. Illinois Senator Dick Durbin, sponsor of the amendment, attributed its failure to the pressure and political contributions of the banking industry. He said, "The banks are still the most powerful lobby on Capitol Hill."

This was not a victory for the monolithic conservative Republican Party. It was a reminder that the appeal of economic conservatism and generous corporate contributions crosses party lines. The battle will be joined again in Democratic efforts to reform credit card fees, tax the foreign profits of American corporations, and expose wealthy Americans who escape income taxation by placing their wealth in secret foreign bank accounts. The fight for these progressive measures will take place in the Senate, because the liberals are stronger in the House (which despite gerrymandering comes much closer than the Senate to reflecting public opinion) and fewer Representatives are influenced by huge corporate contributions.

If the Democratic liberal leadership continues to be stymied in the Senate, there are several strategies to which it could resort. The liberals might attempt to purge the conservatives from the party. In 1938, President Roosevelt attempted to do that by opposing conservative incumbents in party primaries. Despite his own popularity, Roosevelt suffered a stinging defeat. Barack Obama is, by temperament and political design, opposed to attempting such radical change. Count on the continued support of the Democratic leadership for Senator Joe Lieberman, its 2000 vice presidential candidate who in 2008 enthusiastically endorsed John McCain's Republican candidacy, and for Arlen Specter, even if he only gives marginally greater support to Democratic proposals. (In fact, party switchers historically have voted more consistently with their new party than they had before they switched.) The Democrats are not about to copy the Republicans' suicidal quest for ideological purity.

Obama's continued popularity and the disillusionment of the electorate with the financial sector could result in midterm gains of three or four Democratic seats in the Senate. Add the ultimate seating of Al Franken as a Minnesota Senator, and the majority of liberals among Democratic Senators comes closer to being a liberal majority in the Senate. Maine's moderate Republican Senators Olympia Snowe and Susan Collins, who have voted with the Democratic majority on nearly half of all controversial issues, have safe seats, but only as long as they continue to occupy them. If the Democratic tide rolls on, the 2010 election could have the effect of winning over wavering Democrats.

If the Democratic majority holds but doesn't increase, they might seek to rewrite the rules to permit a simple majority to end debate after an extended period of floor debate. This bold strategy risks the departure of the most conservative Democrats. Whatever Obama and the congressional leadership do to advance their agenda, the outcome may hinge, for liberals, on Obama's continued high public approval rating and, for conservatives, on the continuing financial influence of lobbyists. The Republicans will seek to take advantage of future tensions within the Democratic Party, but they will succeed only if they broaden their appeal and hold out the realistic possibility of becoming an electoral majority.

*I welcome your comments and criticisms.  
Please forward to [left@stanleyfeingold.com](mailto:left@stanleyfeingold.com).*

I want to share with my City Colleagues and friends my thoughts on several political subjects, and I look forward to your sharing your views with me. Stanley Feingold

**Senate consideration of Sonia Sotomayor's nomination to be an Associate Justice of the Supreme Court will be less about her than about opposing views of the role of the Justices.**

**The Senate's 90-6 rejection of President Obama's request for funds to close the American prison at Guantanamo Bay in Cuba was an irrational fear-driven act that only puts off the inevitable resolution of how the United States deals with these prisoners.**

**The Gallup Poll reveals a widening gap between Democrats and Republicans in every age and income group, on every educational level, in every region, among both men and women, whether married or unmarried, among whites, blacks and other non-whites, and religious commitment (excepting only weekly churchgoers).**

**Senate consideration of Sonia Sotomayor's nomination to be an Associate Justice of the Supreme Court will be less about her than about opposing views of the role of the Justices.** Discussion of Judge Sotomayor's qualifications has already taken a predictable course. Her supporters will stress the relevance of the "empathy" to which President Obama alluded, that derives from her background and is exhibited in opinions she has written in lower courts, with the clear implication that Justices of different backgrounds and different temperaments are likely to interpret the Constitution differently. In other words, the president hopes that she will be a liberal jurist. Her critics will question whether her judicial opinions and public statements are faithful to what they construe to be the true meaning of the Constitution. In other words, they fear that she will be a liberal jurist. Barring an extremely unlikely damaging revelation, she will be confirmed. If both liberal hopes and conservative fears are fulfilled, she is likely to be close to but different from Justice David Souter, whom she will replace. Of course, she may turn out to be a surprise, as Souter did. More than this about her likely impact we cannot say.

What we can and should say is that, on the present Supreme Court, there are four intelligent, educated and devoted Justices whose views as to how the Constitution should be interpreted are often (but not always) opposed to four other intelligent, educated and devoted Justices. (Anthony Kennedy, the ninth Justice, cannot be placed in one camp or the other.) Both the four conservatives and the four liberals have spent much of their lives in the study and application of constitutional law. Members of either faction can be influenced by members of the other, but are unlikely to abandon their fundamental values. While the division has not always been as evenly divided as it is now, it has always existed.

No one who has ever read the debates on the writing and ratification of the American Constitution can escape the conclusion that there were comparable divisions in the Constitutional Convention on the structure and composition of the national government. Many issues were decided differently on different occasions. While some were resolved by

compromise, the Framers deliberately avoided confronting the most divisive moral issues. To speak of the true or “original” meaning of controversial constitutional clauses is to speak with ignorance of the debates which preceded the adoption of the final text.

The Constitution did not even mention judicial review, the power of the Supreme Court to compose binding interpretations of the Constitution in cases before it. More than two centuries of judicial review should persuade us that those who dissent from the majority on any constitutional issue are as knowledgeable of and devoted to the law as those whose judgment has prevailed. To believe otherwise is to believe that a large number of Justices (often a majority) are fools or knaves. They are neither.

On two recent consecutive days, op-ed pieces in *The New York Times* transcended the polemical exercises that pretend that there is only one correct way to interpret the language and history of the Constitution. On May 28, Nicholas Kristof pointed out that the brain’s medial prefrontal cortex probably has a crucial role in shaping our moral values. If that is so, we can be more open-minded about why and how we differ by examining well-reasoned and compassionate defenses of positions that we personally oppose. The differences will remain, but we will understand them better.

On the next day’s op-ed page, David Brooks exposed the fiction that ours is a nation of laws, not men, and spelled out how our differing value judgments shape our differing assessments of the facts. Intellectual honesty would require the admission that presidents try to appoint Justices whose sympathies, moral preferences, or theories of law are similar to their own. They try, but President Theodore Roosevelt regretted his appointment of Oliver Wendell Holmes, President Eisenhower regretted his appointment of Earl Warren, and President George H.W. Bush probably regretted his appointment of David Souter.

Liberal Kristof and conservative Brooks both possess the intellectual and moral honesty to confess that the moral compass they employ to view facts and cases influences their judgment. There is every reason to believe that Sonia Sotomayor will prove to be an intelligent, educated and devoted Justice. What remains to be established is whether President Obama has chosen a Justice whose moral compass is close to his own.

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**The Senate’s 90-6 rejection of President Obama’s request for funds to close the American prison at Guantanamo Bay in Cuba was an irrational fear-driven act that only puts off the inevitable resolution of how the United States deals with these prisoners.** Only six Senators had the courage to vote to provide the funds on the clear understanding that closing this prison would not lead to freeing the prisoners to commit crimes against the United States or its citizens. Those Senators are Richard Durbin, the majority whip; Carl Levin, chairman of the Armed Services Committee; Patrick Leahy, chairman of the Judiciary Committee; Jack Reed, a West Point graduate and former Army Ranger, Tom Harkin, and Sheldon Whitehouse.

Among those who did not support funding the prison’s closure were many who had earlier indicated that they support abandoning Guantanamo, but were swayed by the narrow-minded political appeal of NIMBY (“Not in my backyard”). South Dakota Senator John Thune apparently spoke for many members of Congress when he said, “The American

people don't want these men walking the streets of America's neighborhoods." Texas Representative Lamar Smith expressed a similar sentiment when he said, "No good purpose is served by allowing known terrorists, who trained at terrorist training camps, to come to the U.S. to live among us." In requesting funds for closing Guantanamo, President Obama clearly made a political mistake by not first spelling out the conditions under which prisoners who will remain in American custody will be kept.

Disposing of fear-mongering, President Obama has outlined how we will deal with the vast majority of prisoners at Guantanamo. Many who can be safely transferred to other countries will be transferred; those who have violated American criminal laws will be tried in federal courts (as have terrorists who have been convicted and are now serving life sentences in supermax prisons), and those who have violated the laws of war will be tried in military commissions, with safeguards against torture or other unconstitutional treatment. That leaves two categories of prisoners who would remain in American custody. A small number consists of Uighers from China who were ordered released because they were found not to be enemy combatants, but who would be imperiled if returned to China, which considers them enemies of the state. A larger number (estimated at between 50 and 100) cannot be prosecuted, yet they "pose a clear danger to the American people."

That last group inspires the appeal to hysteria that has been whipped up by those who, frighteningly but falsely, conjured up images of Guantanamo prisoners walking the streets of America. Contrary to those fearful imaginings, Al Qaeda-affiliated convicts who are now within the United States are housed in supermax prisons (principally the federal facility in Florence, Colorado), including Ramzi Yousef, who headed the group that carried out the first bombing of the World Trade Center in 1992; Zacarias Moussaoui, who conspired in the terrorist attacks of 9/11; Ahmed Ressay of the foiled December 31, 1999 Los Angeles millennium attack plot; Ahmed Omar Abu Ali, conspirator in several plots including one to assassinate President George W. Bush; Wadhi el-Hage, convicted of the 1998 bombing of the U.S. Embassy in Kenya, and Richard Reid, who sought to detonate explosive materials hidden in his shoes while on board an aircraft.

Among others in this highest security prison are Theodore Kaczynski, the Unibomber, whose attacks took the form of mail bombs; Robert Hanssen, the FBI agent who turned Soviet spy, and Terry Nichols, an accomplice in the Oklahoma City bombing of a federal building. They are allowed out of their cells for one hour a day to exercise alone with their legs shackled and accompanied by three guards. Other prisoners in supermax prisons include gang leaders and some of the most dangerous criminals in America. They are kept in solitary confinement. No prisoner in a supermax prison facility has ever escaped.

These named individuals have been convicted and sentenced. What President Obama seeks to establish is a category of future inmates who will be placed in federal prisons without a trial and conviction.

The facts are that known terrorists, along with other dangerous convicts, are presently housed in supermax prisons, that they are subject to extraordinary constraints in prison, that no one has ever escaped from a supermax facility, and that there is absolutely no prospect that any imprisoned terrorists will ever be "walking the streets of America's neighborhoods." Obama has carefully constructed five categories in which the

Guantanamo p The facts are that known terrorists, along with other dangerous convicts, are presently housed in supermax prisons, that they are subject to extraordinary constraints in prison, that no one has ever escaped from a supermax facility, and that there is absolutely no prospect that any imprisoned terrorists will ever be “walking the streets of America’s neighborhoods.” Obama has carefully constructed five categories in which the Guantanamo prisoners fall, only one of which presents serious questions in law and justice which Obama acknowledges have not been resolved.

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**The Gallup Poll reveals a widening gap between Democrats and Republicans in every age and income group, on every educational level, in every region, among both men and women, whether married or unmarried, among whites, blacks and other non-whites, and religious commitment (excepting only weekly churchgoers).**

Overall, the parties were evenly matched in 2001, when Americans divided at 33% Democratic, 32% Republican, and 34% independent. The most recent poll (January-April 2009) shows gains among Democrats (36%) and independents (37%) and a decline among Republicans (27%). The Republican decline in the past eight years has been sharpest among groups that were already leaning Democratic: self-identified liberals and moderates, church non-attenders, those with lower incomes, and young adults. (A Pew Research Center poll in April measured an even more precipitous Republican decline to 22%, with 33% identifying as Democrats.)

The only exception is among weekly churchgoers, where Republicans hold steady at 52%. Decline takes place in every **age group** (18-29 from 41 to 32%, 30-49 from 46 to 42%, 50-64 from 44 to 38%, 65+ from 42 to 41%), **income group** (under \$30,000 annual income from 37 to 28%, \$30,000-75,000 from 48 to 39%, \$75,000+ from 54 to 47%), ideology (moderate from 37 to 28%, liberal 17 to 9, conservative from 66 to 65), **region** (Midwest from 46 to 37%, East 39 to 33, West 45 to 40, South 47 to 43), **educational level** (college graduates from 47 to 37% and non-graduates from 43 to 40%), **sex** (males from 49 to 42%, females 40 to 35%), **color** (whites from 50 to 44%, nonwhites from 23 to 22%, blacks from 12 to 10% **marital status** (unmarried from 37 to 29%, married 51 to 46), and **churchgoing behavior** (seldom or never from 38 to 29%, less than weekly from 46 to 40%, weekly held at 52%).

The United States had only one major party briefly in the early nineteenth century, but for all of the rest of our history, there has been a two-party system. (This was true even in the 1850s, when the Republican Party replaced the Whig Party as the second major party. There are constitutional, cultural and mathematical – yes, mathematical – reasons why the U.S. must have a two-party system.) The Republican Party will once again be an effective alternative to the Democratic Party when it broadens its appeal in most of the above-listed population groups.

This prospect is not assisted by Dick Cheney’s emergence from the near-secrecy of his vice presidency as a highly vocal extremist defender of policies that do not represent

President George W. Bush's second term. At best, Cheney charges up those who will never leave the party; at worst, he encourages the conservative diehards not to reach out to others who fall short of their standard of ideological purity. There may be some grim satisfaction for Cheney, Newt Gingrich and Rush Limbaugh to be surrounded by true believers, but an American major party cannot prosper if it appears to impose an intellectual and moral purity test on its supporters.



Dear City Colleagues:

I am looking forward to our discussion of the politics of health care at our Thursday lunch, particularly to the contributions of Nadia Bernstein, who has provided valuable background information, and our guest, Robert Rosenblatt, who has written about these issues. Of course, our focus will be altered by what President Barack Obama has to say in his address on Wednesday evening. What follows is one layman's biases on the problem and the politics.

**What's wrong with our system of health care?**

**1 Health care is always rationed. The issue is by what criteria, for whose benefit, and who is deprived of basic care?**

The choice comes down to a disparity based on the individual's ability to pay and the greatest good of the greatest number.

**2 Unnecessary treatments and medicines increase the cost without genuine benefits and often cause great harm.**

President Obama has read Dr. Atul Gawande's insightful article, "The Cost Conundrum" (*The New Yorker*, June 1, 2009), in which Dr. Gawande spells out how ours "is the most wasteful and the least sustainable health-care system in the world...."

Many people in medicine don't see why they should...reduce waste and improve quality if it means sacrificing revenue."

We know that patients request services that are unhelpful or harmful, often based on misleading television advertising.

We also know that physicians prescribe treatments and medicines that are demanded or profitable for the physicians.

Health providers should not receive payments or gifts from any source that may compromise professional impartiality.

**3 Fee-for-service financial incentives encourage some doctors to become profiteers, for which all of us ultimately pay.** Physicians should be paid per patient, individually or in groups or hospitals, as in the Mayo Clinic and superior groups.

**4 Only a universal single-payer system can provide adequate coverage for those who most need and can least afford it.**

**How do other industrial nations differ from the U.S. in the health care that they provide and insure?**

**5 The United States is the only modern industrial nation that has not adopted a goal of universal health care.**

**6 Health measures are lower in the U.S. than in other industrial nations, but health care costs are higher.**

Life expectancy is higher in Japan, France, Switzerland, Holland, Sweden, Canada, Norway, Germany, and Finland.

All of these countries have lower infant mortality rates and lower death rates for infants (1-4) and young adults (15-24).

The U.S. exceeds all other nations in possessing what is acknowledged to be the world's best emergency care system.

**Other nations have longer life spans, lower infant mortality rates, and other indices of better health outcomes.**

**7 The U.S. spends more than twice as much per capita as Canada and has significantly worse results.**

**How do undemocratic or untruthful political tactics prejudice the outcome of the health care debate?**

**8 Majority rule does not exist when sixty affirmative votes are necessary to pass legislation in the United States Senate.** Every alternative to simple majority rule is minority rule. The effect is to empower a minority to compel maintenance of the status quo or to require compromises that go beyond what the majority in both houses of Congress is prepared to concede.

**9 Senators who represent a very small proportion of Americans are likely to have very much greater influence.**

The 6 Senate Finance Committee members appointed to create a compromise represent states with 2.74% of the population.

The Republicans are Charles Grassley of Iowa (30th in population), Olympia Snowe of Maine (40th), and Michael Enzi of Wyoming (50th), who has said: "Of I hadn't been involved in this process as long as I have and to the depth as I have, you would already have national health care. It's not where I get them to compromise, it's what I get them to leave out." The Democrats are Jeff Bingaman of New Mexico (36th), Max Baucus of Montana (44th), and Kent Conrad of North Dakota (48th).

The six key Senators represent six states which have a total of only 2.74 percent of the nation's population.

At least seven liberal Democrats on the Senate Finance Committee were not appointed by Chairman Baucus to this group.

**10 Malicious attacks on proposed health care bills and President Obama's proposals have been widely disseminated.**

There are no "death panels"; only voluntary assistance for the aged that already exists in federal legislation.

There is no compulsory government coverage; only a limited option for a present or future government option.

At best and at most, national health insurance would extend the benefits of Medicare to the entire population.

**Can the United States afford national health insurance? Can it afford not to have national health insurance?**

**11      Improving the nation's health is as important as any other government function that promotes the general welfare.**

There is a great financial cost in postponing or denying medical care because of an individual's inability to pay.

The U.S. has extended economic assistance to the financial and business sectors without requiring budget neutrality.

There is no greater measure of inequality in the United States than the inequality in providing health care.

The More Things Change  
November 9, 2009

The House of Representatives has passed a health care reform bill. Contrary to predictions just weeks ago, it contains a public option. It is too early to tell if there will be a Senate bill or, if there is, how it will differ, and how the two bills would be reconciled. It is not too early to recognize remarkable parallels with earlier congressional debates on related issues.

In 1935, Republican members of Congress were overwhelmingly opposed to enactment of the Social Security Act. (Although we tend to equate that law with old-age survivors insurance, it also established a federal-state system of unemployment insurance and aid to the states in many areas.) On a crucial vote to recommit the bill to the House Ways and Means Committee (which tactic is a euphemism for killing it), only one Republican in the House voted not to commit. Similarly, when the Senate two months later voted on an amendment to eliminate federal old-age benefits, nearly twice as many Republicans voted to eliminate what we now call Social Security as voted to keep it. Representative James W. Wadsworth said: "This bill opens the door and invites the entrance into the political field of a power so vast, so powerful as to threaten the integrity of our institutions and to pull the pillars of the temple down upon the heads of our descendants." The National Association of Manufacturers called Social Security the first step toward "ultimate socialistic control of life and industry."

Thirty years later, similar fears were voiced. Senator Carl Curtis said that Medicare, medical insurance for the aged, is "brazen socialism." In the House, Medicare was adopted by the Ways and Means Committee by a party-line vote of 17-8. When it then went to the Rules Committee, all four Republicans voted against it. It received no Republican votes until it reached the House floor. As had occurred in 1935, the likelihood of ultimate passage probably weakened opposition, and three months after House passage, four of the eight Republicans on the Senate Finance Committee supported the bill. The overwhelming final vote for passage in both houses hid the strong partisan passions that the bill had engendered. When Medicare was adopted in 1965, only one-half of seniors had any health insurance, and most coverage was only for inpatient hospital costs. Medicare's extensive coverage for virtually all seniors has been credited with extending life expectancy for 65-year-olds from 14 to 18 years and has reduced the senior poverty rate from more than 28 percent to less than 10 percent.

Despite Medicare's widespread acceptance and success, opposition did not disappear. Thirty years after its adoption, Republican Senate Majority Leader Bob Dole boasted: "I was there, fighting the fight, voting against Medicare...because we knew it wouldn't work." The fight did not end. Only Republican Senators voted in 1999 against Senator Kennedy's amendment to reduce tax breaks for the wealthiest Americans and to use these funds for Medicare. Only Republicans voted in 2000 against Senator Kent Conrad's amendment to establish Social Security and Medicare lock boxes to protect surpluses in either program from being raided for other programs or to provide tax breaks. Only Republican Senators voted in 2008 to sustain President Bush's veto of the Medicare Improvements for Patients and Providers Act of 2008 when the U.S. Senate voted to override that veto.

There is a profound difference of opinion between those who champion individualism and self-interest above all else, and those who seek a common good that involves some sacrifice from those who are most advantaged. It is an understandable philosophical, moral, political, and economic difference and it should not be glossed over. But it is unduly harsh and untrue for those who extol individual liberty above the general welfare to attribute evil motives to those who won adoption of Social Security and Medicare and now seek to secure widespread health care reform.

It was hysterical and untrue for these opponents to warn in 1935 and 1965 that adoption of social reform would mark the decline, if not the death, of American freedom. It still is when Representative Virginia Foxx says, on the eve of this House vote: “I believe we have more to fear from the potential of that bill passing than we do from any terrorists right now in any country.” It is hypocritical and untrue for today’s opponents of health care reform to argue that it would cut Medicare payments to seniors when they opposed its adoption and have sought to undermine it ever since.

The other side was simply put by President Franklin D. Roosevelt, when he told Secretary of Labor Frances Perkins: “There is no reason why everybody in the United States should not be covered. I see no reason why every child, from the day he is born, shouldn’t be a member of the social security system.... If he is out of work, he gets a benefit. If he is sick or crippled, he gets a benefit.... I don’t see why not. Cradle to grave—from the cradle to the grave they ought to be in a social insurance system.” However history will call it, the New Deal is still being dealt.

Constitutional Democracy v. the Senate and the Supreme Court  
January 23, 2010

Mea culpa. For fifty years I taught courses in American government and politics, the American presidency, the American legislative process, and American political thought. Beginning nearly a decade before that and continuing for more than a decade since, I have read, thought and written about almost every imaginable aspect of American politics.

For most of those seventy years, I believed that my most fundamental political belief was solidly based in American practice. This belief was that, despite the since-repealed prejudices of racism and sexism and the structural limitations of federalism, the American political system is basically democratic, that is, one in which the majority of the people freely choose their representatives and that a majority of these representatives, after due deliberation and with the approval of the elected president, choose the public policies of the nation. I was wrong. There is no assurance that majority rule will prevail in the choice of our representatives and no assurance that a majority of our representatives will prevail in the enactment of law.

My deep and lifelong commitment to American democracy has suffered not one but two devastating blows. The more obvious is that the threat of unlimited debate in the United States Senate can prevent a majority from adopting legislation and thus subvert majority rule in that body. In order to create a filibuster-proof sixty-vote majority to adopt health care reform, the Democratic leadership made unconscionable concessions to Senators Joseph Lieberman of Connecticut, the primary home of the insurance industry (by eliminating a public health plan option), Mary Landrieu of Louisiana (Louisiana was promised up to \$300,000,000 in added Medicare aid), and Ben Nelson of Nebraska (the federal government will permanently pay the full cost of Nebraska's Medicare, while paying the cost of expansion in all other states for only three years). These and other less costly concessions were made to win the few votes necessary to obtain sixty votes in the U.S. Senate.

Despite these efforts, the Democrats has now fallen one short of that arbitrary three-fifths majority by the defeat of its candidate in the special election to fill the vacancy caused by the death of Massachusetts Senator Ted Kennedy. If the three above-named Senators had not been given political bribes and the Democratic loss of the Massachusetts seat, a health care bill still could be approved by 56 votes to 44. This would be a clear majority, incidentally representing far more than a majority of the votes cast for the one hundred Senators.

Let us be clear: Anything other than majority rule is minority rule, that is, the ability of a minority (and as we have once again witnessed in this process, the ability of a single Senator) to prevent the majority from acting. This is not the minority rule of a single emperor or dictator, or the minority rule of an oligarchy or aristocracy. But the ability of a minority of a representative body to prevent adoption of public policy is minority rule, most emphatically when the minority wants to retain the status quo, which is clearly the case now with a Senate minority opposed to the enactment of any meaningful health care legislation.

The second blow to democracy is that the majority choice may not even attain office. That hope was undermined in the presidential election of 2000, when a Supreme Court majority stopped the counting of votes in Florida, a process that, if completed, would have resulted in Vice President Gore's winning that state's electoral vote and being elected president. (Apart from Florida's improper and illegal denial of the vote to many citizens, an extensive study by a broad bipartisan consortium of newspapers demonstrated that, if disputed punch-card ballots were apportioned to the two candidates by any of eight possible methods of counting them, Gore would have won the Florida vote and the presidential election by every one of the eight methods.)

The United States Supreme Court has now decided (in a decision that went far beyond what was necessary to decide it), that corporations may expend any amount of money in order to influence the outcome of an election. It should not need to be pointed out that if the Supreme Court had not decided the presidential election of 2000 in *Bush v. Gore* contrary to the evidence, two members of the present Court would not be sitting on it, and the present case of *Citizens United v. Federal Election Commission* would certainly have been decided very differently.

To allay our fears regarding the undermining of the democratic process, this 5-4 majority assures us that corporations may not give the money directly to a candidate, but they can spend many millions of dollars on behalf of candidates. We are to be reassured that, because the money doesn't pass through the candidate's hands, lavish expenditures on his or her behalf would not affect the candidate's behavior after taking office. We are also reassured that the vast sums of money that are spent to prejudice the outcome of the election will not affect the adoption of future public policy.

I cannot help but be reminded of the evenhandedness of Anatole France's observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." One hundred and sixteen years later, the U.S. Supreme Court, in its majestic equality, is saying that civic groups, trade unions, you and I are free to spend as many tens of millions of dollars in support of our favored candidates as wealthy corporations will spend in favor of their candidates. If you are reassured by the alleged impartiality of these positions, you and I have irreconcilably different views of human nature and political behavior. Beyond the bias that money introduces, it seems almost certain that the messages of the candidates will be drowned out by the vastly more expensive and more irrational messages of their supporters.

How could this have happened? To put it bluntly: How has the Constitution, which begins with its proclamation that it is the product of "we the people of the United States," and which never mentions corporations, has been subverted to represent the interests of groups or entities whose life extends beyond the lives of ordinary mortals and whose financial and other resources are vastly greater than any large number of individuals?

Corporations are not mentioned in the United States Constitution. Adam Smith, the revered philosopher of capitalism, favored private (i.e., non-stock owning) companies, warning that managers and directors of public companies would not show the same concern for "other people's money." Long after his presidency had ended, Thomas Jefferson wrote: "I hope we shall...crush in its birth the aristocracy of our moneyed corporations which dare

already to challenge our government in a trial of strength, and bid defiance to the laws of our country.”

In nineteenth-century America, the wealth, power and judicial influence of corporations grew. Businessmen recognized that a corporation chartered under the lax laws of one state could do business in all states. Lawyers began referring to the corporations they represented as “artificial persons.” Although corporations are not mentioned in the Fourteenth Amendment, which sought to extend the national liberties of persons in the Bill of Rights to protection against the states, courts extended these protections to corporations without constitutional or statutory sanction. This is irrational because corporations have none of the fundamental attributes of persons. It is undemocratic because it bestows enormous power on organizations that have economic resources that no individual, collection of individuals, or any other type of group can equal, resources that can persuade, intimidate, and finally overwhelm those who dare to contradict it.

At best, a corporation is an impersonal organization whose sole purpose is the financial profit of its investors and management. It has no intrinsic altruistic motive, no emotional or moral impulse to sacrifice self-interest for a larger cause. In short, it is not a person. It doesn’t have to do good; it wants to make money. It doesn’t have to engage in insider trading, stock-price manipulation, or the diversion of corporate funds for personal use, but it can and too often will, if it can get away with it. Carnegie, Rockefeller, Ford, Pew, and other great foundations have done immense good since the deaths of their founders, and Bill Gates, Warren Buffet and others have demonstrated that they can benefit humanity while they are still alive. But that is precisely the difference between a corporation whose motive is profit and a foundation which may be motivated by a desire to do good.

Despite the misgivings of Adam Smith and Thomas Jefferson, corporations may be irreplaceable in the modern world, but that does not entitle the courts to elevate them to the status of persons. It is contrary to both the American Constitution and human biology to endow corporations with rights that equal, let alone exceed, the rights of persons. Court cases have long demonstrated how the power of corporations is greater than that of mere citizens. Now the Supreme Court, in an unprecedented decision, has empowered them to spend unlimited funds to influence the outcome of elections. In 2000, a 5-4 majority of the Supreme Court stole the presidential election. In 2010, a 5-4 majority of the Supreme Court has announced that all American elections are for sale.

What can be done? Majority rule can come to the U.S. Senate by “reconciliation,” a legislative process by which the majority can force a vote on health care and any proposed legislation which has the support of a majority of its one hundred members. No action of any Senate, including its rules of debate, is protected against its reversal by a future Senate. This Senate can enact rules that protect the right of all of its members to engage in vigorous extended debate, but without the ability to prevent the majority from acting.

Without changing the rules, the House of Representatives can accede to adoption of the Senate health care bill, without a conference committee of the two houses and without the risk of a Senate filibuster, allowing the president to sign it into law and permitting the United States to join every other industrial country in the world in establishing a national



system of health insurance. Congress can then turn to amending the law as experience dictates.

Popular government can be retained in elections by the enactment of federal legislation that provides free and equal access to television and radio, as many countries now provide. A constitutional amendment can reaffirm the intention of the Framers and the authors of the Fourteenth Amendment (that extended protection of civil liberties to persons in the states) to confine these rights to living, breathing persons -- the only kind that the Constitution recognizes -- who cast votes and decide elections, at least they have until the profoundly undemocratic decision in *Citizens United v. Federal Election Commission* begins to corrupt the political process.

Given the profoundly undemocratic and unconstitutional position of the present Supreme Court majority, we should consider a straightforward change in the size of the Court. The Constitution gives Congress the power to set the size of the Supreme Court, which Congress originally put at six, expanded to seven in 1807, nine in 1837, and ten in 1863, reduced by congressionally-mandated attrition to nine in 1866 and eight in 1867, and reset at nine in 1867. President Franklin D. Roosevelt proposed enlarging the Supreme Court to as many as fifteen, adding one for each Justice over 70 years who failed to retire. Roosevelt's plan failed, but induced at least one Justice less than two months after FDR's proposal to switch from opposing a state minimum wage law less than a year before to upholding it, giving rise to the pun, "a switch in time saves nine." The dramatic change in the Supreme Court's majority helped to defeat the president's plan.

The possibility of an enlargement of the size of the Court might have a similar impact today; the reality of such a change would surely have major consequences. One can almost hear the cries of "court-packing," as if presidents do not, as a matter of course, apply litmus tests in order to bring about the constitutional interpretations they want. The longevity of Justices becomes the key to constitutional interpretation. The "Nine Old Men" of the 1930s are gone, but five others are there to rewrite the Constitution and violate the most elementary principles of democratic government.

For the United States to deserve to be called a democracy requires our reaffirming that its Constitution was designed to give basic human rights only to human beings and our declaring that a majority vote after due deliberation is the basis for legislating in the United States Senate. The Framers of the Constitution and the authors of the Bill of Rights and the subsequent civil rights amendments wanted and deserve no less. So do we.

My Response to Your Rebuttal of My Comments  
on the Filibuster and the Citizens United Case  
January 24, 2010

I am grateful to you for taking the trouble to reply to my critique of the filibuster and the Supreme Court decision in *Citizens United v. Federal Election Commission*. I refrain from commenting on your premature burial of the present federal Administration, although I am truly puzzled by your characterization of its “extreme misuse of power,” without citing a single example. (Surely you meant to write unwise use, unless you have evidence of the abuse of power that would justify constitutional condemnation of the president.)

Bypassing the partisan political swipes, your letter provides me with the incentive to respond to what I deem to be your failure to appreciate how far we have come in achieving a more democratic society and how threatened that achievement is by the ability of a minority in the United States Senate to not merely delay a majority vote but to prevent it and the Supreme Court’s interpretation of “free speech” that will impose a prohibitively high cost on the ability of most Americans to compete effectively in the marketplace of ideas.

Permit me to assure you that I am acutely aware that the United States is not “a literal democracy.” One reason that I honor the achievement of the Framers in writing the Constitution is because, despite the reservations that many of them had regarding the desirability of popular government, this Constitution made possible the growth of democracy if the people and their representatives willed it, and they did. I recognize, as I put it in my earlier letter, that “the structural limitations of federalism” required the constitutional compromise that resulted in the equal representation of the states in the Senate and a winner-take-all electoral vote in each state, both of which are serious impediments to majority rule. I have not written that America is no longer a democracy; insofar as these features of federalism distort or prevent majority rule, the United States falls short of being a democracy. I love my country; I just don’t lie about it.

Nevertheless, I cherish the ideal of democracy and the extent to which that ideal has been embodied in America’s development. The Bill of Rights, the abolition of slavery, woman’s suffrage, and the extension of civil rights to everyone all speak to the growth of democracy in America, and I am proud to identify myself with efforts to extend democracy by providing equal access to education and health, without which we cannot achieve the full and fair participation of all people in their government.

I referred in my earlier letter to the denial of majority rule in *Bush v. Gore*. That anti-democratic decision remains relevant today and its history should not be distorted. Your response is misleading in two respects. One is with regard to the Court’s finding. You write: “The Court’s decision was 7-2 on rejecting the Florida Supreme Court ruling.” It is deceptive to write this without emphasizing that four of the nine U.S. Supreme Court Justices categorically rejected the merits of Bush’s suit and the Court’s conclusion that compelled a certification of Bush’s Florida victory and his election as president. Those four Justices were unequivocal in their claim that there was no constitutional or political reason why the Florida vote count could not be continued and concluded.

The other reference is simply untrue, even though it has been repeated by people who should have known better, including you. You write regarding “what a full recount of the entire state would have shown...On that, even the *New York Times* has agreed that Bush would have won.” This untruthful statement has been widely circulated, but it deserves to be categorically refuted. The embarrassing fact is that, arbitrarily and contrary to Florida law, Gore’s attorneys did not demand a full recount but requested it only in four counties. Nevertheless, a consortium of distinguished newspapers (including *The New York Times* and *The Wall Street Journal*) hired the National Opinion Research Center to engage in what was not a “recount,” but a first count of approximately 120,000 overvotes (where voters appeared to have made two choices, even if both were for the same candidate) and 60,000 undervotes (where the machine count had not revealed a choice) that had not been included in the official count.

The newspaper consortium calculated eight different ways of counting disputed punch-card votes – correctly marked paper ballots, full punches, poorly marked paper ballots, chads detached at three corners, chads detached at two corners, chads detached at only one corner, dimpled ballots with sunlight, or only dimples — and concluded that Gore would have won the Florida vote by every one of the eight methods. Of course, no examination after the fact could entirely take into account the thousands of Palm Beach County voters who mistakenly, as a consequence of an unconstitutional ballot, voted for Buchanan instead of Gore, the thousands who sought to correct their mistake by voting for both Buchanan and Gore and thus invalidated their ballots, the thousands of ballots in election precincts where Gore won a substantial majority of the counted votes but other ballots remained uncounted, and the voters who had been turned away from the polls or were discouraged from coming to the polls because of intimidation or the improper appearance of their names on lists of felons improperly barred from voting.

Despite the unequivocal nature of the consortium’s findings, many newspapers misled readers into thinking that the study had confirmed Bush’s victory. The front-page headline reporting the study in *The New York Times* implied a result that was not borne out by its two full pages of analysis. It read: “Study of Disputed Ballots Finds Justices Did Not Cast the Deciding Vote.” The misleading reference in that headline (repeated by some other newspapers) is to the fact that Bush would have been the winner in – *and only in* – the restrictive four-county recount requested by Gore, a recount that would have violated the explicit requirements of Florida law.

I am certain that you will rejoice with me in the conviction that neither Gore’s lawyer, David Boies, nor the headline writers for *The New York Times* had the right (or, apparently, the ability) to determine and apply Florida election law. One has only to read the summary of the consortium’s findings that appeared in two full pages of *The Times* to reach the inescapable conclusion that, in a total recount by the media consortium of any of the eight exhaustive criteria (all of which could have been completed in time for certification before Congress counted the electoral vote), Gore would have received the Florida electoral vote and been elected.

Gerry, I’m sure that you don’t “hate to inform” me that *The New York Times* is a corporation, because I enjoy informing you that the authors of the First Amendment were

aware of the private ownership of newspapers when they wrote that “Congress shall make no law...abridging the freedom of speech, or of the press.” No other corporate enterprise is included here or in any other provision of the Constitution. By an extension that has never been seriously challenged, “the press” has been interpreted to include all means of expression of political ideas, whether by print, broadcast, film, Internet, or any as-yet undeveloped method of communication. All are permissible, subject to laws limiting their involuntary intrusion, libel and slander, violation of the public peace, certain forms of advertising, improper interference with the election process, or the improper use of a public privilege such as incorporation, which defines the purposes for which the corporation can be employed. (I may have omitted some other legitimate restrictions.)

My point is that the government may limit speech within earshot of a hospital, speech which falsely advertises a harmful product, speech that enters your home without your consent, or (the speech in contention in the *Citizens United* case) commercially sponsored speech on publicly-owned radio and television frequencies within a confined period prior to an election. This does not bar speech, but in the present case creates narrow limits in the hope that some speech does not drown out other speech simply because the speaker’s sponsors are prepared to pay for it.

My fervent faith in the possibility of democracy is undiminished by both the Senate filibuster and the Supreme Court’s removal of all practical constraints on corporate campaigning and indirect financial contributions to candidates and office-holders. I have long been aware of frequent successful efforts to deny free speech to radicals, egalitarians, and enemies of the status quo, but until now I have been unaware that the Constitution has muzzled the free speech rights of wealthy Americans.

To put one difference between us as simply as I can: The Constitution has a great deal to say regarding the rights of persons; beyond the free press guarantee, the Constitution says or implies nothing about the rights of corporations. There is a fundamental difference between the silence of the Constitution regarding particular rights (which you acknowledge doesn’t preclude their inclusion) and the persons to whom they are granted. Rights are granted to “the people,” “all persons,” and “citizens of the United States,” and these grants implicitly deny these rights to any but “the people,” “all persons,” or “citizens of the United States.” Corporations are not persons and they are not citizens.

That the Supreme Court’s decision in *Citizens United v. Federal Election Commission* and the use of the Senate filibuster to prevent a majority vote are setbacks to free speech is undeniable by any rational definition of democracy. No one has devised a better way to govern than with the consent of the majority of the people. We have been a long time getting to a “majority,” and we should be certain that it will be a majority of “the people.”

The Tea Party Movement  
February 19, 2010

Erase this if you read it in *The Times* on Tuesday, February 16, but read it if you haven't. It's the best – and most terrifying – account I have yet read about the Tea Party movement. In part, its opposition to the bank bailout is a reminder that populism has two faces: one that advocates a two-centuries-old constitutional movement toward a more democratic society and another – exemplified by the Tea Party protests – that is irrational in its opposition to taxation, undemocratic in its incitement to armed opposition to laws simply because they don't like them, and ignorant in its failure to understand the nature of political parties and elections in our system of government.

**Tea Party Lights Fuse for Rebellion on Right, by David Barstow, *The New York Times*, February 16, 2010**

SANDPOINT, Idaho — Pam Stout has not always lived in fear of her government. She remembers her years working in federal housing programs, watching government lift struggling families with job training and education. She beams at the memory of helping a Vietnamese woman get into junior college. But all that was before the Great Recession and the bank bailouts, before Barack Obama took the White House by promising sweeping change on multiple fronts, before her son lost his job and his house. Mrs. Stout said she awoke to see Washington as a threat, a place where crisis is manipulated — even manufactured — by both parties to grab power.

She was happily retired, and had never been active politically. But last April, she went to her first Tea Party rally, then to a meeting of the Sandpoint Tea Party Patriots. She did not know a soul, yet when they began electing board members, she stood up, swallowed hard, and nominated herself for president. “I was like, ‘Did I really just do that?’ ” she recalled. Then she went even further. Worried about hyperinflation, social unrest or even martial law, she and her Tea Party members joined a coalition, Friends for Liberty, that includes representatives from Glenn Beck's 9/12 Project, the John Birch Society, and Oath Keepers, a new player in a resurgent militia movement.

When Friends for Liberty held its first public event, Mrs. Stout listened as Richard Mack, a former Arizona sheriff, brought 1,400 people to their feet with a speech about confronting a despotic federal government. Mrs. Stout said she felt as if she had been handed a road map to rebellion. Members of her family, she said, think she has disappeared down a rabbit hole of conspiracy theories. But Mrs. Stout said she has never felt so engaged. “I can't go on being the shy, quiet me,” she said. “I need to stand up.”

The Tea Party movement has become a platform for conservative populist discontent, a force in Republican politics for revival, as it was in the Massachusetts Senate election, or for division. But it is also about the profound private transformation of people like Mrs. Stout, people who not long ago were not especially interested in politics, yet now say they are bracing for tyranny. These people are part of a significant undercurrent within the Tea Party movement that has less in common with the Republican Party than with the

Patriot movement, a brand of politics historically associated with libertarians, militia groups, anti-immigration advocates and those who argue for the abolition of the Federal Reserve.

Urged on by conservative commentators, waves of newly minted activists are turning to once-obscure books and Web sites and discovering a set of ideas long dismissed as the preserve of conspiracy theorists, interviews conducted across the country over several months show. In this view, Mr. Obama and many of his predecessors (including George W. Bush) have deliberately undermined the Constitution and free enterprise for the benefit of a shadowy international network of wealthy elites.

Loose alliances like Friends for Liberty are popping up in many cities, forming hybrid entities of Tea Parties and groups rooted in the Patriot ethos. These coalitions are not content with simply making the Republican Party more conservative. They have a larger goal — a political reordering that would drastically shrink the federal government and sweep away not just Mr. Obama, but much of the Republican establishment, starting with Senator John McCain. In many regions, including here in the inland Northwest, tense struggles have erupted over whether the Republican apparatus will co-opt these new coalitions or vice versa.

Tea Party supporters are already singling out Republican candidates who they claim have “aided and abetted” what they call the slide to tyranny: Mark Steven Kirk, a candidate for the Senate from Illinois, for supporting global warming legislation; Gov. Charlie Crist of Florida, who is seeking a Senate seat, for supporting stimulus spending; and Meg Whitman, a candidate for governor in California, for saying she was a “big fan” of Van Jones, once Mr. Obama’s “green jobs czar.”

During a recent meeting with Congressional Republicans, Mr. Obama acknowledged the potency of these attacks when he complained that depicting him as a would-be despot was complicating efforts to find bipartisan solutions. “The fact of the matter is that many of you, if you voted with the administration on something, are politically vulnerable in your own base, in your own party,” Mr. Obama said. “You’ve given yourselves very little room to work in a bipartisan fashion because what you’ve been telling your constituents is, ‘This guy’s doing all kinds of crazy stuff that is going to destroy America.’”

The ebbs and flows of the Tea Party ferment are hardly uniform. It is an amorphous, factionalized uprising with no clear leadership and no centralized structure. Not everyone flocking to the Tea Party movement is worried about dictatorship. Some have a basic aversion to big government, or Mr. Obama, or progressives in general. What’s more, some Tea Party groups are essentially appendages of the local Republican Party. But most are not. They are frequently led by political neophytes who prize independence and tell strikingly similar stories of having been awakened by the recession. Their families upended by lost jobs, foreclosed homes and depleted retirement funds, they said they wanted to know why it happened and whom to blame.

That is often the point when Tea Party supporters say they began listening to Glenn Beck. With his guidance, they explored the Federalist Papers, exposés on the Federal Reserve, the work of Ayn Rand and George Orwell. Some went to constitutional seminars. Online, they discovered radical critiques of Washington on Web sites like ResistNet.com

(“Home of the Patriotic Resistance”) and Infowars.com (“Because there is a war on for your mind.”). Many describe emerging from their research as if reborn to a new reality. Some have gone so far as to stock up on ammunition, gold and survival food in anticipation of the worst.

For others, though, transformation seems to amount to trying on a new ideological outfit — embracing the rhetoric and buying the books. Tea Party leaders say they know their complaints about shredded constitutional principles and excessive spending ring hollow to some, given their relative passivity through the Bush years. In some ways, though, their main answer — strict adherence to the Constitution — would comfort every card-carrying A.C.L.U. member.

But their vision of the federal government is frequently at odds with the one that both parties have constructed. Tea Party gatherings are full of people who say they would do away with the Federal Reserve, the federal income tax and countless agencies, not to mention bailouts and stimulus packages. Nor is it unusual to hear calls to eliminate Social Security, Medicare and Medicaid. A remarkable number say this despite having recently lost jobs or health coverage. Some of the prescriptions they are debating — secession, tax boycotts, states “nullifying” federal laws, forming citizen militias — are outside the mainstream, too.

At a recent meeting of the Sandpoint Tea Party, Mrs. Stout presided with brisk efficiency until a member interrupted with urgent news. Because of the stimulus bill, he insisted, private medical records were being shipped to federal bureaucrats. A woman said her doctor had told her the same thing. There were gasps of rage. Everyone already viewed health reform as a ruse to control their medical choices and drive them into the grip of insurance conglomerates. Debate erupted. Could state medical authorities intervene? Should they call Congress? As the meeting ended, Carolyn L. Whaley, 76, held up her copy of the Constitution. She carries it everywhere, she explained, and she was prepared to lay down her life to protect it from the likes of Mr. Obama. “I would not hesitate,” she said, perfectly calm.

**A Sprawling Rebellion** The Tea Party movement defies easy definition, largely because there is no single Tea Party. At the grass-roots level, it consists of hundreds of autonomous Tea Party groups, widely varying in size and priorities, each influenced by the peculiarities of local history. In the inland Northwest, the Tea Party movement has been shaped by the growing popularity in eastern Washington of Ron Paul, the libertarian congressman from Texas, and by a legacy of anti-government activism in northern Idaho. Outside Sandpoint, federal agents laid siege to Randy Weaver’s compound on Ruby Ridge in 1992, resulting in the deaths of a marshal and Mr. Weaver’s wife and son. To the south, Richard Butler, leader of the Aryan Nations, preached white separatism from a compound near Coeur d’Alene until he was shut down.

Local Tea Party groups are often loosely affiliated with one of several competing national Tea Party organizations. In the background, offering advice and organizational muscle, are an array of conservative lobbying groups, most notably FreedomWorks. Further complicating matters, Tea Party events have become a magnet for other groups and causes — including gun rights activists, anti-tax crusaders, libertarians, militia organizers, the

“birthers” who doubt President Obama’s citizenship, Lyndon LaRouche supporters and proponents of the sovereign states movement.

It is a sprawling rebellion, but running through it is a narrative of impending tyranny. This narrative permeates Tea Party Web sites, Facebook pages, Twitter feeds and YouTube videos. It is a prominent theme of their favored media outlets and commentators, and it connects the disparate issues that preoccupy many Tea Party supporters — from the concern that the community organization Acorn is stealing elections to the belief that Mr. Obama is trying to control the Internet and restrict gun ownership. WorldNetDaily.com trumpets “exclusives” reporting that the Army is seeking “Internment/Resettlement” specialists. On ResistNet.com, bloggers warn that Mr. Obama is trying to convert Interpol, the international police organization, into his personal police force. They call on “fellow Patriots” to “grab their guns.”

Mr. Beck frequently echoes Patriot rhetoric, discussing the possible arrival of a “New World Order” and arguing that Mr. Obama is using a strategy of manufactured crisis to destroy the economy and pave the way for dictatorship. At recent Tea Party events around the country, these concerns surfaced repeatedly. In New Mexico, Mary Johnson, recording secretary of the Las Cruces Tea Party steering committee, described why she fears the government. She pointed out how much easier it is since Sept. 11 for the government to tap telephones and scour e-mail, bank accounts and library records. “Twenty years ago that would have been a paranoid statement,” Ms. Johnson said. “It’s not anymore.”

In Texas, Toby Marie Walker, president of the Waco Tea Party, stood on a stage before several thousand people, ticking off the institutions she no longer trusts — the federal government, both the major political parties, Wall Street. “Many of us don’t believe they have our best interests at heart,” Ms. Walker said. She choked back tears, but the crowd urged her on with shouts of “Go, Toby!” As it happened in the inland Northwest with Friends for Liberty, the fear of Washington and the disgust for both parties is producing new coalitions of Tea Party supporters and groups affiliated with the Patriot movement.

In Indiana, for example, a group called the Defenders of Liberty is helping organize “meet-ups” with Tea Party groups and more than 50 Patriot organizations. The Ohio Freedom Alliance, meanwhile, is bringing together Tea Party supporters, Ohio sovereignty advocates and members of the Constitution and Libertarian Parties. The alliance is also helping to organize five “liberty conferences” in March, each featuring Richard Mack, the same speaker invited to address Friends for Liberty.

Politicians courting the Tea Party movement are also alluding to Patriot dogma. At a Tea Party protest in Las Vegas, Joe Heck, a Republican running for Congress, blamed both the Democratic and Republican Parties for moving the country toward “socialistic tyranny.” In Texas, Gov. Rick Perry, a Republican seeking re-election, threw his support behind the state sovereignty movement. And in Indiana, Richard Behney, a Republican Senate candidate, told Tea Party supporters what he would do if the 2010 elections did not produce results to his liking: “I’m cleaning my guns and getting ready for the big show. And I’m serious about that, and I bet you are, too.”



**Turning Points** Fear of co-option — a perpetual topic in the Tea Party movement — lay behind the formation of Friends for Liberty. The new grass-roots leaders of the inland Northwest had grown weary of fending off what they jokingly called “hijack attempts” by the state and county Republican Parties. Whether the issue was picking speakers or scheduling events, they suspected party leaders of trying to choke off their revolution with Chamber of Commerce incrementalism.

“We had to stand our ground, I’ll be blunt,” said Dann Selle, president of the Official Tea Party of Spokane. In October, Mr. Selle, Mrs. Stout and about 20 others from across the region met in Liberty Lake, Wash., a small town on the Idaho border, to discuss how to achieve broad political change without sacrificing independence. The local Republican Party was excluded.

Most of the people there had paid only passing attention to national politics in years past. “I voted twice and I failed political science twice,” said Darin Stevens, leader of the Spokane 9/12 Project. Until the recession, Mr. Stevens, 33, had poured his energies into his family and his business installing wireless networks. He had to lay off employees, and he struggled to pay credit cards, a home equity loan, even his taxes. “It hits you physically when you start getting the calls,” he said.

He discovered Glenn Beck, and began to think of Washington as a conspiracy to fleece the little guy. “I had no clue that my country was being taken from me,” Mr. Stevens explained. He could not understand why his progressive friends did not see what he saw. He felt compelled to do something, so he decided to start a chapter of Mr. Beck’s 9/12 Project. He reserved a room at a pizza parlor for a Glenn Beck viewing party and posted the event on Craigslist. “We had 110 people there,” Mr. Stevens said. He recalled looking around the room and thinking, “All these people — they agree with me.”

Leah Southwell’s turning point came when she stumbled on Mr. Paul’s speeches on YouTube. (“He blew me away.”) Until recently, Mrs. Southwell was in the top 1 percent of all Mary Kay sales representatives, with a company car and a frenetic corporate life. “I knew zero about the Constitution,” Mrs. Southwell confessed. Today, when asked about her commitment to the uprising, she recites a line from the Declaration of Independence, a Tea Party favorite: “We mutually pledge to each other our lives, our fortunes, and our sacred honor.” Mr. Paul led Mrs. Southwell to Patriot ideology, which holds that governments and economies are controlled by networks of elites who wield power through exclusive entities like the Bilderberg Group, the Trilateral Commission and the Council on Foreign Relations.

This idea has a long history, with variations found at both ends of the political spectrum. But to Mrs. Southwell, the government’s culpability for the recession — the serial failures of regulation, the Federal Reserve’s epic blunders, the cozy bailouts for big banks — made it resonate all the more, especially as she witnessed the impact on family and friends. “The more you know, the madder you are,” she said. “I mean when you finally learn what the Federal Reserve is!”

Last spring, Mrs. Southwell quit her job and became a national development officer for the John Birch Society, recruiting and raising money across the West, often at Tea Party

events. She has been stunned by the number of Tea Party supporters gravitating toward Patriot ideology. “Most of these people are just waking up,” she said.

**Converging Paths** At Liberty Lake, the participants settled on a “big tent” strategy, with each group supporting the others in the coalition they called Friends for Liberty. One local group represented at Liberty Lake was Arm in Arm, which aims to organize neighborhoods for possible civil strife by stockpiling food and survival gear, and forming armed neighborhood groups. Also represented was Oath Keepers, whose members call themselves “guardians of the Republic.” Oath Keepers recruits military and law enforcement officials who are asked to disobey orders the group deems unconstitutional. These include orders to conduct warrantless searches, arrest Americans as unlawful enemy combatants or force civilians into “any form of detention camps.” Oath Keepers, which has been recruiting at Tea Party events around the country and forging informal ties with militia groups, has an enthusiastic following in Friends for Liberty. “A lot of my people are Oath Keepers,” Mr. Stevens said. “I’m an honorary Oath Keeper myself.” Mrs. Stout became an honorary Oath Keeper, too, and sent an e-mail message urging her members to sign up. “They may be very important for our future,” she wrote.

By inviting Richard Mack to speak at their first event, leaders of Friends for Liberty were trying to attract militia support. They knew Mr. Mack had many militia fans, and not simply because he had helped Randy Weaver write a book about Ruby Ridge. As a sheriff in Arizona, Mr. Mack had sued the Clinton administration over the Brady gun control law, which resulted in a Supreme Court ruling that the law violated state sovereignty by requiring local officials to conduct background checks on gun buyers. Mr. Mack was selling Cadillacs in Arizona, his political career seemingly over, when Mr. Obama was elected.

Disheartened by the results, he wrote a 50-page booklet branding the federal government “the greatest threat we face.” The booklet argued that only local sheriffs supported by citizen militias could save the nation from “utter despotism.” He titled his booklet “The County Sheriff: America’s Last Hope,” offered it for sale on his Web site and returned to selling cars. But last February he was invited to appear on “Infowars,” the Internet radio program hosted by Alex Jones, a well-known figure in the Patriot movement. Then Mr. Mack went on “The Power Hour,” another Internet radio program popular in the Patriot movement. After those appearances, Mr. Mack said, he was inundated with invitations to speak to Tea Parties and Patriot groups. Demand was so great, he said, that he quit selling cars. Then Andrew P. Napolitano, a Fox News legal analyst, invited him to New York to appear on his podcast. “It’s taken over my life,” Mr. Mack said in an interview.

He said he has found audiences everywhere struggling to make sense of why they were wiped out last year. These audiences, he said, are far more receptive to critiques once dismissed as paranoia. It is no longer considered all that radical, he said, to portray the Federal Reserve as a plaything of the big banks — a point the Birch Society, among others, has argued for decades. People are more willing, he said, to imagine a government that would lock up political opponents, or ration health care with “death panels,” or fake global warming. And if global warming is a fraud, is it so crazy to wonder about a president’s birth certificate? “People just do not trust any of this,” Mr. Mack said. “It’s not just the fringe people anymore. These are just ordinary people — teachers, bankers, housewives.”

The dog track opened at 5:45 p.m. for Mr. Mack's speech, and the parking lot quickly filled. Inside, each Friends for Liberty sponsor had its own recruiting table. Several sheriffs and state legislators worked the crowd. "I came out to talk with folks and listen to Sheriff Mack," Ozzie Knezovich, the sheriff of Spokane County, Wash., explained. Gazing out at his overwhelmingly white audience, Mr. Mack felt the need to say, "This meeting is not racist." Nor, he said, was it a call to insurrection. What is needed, he said, is "a whole army of sheriffs" marching on Washington to deliver an unambiguous warning: "Any violation of the Constitution we will consider a criminal offense." The crowd roared.

Mr. Mack shared his vision of the ideal sheriff. The setting was Montgomery, Ala., on the day Rosa Parks refused to give up her bus seat for a white passenger. Imagine the local sheriff, he said, rather than arresting Ms. Parks, escorting her home, stopping to buy her a meal at an all-white diner. "Edmund Burke said the essence of tyranny is the enforcement of stupid laws," he said. Likewise, Mr. Mack argued, sheriffs should have ignored "stupid laws" and protected the Branch Davidians at Waco, Tex., and the Weaver family at Ruby Ridge.

**Legacy** A popular T-shirt at Tea Party rallies reads, "Proud Right-Wing Extremist." It is a defiant and mocking rejoinder to last April's intelligence assessment from the Department of Homeland Security warning that recession and the election of the nation's first black president "present unique drivers for right wing radicalization." "Historically," the assessment said, "domestic right wing extremists have feared, predicted and anticipated a cataclysmic economic collapse in the United States." Those predictions, it noted, are typically rooted in "antigovernment conspiracy theories" featuring impending martial law. The assessment said extremist groups were already preparing for this scenario by stockpiling weapons and food and by resuming paramilitary exercises. The report does not mention the Tea Party movement, but among Tea Party activists it is viewed with open scorn, evidence of a larger campaign by liberals to marginalize them as "racist wingnuts."

But Tony Stewart, a leading civil rights activist in the inland Northwest, took careful note of the report. Almost 30 years ago, Mr. Stewart cofounded the Kootenai County Task Force on Human Relations in Coeur d'Alene. The task force has campaigned relentlessly to rid north Idaho of its reputation as a haven for anti-government extremists. The task force tactics brought many successes, including a \$6.3 million civil judgment that effectively bankrupted Richard Butler's Aryan Nations. When the Tea Party uprising gathered force last spring, Mr. Stewart saw painfully familiar cultural and rhetorical overtones. Mr. Stewart viewed the questions about Mr. Obama's birthplace as a proxy for racism, and he was bothered by the "common message of intolerance for the opposition." "It's either you're with us or you're the enemy," he said.

Mr. Stewart heard similar concerns from other civil rights activists around the country. They could not help but wonder why the explosion of conservative anger coincided with a series of violent acts by right wing extremists. In the Inland Northwest there had been a puzzling return of racist rhetoric and violence. Mr. Stewart said it would be unfair to attribute any of these incidents to the Tea Party movement. "We don't have any evidence they are connected," he said. Still, he sees troubling parallels. Branding Mr. Obama a tyrant, Mr. Stewart said, constructs a logic that could be used to rationalize

violence. “When people start wearing guns to rallies, what’s the next thing that happens?” Mr. Stewart asked.

Rachel Dolezal, curator of the Human Rights Education Institute in Coeur d’Alene, has also watched the Tea Party movement with trepidation. Though raised in a conservative family, Ms. Dolezal, who is multiracial, said she could not imagine showing her face at a Tea Party event. To her, what stands out are the all-white crowds, the crude depictions of Mr. Obama as an African witch doctor and the signs labeling him a terrorist. “It would make me nervous to be there unless I went with a big group.”

**The Future** Pam Stout wakes each morning, turns on Fox News, grabs coffee and an Atkins bar, and hits the computer. She is the hub of a rapidly expanding and highly viral political network, keeping a running correspondence with her 400 members in Sandpoint, state and national Tea Party leaders and other conservative activists. Mrs. Stout forwards along petitions to impeach Mr. Obama; petitions to audit the Federal Reserve; petitions to support Sarah Palin; appeals urging defiance of any federal law requiring health insurance; and on and on. Meanwhile, she and her husband are studying the Constitution line by line. She has the Congressional switchboard programmed into her cellphone. “I just signed up for a Twitter class,” said Mrs. Stout, 66, laughing at the improbability of it all.

Yet for all her efforts, Mrs. Stout is gripped by a sense that it may be too little too late. Yes, there have been victories — including polls showing support for the Tea Party movement — but in her view none of it has diminished the fundamental threat of tyranny, a point underscored by Mr. Obama’s drive to pass a health care overhaul. She and her members are becoming convinced that rallies alone will not save the Republic. They are searching for some larger answer, she said. They are also waiting for a leader, someone capable of uniting their rebellion, someone like Ms. Palin, who made Sandpoint one of the final stops on her book tour and who has announced plans to attend a series of high-profile Tea Party events in the next few months. “We need to really decide where we’re going to go,” Mrs. Stout said.

These questions of strategy, direction and leadership were clearly on the minds of Mrs. Stout’s members at a recent monthly meeting. Their task seemed endless, almost overwhelming, especially with only \$517 in their Tea Party bank account. There were rallies against illegal immigration to attend. There was a coming lecture about the hoax of global warming. There were shooting classes to schedule, and tips to share about the right survival food. The group struggled fitfully for direction. Maybe they should start vetting candidates. Someone mentioned boycotting ABC, CBS, NBC and MSNBC. Maybe they should do more recruiting. “How do you keep on fighting?” Mrs. Stout asked in exasperation. Lenore Generaux, a local wildlife artist, had an idea: They should raise money for Freedom Force, a group that says it wants to “reclaim America via the Patriot movement.”

The group is trying to unite the Tea Parties and other groups to form a powerful “Patriot lobby.” One goal is to build a “Patriot war chest” big enough to take control of the Republican Party. Not long ago, Mrs. Stout sent an e-mail message to her members under the subject line: “Revolution.” It linked to an article by Greg Evensen, a leader in the militia movement, titled “The Anatomy of an American Revolution,” that listed “grievances” he said “would justify a declaration of war against any criminal enterprise including that which

is killing our nation from Washington, D.C.” Mrs. Stout said she has begun to contemplate the possibility of “another civil war” It is her deepest fear, she said. Yet she believes the stakes are that high.

Basic freedoms are threatened, she said. Economic collapse, food shortages and civil unrest all seem imminent. “I don’t see us being the ones to start it, but I would give up my life for my country,” Mrs. Stout said. She paused, considering her next words. “Peaceful means,” she continued, “are the best way of going about it. But sometimes you are not given a choice.

Fourteen Months into His Presidency, Where Is Obama?  
And where is the United States?  
March 17, 2010

Ideologically polarized parties have made bipartisanship impossible. The era of multi-factional, cross-sectional parties ended with a realignment that has taken place over several decades (and is still going on) as a result of the civil rights and voting rights acts, *Roe v. Wade* and the nationalization of moral issues, America's conduct of preventive and preemptive war, conflict over tax policy, the changing ethnicity and identification of voters, an accelerating concentration of wealth, and a primary process that tends to choose candidates who represent the more extreme factions of their party. The major party out of power derives no advantage in acceding to compromises that result in the passage of legislation that will be credited to the party in power. As a consequence, the inclusion of Republican proposals in a health bill sponsored by the Democrats will not result in Republican votes for the final bill.

Those who advocate conciliation and amity in the legislative process, including President Obama, are disheartened, but they must realize that the curious circumstances of an earlier period (when, to cite one example, the Democratic Party contained both the strongest advocates and the sharpest critics of civil rights legislation) no longer exist and are unlikely to exist ever again. Now our parties resemble the ideological opponents of other elective systems. (It's been a long time since critics have suggested that our elections resemble a choice between Tweedledum and Tweedledee.) Watch a television broadcast of the British Prime Minister's Question Time. The party in power does not hope to win support from the party out of power. The majority party or coalition will prevail and the minority will not shape public policy unless and until it wins power in the next election. It's called majority rule.

In the United States, the threat of a filibuster undermines the ability of a majority party in the presidency and both houses of Congress to legislate in the absence of a sixty percent majority in the Senate. Reconciliation is an odd and utterly inappropriate name for the procedure to bypass this undemocratic hurdle. (The majority is not reconciled to being vetoed by a minority.) The honest name for the parliamentary maneuver to avoid a filibuster is majority rule. Every alternative to it is form of minority rule, whether it is the rule of a tyrant, monarch, aristocracy, ruling class, or a minority that has the power to keep the majority from governing. There are anti-majoritarian features in the American Constitution, including the allocation of electoral votes and the equality of states in the Senate, but the ability of a minority of Senators to prevent a majority vote is not one of them. The time has come for President Obama to commit himself and the Democratic Party to the democratic principle of majority rule.

In the present economic crisis, our highest priority should have been job creation. America's schools, roads, waterways, hospitals and public works are sadly in need of repair, and we have not begun to meet the challenges of providing adequate non-fossil-fuel energy and up-to-date technological and scientific education. The cost of meeting these needs will be very high. The cost of not meeting them will be very much higher. In 1935, Roosevelt's Works Progress Administration alone put 3.5 million people to work within a year of its

creation in 1935. Although relief programs did not end the Depression, they altered the nation's mood. In the 1934 mid-term election, the Democrats gained nine House seats and nine more in the Senate. Better bold initiatives by the federal government and inducements to private enterprise can not only raise our spirits; they can also raise our standard of living.

In this connection, Obama might have been a more effective advocate for health care reform. He should have outlined early and clearly how a national health policy establishing broader coverage could be financed by medical reforms and taxes that would protect individuals and small businesses from the escalating costs of medical practice. He should have advocated Medicare for all to counter the confusion and ignorance of those who in the same breath have said that they oppose socialism and favor Medicare.

The Troubled Asset Relief Program (TARP) was adopted quickly to prevent failure of the financial system, and as a result, it was identified with rescuing the very financial institutions whose greed and ignorance caused the collapse of housing and securities markets. At the very least, severe restrictions on financial salaries and bonuses and securities sales should have been adopted and AIG should not have been bailed out (for \$182 billion) in contrast to the great declines suffered by innocent private investors.

Obama should take advantage of the fact that Wall Street, banks and businesses that were deemed "too big to fail" are poorly regarded by both the Right *and* the Left. He was mistaken in placing or keeping in power Geithner, Summers, Bernanke and others who played a part in precipitating the recession, thus implicitly supporting the view that only those who screwed up the economy possess the knowledge and ability to revive it. There are entrepreneurs, economists and others who would not have engaged in transactions that they did not understand, would not have sold their clients products that they knew were not what they were represented to be, and would not have protected an increasingly disproportionately high income for themselves.

Obama's Recovery Act allocated \$787 billion to be spent over two years (much of it not yet spent). A forecast that unemployment would peak at 8.5 percent was off the mark, but independent analysts conservatively attribute between 1.6 and 1.8 million jobs to the law. It has saved jobs and created jobs, but falls far short of turning around the recession. What would a real recovery act do?

Confronted with the need for massive expenditures to promote a healthier, safer and more fulfilling life for its citizens, the United States has three options: borrowing, taxing, and doing without. Restoring income tax levels to those of a more prosperous era (let alone raising them to the rates in other industrial nations) would greatly reduce our present (\$12.5 trillion) and prospective debt.

With a boldness he had not previously shown, President Franklin D. Roosevelt took on "the agents of organized greed" in the 1934 mid-term election and won unprecedented gains in both houses of Congress. He took them on again in 1936 and was rewarded with a second term, still greater Democratic majorities in both houses, and renewed confidence in America's future.

**Rand Paul's Republican Senate nomination** in Kentucky demonstrates how a militant minority can overturn a party organization. This has little resemblance to the coalition that supported Ronald Reagan in 1980 (although he was not so conservative in office) or Newt Gingrich's Contract with America in 1994, which spelled out conservative objectives. The conservative coalition sought to unify fiscal, economic, religious, racial and social conservatives. By contrast, the inchoate Tea Party movement has trouble defining what it's against (as Rand Paul has discovered) and even more trouble articulating what it's for. Being "against The Government" would make it difficult to govern, particularly if it is against the wars in Iraq and Afghanistan, anti-abortion laws, TARP, Medicare, and Social Security. The Tea Party is unlikely to govern, but it is likely to make it very difficult to revive a broadly conservative Republican Party that can.

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**Two weeks ago in Graham v. Florida**, a 5-4 Supreme Court majority voided life imprisonment without possibility of parole for minors who have committed non-homicidal crimes, are not surprising. The only news was that this time Kennedy came down on the side of the liberals, which is why he wrote the opinion, and Roberts concurred insofar as he believed that Graham was entitled to the hope of parole, but would have upheld a no-appeal verdict in other cases, nominally making the verdict 6-3, but in reality reducing the majority principle to a 5-4 majority. Of course, Thomas dissented, joined by Scalia and mostly by Alito. So the lineup remains 4-4, with Kennedy casting the deciding vote.

The majority concluded that, although 37 states and the District of Columbia allow life imprisonment without parole for heinous non-homicidal crimes committed by minors, this is very rarely applied. Moreover only 11 nations permit life without parole for juvenile offenders under any circumstances, and only two (the U.S. and Israel) ever impose it in practice. Having made a case for public opinion, Kennedy scuttled it, writing: "Community consensus, while entitled to great weight, is not determinative of whether a punishment is cruel and unusual." Stevens, joined by Ginsburg and Sotomayor, spelled out the alternative: "Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time." Standards of decency never stop evolving.

Thomas's dissent held that the Constitution is silent on this sentencing practice; it would not have offended standards then and the evidence of Congress and 37 states is that it does not now. He added that a judicial majority that exempts a class of offenders from the second most severe penalty could also immunize offenders from any other penalties.

What this decision reveals – or reinforces – is that there is a gulf between the sides on the Supreme Court and in the nation that cannot be bridged by reference to the Constitution or judicial precedents. (There are usually precedents on both sides.) When the cant and incantations of constitutional fidelity are set aside (but not while the Senate considers a Supreme Court nomination), both sides can make an impressive case based upon their



understanding of whether the Constitution's meaning was fixed by its authors or subject to change as circumstances change and values evolve.

Depending on which way recent constitutional issues have been decided, both sides are capable of exercising judicial self-restraint or activism in promoting their position. Earlier this month, the 5-4 decision in *Citizens United v. Federal Election Commission* was the most egregious exercise of judicial activism in years, going well beyond the arguments and requirements of the case in order to undermine Congress's effort to curb huge corporate expenditures in elections. There have been other recent decisions with Kennedy casting the decisive vote. 2007's 5-4 *Ledbetter* decision required that an employee file a claim of wage discrimination within 180 days of the initial action, even though the employee would be unlikely to learn that soon of wage discrimination. The only difference was the fourth liberal vote was cast then by Souter, and now it is Sotomayor. The simple truth is that the nature of the constitutional questions before the Court hardly matters. What matters are the conservative and liberal predispositions of the nine Justices now sitting.

Conservatives have been very lucky, because conservative presidents made eleven consecutive appointments to the Supreme Court before Clinton made two, Bush II made two more, and now two by Obama. Conservatives have been unlucky because Blackmun, Stevens and Souter became liberals on the Court. Liberals were lucky because O'Connor and Kennedy were moderates who sometimes voted with them. But they were unlucky when Johnson's attempt to elevate Fortas to Chief Justice and fill a vacancy with a liberal was defeated, and there were no Supreme Court vacancies in Carter's presidency. A morbid thought that those who seriously study the Supreme Court entertain (but not publicly) is when one or more sitting Justices will die or retire. Yes, the meanings of free speech, due process, equal protection, the scope of federal power, and other constitutional principles depend on luck and longevity

CORPORATIONS AND THE CONSTITUTION:  
(How the Supreme Court created rights where the authors of the  
Constitution had not, and how corporate rights diminish the rights  
that the Constitution gave to people)  
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Supreme Court decisions with great consequences have been rendered in cases whose importance was evident in the issues before the Court, in cases in which the facts were inconsequential but the Court's decision had great legal impact, in cases in which an important judicial observation was expressed in a gratuitous opinion (*obiter dictum*) that carried weight with future courts, and in cases in which a dissenting opinion presented a view that was adopted by later courts. Differing from all these ways in which far-reaching principles of constitutional law have been shaped, in one remarkable instance in 1882, oral remarks by one or more Justices made before a case was argued and that were unrelated to the Court's later decision were paraphrased by the court reporter in his account of the case. What the court reporter wrote was that corporations have the constitutional rights of persons, although no statement to that effect appeared in the Court's opinion. Nevertheless, the Supreme Court has adopted this view in cases involving corporate rights and powers, and this has profoundly altered the design of the Constitution, to the detriment of the rights of persons.

Other judicial decisions have undermined the constitutional movement to popular government, but no other has survived so long or has been extended so far. The judicial invention of corporate personhood has altered the meaning of constitutional government, but it is not irrevocable.

**Why were corporations created and what powers and rights were they given?**

Corporations were known to the authors of the Constitution. Strictly speaking, the Europeans who settled North America in the seventeenth century did not represent nations, but private corporations established by national charters. The first corporations were Dutch trading companies in the sixteenth century, created by the government but owned and operated by wealthy men. Corporations were allowed to own land, participate in the legal process, and hold assets, but were limited to the granted rights. In England, Holland and Spain, company charters allowed investors to pool their capital and develop colonies from which raw materials would be extracted and to which manufactured goods were to be sold.

The antecedents of these companies are found in medieval guilds of various crafts and occupations, whose members established standards, determined membership, controlled local governments, and occasionally engaged in physical combat against rivals. By the sixteenth century, Parliament had gained control over taxation, and English kings sought sources of revenue that did not rely on parliamentary approval. The uniformed guilds provided the revenue, as when the Grocers' Company and others financed the ships that defeated the Spanish Armada. Gradually, the guilds assumed the characteristics of corporations in which the members invested their wealth.

Corporations seeking foreign investment first raised capital for a single voyage, later issuing permanent stock with profits divided among shareholders. What was crucial in this

transformation is that the state was no longer dealing with individuals and their investments but with a new collective identity whose only motive was to profit its investors. The Virginia Company created the first English settlement in the new world at Jamestown. Apart from adventurers and skilled workers whose trade might be needed, the first settlers were servants, criminals, women, and children. Only one in five involuntary settlers survived their seven-year period of servitude, but the Virginia Company was undaunted in its efforts to recruit or impress into service more destitute adults and homeless children. Whatever conscience individual subscribers may have had, the corporations had none.

King Charles I chartered the Massachusetts Bay Company to colonize America in 1628. Thirty-six years later, the king sent his commissioners to see whether this company was complying with the terms of its charter. The governors of the company objected, declaring that this investigation infringed upon their rights. On behalf of the king, the commissioners responded: "The king did not grant away his sovereignty over you when he made you a corporation. When His Majesty gave you power to make wholesome laws, and to administer justice by them he parted not with his right of judging whether justice was administered accordingly or not. When His Majesty gave you authority over such subjects as live within your jurisdiction, he made them not your subjects, nor you their supreme authority."

The East India Company, nearly two centuries old at the time of the American Revolution, acquired corporate advantages of limited liability, longevity, and an enlarging sphere of power. Limited liability made investors responsible for the debts and errors of the corporation only to the extent of their investment. They became so wealthy that the English King required frequent loans from the East India Company, in which a third of the members of Parliament owned stock, and which provided ten percent of the government's revenue from the tax it imposed on tea. The Pilgrims who arrived in 1602 chartered their ship, the Mayflower, from the East India Company.

The Virginia Corporation and the Massachusetts Bay Company were compelled by law to trade with the East India Company. A 1681 Act required a license, granted only to British corporations, to import anything into the colonies. The Tea Act of 1773, adopted in response to a boycott and smuggling by colonial traders opposed to the East India Company's monopoly on tea, gave the company unlimited access to the American tea trade without paying the tax required of smaller businesses. What aroused colonial ire even more than the tax on tea (other taxes had been repealed and more tea was smuggled into the colonies from other countries than bought from Britain) was the fear that the East India Company was moving to monopolize the American market in all commodities.

The reaction was quick and sharp. Before a huge shipment of tea could be unloaded in Boston harbor and before a single penny of the onerous new tax could be collected, colonists dressed as Indians boarded three ships on the evening of November 29, 1773 and in three hours tossed overboard 343 chests containing over 90,000 pounds of tea. The Boston Tea Party, which set in motion the actions and reactions that led to the American Revolution, expressed opposition to the monopoly of trade possessed by the East India Company, which was in fact the world's largest multinational corporation. The British

government did not see a distinction between an attack upon this powerful corporation and one upon the government itself.

Parliament reacted to the Boston Tea Party with the adoption of the Intolerable (also known as Coercive) Acts, which closed Boston Harbor and outlawed the Massachusetts assembly, and had the unanticipated effect of rallying other colonists to support Boston. Now it was the colonial leaders who erased the distinction between the corporation they opposed and the country whose laws supported it. That is how the American Revolution began.

### **What was the status of corporations when the Constitution was adopted?**

The word “corporation” does not appear in the Constitution, nor is there any reference to such organizations. It is not surprising that the Framers of the Constitution showed a distinct animus toward corporate power. It was a hostility shared by many others, including Adam Smith, the revered philosopher of capitalism, who wrote in 1776 that he favored private (i.e., non-stock owning) companies, warning that managers and directors of public companies would not show the same concern for “other people’s money.”

Thomas Jefferson shared the hopes of those who would restrict corporate power. He wrote: “I hope we shall...crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength, and bid defiance to the laws of our country” James Madison was of a similar mind, writing: “Incorporated companies, with proper limitations and guards, may in particular cases be useful, but they are at best a necessary evil only. Monopolies and perpetuities are objects of just abhorrence. The former are unjust to the existing, the latter usurpations on the rights of future generations.”

Madison proposed to put the federal government in charge of corporations in cases where “the authority of a single state may be incompetent.” However, others feared that a nationally created corporation would achieve power comparable to that of the hated East India Company. Given the antipathy toward corporations that had existed in the colonial era, the new states confined their chartering to specific public purposes, such as roads, canals, bridges, and other public works, and to establish banks and insurance companies. But when American trade with Europe was halted by an embargo in 1807-09 and the War of 1812, new companies were created not to fulfill a public purpose, but to create private wealth by manufacturing goods that had until then had come from Great Britain.

Early corporate charters were granted for a defined duration, never more than fifty years. Corporations were confined by laws that limited their purposes, capitalization, land ownership, and often profits. A corporation could not own or create another corporation. Directors and stockholders were personally liable for the debts of the group and interlocking corporate directorships were illegal.

### **How did legislatures and courts deal with early corporations?**

The first inhibition of state power to control a corporation occurred in 1819. New Hampshire sought to convert private Dartmouth College into a public institution and the U.S. Supreme Court concluded that the charter granted by King George III in 1769 could not be revoked because it contained no clause allowing it. Although it was written twenty

years before the American Constitution was adopted, the charter to create the college was considered a valid contract and the Constitution prohibits states from passing any law impairing the obligation of contracts. Although future charters of incorporation included a provision allowing for their revocation when a state concluded that a corporation had exceeded its authority, the Dartmouth College decision was that, in the absence of such a qualification, a corporation was permanent and beyond a state's power to regulate. It marked a decline in government regulation of the scope and duration of corporation power and the beginning of the corporate onslaught against state sovereignty.

The decision in the Dartmouth College case was met with derision by state legislatures and courts that insisted that the power of states to alter or revoke a corporate charter was the same as their power to adopt it. Jefferson wrote to the governor of New Hampshire, "The idea that institutions, established for the use of the nation, cannot be touched or modified... may perhaps be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself." It amounts to the belief that "the earth belongs to the dead, and not to the living."

It was a view later shared by President Andrew Jackson, who demanded an end to the political activities of the Second Bank, which was the first large American privately-owned corporation. In a message to Congress in 1833, he said: "The question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation is to be secretly exerted to influence their judgment and control their decision." In vetoing the renewal of the bank's charter, Jackson focused on the unfairness of corporate power: "Distinctions in society will always exist under every just government...but when the laws undertake to add to...natural and just advantages artificial distinctions, to grant titles, gratuities and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor means of securing such favors for themselves, have a right to complain of the injustice to their government."

The issue was joined again in the courts in 1837 when a toll bridge in Massachusetts sought to prevent the creation of a second toll bridge that would result in a decline in the revenue of the existing bridge. The Supreme Court rejected the Dartmouth College decision, holding that government never surrenders its power to any entity that it establishes. The impact of this decision was blunted two years later when the Supreme Court held that a corporation can conduct business in a state other than the one in which it was chartered unless explicit reasonable restrictions had been adopted by that state.

The growing wealth and power of new corporations was accelerated during the Civil War, which enriched businesses that manufactured the war materiel and the railroads that transported it. In 1864, President Abraham Lincoln warned that this threatened the nation's survival, when he prophesied: "I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country.... Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."

Lincoln's fears were prompted in part by the creation of unincorporated manufacturing companies that resulted in America's achieving by 1860 the second highest per capita manufacturing output after Great Britain, as well as by legislative support for removing the restrictions on railroad corporations that led to general incorporation, without limits on the purposes, growth, or lifespan of these corporations, and extending the advantage of limited liability of investors to unincorporated businesses.

### **How did the Supreme Court demonstrate its bias in favor of corporations?**

In a Circuit Court opinion in 1878, Supreme Court Justice Stephen Field wrote: "There is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations." This hugely extravagant and factually unsupported bias has not always been expressed so clearly, but it has been evident both in the creative interpretation of constitutional clauses and the inspired invention of constitutional principles.

That creative interpretation is clearly seen in how the Supreme Court applied Article I, Section 10 of the Constitution, which bars the states from "impairing the obligation of contracts," a phrase that does not define what constitutes a legal contract. Even a corrupt contract was deemed to be valid. In 1794, after bribing almost every Georgia state legislator, two Senators, and state and federal judges, the Georgia legislature sold 35 million acres to four land companies for one-and-a-half cents per acre. The corrupt legislators were defeated in the next election and the legislature then elected rescinded the grant, invalidating the property rights of the new owners, including those who had bought land from the original purchasers. The United States Supreme Court concluded that Georgia had unconstitutionally abridged the obligation of contracts. When an agreement is "in its nature, a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights." In defending the investors against the state, the Supreme Court upheld a corrupt statute and declared unconstitutional the statute that repealed it.

The Supreme Court later invented the "liberty of contract," applying it to declare unconstitutional state laws that regulated wages and hours of labor and federal law protecting the right of union membership. It defended the "liberty" of working people to contractually surrender their liberty to their employers, by promising as a condition of employment not to join a labor union. "Liberty of contract" was read into the Constitution by interpreting the Fifth and Fourteenth Amendment clauses stating that no person shall be deprived "of life, liberty, or property, without due process of law" to mean that a valid contract (applied most frequently to employment) may not be limited by a state, except to protect the health, welfare, and morals of the community or to prevent crime. Nothing in the text, nothing said in the Constitutional Convention, and nothing relevant to the debates accompanying the adoption of the two due process clauses recommends such a reading.

Freedom of contract embodied the free market ideology of classical economics, clearly favoring employers against workers. In 1905, a 5-4 Supreme Court majority declared unconstitutional a New York law limiting bakery workers to ten hours of work a day or sixty hours a week because barring them from working longer hours deprived the workers "of life, liberty, or property, without due process of law." In a stinging dissent, Justice Oliver

Wendell Holmes Jr. wrote: “I think that the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

It was another three decades before the Court acknowledged that society’s well-being is superior to the obligation of contracts. In 1934, in the depths of the Great Depression, a narrow Court majority upheld a state moratorium on the duty of homeowners to make mortgage payments, despite the contract clause (Article I, section 10 states: “No State shall...pass any...Law impairing the Obligation of Contracts”), because the law was a “reasonable means to safeguard the economic structure upon which the good of all depends,” and we must not use the Constitution to restrict the ability of the states to protect their fundamental interests. After decisions in which the Supreme Court upheld the right of women to work for less than a legislatively mandated minimum wage, a narrow Court majority acknowledged in 1937 that “the Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.”

The judicial bias in support of corporations was also demonstrated in the narrow interpretation of powers that were granted to Congress. In 1895 the Supreme Court concluded that the power of Congress to regulate commerce among the states referred to the actual buying and selling from state to state or abroad, but not to the manufacture of goods, which at that point had not entered commerce, thus stripping the commerce clause of its greatest potential effect. In the same year, the Supreme Court ruled that the power to regulate commerce gave Congress the power to stop a strike in the interests of the “general welfare.” This and subsequent decisions had a great negative impact on the ability of labor unions and other organizations that sought to counteract the power of corporations.

### **How did corporations acquire constitutional rights and powers?**

The inspired invention of a constitutional principle cannot be better illustrated than in the ability of the Supreme Court to do what science has not yet accomplished: the creation of persons, persons who can live for centuries, and who have rights and powers nominally as great as, but in reality far greater than, the rights and powers of ordinary mortal persons.

In mid-nineteenth century America, railroads challenged states in dozens of cases relating to the power of taxation, often with respect to whether corporate property could be taxed more heavily than the property of persons. The railroads had lost every previous case in which they had sought the same Fourteenth Amendment rights as persons, but presented the same argument in their briefs before the case of *Santa Clara County v. Southern Pacific Railroad* was argued in the Supreme Court in 1882. The argument was never addressed in the Court’s opinion, which was confined to the narrow question of whether fences on the railroad property could be taxed by the county or the state. The case would have been forgotten except for one curious circumstance.

Four months after the decision had been announced, the court reporter, J. C. Bancroft Davis, himself a former railway president, sent a note to the Chief Justice, including

an earlier memorandum in which the court reporter wrote: “The Court stated that it did not wish to hear argument on the question whether the Fourteenth Amendment applies to such corporations as are parties in these suits. All the Judges were of opinion that it does. Please let me know whether I correctly caught your words and oblige.” Five days later Chief Justice Waite replied: “I think your mem. in the California Railroad Tax cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision.”

Court reporter Davis not only thought it worth including, but made this the opening statement in his headnote preceding the opinion of the Court. (The headnote is the court reporter’s summary of the opinion and main facts and arguments of a case.) He then rephrased his memo to Chief Justice Waite, quoting him as saying that “the provision in the Fourteenth Amendment to the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations.”

Were the words written by Court Reporter Davis the actual words of the Chief Justice? They do not appear in Davis’s memo to Waite or in any other document. Davis’s reportorial objectivity and impartiality were questionable. In his headnote in reporting the case of *Plessy v. Ferguson*, which uphold racial segregation in public facilities, he wrote that this “1/8 Negro” was assigned “to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong.”

If Chief Justice Waite’s comment had been in an opinion (if that is what he said and if it accurately represented the views of his colleagues), it would have been *obiter dictum*, over and beyond the decision of the case and having no binding effect on future cases. But this is much less than *obiter*. Waite categorically stated that the Court “avoided meeting the constitutional question in the decision.” He hardly seemed to care whether or not Davis referred to his offhand remark in reporting the case. On the same day that the *Santa Clara* decision was rendered, Justice Field, the Supreme Court’s leading champion of corporate personhood, expressed his regret that the issue had not been resolved, but recognized the wisdom of not dealing with a constitutional issue when a case could be decided without it.

The most senior member of the Supreme Court when the *Santa Clara* case was decided, Justice Samuel F. Miller, had written the majority opinion in the *Slaughterhouse Cases* only six years after the adoption of the Fourteenth Amendment, in which he wrote that “the one pervading purpose” of the post-Civil War amendments was to achieve “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” It is a view that is incompatible with corporate personhood.

Justice John Marshall Harlan, who wrote the opinion in *Santa Clara*, later unequivocally rejected the notion that the Fourth Amendment’s protection against unreasonable searches and seizures was applicable to corporations. “In my opinion, a corporation – an artificial being, invisible, intangible, and existing only in contemplation of law – cannot claim the immunity given by the Fourth Amendment; for it is not a part of the “people” within the meaning of that Amendment. Nor is it embraced by the word “persons” in the Amendment.” Chief Justice Waite clearly was in error in his offhand



remarks regarding the unanimity of the court on this constitutional question. The judicial elaboration of the constitutional rights and powers of corporations rests on this extralegal and erroneous evidence.

In the decades following *Santa Clara*, corporate concentration advanced rapidly (Carnegie Steel and Standard Oil became the first billion-dollar corporations), Social Darwinism earned wide acceptance as moral and scientific truth, and an increasingly conservative Supreme Court stated that “corporations can invoke the benefits of provisions of the constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.”

### **How do judicially-invented corporate rights diminish the constitutional rights of persons?**

In giving corporations the same right of speech as real persons, that right has been made greater by the ability of corporations to expend vast sums to influence opinion and to own the major media of news and entertainment, present their views, and effectively limit the wide dissemination of views they oppose. Five corporations – General Electric, The News Corporation, Time Warner, Viacom, and the Walt Disney Company – have recently owned the four leading broadcast channel networks and many other broadcast and cable television systems and multiple television stations in major markets, as well as most of the new series that they broadcast; most of the leading motion picture producing companies; frequently two, three or more radio stations in the same city; book publishers, magazines, and newspapers in countries throughout the world, and dozens of businesses tangentially related (and many unrelated) to shaping public opinion. This has occurred because the massive communications corporations persuaded the Federal Communications Commission to allow companies in the largest cities to own many television and radio stations, a cable operator and a newspaper (often the only daily newspaper) in a single market.

One recent estimate is that there are more than 20,000 registered lobbyists in Washington, including more than one hundred former members of Congress, whose primary job is to influence Congress and the federal agencies. The vast majority are employed by corporations and organizations created by corporate groups. Exercising the First Amendment rights that corporations have earned as “persons,” they contribute to candidates, bestow gifts, vacations, and honoraria on members of Congress and prominent officials, employ their spouses and children, and deduct almost all of this from their reported income as business expenses. Of course, you and I are free to do the same.

Next to the outright purchase of the votes of members of Congress or support of officers of administration, the most corrupting influence of lobbying is the practice of employing former legislators and administrators as lobbyists, almost always with much higher salaries than they received in government. Since the beginning of 2009, organizations in the financial sector alone have deployed at least 1447 former federal employees, including at least 73 former members of Congress, to lobby Congress and federal agencies. A publicized example was Representative Billy Tauzin, who as chairman of the House Committee on Energy and Commerce, played a key role in Congress’s passage of the Medical Prescription Drug Bill, which critics cited as being too favorable to the pharmaceutical industry, and who thereupon resigned from Congress to take a \$2.5 million a

year position as the head of the Pharmaceutical Research and Manufacturers of America (Pharma).

In conservative administrations it became commonplace for government regulators of business activities to come from and later leave for high-income positions in the regulated industry. This is vividly seen in the success of financial corporations to escape the scrutiny of laws designed to protect the interests of ordinary Americans, because the exotic nature of some financial practices is nowhere better seen than in the ability of financial institutions to obtain virtual exemption from effective regulation. The exotic nature of financial activities that led to the deep recession of the past three years escaped regulation before the crisis and the government has often acted since the crisis as if only those who participated in causing the crisis have the knowledge and ability to cope with it.

Among the benefits of corporate personhood and the political power that corporations have derived from it have been the taxation of corporate profits and investment income at a lower rate than personal income, an increasing concentration of wealth in corporate officials (Chief Executive Officers who less than fifty years ago averaged incomes approximately forty times the average worker's income in their company now average more than four hundred times the average worker's income and are additionally rewarded with huge bonuses and stock options), protection from risk to stockholders who are responsible only to the extent of their ownership regardless of the foolhardy, criminal or socially undesirable behavior of corporate officials, the loss of skilled domestic jobs to low-paying foreign markets because the only incentive of the corporation is the maximization of its profits and dividends to shareholders, the skewed influence of corporations in the political process because of the vast contributions they make to parties, campaigns and candidates, their day-to-day involvement in the legislative and administrative processes, and the recognition that friendly legislators and administrators will, upon leaving public office, be able to move into much higher-paying corporate positions.

Despite the Supreme Court's having upheld unprecedented governmental policies since 1937 and the doubts raised by individual Justices, it has not reviewed its doctrine of corporate personhood. On the contrary, it has expanded the incorporation of personal liberties within it. These have included the Fifth Amendment right against being tried twice for the same offense, the Seventh Amendment right to a jury trial in a civil case, the Fourth Amendment right against unreasonable searches, and the First Amendment rights of "commercial free speech," to spend money to influence a state referendum, and to engage in "negative free speech."

### **How was corporate power partially restrained in the Great Depression?**

The tide began to turn in 1932, when Congress adopted the Norris-LaGuardia Act, which outlawed both yellow dog contracts (in which workers agreed as a condition of employment not to join a labor union) and the use of injunctions in labor disputes, two of the most powerful weapons corporations had employed to stifle labor organization. Campaigning for the presidency in 1932, Franklin D. Roosevelt observed that six hundred companies controlled two-thirds of American industry: "If the process of concentration goes on at the same rate, at the end of another century we shall have all American industry

controlled by a dozen corporations, and run by perhaps a hundred men. Put plainly, we are steering a steady course toward economic oligarchy, if we are not there already.”

In the aftermath of Franklin D. Roosevelt’s overwhelming reelection in 1936, his criticism of the Supreme Court, and his proposal to enlarge it, Justice Owen Roberts, who had rejected a New York minimum wage law in 1936, decided in 1937 to affirm a Washington State minimum wage law, producing a new 5-4 majority. In the following two months, the slender new Supreme Court majority upheld the rights of workers to be protected against recriminations because of their activity in organizing unions and the constitutionality of the Social Security Act that provided for unemployment compensation and old age benefits.

In the following decades, a few Justices have reminded their colleagues that it was the Court, not the Constitution, Congress, or state legislatures, that had enshrined corporate power. They have argued that Chief Justice Waite’s off-the-cuff comment regarding the constitutional status of corporations should be disregarded, because it was incorrect as a statement of judicial opinion, irrelevant to the decision the Court later reached, without legal standing as a precedent for future decisions, and untrue as an expression of the intent of the Framers of the Constitution and the states that ratified it, of the Congress that proposed the Bill of Rights and of the states that ratified it, or of the Congress that proposed the Fourteenth Amendment and of the states that ratified it.

Justice Hugo Black put it this way in a 1938 opinion: “Both Congress and the people were familiar with the meaning of the word ‘corporation’ at the time the Fourteenth Amendment was submitted and adopted. The judicial inclusion of the word ‘corporation’ in the Fourteenth Amendment has had a revolutionary effect on our form of government. The states did not adopt the amendment with knowledge of its sweeping meaning under its present construction. No section of the amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, and all administrative actions under them to censorship of the United States courts. No word in all this amendment gave any hint that its adoption would deprive the states of their long-recognized power to regulate corporations.”

Eleven years later, Justice William O. Douglas wrote: “It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation.”

### **How has the present Supreme Court further increased the rights and powers of corporations and thereby diminished the rights of persons?**

The most recent and far-reaching extension of corporate power beyond any rational interpretation of the Constitution or Acts of Congress occurred earlier this year in the Supreme Court’s 5-4 decision in *Citizens United v. Federal Election Commission*. The Court decided that corporations may expend any amount of money in order to influence the outcome of an election. In order to reach this unprecedented conclusion, the Supreme Court had to decide questions never raised by the parties to the case and not necessary in

order to have decided the case in favor of the constitutional rights asserted by the organization that brought the case. I cannot imagine a more egregious case of judicial activism beyond the requirements of a case.

To allay our fears regarding the potential undermining of the democratic process, this majority assures us that corporations may not give the money directly to a candidate, but they can spend many millions of dollars on behalf of candidates. We are to be reassured that, because the money doesn't pass through the candidate's hands, lavish expenditures on his or her behalf would not affect the candidate's behavior after taking office. We are also reassured that the vast sums of money that are spent to prejudice the outcome of the election will not affect the adoption of future public policy.

I cannot help but be reminded of the satirical evenhandedness of Anatole France's bitter observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." More than a century later, the U.S. Supreme Court, in its majestic equality, is saying that civic groups, trade unions, you and I are free to spend as many tens of millions of dollars in support of our favored candidates as wealthy corporations will spend in favor of their candidates. If you are reassured by the alleged impartiality of these positions, you and I have irreconcilably different views of human nature and political behavior. Beyond the obvious bias that great sums of money introduce, it seems almost certain that the messages of the candidates will be drowned out by the vastly more expensive and more irrational messages of their supporters. The right of the people to petition the government does not imply a right to purchase it.

### **Why should the extra-constitutional power of corporations be curbed?**

The judicial extension to corporations of the constitutional rights granted to persons is irrational because corporations have none of the fundamental attributes of persons. It is undemocratic because it bestows enormous power on organizations that have economic resources that no individual, collection of ordinary individuals, or any other type of group (such as a trade union) can equal, resources that can persuade, intimidate, and finally overwhelm those who dare to contradict it.

Corporations have no conscience, and insofar as its officers may exercise theirs, they often will be acting contrary to the corporation's interest which is nothing more, nothing less, and nothing other than the maximization of the financial profit of its investors and management. It has no intrinsic altruistic motive, no emotional or moral impulse to sacrifice self-interest for a larger cause. In short, it is not a person. It doesn't have to do good; it wants to make money. It doesn't have to engage in insider trading, stock-price manipulation, or the diversion of corporate funds for personal use, but it can and too often will, if it can get away with it. Carnegie, Rockefeller, Ford, Pew, and other great foundations have done immense good since the deaths of their founders, and Bill Gates, Warren Buffet and others who have made great fortunes from corporate enterprises have demonstrated that they can benefit humanity while they are still alive. But that is precisely the difference between a corporation whose sole motive is profit and an individual who may be motivated by a desire to do good.

When the Ford Motor Company concluded that it would continue to sell a deadly dangerous car because it estimated that the cost incurred in lost lawsuits would be less than

the cost of correcting the flaw, it was acting as a corporation should. When a corporation abandons a toxic site or dissolves itself without undertaking the cost of cleaning it (let alone the cost of avoiding the contamination), it is acting in the interests of its stockholders. When a corporation fails to reveal studies that indicate the harmful consequences of eating or breathing its potentially hazardous product, it is acting rationally as a corporation.

Limited liability makes it often difficult to identify the persons who are directly responsible for the commission of corporate crime. Imposing a financial penalty on a successful corporation can never be as effective a deterrent to future misbehavior as the prosecution and conviction of the individual perpetrators. A corporation that is not subject to a limited function and limited life (as corporations were for more than four hundred years) can live forever, alter and broaden its purpose and possess advantages over new companies that lack its experience, expertise, and public confidence.

Because of their single-minded focus on accumulating ever-greater wealth, corporations sometimes succumb to the temptation of corruption and practices which may be immoral and unlawful, if they believe they are consistent with the maximization of profits. In 2009, ten of the 35 active mines owned by the Massey Energy Company had 2400 safety citations, four averaging more than twice the national rate. Citations and fines are contested for years. At the time of the explosion at Massey's Upper Big Branch mine in West Virginia that killed twenty-nine miners in April, there were 16,000 citation appeals pending, worth millions in fines. Mine supervisors, foremen and the companies as a whole can face criminal penalties for serious safety violations, but the company presidents and CEOs who put productivity before safety cannot. Consistent with a corporation's primacy of profits, Standard and Poor Equity Research concluded, while the last bodies were being removed from the Upper Big Branch mine, that the financial impact on Massey Energy would be "immaterial" and that the company remained a good buy for investors.

Real corporations perform unsavory acts in the knowledge that, in the absence of proof of conventional criminal activity (cooking the books, stealing funds, or physically harming their competition or critics), their executives and stockholders will pocket the profits. As we have recently seen, the executives sometimes leave the shareholders out. Despite recent convictions of corporate executives who engaged in egregiously illegal acts, it remains true that they generally escape personal responsibility for the corporate crimes that they commit, abet, or neglect. No tobacco executives who lied under oath that the product they sold was harmful spent any time in prison.

When Royal Caribbean Cruise Lines was prosecuted for dumping waste oil and hazardous chemicals in the ocean, the two federal criminal prosecutors confronted a defending legal team that included two former Attorneys General, two former heads of the Justice Department's Environmental Crimes Section, two former federal prosecutors, two former State Department officials, four retired senior admirals, and attorneys in private practice. Royal Caribbean engaged in a huge public relations campaign, employing former Environmental Protection Agency administrators, Super Bowl commercials, and contributions to environmental groups. Ultimately, it pled guilty and paid an \$18 million fine, but no responsible officer of the company was prosecuted for its illegal actions. A dozen more recent similar incidents can be cited to the same effect.

Three times as many Americans die every year on the job or from occupational diseases such as black lung and asbestosis as are murdered, and many thousands more die because of criminal recklessness resulting in pollution, contaminated foods, hazardous consumer products, and hospital malpractice. The Savings and Loan Association fraud alone cost American taxpayers between \$300 and \$550 billion. Most of those who profited retained their profits. Corporations have no conscience, and insofar as its officers may exercise theirs, they often will be acting contrary to the corporation's interest which is nothing more, nothing less, and nothing other than the maximization of profit.

BP (formerly known as British Petroleum) deceived the United States government when it alleged that they had adequate remedial measures in the event of a tragic accident such as the ongoing tragedy now taking place in the Gulf of Mexico. If it is demonstrated that BP willfully took money-saving risks that led to the loss of lives and livelihoods and irreparable damage to the environment, will those who made those decisions be prosecuted and imprisoned if found guilty? It has very rarely been the case in the past.

The roll call of rotten corporations has grown longer. In recent years a number of once-prestigious names have been added to this dishonor roll, including Tyco, Enron, Rite-Aid, Adelphia, WorldCom, Global Crossing, Imclone, Lucent, MicroStrategy, and Qwest Communications. Merely stating serious allegations against and legal convictions of large corporations exposes the author to a SLAPP suit. (SLAPP is an acronym for Strategic Lawsuits Against Public Participation.) The corporation filing such a suit doesn't expect to win. It expects to exhaust the very modest resources of the person being sued for defamation and to deter others from making public allegations. Very few SLAPP suits win in court; they win by silencing legitimate criticism by individuals and modestly-financed interest groups that cannot compete with giant corporations in defending themselves against frivolous suits.

Nowhere does the impact of corporate power distort the democratic process more than in the conduct of government, most obviously in monetary contributions to political campaigns, most deviously in the unpublicized gifts and junkets and rewards of future private employment given to office-holders. Federal law has banned corporate donations since the early 20th century and labor union donations since 1947. President George W. Bush asked Congress to adopt legislation requiring unions to obtain the permission of their members before using dues money for political purposes. This would be a salutary step, if applied not only to union members, but to stockholders and others with a financial stake in the donor. Logically and democratically, the law should proceed one step further and bar all political contributions and expenditures except by persons who, by virtue of their citizenship, can qualify as voters.

Between 2000 and 2002, prior to the wars in Iraq and Afghanistan, the ten largest defense contractors spent over \$140 million in campaign contributions and lobbying expenditures. It would seem to be a great sum, but for the fact that during the same period these same corporations received defense contracts worth more than \$177 billion. That comes to a modest investment of less than one-tenth of one percent of that income to curry favor with and win lucrative contracts from the government. As no one knows when saturation is achieved, lobbyists assume that it never occurs. Large corporate contributors

give till it helps, and then don't stop, for fear that it will stop helping. In political finance, nothing succeeds like excess.

The same judicial alchemy that transformed corporations into persons subverted the power of national and state governments. It is unconstitutional in that it has no basis in the language of the original Constitution or the debates accompanying its adoption or the Bill of Rights or the Fourteenth Amendment. It is irrational in that corporations have none of the fundamental physical, moral and psychological attributes of persons. Most remarkable is the inescapable fact that it bestows enormous power on corporations that can survive for centuries and acquire economic resources that virtually no individual or group can equal, resources that can persuade, overwhelm or intimidate those who dare to contradict it, thus diminishing the legal rights of real persons acting individually or collectively in government. No other extra-constitutional extension of the Court's power has had such far-reaching consequences, consequences that contradict the deliberations and subvert the design of the Framers of the Constitution.

### **How can we restore government by the representatives of the people?**

The only reform that can significantly reduce the impact of vast political expenditures is to reject the judicial fiction that corporations are persons and to sharply limit the ability of corporations, trade unions, and organizations of any kind to contribute to political campaigns or to elected or appointed officers of government. If you cannot vote, you cannot participate directly in the political process. Nothing could be simpler, or fairer, or more democratic. This would have the salutary effect of facilitating the public financing of federal elections and contributions to officers of government.

The inclusion of corporations as persons in the Constitution, taken together with the liberty of contract and substantive due process – all of them judicial inventions – had extraordinary negative consequences for the liberties of individual persons. It is reasonable to believe that, despite the misgivings of the Founding Fathers, corporations may be irreplaceable in the economic organization of the modern world, but that does not entitle the courts to elevate them to the status of persons. For the United States to justify its democratic development requires our reaffirming that its Constitution was designed to give basic human rights only to human beings. The Framers of the Constitution and the authors of the Bill of Rights and the subsequent civil rights amendments wanted and deserve no less. So do we.

Personal and Political Observations  
September 1, 2010

I have spent many hours in the last several weeks reading and writing about the American internment of persons of Japanese ancestry after the attack on the United States at Pearl Harbor. (What I have been writing is designed to be, if I live long enough, the beginning of a chapter whose theme is: In a democracy, national security does not diminish individual liberty.) As a young man, lived through Pearl Harbor, the Japanese internment and the war, I later studied the events in school, still later I taught the still-relevant court cases of Hirabayashi, Korematsu, and Endo in courses in American political thought, and I have been even more closely involved with American anti-Asian attitudes in forty-seven years of marriage to Fumiko, my Japanese-born wife.

Little that I have encountered in the books and articles I have recently been reading on the Japanese internment is new to me, yet I have once again been taken aback by the deliberate deceit that was employed in order to provide legal justification for the American government's militarily unjustified and legally unconstitutional actions toward American citizens of Japanese descent at the outset of the war and my country's unconscionable decades-long delay in correcting the historical record. But most shocking is recalling the irrational and venomous reactions of so many non-Japanese Americans toward their fellow citizens. As a lifelong student of American society, I am aware that it was not the first instance of irrational belief and behavior in our history, and I am sadly resigned to the likelihood that our present intemperance and intolerance toward Americans of Muslim background is unlikely to be the last.

Of course, today's prejudice against American Muslims is different from World War II's anti-Japanese American prejudice. Every period of bigotry is different, whether it is against native Indians, Blacks, foreign-born, Catholics, Chinese, Jews, pacifists, radicals, or any other nationality, religion, race, or ideology. What is always the same after the wave of hysteria has abated is that some people feel ashamed and others choose to forget.

Recent events have led me to conflate my thoughts regarding American democracy, the survival of Israel, the threat that terrorists pose to freedom, and hostility toward the building of a Muslim center close to the site of the destroyed World Trade Center. As a result, I find a need to express views that I have long resisted articulating, despite reading more than a hundred e-mails on these subjects from correspondents I characterize as my City Colleagues, almost all of whom were my students very long ago.

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I have until now refrained from participating in e-mail discussions on America's relations with Israel and the Muslim Middle East because, although it is tempting, it is not helpful to provide easy emotional answers to complex and divisive issues and because some correspondents have seen fit to characterize the beliefs of those with whom they disagree in ways that I find offensive. I cannot protect myself from abusive responses, but I can at least clarify where I am coming from.



My political allegiance is to being an American. Another relevant attribute in some of these issues is my being a Jew. My Jewishness derives from a moral and cultural inheritance from my parents. I am not an observant Jew with regard to religious beliefs and practices. I describe myself as a Yid, because I have inherited and cherish Yiddish beliefs and traditions and because the term expresses my defiance of those who use that term as a slur and expression of hatred. I will remain a Yid as long as this virulent strain of anti-Semitism survives, which I regret will outlive me. I have acquired a number of convictions that derive from a complex mixture of this moral and cultural background and my being part of the first American-born generation of my family.

Those convictions are as authentically American and Jewish as the different and sometimes opposed convictions of others who, as justifiably as I, call themselves Americans and Jews. What I find offensive, untrue and intolerant is the epithet “self-hating Jews” that some Jews who disagree with me hurl at those who disagree with them. (It is similar to and as intolerant as the epithet “un-American” with which some label the views of Americans who don’t agree with them.) That castigation desecrates the indisputable and essential variety of Jewish belief. It denies the humorous and insightful anecdote of the solitary Jew on a desert island who builds two synagogues, one of them being the one to which he never goes. It is profoundly undemocratic because it precludes the difference without which democracy perishes. If after hearing my views, other Jews dismiss me as a self-hating Jew, they will know that I shall no longer listen to them, because they are the ones who display hatred and have closed their minds to positions with which they disagree.

Perhaps because of the millennia-long history of prejudice and discrimination, I inherited a deep commitment to tolerance and understanding from my Jewish and Yiddish background. (As a boy, I attended a Sholem Aleichim folkshul, which was Jewish with a distinctly Eastern European Yiddish accent.) I was taught at home, in school and in shul not only to respect, but also to try to understand, the different views and values of others.

Perhaps it was then that it occurred to me that the Golden Rule is not universal. To do unto others as I would have others do unto me is predicated on the insupportable conviction that others want done unto them everything that I want done unto me. This is simply untrue. We don’t all live by that gold standard. The compassionate criterion for personal conduct is for me to do unto others as they would want done unto them, insofar as it does not compel me to do what I find intolerable or immoral. I shake hands or bow, put on or take off a head covering, and put on or take off my shoes as the customs and convictions of my host dictate. I fall short when I do not understand the values of others or incorrectly assume that they share mine.

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Although as an adult I have always cherished a fervent hope that Israel would survive and thrive, I have attempted to understand and sympathize with the aspirations of the Palestinians who live in Israel and those who live outside it. I know that there are many American Jews who share that complex mix of emotions with me. To put briefly what would take a very long message to describe in detail, I cheered Israel’s victory in the six-day war against Arab hegemony, and ever since have deplored the extension of Jewish settlements in the occupied areas. There reasons for this latter conviction are that Israeli

territorial aggrandizement violates the rights of others and it endangers the future safety and survival of Israel itself.

If Jews are, as some believe, “God’s chosen people,” they were chosen, not to be better or prouder or more self-righteous than others, but to exemplify a moral standard. Even if you do not believe this, the ancient suffering and against-all-odds survival of Jews should provide enough inspiration for Jews to lead moral lives. Contrary to many Jews, I do not believe that Jews have been chosen apart and above other peoples, and, contrary to many Americans, I do not believe that the United States is the unique beneficiary of a divinely-bestowed “exceptionalism.” Human vanity is common enough for me to recognize that many members of other faiths and citizens of other nations are equally tempted to believe that they are “different” in a sense that makes them better or superior. They are victims of their hubris. But I believe that firsthand knowledge of the prejudice and violence that religious, racial and national minorities have suffered and the extraordinary advantage we derive from our good fortune in being citizens of this freer, richer and more varied America can provide us with the incentive to be fairer, more just, and more understanding than those who persecute people who are different.

That’s not just a moral precept; it’s a political imperative. Intransigence is a formula for endless conflict that cannot benefit either side in the Middle East. The advocates on one side of a biblical Israel or on the other of a pre-Balfour Palestine are effectively advocates of endless conflict, but rational partisans have grown weary of the price in lives and well-being that has already been paid. Violence and settlement extensions are down and Arab and Israel support for a two-state solution is up. Leaders know the general outlines of the compromises that must take place. Israel must withdraw from most of the West Bank, Palestinians must surrender a right of return, and the Arab states must respect Israel’s sovereignty. It will be very difficult to persuade partisans to take these steps, but all and more are necessary to achieve a reasonably stable peace.

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Here at home, the prospective building of a Muslim community center and prayer hall in downtown Manhattan has been criticized as a moral issue by those who see it as the desecration of a sacred place, the very site of the Twin Towers that were destroyed by Islamic terrorists with a great loss of innocent lives. The objections of some family survivors of that tragedy merit a sympathetic response. On the other hand, there is the moral issue of the right of the project’s sponsors to build. I want to spell out the significance of the site, the builders, the building they would construct, and the political consequences.

**Where will it be?** The Anti-Defamation League (for which I worked as a young man) has stated: “Proponents of the Islamic Center may have every right to build at this site.” The ADL does not honor democracy by using the weasel word “may.” The right is unequivocal: They have every right. Newt Gingrich says: “There should be no mosque near Ground Zero in New York as long as there are no churches or synagogues in Saudi Arabia.” He calls this a “double standard.” Gingrich does not understand the meaning of a double standard. There is no double standard here; there is a conflict of standards between the intolerance of anti-democrats and the free speech and worship of Americans. As for “hallowed ground” two blocks from Ground Zero, a site on which a coat factory once

stood, it is closer to a “gentlemen’s club” and other less-than-inspiring enterprises. If you’re not a New Yorker, it may be difficult to understand what a great difference a few blocks make in a Manhattanite’s perception of a neighborhood. The proposed building, built at the present site at the proposed height will not be visible from Ground Zero.

**What will the building be?** It has been proposed by Sharif el-Gamal, who was born in Brooklyn. At age 9, after his Polish Catholic mother’s death, his father lived with him in Egypt, where he attended the Schutz American School, an independent co-educational school that follows an American curriculum. Now a real estate developer in America, he plans to build a 15-story building open to all with a theater, educational programs, a swimming pool, restaurant, mosque and 9/11 memorial. This plan cannot be considered more than preliminary because he has not yet acquired either funding or an architect. Both the site and the project have received the near-unanimous (29-1) support of Community Board 1, which represents both the site of the World Trade Center and the proposed Muslim community center. Approval has also been given by Mayor Bloomberg, the Manhattan Borough President, City Council members, the City Controller, the New York State Governor, the State Attorney General, other prominent officials, and civic leaders.

**Who will operate it?** Along with the builder, Feisal Abdul Rauf is project manager. Rauf has been sent on speaking tours by both the Bush and Obama State Departments to promote tolerance in Arab and Muslim nations. He delivered a eulogy at the Manhattan synagogue B’nai Jeshurun at a memorial service for Daniel Pearl, the Wall Street Journal reporter murdered by Islamist terrorists. Rauf has expressed sympathy for the Hamas political party, both in its victory in the Gaza elections and its opposition to Israel’s economic blockade. In this respect, Rauf is like other American Muslims who oppose Islamist terrorism.

Rauf is a preacher of Sufism, an indigenous Islamic movement that opposes fundamentalism. Sufism teaches that all religions are manifestations of the same divine reality. It is moderate, pluralistic, and despised by Osama bin Laden. Its shrines and cultural centers in Pakistan have been repeatedly bombed by the Taliban. To condemn this and other non-violent Muslim groups along with terrorist Muslims or to indiscriminately label them “Islamofascists” is ignorant, intolerant, and opposed to America’s interests in promoting peace and freedom in predominantly Muslim countries. I am reminded of the late Senator Joseph McCarthy’s possibly apocryphal retort to the witness who proclaimed his anti-communism, “I don’t care what kind of communist you are.”) Sufism is opposed to Wahhabism, the dominant form of Islam in Saudi Arabia.

**What are the political consequences?** Some protest construction of this Muslim structure because of political bias, racial prejudice or ignorance. A recent Pew Center poll pointed out: “Beliefs about Obama’s religion are closely linked to political judgments about him. Those who say he is a Muslim overwhelmingly disapprove of his job performance, while a majority of those who think he is a Christian approve of the job Obama is doing.” There is a similar close correlation between those who, contrary to the evidence, persist in questioning Obama’s place of birth and those who deplore building a Muslim cultural center two blocks from Ground Zero.

There are other broader political consequences. Every serious scholar and military officer who has studied the Middle East knows that the United States needs all the Muslim allies it can get, and without them our efforts in the Middle East are doomed to failure. We fail to distinguish between terrorists and other Muslims at our own peril. In the absence of the current controversy, if the Muslim center had been built where and how its sponsors intend to build it, it would not have been noticed by visitors to the 9/11 memorial site. That anonymity is no longer possible, but if it is built and it fulfills the aspirations of its sponsors, it will now become a fitting reminder to us and to the world of an American faith in freedom and democracy that no terrorists can ever destroy.

Recession Election  
October 30, 2010

In the current issue of *The New Yorker*, Hendrik Hertzberg succinctly and persuasively examines the similarities of and the differences between Franklin D. Roosevelt's election as president in the midst of the Great Depression and Barack Obama's election near the outset of the ongoing Great Recession. I apologize to Hendrik Hertzberg and *The New Yorker* for reprinting his essay without permission. Hertzberg has put in sharp perspective everything that needs to be said about the American economy in this election. It adds up to an irrefutable rejection of the greed of Obama's enemies and the irrational responses of those they have persuaded to support the advocates of disgraced failed policies.

**Recession Election by Hendrik Hertzberg, *The New Yorker*, November 1, 2010**

Franklin Roosevelt was a lucky man and, in 1932, a lucky candidate. Start with the name—or, as today's political marketers would say, the brand. F.D.R.'s name paired that of the twinkly, kindly philosopher of the American Revolution—the Uncle of His Country—with that of his own distant cousin, the most popular and dynamic President of the still-young twentieth century and the namesake of the Teddy bear, to boot. On top of that, F.D.R. was born to wealth and position. Just in time for radio, he had a beautiful voice. His political base was the most populous state in the nation. He was even lucky in his bad luck: people knew, vaguely, that he had had polio, but the mannerly conventions of what was not yet called the media kept his disability below the level of public consciousness.

The current President of the United States is a lucky man, too, on the whole. He's had to be, if only to surmount *his* name (a veritable catalogue of unfortunate rhymes and echoes) and his birth (which, besides providing fodder for malevolent fantasies, brought him no riches, no entrée into any élite, and a skin color that presented some challenges). Barack Obama won the Democratic Presidential nomination by dint of his own large talents, a superior strategy, and his opposition to the Iraq War, but his (and his party's) victory in the general election was mainly a function of public unhappiness with the record of the outgoing Administration, culminating in the most serious crisis in the economy since the one that lifted Roosevelt to power. For both men, national economic disaster was electoral good fortune. But Obama's luck ran out almost as soon as the votes had been counted. F.D.R.'s held. Many factors account for the difference, but the biggest is a mundane matter of timing.

As of Black Thursday—the stock-market crash of October 24, 1929—Roosevelt's Inauguration was more than three years away. In the long interim, the unemployment rate went from three per cent to twenty-five per cent. Average family incomes fell by a third, industrial production by nearly half, housing starts by four-fifths, stock prices by nine-tenths. Eleven thousand banks ceased to exist, taking the savings of some ten million depositors into the ether with them. By the time Roosevelt moved into the White House, what had begun as a financial panic had become an existential threat. The Great Depression had fully taken hold. Its effects had been felt for years. No one could argue that the new President or his party was to blame for it, or that getting out of it would be a quick or easy task.

The rough equivalent of the '29 crash—the collapse of Lehman Brothers—took place on September 15, 2008, the day that John McCain declared that “the fundamentals of our economy are strong.” It was a mere seven weeks until Election Day. The economy had been an issue well before that, of course. Under the Bush Administration and its tax cuts, growth was sluggish. All of its fruits, such as they were, trickled up to the top, mostly to a tiny sliver atop the top: by 2007, the richest one per cent were claiming almost a quarter of total national income, their highest share since 1928. (When Ronald Reagan launched the era of modern conservatism, it had been one-tenth.) Under Bush, the wages and incomes of average families actually declined. But when Obama declared his candidacy, in February of 2007, unemployment—the most politically salient of economic numbers—was below five per cent. When he accepted the Democratic nomination, in August of 2008, it was still “only” 6.1 per cent. When Lehman went under, it was 6.2 per cent. Only after the Democrats won the election did the full impact of the disaster kick in. On Inauguration Day, the jobless rate was 7.7 per cent. A month later, when President Obama signed the stimulus bill, unemployment was 8.2 per cent, and by the end of the year it was in double figures. The most recent report, for September, puts it at 9.6 per cent. Last month, people at the National Bureau of Economic Research announced that, the way they define recessions, this one ended sixteen months ago. The way actual people experience their actual lives, it most certainly did not.

Obama is no more to blame for the Great Recession than F.D.R. was for the Great Depression. But the longest and deepest mass suffering has occurred with Obama in the White House and Democrats holding a majority in (if not always in control of) our two national legislatures. That—more than tea parties, more than Fox News, more than the scores of millions of anonymous corporate dollars poured into negative campaign advertising courtesy of five Justices of the Supreme Court—is why, next Tuesday, the Republican Party is overwhelmingly likely to retake the House of Representatives outright and, at the very least, to augment its share of seats in the Senate enough to make its veto power absolute.

From the outset, the Republican legislative strategy has been to reject any hint of compromise in favor of making unprecedentedly ruthless use of Senate filibusters and threats of filibusters in order to thwart or weaken everything the Democrats seek to do, the better to attack them for lack of accomplishment. In this way, four hundred and twenty bills passed by the House (which is fifty-nine-per-cent Democratic) have died in the Senate (also fifty-nine-per-cent Democratic). Even among the small minority of voters who have some familiarity with Senate rules and their baneful consequences, few know that the Democrats had their filibuster-proof majority—sixty votes, not all of them reliable—for just seven of the Obama Administration’s twenty-one months. Under the circumstances, the record is impressive: a health-care program that will cover twenty million of the uninsured while restraining costs; partial reform of the financial industry; the rescue of the American auto industry, saving a million jobs; and a fiscal stimulus—\$814 billion of tax cuts, infrastructure projects, and help for states and cities—without which, according to the nonpartisan Congressional Budget Office, today’s unemployment rate would be pushing twelve per cent.

It is often said that Obama—in 2008, a gifted orator with minimal national experience—has been better, as President, at “governing” than at “politics.” His fitful

attempts to present his programs as a coherent, compelling whole have been a failure. He seldom offers the consolation of anger; his instinct for comity can look, to some, like detachment, even weakness. His supporters are worried, sometimes dispirited; his enemies are full of passionate intensity. The Republicans offer plenty of rage and resentment, but nothing of substance beyond fulminations about a deficit that their proposals—more and bigger tax cuts for the comfortable, the gutting of health-care reform—would exacerbate. President Obama and the Democrats kept the Great Recession from becoming a second Great Depression. But the presence of pain is more keenly felt than the absence of agony.

## Will It Take Austerity to Overcome the Great Recession?

November 16, 2010

When it comes to economics, most people are pretty clueless. If we weren't, stock exchanges couldn't fool us into believing that insiders don't always have an advantage, banks wouldn't sell us mortgages that postpone paying back any of the principal loan for many years, all but the wealthiest Americans would favor higher income tax rates in preference to sales taxes, goods would not be advertised with 99 cents to make them appear to be less than a dollar more, and so on. But it took this Great Recession for us to find out how much so many economists don't know, but believe they do. No wonder economics is known as the dismal science. These are the experts who helped to convert a \$127 billion surplus at the end of 2000 (when Clinton left office) into a \$483 billion deficit eight years later (when Bush II left), and has been growing approximately \$4 billion every day since.

Despite the announcement that the recession is over, a modest uptick in productivity hasn't impressed most Americans who don't see a corresponding rise in employment. Consumers are reluctant to spend and employers are reluctant to invest because both fear that recovery might be small and temporary. The fifty states, required to have balanced budgets, are on the brink of bankruptcy. The national government has a huge debt (as I write, nearly \$14 trillion), vastly increased by enormous tax cuts for wealthy Americans, rampant tax evasion by many of the same people, and two unwinnable and unending wars. Now the same experts (the ones who told us that the free market always corrects itself, and when it didn't, made us pay the bill for firms that were "too big to fail") are counseling the government to tighten its belt, end nonessential and even many essential expenditures, cut taxes further, and keep doing it year after year. I assume that we can stop when the United States declares that it's bankrupt.

The dilemma is that if nearly all of us are rational and spend less, more of us will soon have nothing left to spend, and the Great Recession will become another Great Depression. All it would take to avert this bitter end is enough entrepreneurs to invest in goods and services and enough consumers to purchase them to create escalating demand. Do you say that you won't spend all of your diminished capital to start the ball rolling? Neither will I. To do it on the necessary scale requires a commitment by the national government, the only enterprise that is powerful enough and that can be dedicated to the public welfare. That's what happened in the Great Depression of the 1930s. Even then, the unprecedented commitment by Franklin D. Roosevelt's New Deal to create public works and private stimulus fell far short of ending mass unemployment and restoring widespread prosperity.

The partisanship dividing New Dealers and their conservative critics ended with America's entrance into the Second World War. There could be no limit on what the government would borrow and spend to win. Taxes for the highest income earners rose to over 90 percent and the federal deficit ran as high as 29 percent in a single year. Huge public investment and debt enabled the United States to achieve an unprecedented level of productivity, accompanied by full employment. When the war ended, the United States had a public debt of \$120 billion. It was the wisest expenditure of borrowed money in the nation's history, because it put ten million Americans to work, plus twelve million more in the armed forces. The consequence was a 50 percent wartime increase in the Gross



Domestic Product. What followed was a half-century of unprecedented growth and the greatest prosperity most Americans have known. (Two regrets: One, Success required a war that cost more than seventy million lives; Two, Millions of poor and minority Americans, handicapped by their constricted circumstances and prejudice, did not share in that success.)

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As in the Great Depression, again in this Great Recession America confronts a choice between moving in either of two directions. One is austerity, having the nation react much as most people reflexively do in hard times, by countering less income with less spending and avoiding new debt. That is the course proposed by Democrat Erskine Bowles and Republican Alan Simpson, co-chairs of a bipartisan National Commission on Fiscal Responsibility and Reform created by President Obama. They propose three major reductions: Cut the military budget by \$48 billion (more than half of the proposed savings), eliminate legislative earmarks (appropriations for favored projects of individual members of Congress), and freeze the salaries of federal employees.

These cuts would be supplemented by tax increases, most of which would fall almost equally on all income earners (which is to say, lower-income people would be harder hit): raise the gasoline tax by 15 cents a gallon, impose a tax on employee health benefits, limit or end the mortgage-interest deduction, and limit or end the child tax credit and earned income tax credit. High-income earners would contribute more to the payroll tax that supports Social Security. Americans who count heavily on Social Security would suffer reduced benefits if they are already retired and the benefits for future retirees would be reduced. The age at which retirees could collect Social Security would be increased to 69 by 2075, long after everyone now working had retired.

There is no room in future budgets for the United States to invest in programs that improve the nation's well-being. This is the formula for hunkering down and waiting for the bad times to pass. History teaches that they won't pass unless they are made to.

The other direction in which the United States can move is to make extensive and wise public investments in the economy. It took an unprecedented commitment by the national government, involving enormous indebtedness, in order to end the Great Depression. (Try to imagine what would have happened if the New Deal had not ameliorated some of the worst conditions of the Depression and the war had not led to unprecedented prosperity.) The collapse of the Soviet Union left us without an enemy so powerful (or so we thought) that we needed to marshal all of our resources to defeat it. The best – or worst – the government can do now is attempt to persuade the American people to engage in more small unjustified, unwinnable and unending wars like those we started in Iraq and Afghanistan. But they would not end the recession; they would only succeed in deepening it.

Can we commit ourselves to a national effort of such a scope without a war? Until now, the response of the government has been wholly inadequate. The Recovery and Reinvestment Act commits us to \$787 billion for the next four years, but the states confront a shortfall exceeding \$600 billion. That's leaves no real investment. What needs to be done to end the recession is what needed to be done before it began in order to provide universal employment, improve our standard of living, and keep America competitive in the world.

International education tests demonstrate that our schoolchildren are being shortchanged, leading us to import skilled foreign workers and outsource scientific and technological jobs for which too few of our young adults qualify. France, China, Japan and other nations are creating high-speed railroad systems while we continue to rely on more expensive, time-consuming, and environmentally harmful highway truck traffic to transport goods. There are other areas in which we fall short of meeting our needs in science, technology, infrastructure, and education. All of these require vast public expenditures.

Such investments by government require increased short-term debt. In the long term, any debt increase would be reduced by increased prosperity. Honest, fair and enforced tax laws would help. To give a single example of a dishonest and unfair tax law: Uglund House, a modest five-story white building in the Cayman Islands, houses 12,748 U.S. corporations (at last count). The building isn't crowded because the offices are unoccupied. But they are credited with earning hundreds of billions of dollars for the corporations registered there, because the Cayman Islands don't levy a corporate tax. Similar legal but untruthful corporate offices exist in Liechtenstein, Panama, Bermuda, and other tax havens. At least eighty of the one hundred largest American corporations have hundreds of foreign offices where they escape American taxation. Corporations should pay the taxes they owe on the income they earn. They could then save the cost of the lobbyists who help them create and maintain these tax dodges.

The choice between austerity and investment isn't a real one. Austerity has never reversed a sharp economic downturn. Saving for a rainy day would be good (although it's not what most Americans do), but it isn't enough because when a rainy day comes, we must spend beyond our means to repair our leaky shelter. Critics who sneer at what they dismiss as Keynesian economics include those who supported the financial practices, tax cuts and unending wars which have impoverished us. They made hay when the sun was shining, and still make hay when the sky turns gray for others. (I daily observe that the advertisements for obscenely expensive watches, jewelry and other luxury items on pages 2 and 3 of The New York Times haven't diminished.)

Obama must choose. Austerity would mean the abandonment of significant change in so many areas where America can improve, with the president reduced to being a caretaker for a country in decline. His supporters would feel betrayed and he and the Democratic Party would be certain to suffer a grievous defeat in 2012. This cannot be an acceptable option for the president who, as a candidate, inspired the a new generation of voters and renewed the hopes of older people who could dream again of a more just and more inclusive America. Yes he can do better, and with his leadership, so can we.

## The Second Amendment After Tucson

January 13, 2011

I have no idea what motivated a young man to plan to kill Representative Gabrielle Giffords in a Tucson supermarket, succeeding in almost fatally injuring her, killing six others and injuring at least a dozen more. We must be aware that forbidding the legal sale of firearms to felons and mentally ill individuals is desirable, but it has never stopped gun violence in the United States.

I don't know how to eliminate the appetite for violence and the verbal incitement of violence in popular media ranging from radio and television to video games and the Internet without infringing upon freedom of speech and artistic expression. We can only morally condemn it and deny our support to those who propagate and profit from it.

I appreciate a deep difference of opinion among Americans as to whether the Second Amendment confers an absolute right to bear arms, or is subject to rational restraints that do not deny the right (as, for example, First Amendment rights are), or is qualified by its introductory clause ("A well-regulated Militia, being necessary to the security of a free State"), making the right contingent on determining the existence of whatever is meant by "a well-regulated militia." No other liberty in the Bill of Rights in its statement there.

Here's what I do know. The Congress that proposed and the states that ratified the Second Amendment did not imagine the development of modern multi-round handguns. They did not know how prevalent gun violence would become. Since 1960, more than a million Americans have died in firearm suicides, homicides, and accidents. In 1995, handguns were used in more than three-fourths of the 10,100 reported homicides committed with firearms in the United States. The mortality rate for gunshot wounds to the heart is 84 percent, compared with 30 percent for knife wounds. Moreover, a knife-wielding assailant is unlikely to have more than one victim. The National Rifle Association to the contrary notwithstanding, guns kill people, far more than any other means of committing murder.

Licensing has little more than a nuisance effect on the ability to acquire firearms. Authorities estimate that between thirty and forty percent of gun sales are from private parties to unlicensed individuals. Unlicensed private sellers are permitted by law to sell their guns at gun shows or private locations in approximately half of the states. The Committee on Law and Justice of the National Academy of Science estimated in 2004 that a half million guns are stolen each year, allowing them to get into the hands of criminals. Only 18 percent of the guns used criminally in one recent year were in the possession of the original owner. In 2009, more than 14 million new guns were bought in the United States.

It is a mark of the decline of civilized society that we feel politically limited to conducting a debate as to whether people should be able to add a magazine to their guns that shoots 30 or more rounds, as Jared Lee Loughner did, or should be limited to a magazine that can fire only ten bullets before reloading. In 2007, Seung-Hui Cho used the same model pistol in the Virginia Tech massacre, which claimed 32 lives. He would not

have been allowed to purchase the gun in his native South Korea. Of course, we should support every small step that brings us even a little closer to a saner and safer America.

There is only one preventive for the unconscionable level of gun deaths in the United States, and that is to make it as difficult here for a private citizen to purchase, own or use a handgun or other firearms as it is in England or Japan and other civilized nations. According to the World Health Organization and other United Nations statistics, America's murder rate is nearly four times greater than that of England and Wales, and twelve times greater than that of Japan. Yes, criminals in both of those countries sometimes find a way to obtain guns, but it is also true that everyone else is safer.

Most Americans favor more controls on the sale and use of guns. Our shocked response to the Tucson massacre is certain to increase the number who do. We can begin to make progress by rejecting any candidate for public office who solicits or accepts the support of the National Rifle Association.

One Hundred Years Ago Today  
March 25, 2011

**One hundred years ago today, March 25, 1911, a fire broke out on the ninth floor of a downtown New York factory building.** Because the exits from the Triangle Shirtwaist factory were locked to ensure that workers would not leave their sewing machine to use the outside toilets, 146 mostly Jewish and Italian young women died, either by jumping to their deaths or by being burned to death.

Two years earlier, the women at the Triangle Shirtwaist Company had gone on strike to protest the firing of workers who were suspected of promoting unionization. They were gradually joined by more than 20,000 workers at other shops. After striking for 13 weeks, many shops settled, but not Triangle. It remained staunchly anti-union.

The two owners (who had not locked themselves in) survived by fleeing to the building's roof when the fire started. They were subsequently acquitted of criminal neglect because it could not be proven that they knew that the exits were locked. Two years later, one of the owners was fined \$20 for again locking his new factory's doors during working hours.

A report by a factory investigating committee of the New York State legislature brought about significant reforms. President Roosevelt's Secretary of Labor Frances Perkins said that the Triangle Shirtwaist factory fire was the beginning of the New Deal. We have just witnessed the once-progressive state of Wisconsin seeking to join the 22 states that have enacted so-called right-to-work laws. A right-to-work law is a right to work for longer hours at lower wages under less safe working conditions. I wonder if the recent action by the once-progressive state of Wisconsin to end collective bargaining may mark the beginning of the end of the New Deal.

\* \* \*

**A letter from Japan.** Fortunately, Fumiko and I have no family in northeast Japan, and none were travelling there when the earthquake and tsunami struck. (Our family and friends live in Tokyo and the south of Japan.) We have received a sad, yet uplifting, letter from an American we don't know in Sendai, writing from an outsider's perspective. Here it is:

Things here in Sendai have been rather surreal. But I am very blessed to have wonderful friends who are helping me a lot. Since my shack is even more worthy of that name, I am now staying at a friend's home. We share supplies like water, food and a kerosene heater. We sleep lined up in one room, eat by candlelight, share stories. It is warm, friendly, and beautiful.

During the day we help each other clean up the mess in our homes. People sit in their cars, looking at news on their navigation screens, or line up to get drinking water when a source is open. If someone has water running in their home, they put out sign so people can come to fill up their jugs and buckets. Utterly amazingly where I am there has been no looting, no pushing in lines. People leave their front door open, as it is safer when an earthquake strikes. People keep saying, 'Oh, this is how it used to be in the old days when

everyone helped one another. ' Quakes keep coming. Last night they struck about every 15 minutes. Sirens are constant and helicopters pass overhead often. We got water for a few hours in our homes last night, and now it is for half a day. Electricity came on this afternoon. Gas has not yet come on. But all of this is by area. Some people have these things, others do not. No one has washed for several days. We feel grubby, but there are so much more important concerns than that for us now. I love this peeling away of non-essentials. Living fully on the level of instinct, of intuition, of caring, of what is needed for survival, not just of me, but of the entire group.

There are strange parallel universes happening. Houses a mess in some places, yet then a house with futons or laundry out drying in the sun. People lining up for water and food, and yet a few people out walking their dogs. All happening at the same time. Other unexpected touches of beauty are first, the silence at night. No cars. No one out on the streets. And the heavens at night are scattered with stars. I usually can see about two stars, but now the whole sky is filled. The mountains of Sendai are solid and with the crisp air we can see them silhouetted against the sky magnificently.

And the Japanese themselves are so wonderful. I come back to my shack to check on it each day, now to send this e-mail since the electricity is on, and I find food and water left in my entrance way. I have no idea from whom, but it is there. Old men in green hats go from door to door checking to see if everyone is OK. People talk to complete strangers asking if they need help. I see no signs of fear. Resignation, yes, but fear or panic, no.

They tell us we can expect aftershocks, and even other major quakes, for another month or more. And we are getting constant tremors, rolls, shaking, rumbling. I am blessed in that I live in a part of Sendai that is a bit elevated, a bit more solid than other parts. So, so far this area is better off than others. Last night my friend's husband came in from the country, bringing food and water. Blessed again.

Somehow at this time I realize from direct experience that there is indeed an enormous cosmic evolutionary step that is occurring all over the world right at this moment. And somehow as I experience the events happening now in Japan, I can feel my heart opening very wide. My brother asked me if I felt so small because of all that is happening. I don't. Rather, I feel as part of something happening that much larger than myself. This wave of birthing (worldwide) is hard, and yet magnificent.

\* \* \*

**In praise of Sarah Palin.** I am grateful for being reminded of something Sarah Palin said during the 2008 presidential campaign: "The truest measure of any society is how it treats those who are most vulnerable." Who are the most vulnerable members of society? Children, the handicapped, the gravely ill, the elderly, the homeless, the working poor, the seriously addicted, battered wives who lack the means to escape. These constitute most of those who do not have the resources to protect themselves from the selfishness, insensitivity and indifference of those who have the ability to redress the imbalance but lack the will to do so. Sarah Palin has asked the correct first question we should ask and answer when considering education, health care, taxation, and other public policies: What is their impact on the most vulnerable members of society?

\* \* \*

**“Inside Job”** is the name of the Academy Award winning documentary film that clearly and factually presents evidence demonstrating that this worst economic crisis since the Great Depression was created by the greed, hubris and stupidity of the most powerful members of the financial community. Nothing I have seen and little that I have read says so much or so persuasively about how our wealth has been stolen. It was worth sitting through Hollywood’s annual orgy of self-praise to hear Charles Ferguson, the documentary’s author and director, point out “that three years after our horrific financial crisis caused by financial fraud, not a single financial executive has gone to jail, and that's wrong.” Upon reflection, I want to retract my characterization of those who perpetrated this swindle as stupid. The financial sector has greatly increased its proportion of the nation’s income. Perhaps they really knew what they were doing.

\* \* \*

**An acid test of President Obama’s determination to reform the financial system** will be whether he appoints Elizabeth Warren as the first director of the Consumer Financial Protection Bureau, the creation of which was her idea. I first heard Professor Warren several years ago give a trenchant analysis of the predatory practices of the credit card industry. The financial sector and its Senate allies will do everything they can do to prevent her appointment, which is all the more reason why she should be given the job. Ever since Congress created the Interstate Commerce Commission in 1887, corporate interests have done their utmost (and often succeeded) to ensure that regulatory commissions would be their cronies and not their regulators. We have just witnessed the failure of the Securities and Exchange Commission to protect Americans from Wall Street’s insatiable greed. The thought that there should be an agency that puts the interests of consumers first is repugnant to corporate power.

\* \* \*

**The Black Swan.** (No, not the movie.) Several months ago I read a remarkable book. It is “The Black Swan: The Impact of the Highly Improbable,” by Nassim Taleb. I found it to be one of the most intellectually stimulating books I have read in years. Taleb achieved a certain fame for having predicted and explained the causes of the financial meltdown long before it occurred. A little bit of the book poses problems for non-scientists; most of it makes the reader think – differently from how you’ve thought before. I confess that I am partial to anyone who shares my distaste for the Nobel prize in economics, leveraged buyouts, and “banksters whose wealth has been subsidized by taxpaying schoolteachers.” I recommend this book now because it occurs to me that Taleb says a lot about the highly improbable possibility of a nuclear disaster – even though he never mentions it. We are being told that a nuclear disaster is impossible, just as we were told black swans were impossible – until we saw one.

Thoughts Before the Bimonthly Meeting  
With My City Colleagues  
February 5, 2012

My thoughts on the eve of departing for New York for a bimonthly meeting with my City Colleagues.

1. Didn't our elders caution us when we were growing up to "save for a rainy day"? Didn't that mean we should save when the sun was shining so that we could afford the cover when it was pouring? Wasn't that good advice? When did austerity ever pull a declining economy out of its hole? What good is it doing for declining Britain or bankrupt Greece? The Great Depression was modified by the New Deal and spectacularly reversed by the infusion of capital investment, initially and overwhelmingly by the federal government, during and after the Second World War.

2. I am almost (but not quite) persuaded that the United States would be better off by choosing the poorer alternative than by our electing a divided government, when at least one house of Congress is controlled by a party ideologically opposed to the President. I fear that a reactionary republican (lower case to differentiate it from democratic) government will be an economic and social disaster, but how much worse could that be than a government that is incapable of any decisive domestic action? It's bad enough that forty percent of the American electorate never votes, but it's worse when a mere forty percent change the complexion of Congress in mid-term elections. Given the present composition of the parties, it is political to irrationality to even think of voting for a House or Senate candidate you prefer, instead of casting it for the party you prefer.

3. It is ludicrous to castigate President Barack Obama as a socialist or worse. My complaint is that he falls far short of proposing the extent of government intervention in a mixed economy that I hope for. What he proposed and Congress adopted will reform health care, but far short of what other industrial nations have adopted. (Shall I bore you again with how my life was saved by the National Health in Great Britain, and how I could not have afforded or received it in the United States?) The principal individuals who engaged in illegal and greedy acts that contributed to the Great Recession have not been prosecuted. Dodd-Frank is the palest shadow of the regulation that the economic system requires. History will record that Obama, like FDR, has been a savior of the American brand of capitalism. I hoped (and still faintly hope) that he will be its reformer.

4. Is Citizens United and unlimited spending from partially unknown sources justified on the basis of our experience in the early 2012 Republican primaries and in anticipation of the coming election campaign? There are persuasive historical, constitutional, and moral (not to mention biological) reasons why corporations are not persons and not entitled to the rights of persons. If there were no other reason for dismay, consider how often President Obama and the Republican candidate will have to plead ignorance and innocence of the untruths that their own supporters will be spreading during the course of the campaign.



5. This is personal, but I suspect that I'm not the only person who feels this way. Every morning after reading The Times (or as much as I can get through at breakfast), I confront a magazine that arrived yesterday, e-mail I haven't read for several days, books I intend to read, phone calls to initiate or answer, and the writing project that Fumiko has stopped asking me about. And I don't have a job to go to or a deadline to meet! To give myself more time to think and read and write, I haven't joined Facebook, don't know how to Twitter, and don't own a mobile phone. (Fumiko lends me hers when I come to New York alone.) And all this makes no mention of the non-political interests and passions of my life. Recent studies have suggested that multitaskers produce more stress hormones, that focus and creativity are connected, and that overload makes people less productive. Unquestionably, I am more informed, but I wonder if I'm better informed.

An “Unreasonable” Decision  
April 6, 2012

Last week a decision by the United States Supreme Court came close to repealing the Constitution’s Fourth Amendment’s protection “against unreasonable searches and seizures” in its resemblance to the intimidating and prejudicial behavior of a totalitarian society. As a consequence of this decision, any person detained by any correctional officer for any reason may be subject to a humiliating personal examination. Here are the facts.

Albert Florence was arrested during a traffic stop by a state trooper who checked a statewide computer database and found a bench warrant issued for Florence’s arrest after he had failed to appear at a hearing to enforce a fine. He was held at a detention center and transferred to a correctional facility before it was discovered that the fine had been paid and the database was in error.

The Supreme Court’s summary continues: “At the first jail, petitioner, like every incoming detainee, had to shower with a delousing agent and was checked for scars, marks, gang tattoos, and contraband as he disrobed. Petitioner claims that he also had to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. At the second jail, petitioner, like other arriving detainees, had to remove his clothing while an officer looked for body markings, wounds, and contraband; had an officer look at his ears, nose, mouth, hair scalp, fingers, hands, armpits, and other body openings; had a mandatory shower, and had his clothes examined. Petitioner claims that he was also required to lift his genitals, turn around, and cough while squatting.”

Justice Kennedy concluded his opinion for the Court majority: “Even assuming all the facts in favor of petitioner, the search procedures...struck a reasonable balance between inmate privacy and the needs of the institutions.” Chief Justice Roberts and Justice Alito concurred, but conjectured that there might be unexamined exceptions to the discretionary power of detention officers.

Justice Breyer, for the four dissenters (that’s right; you know who they are), wrote: “A search of an individual arrested for a minor offense that does not involve drugs or violence—say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor—is an ‘unreasonable search’ forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.... Such searches are inherently harmful, humiliating, and degrading.”

No mention is made either in the Supreme Court reporter’s summary or the opinions in this case of the fact that Albert Florence is black, but haven’t you already guessed that?

**Take a moment out from political reality. Suppose that all of the following had been adopted into law this year:** employers must demonstrate that salary differences for the same work are not sex-related; tax deductions are eliminated for costs related to moving jobs abroad, and the money saved is used to “insource” labor back; anyone earning \$2 million in salary, capital gains and interests (to be reduced to \$1 million) must pay at least 30% of the federal tax rate; increased cybersecurity against terrorist attacks is coupled with the defense of free speech, and halving the student loan interest rate (from 6.8% to 3.4%) is indefinitely extended. All of these measures, as well as others, gained majority approval in the Senate this year, but failed to receive the sixty votes necessary to prevent a filibuster and therefore were not adopted under present Senate rules

Every alternative to majority rule is a form of minority rule. Against super majorities, Alexander Hamilton wrote in No. 75 of *The Federalist*: “All provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and in indirect one to subject the sense of the majority to that of the minority.”

If we believe in the rights of all safeguarded in a system of majority rule, we should understand the following:

One. The filibuster is not a constitutional power of the Senate. It is a historical accident resulting from the Senate’s inadvertent abandonment in 1806 of the rule to move the previous question. It was never proposed that one or many Senators could prevent the entire body from acting. Only decades later did Senators realize that, if the rules were not changed, debate would be unrestricted, and a minority could prevent the majority from passing a bill or approving a nomination.

Two. No Senate can bind a future Senate to its rules, any more than any Congress can bind a future Congress to its laws. The Senate is not a continuous body even though at least two-thirds of its members continue from one Congress to the next. The Congress that takes office next January will be the 113th Congress, and that designation includes the Senate as well as the House.

Three. The Senate that takes office in January 2013 can adopt new rules, including a rule to move the previous question. If it is challenged, the President of the Senate can uphold that action; if necessary, the Parliamentarian can confirm, and a majority of the Senate can concur. For this to happen, a Democratic majority of the Senate will have to uphold Vice President Biden.

If this occurs, it will be much more than a victory for the Democratic Party. It will be a victory for democracy.

**Americans are not more divided politically than in the past, but their political parties are, and that produces a grave challenge to the ability of our separation-of-powers, checks-and-balances government to govern at all.**

The story occupied about one-eighth of page A14 in yesterday's (June 5) New York Times, but I think that it deserves more attention. The gist of the Times report and the study that inspired it is that in most areas in which Americans divide politically (sex, skin color, religious conviction, and educational level), we are not more divided today than we were 25 years ago. What makes us appear more divided is the fact that the gap in political attitudes between Democrats and Republicans is nearly twice as great as it was a quarter-century ago. It is obvious to any political observer that the parties today are smaller and more ideologically homogeneous, but what is not obvious is that this does not reflect changing public views, but rather a closer correspondence of personal beliefs and party orientation.

This is the result of a study by the Pew Research Center for the People & the Press, "Trends in American Values: 1987-2012," that concludes that the gap between Republicans and Democrats on 48 political values has nearly doubled (from ten to eighteen percent), creating what the Pew study calls an "overwhelming partisan divide." Nearly all has occurred in the presidencies of George W. Bush and Barack Obama. Conservatives now outnumber moderates in the Republican party by two-to-one, liberals are now as numerous as moderates in the Democratic party, and the number of self-styled independents has grown, although most incline toward one party or the other.

Many issues demonstrate partisan polarization. In the past quarter-century, Republican support for the safety net (taking care of people who can't take care of themselves) has plummeted from 62 to 40 percent, while Democratic support at 75 percent today is about where it was twenty-five years ago (when the Pew project began). If the issue is put more extremely as to whether the national government should help more needy people by guaranteeing food and shelter, even if that means adding to the debt, Republican support has been cut in half (from 39 to 20 percent), while Democratic support remains at 65 percent. Other issues show similar changes. Twenty-five years ago, 93 percent of Democrats believed that there should be stricter regulations to protect the environment, and the same percent still believes it. In 1987, 86 percent of Republicans shared those views, but this has declined to 47 percent.

The Occupy movement has not increased the level of class antagonism, despite the belief of a substantial majority that the rich are getting richer and the poor poorer. There are contradictory signals about our future. On the one hand, half (51%) of all Americans believe that there are no limits to America's growth, compared with two-thirds (67%) a quarter-century ago. Nevertheless, 69 percent believe (as they did then) that we will solve our problems.

That optimism may not be justified. Twenty-five years ago, Americans were about as divided as they are today, but both parties contained a broader spectrum of political views,

making compromise possible. (Much of the success of the Democrats in the Great Depression began with their success in shaping compromises within their party.) The unhappy prospect for this year is that, whether Obama or Romney is elected, if his party fails to win control of both houses of Congress (including sixty seats in the Senate), it will result in a severely handicapped government. The ensuing stalemate would frustrate both parties, most Americans, and the ability to act in an economic crisis.

There is no prospect that the multi-factional, cross-sectional parties of the post-World War II era will ever return. The more nearly monolithic parties we have today will work (at least better) when the majority will is reflected in the composition of the government. What can be done? Voters who say that they vote for the person, not the party, should be persuaded why this is irrational in a highly partisan political climate. The Senate should adopt a majoritarian process to limit debate and enact laws. Public pressure should lead more states to create independent commissions to design congressional districts. More states should indicate their willingness to cast their electoral votes for the candidate who wins a popular majority. Strategies should be devised to increase the vote turnout in all elections. It will be, as it always has been, difficult to win, because it is what distinguishes democrats from republicans. The struggle to establish democracy in America has been a long one, and it resumes on November 6.

On the Eve of the Election  
November 3, 2012

Dear City Colleagues:

The answers to the questions that I pose here are going to be just as important after we know the results of Tuesday's election as they are now.

1. Do lower taxes stimulate investment and increase productivity?
2. Is private action always better than public action? (Or: Does Romney ever really mean what he says?)
3. What is the relationship between Democratic and Republican Administrations and jobs and the stock market?

1. The fundamental premise of Mitt Romney's economic program is that lower taxes stimulate investment and that investment creates prosperity. It isn't true, says a Congressional Research Service report to Congress. [Thomas L. Hungerford, *Taxes and the Economy: An Economic Analysis of the Top Tax Rates Since 1945* (Congressional Research Service Report for Congress, September 14, 2012)] Throughout its history, the CRS has had an untarnished reputation for objectivity and integrity.] The following three paragraphs constitute the entire conclusion of its September report:

"The top income tax rates have changed considerably since the end of World War II. Throughout the late-1940s and 1950s the top marginal tax rate was typically above 90%; today it is 35%. Additionally, the top capital gains tax rate was 25% in the 1950s and 1960s, 35% in the 1970s; today it is 15%. The average tax rate faced by the top 0.01% of taxpayers was above 40% until the mid-1980s; today it is below 25%. Tax rates affecting taxpayers at the top of the income distribution are currently at their lowest levels since the end of the Second World War.

"The results of the analysis suggest that changes over the past 65 years in the top marginal tax rate and the top capital gains tax rate do not appear correlated with economic growth. The reduction in the top tax rates appears to be uncorrelated with saving, investment, and productivity growth. The top tax rates appear to have little or no relation to the size of economic pie.

"However, the top tax rate reductions appear to be associated with the increasing concentration of income at the top of the income distribution. As measured by IRS data, the share of income accruing to the top 0.1% of U.S. families increased from 4.2% in 1945 to 12.3% by 2007 before falling to 9.2% due to the 2007-2009 recession. At the same time, the average tax rate paid by the top 0.1% fell from over 50% in 1945 to about 25% in 2009. Tax policy could have a relation to how the economic pie is sliced – lower top tax rates may be associated with greater income disparities."

2. "Every time you have an occasion to take something from the federal government and send it back to the states, that's the right direction. And if you can go even further, and send it back to the private sector, that's even better." Mitt Romney said this about FEMA during the primary debates. Apart from the embarrassment this must cause in the aftermath of this week's superstore, it represents a radicalism that deserves notice. He

was saying that in every case, the states are better equipped to deal with an issue than the federal government, and *private enterprise is always better than even the states*. I don't think that a more radical anarchic Ayn Randian position is possible. Of course, Romney cannot possibly believe it. What does he really believe except what he says to his friends when he thinks we're not listening?

3. I wrote the following summary in September based on the August employment figures. (If the employment figures were updated, they would provide a small boost for the Obama Administration.) I put this aside at the time because it left me with a question, one which constitutes an indictment of an ideological bias. But first consider the statistics.

**Millions of Americans vote their ideological bias, not their economic interest. If they voted their economic interest, few Americans would vote Republican.**

**The greatest economic task confronting the United States today is creating jobs.** The job market always improves more under Democratic presidents – and Democratic Congresses – than under Republicans. So does the stock market. Some people find facts boring, but they tell the truth: The overwhelming majority of Americans, poor or middle-class or rich, do better financially in a Democratic administration.

In the presidency of:	The average annual change in the number of jobs was
Eisenhower 2nd term	-0.08%
Kennedy-Johnson	+2.42
Johnson	+3.62 This marked the greatest rate of growth in both private and public employment.
Nixon	+1.99
Nixon-Ford	+1.46
Carter	+3.28 The greatest private sector growth since LBJ, but with little public sector growth.
Reagan 1st term	+1.74
Reagan 2nd term	+2.80
George H.W. Bush	+0.41
Clinton 1st term	+2.85 High private sector growth accompanied by a decline in federal government jobs.
Clinton 2nd term	+2.37
George W. Bush 1st term	0.21 George W. Bush's presidency marks the poorest job performance in modern times.
George W. Bush 2nd term	+0.06
Obama (through Aug. 2012)	+0.10 More than 4.6 million new private sector jobs were created since early 2010.

Since 1957, the average annual rate of increase in the number of private sector jobs has been higher under Democratic presidents than under Republican presidents. The average annual increase in the number of jobs has been 1.02 percent under Republican presidents and 2.48 percent – more than twice as high – under Democrats. The decline of private sector jobs in the first year of the Obama presidency was overcome by the 1.8

percent growth of the past twelve months, a rate higher than that in any Republican administration since Reagan's second term (which was lower than in Carter's presidency or in Clinton's first term). Of course, it is important to note that many new jobs pay significantly less than many of the industrial jobs lost in the recent Great Recession.

There has been an increase in private sector jobs in every term of every Democratic president, while there was a net decrease in Eisenhower's second term and George W. Bush's first term. The rate of increase of private sector jobs under Democratic presidents has been higher than any increase under either his Republican predecessor or successor. Only once in the eight Republican terms has there been a job increase exceeding 2 percent. In two of the six Democratic terms there was a job increase exceeding 3 percent; in two others the job increase has exceeded 2 percent. Only in Obama's term has the job increase been so small, but it is higher than in George W. Bush's second term, and there was a net decline in Bush's first term.

Contrary to the view that Democrats greatly increase the size of government, there has been a very small increase in the number of government jobs under both Democratic and Republican presidents, but it has been greater under the Republicans. In the eleven administrations since Johnson and the Great Society, the number of government jobs rose during five of the seven Republican administrations and fell during each of the four Democratic ones, including Obama's. The greatest increase in federal government employment since Johnson took place in Reagan's two terms. The greatest decrease in federal employment took place in Clinton's two terms. The rate of increase in federal government employment in George W. Bush's second term was four times as great as in Obama's term (through August 2012).

Of course, some prosperous people are more interested in the stock market than the job market. The results there strikingly favor the Democrats. Seven of eight recessions since Kennedy started in a Republican presidency. The Bloomberg Government barometer created a hypothetical \$1000 fund that tracked the S&P 500 for the past fifty years. Tracking only the years during which there was a Democratic president beginning with Kennedy, the fund would now be worth \$10,920, an increase of 992%. Tracking only the years during which there was a Republican president, beginning with Nixon until the end of George W. Bush's presidency, the fund would have been worth \$2087, an increase of 109%. The annualized return for 23 Democratic years would have been 11%, while the annualized return for the 28 Republican years would have been 2.7%.

**Postscript.** If the statistics are correct (I have checked and rechecked them), it suggests that there are wealthy Americans who would rather give up a little bit of their *absolutely* greater prosperity in a Democratic Administration in order to enjoy how much they are *relatively* more prosperous than the rest of us in a Republican Administration. This is an appalling conclusion for a variety of reasons. Is there a rational alternative to it?



Debt and Taxes  
January 11, 2013

President George W. Bush inherited a \$236 billion budget surplus in 2001. He left office eight years later with a \$1.3 trillion deficit and a projected multi-trillion dollar shortfall. The principal causes were long, costly wars in Iraq and Afghanistan (wrongly conceived and poorly executed) and tax cuts that enlarged the gap between the superrich and the rest of us. No effort was made to pay for this, but when President Obama sought liberal policies, conservatives argued for spending cuts to exceed appropriations. This was not only transparently hypocritical; it was bad politics, because budget-balancing in hard times does not produce good results.

The Great Depression of the 1930s ended because the United States would spare no expense or debt to win the war. Deficit spending resulted in greater and more widespread prosperity than the United States had ever known. Today, huge investments in infrastructure, education, science and technology are required, but the needs are too big and the possibility of profits too remote to attract private investment. If the government doesn't meet the challenges, no one will, and the already wide income and wealth gap will grow still wider and we will fall farther behind other advanced nations in our quality of life.

Can the U.S. finance a new and better deal for Americans without going bankrupt? (Economics bores most citizens, but not tax lawyers and lobbyists who work for wealthy corporations.) We can eliminate the annual deficit if we collect taxes owed (IRS estimates 17% of taxes are not paid); eliminate exemptions, credits, and capital gains (the top fifth of taxpayers receive two-thirds of each year's "tax expenditures" of \$1.3 trillion); require that corporations pay the same 35 percent tax rate as individuals (General Electric made a \$10.4 billion profit in 2008, 89 and 10, but paid no corporate tax; Boeing made \$9.7 billion in the same three years and paid no taxes, etc.); outlaw tax havens (18,000 corporations share a single address in the Cayman Islands, hiding some of the \$20-to-35 trillion being sheltered against taxation; President Obama called it "either the biggest building in the world or the biggest scam in the world"); extend payroll and Social Security taxes to higher incomes (the latter would end any fears that the Social Security fund will run out of money), and end tax deductions for mortgage interest and charity. The only deduction should be for legitimate dependents.

One thing more. We should reimpose the tax rates we had when America enjoyed its greatest prosperity, the forty years from the end of World War II to the beginning of Reaganomics. From 1939 to 1982, the marginal tax rate for individuals was between 70 and 91 percent. There were sizable deductions, but individuals and corporations paid rates twice as high as now. And most Americans prospered – including the richest.

City College to the contrary, going from rags to riches occurs much more often in countries with greater social mobility, which are those with a narrow gap between the have-too-much and the have-too-little. That's not us. The wealthiest country that ever was (that is us) has a greater proportion of poor people, higher crime rates, and much less social mobility than Germany, Canada, Holland, all of Scandinavia, Japan, and a number of other countries. And our economic inequality keeps growing greater. (It had narrowed in the

forty years after World War II, but began widening – and hasn't stopped – with sharply reduced tax rates under Reagan.)

Americans like to talk about equality of economic opportunity, but this is an empty slogan in the absence of universal access to the extent and quality of education that provides maximum personal benefit. Nor is there anything resembling equal economic opportunity where there is the virtually tax-free inheritance of large estates. If you approve of income-selective colleges and tax-free inheritances, have the intellectual honesty not to pretend that Americans do or can enjoy equal opportunity. No one argues for equal results, but it would be inspiring to live in a country that promised something close to equal chances. The United States can be such a country.

Our Institutions Are Republican  
But Most Americans Are Democrats  
March 4, 2013

Four months ago, 118 million Americans voted to elect a president, the House of Representatives and one-third of the Senate. This should have been a heartening demonstration of democratic majority rule. Instead, in choosing the major participants for the next two years of bickering, brokering, and breaking the promise of majority rule, the 2012 election was a disheartening demonstration of how far our government falls short of achieving majority rule.

Right now, we are immersed in the politics of sequestration, statutory debt limits, budget deadlines, legislative holds, cloture, and all the other disabilities of our dysfunctional government. But before we try to patch together another quick fix (that won't really fix anything), let's spell out why our government fails and how it may succeed.

The election was much less than a triumph of democracy. Obama's reelection with five million more votes than Romney made clear that he was the majority choice, but some Americans believe that occupying the presidency is more important than winning it by the historical electoral vote method, let alone by a genuine majoritarian process. Fearing that they cannot win the electoral vote by winning state pluralities, they advocate a scheme in which one electoral vote would be awarded to the candidate who wins a plurality in each district and the remaining two to the candidate who receives a statewide plurality. The practical consequence in 2012 would have been to elect Romney. Any populous state illustrates the probable consequence in future elections. Obama won Pennsylvania because he carried Philadelphia and Pittsburgh by large margins and lost the more rural congressional districts by far fewer votes, but Romney would have won more electoral votes. The same result would occur in other states that have a high concentration of single women, blacks, Hispanics, college students, foreign-born and other predominantly Democratic voters in urban areas. The present electoral method compromises majority rule, an proposals to divide a state's electoral vote among congressional districts would abandon it.

This radical change wouldn't violate the Constitution because Americans do not have a right to vote for president. In casting his Supreme Court vote to award the presidency to George W. Bush in 2000, Chief Justice William Rehnquist said: "The individual citizen has no federal constitutional right to vote for President of the United States." Read that again. You have no constitutional right to vote for president. It is shocking and it is undemocratic, but it is true. (Do you recall that the Florida state legislature was prepared to give that state's electoral vote to Bush in 2000 even if the vote recount had not been curtailed and it had shown – as it would have – that Gore carried the state?)

The Senate election reaffirmed popular support for the Democrats. Because only one-third of the Senate is elected in each two-year election cycle for a six-year term, the popularity of the two parties can be calculated only by adding up the votes cast for all of the major party candidates in the last three Senate elections. One hundred Democratic candidates received twelve million more votes than the one hundred Republicans. This is not reflected in the size of the Democratic majority in the Senate, because Senators are elected

from states of greatly varying populations. Democrats dominate in urban states in which a very much larger vote is cast and Republicans usually prevail in the very much less populous rural states.

Being the majority party in the Senate is not good enough. At the present time, Senate debate can be limited only by obtaining 60 votes in that 100-seat body. The cloture rule to limit debate (it no longer results in a filibuster, only in the denial of majority rule) has no basis in the Constitution or the intentions of the Framers. Unlimited debate, that is, the denial of a majority vote, is the accidental result of a trivial Senate action over one hundred years ago. We could tolerate this antidemocratic procedure when the two parties were multi-factional and cross-sectional, because the Senate majority would often win enough minority party votes to adopt cloture and bring a bill to a vote. We no longer can, because the parties are now more ideologically polarized than ever before in the lifetime of anyone now living. As a result, 41 votes in the Senate determine what government can't do, and the minority governs by inaction.

The greater popularity of Democratic candidates in 2012 was evident in the election of the House of Representatives where their candidates received 1.3 million more votes than the Republicans. Of course, the Supreme Court ruled (only 49 years ago) that a state's congressional districts should contain approximately equal populations. So, after each decennial census, some states redraw their district lines literally street-by-street to achieve a predetermined result. (A party that controls redistricting can win five out of six congressional districts by a very safe margin with a little more than 48 percent of the statewide vote.)

After the 2010 census, Republican redistricting was most skillfully done in Pennsylvania, Michigan, North Carolina, Texas, and Wisconsin, and to a lesser extent in Virginia, Indiana, Oklahoma and Alabama. The Democratic gerrymandered gains that were much smaller in Massachusetts, Connecticut and Delaware. What it comes down to is that the House was chosen before voters went to the polls. Republican gerrymandering was so successful that the Democrats would have had to improve their national majority overall by eight percent to have won a majority.

Lawsuits forced retired federal judges to do the redistricting in California, where the result has been to create more competitive elections that reflect public opinion. A democratic short-term goal would be to empower impartial judicial commissions to redistrict in every state. But if we really want majority rule and minority representation, we should require that multiple-district states create multiple-member districts that would increase the representation of sizable second parties, eliminate the rationale of minority-majority districts (which increase the number of minority race representatives at the high price of reducing the Democratic Party's total representation), and have the certain effect of increasing voter participation.

Are such changes too visionary to contemplate? So were racial and sexual equality, universal adult suffrage, the welfare state, and every democratic gain that we have made, and every one of those changes was opposed by republicans who vowed that they venerated the unchangeable Constitution. The truth is that the Framers did not venerate the Constitution. They exhibited indecision and doubt, and the constitution they wrote was simply their best

compromise for that time, literally that time, because a month earlier it would have been different. Anyone who has read the debates knows, for example, that the Framers decided five times on the method of election and term of office of the president, and they decided differently every time. It would not have come as a surprise to the Framers (who abandoned the framework of government they had established only six years before the Constitution) that in the two-and-a-quarter centuries since, we have replaced the values of a white male middle-class republic with the convictions of a universal democracy.

Democracy requires more than convictions, it requires the institutions of a popularly elected president, majority rule in the Senate, proportional representation in the House of Representatives, and the elimination of parliamentary devices that prevent majority decision-making. The choice is not between conservatives and liberals; it's a choice between republicans and democrats. Come to think of it, the choice resembles the choice between today's Republican and Democratic party. Four months ago, 118 million Americans voted to elect a president, the House of Representatives and one-third of the Senate. This should have been a heartening demonstration of democratic majority rule. Instead, in choosing the major participants for the next two years of bickering, brokering, and breaking the promise of majority rule, the 2012 election was a disheartening demonstration of how far our government falls short of achieving majority rule.

Right now, we are immersed in the politics of sequestration, statutory debt limits, budget deadlines, legislative holds, cloture, and all the other disabilities of our dysfunctional government. But before we try to patch together another quick fix (that won't really fix anything), let's spell out why our government fails and how it may succeed.

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The Governmental Crisis of Our Dysfunctional Politics  
May 17, 2013

**The governmental crisis of our dysfunctional politics is unprecedented and dangerous, but correctable, *if we care*.**

Many decades ago, to help students understand the composition of the two major parties, I would draw two parallel lines on the blackboard to indicate the range of views within them, identifying prominent political figures who were at various points of the spectrum. From the New Deal until at least the Voting Rights and Civil Rights Acts, the Democratic line tended to be longer on both ends. Since then, the Republican line has been a lot longer on the right.

In the 1950s and '60s, I could ask which party had more and stronger civil rights advocates and which had more and stronger opponents, and the answer to both questions was the Democrats. (That's why it was the majority party.) Students were often inclined to say that the Democratic Party represented "working people" or "the middle class," prompting me to point out that I could spend the remainder of the class naming Democratic millionaires. When a student said that the Republican Party favored "rich people," I summarized key provisions of the Norris-LaGuardia Act (sponsored by two progressive Republicans) that outlawed "yellow dog" contracts (workers signed agreements not to join a labor union as a condition of getting a job) and restricted the use of injunctions against strikes, picketing and boycotts, without which the successes of the trade union movement would not have been possible in the 1930s.

To understand American politics, it was necessary to understand that the parties were multi-factional and cross-sectional and the range of views *within* them was greater than the generalized difference *between* them. All of this was true between the Great Depression and the election of Ronald Reagan in 1980. None of this is any longer true.

What changed was the party alignment. An increasingly doctrinaire Republican Party evolved from the civil rights and women's rights movements, urban white flight, Vietnam and Iraq, the counterculture and changing mores, *Roe v. Wade* and the sexual revolution, Ronald Reagan's charisma, illegal immigration and a racially changed population. Americans chose sides. Traditional conservatives who wanted to restore an idealized America that they feared was vanishing (and perhaps had never been) found themselves allied with Tea Party patriots who believed in America first, last, always, and only, and were zealously shaping a very different and narrowly ideological Republican Party.

One month after the 2012 election in which Democrats won a majority of votes for President, the House and Senate, the Gallup Poll concluded that 59 percent of Americans identify themselves as conservatives and 36 percent as liberals. Given that Democrats have received more votes in five of the last six presidential elections, it is clear that the price of Republican ideological purity is very high. Democrats mostly favor and Republicans oppose policies that would increase the turnout, because both are convinced that a larger voting public would support the Democrats.



No divisive issue is as important as the fact that the parties are as opposed to one another as they can be in a country in which both favor freedom. Recent analyses of congressional voting behavior concluded that the least conservative Republican member of Congress is more conservative than the most conservative (or the least liberal) Democrat. This polarization spills over into the diminishing ranks of voters who vote a “split ticket,” taking pride in voting for the candidate and not the party. Truly independent voters now are voters who don’t pay much attention to politics.

There would be nothing wrong with a governmental system that relied on sharp party differences and in which one or the other won a majority and governed. There is everything wrong with such parties here, because this country was not intended to accommodate parties that are either unable or unwilling to compromise. The United States was constructed to make it very difficult for any single faction, interest or party -- not even a majority party -- to govern.

The President, House and Senate are each chosen in a different way by a different electorate for a different term of office. This does not make for majority rule, but that was the Framers’ deliberate design. Later electoral inventions – gerrymandering the districting of House seats, bloc voting by presidential electors, the primary process for choosing candidates – all increase the unlikelihood of a majority mandate. In the absence of any compelling political need to cooperate and legislate, it isn’t surprising that it is possible for individual members in both houses to impede action. The Constitution did not create “unanimous consent,” unlimited debate, or the ability of a single Senator to place an anonymous “hold” of indefinite duration on consideration of a bill or nomination, but all these devices undermine majority rule. And, of course, the life-tenured Justices of the United States Supreme Court couldn’t care less.

Despite these formidable obstacles, the American government was capable of governing as long as members of Congress could cross the aisle and work out compromises. Today, any Republican who dares to cooperate with the Democrats in shaping legislation risks being purged in the next primary. The failure of some lifelong conservatives to win their party’s re-nomination reminds me that, as in Stalinist Russia, doctrinal purity can always be made purer.

Virtually every proposal made by President Obama that had previously received support from some congressional Republicans has been unanimously rejected by them since he became President, including, most famously, Obama’s adoption of the individual mandate of the Affordable Care Act, originally proposed by the conservative Heritage Foundation two decades ago and endorsed by most Republican leaders then and since—until the President adopted it in his health care plan. When Democratic Senator Kent Conrad and Republican Senator Judd Gregg proposed a solution to the debt problem, seven Republicans were co-sponsors. When it came to a vote, the seven co-sponsors and every other Republican opposed it. It received 53 votes, short of the 60 votes necessary to overcome a filibuster.

The consequence of this sea change (or is it a tsunami?) in American politics is that we have abandoned the pretense of majority rule. Absolute monarchies, dictatorships, aristocracies, and racially-restrictive republics are not the only alternatives to majority rule.

In the United States Congress, not only can 41 of 100 Senators prevent adoption of a bill, but a single member can (anonymously!) prevent consideration of a bill or confirmation of a department head to administer a law that had already been adopted. I am unaware of any other elective system in which this is possible.

Every political alternative to majority rule is minority rule, the ability of a minority to prevent action. I stress *political* alternative because we go through life making familial decisions on the basis of consensus or one individual yielding to another who may have stronger feelings. We can do this without casting votes because we are aware that we have shared interests. This also works in a congenial, relatively homogeneous society. Good will helped in America when opposing views were amenable to compromise. It simply doesn't apply to uncompromising political convictions.

Is this an exaggeration? Republican Senate Majority Leader Mitch McConnell has repeatedly stated that he will block any nominee by any president to head the Consumer Financial Protection Bureau, even though this agency was created by Congress. The record of Republican obstruction of Obama initiatives and nominations has no parallel in American history. In a parliamentary system, the minority party's opposition is expected and may sometimes delay action, but it cannot indefinitely prevent a majority from adopting laws and putting government officials into office.

The ability of the born-again Republican Party to wreak such havoc in the United States will undermine the little faith that we have left in our government. In a half-century before the debt limit crisis of 2011, Congress extended the debt limit 78 times (almost twice as often under Republican presidents than under Democrats). All that these extensions did was to acknowledge expenditures already appropriated. It was a routine action. If Congress doesn't want to increase the debt, it doesn't have to appropriate the money. To hold the American government and people hostage (leading to that ugly word "sequestration") to a minority's desire to thwart the majority will is immoral.

Can we achieve something that resembles majority will in the American political system? We can educate and encourage citizens to care and to vote. When more voters turn out, more of them express a desire to learn what's happening. We can increase voting hours and ballot integrity and we can eliminate barriers that discourage voting.

We can make Congress more deliberative and democratic by eliminating secret holds and other devices that are designed to prevent action. Contrary to popular misconception, there is no constitutional right to allow unlimited debate in the Senate. (The development of the filibuster was the accidental consequence of a change in Senate rules adopted in 1806.) A single majority vote of the Senate can change the rules again. These reforms are all possible now.

I haven't begun to consider constitutional proposals that would make for genuine majoritarian elections. The United States, with a lower voter turnout than other elective systems, has too many and too frequent elections. We should adopt multiple-member districts, proportional representation, instant runoff voting, and the popular election of the president. Every one of these ideas — successful elsewhere — would encourage millions more to participate, and would make our government a better reflection of American

society. These changes will be very difficult to achieve, but the alternative is to continue to have dysfunctional government, leading to more shutdowns, even less public trust, and an inability to resolve critical issues. The failure to reform will come at a price we cannot afford to pay.

New York  
November 6, 2013

This week, Fumiko and I are completing two months in New York City, the longest period since we moved west in 1999. It has been delightful, enriching, exciting. I have fallen in love with New York all over again.

We have noted so many small but significant improvements. Against this is the heightened reality that millions of people who work here can barely afford to live here, and the economic, educational and cultural gap between the well-to-do (you know who you are) and the rest grows greater every year.

In 2012, the richest 1% took home close to 39% of the income earned in the city, more than double the national figure of 19%. It seems that everyone but the super-rich is hurting. During the recovery from the 2008-9 recession, the benefits have overwhelmingly accrued to the wealthiest nationally. The contrast has been even greater in New York. In a recent New York Times poll, solid majorities in all New York City income groups (including those making more than \$100,000 a year) said it is harder to make ends meet financially here than elsewhere, and 85 percent of New Yorkers agreed that “New York City is becoming too expensive for people like you to live in.”

The gap could be narrowed by a higher minimum wage, much more affordable housing, universal pre-K and after-school programs, and the increased employment that these measures would produce. The obstacle, of course, is the opposition to Mayor-elect DiBlasio’s proposal of a tax on incomes over \$250,000. All of the devices by which people escape taxation should be eliminated, including the ability of people who spend a little less than a year in the city to avoid being taxed as residents.

All change is quixotic until it is enacted and enforced. I am confident that very few prosperous New Yorkers will flee the city if they are compelled to pay higher taxes for the unique advantages of living here. New York is the cultural and financial capital of the United States, and neither will diminish because the cost of doing business here goes up. On the contrary, the city will prosper.

The Defining Political Crisis of Our Time  
January 21, 2014

On the eve of the 2014 World Economic Forum, for which some of the richest and most powerful people in the world gather in Davos, Switzerland, Oxfam yesterday released “Working for the Few,” a concise summary of the present status of income and wealth inequality throughout the world. While the facts in it should not be surprising to informed people, the summary is chilling: The 85 richest people have the same wealth as the three-and-a-half billion poorest. The wealthiest one percent of Americans has received 95 percent of economic growth since the 2008 recession, while the bottom 90 percent are poorer.

The place to begin to understanding the significance of these facts is Richard Wilkinson and Kate Pickett’s *The Spirit Level*, because it makes incontrovertibly clear why income and wealth inequality matters, and matters more than anything else we can do anything about for our present well-being and our future.

For some inexplicable reason, *The New York Times* didn’t see fit to mention the Oxfam report in today’s paper, although it devoted nearly a page to the competition among New York’s luxury hotels to create suites costing \$25,000 and more per night.

I am therefore taking the liberty of sending you a link to the Oxfam report:  
[www.oxfam.org/.../bp-working-for-few-political-capture-economic-ineq...](http://www.oxfam.org/.../bp-working-for-few-political-capture-economic-ineq...)

Stanley Feingold  
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Defining Document of Our Time  
January 23, 2014

In 2013 Pope Francis sent a message “to the bishops, clergy, consecrated persons and the lay faithful,” which may not have been read by most of us who are not members of those groups. Most of the Pope’s message dealt explicitly with religious matters, but much didn’t. What follows are excerpts which convey his economic views:

We can only praise the steps being taken to improve people’s welfare in areas such as health care, education and communications.... The hearts of many people are gripped by fear and desperation, even in the so-called rich countries.... Just as the commandment “Thou shalt not kill” sets a clear limit in order to safeguard the value of human life, today we also have to say “thou shalt not” to an economy of exclusion and inequality. Such an economy kills. How can it be that it is not a news item when an elderly homeless person dies of exposure, but it is news when the stock market loses two points? This is a case of exclusion. Can we continue to stand by when food is thrown away while people are starving? This is a case of inequality. Today everything comes under the laws of competition and the survival of the fittest, where the powerful feed upon the powerless. As a consequence, masses of people find themselves excluded and marginalized: without work, without possibilities, without any means of escape....

Some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naïve trust in the goodness of those wielding economic power and in the sacralized workings of the prevailing economic power. Meanwhile, the excluded are still waiting. To sustain a lifestyle which excludes others, or to sustain enthusiasm for that selfish ideal, a globalization of indifference has developed. Almost without being aware of it, we end up being incapable of feeling compassion at the outcry of the poor, weeping for other people’s pain, and feeling a need to help them, as though all this was someone else’s responsibility and not our own. The culture of prosperity deadens us; we are thrilled if the market offers us something new to purchase. In the meantime all those lives stunted for lack of opportunity seem a mere spectacle; they fail to move us....

While the earnings of a minority are growing exponentially, so too is the gap separating the majority from the prosperity enjoyed by those happy few. This imbalance is the result of ideologies which defend the absolute autonomy of the marketplace and financial speculation. Consequently, they reject the right of states, charged with vigilance for the common good, to exercise any form of control.... To all this we can add widespread corruption and self-serving tax evasion, which have taken on worldwide dimensions. The thirst for power and possessions knows no limits. In this system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenseless before the interests of a deified market, which becomes the only rule....

Pope Francis later writes: “In the prevailing culture, priority is given to the outward, the immediate, the visible, the quick, the superficial and the provisional,” which takes us beyond politics. (Or does it?) In this and in other statements, Pope Francis links waste (i.e.,

wealth) and want (i.e., poverty). It's a radical linkage that American leaders have avoided, namely, that there are not only very many who have much too little; there are also a small number who have much too much. It is likely to reverberate in American Catholicism – and out of it as well.

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Economics and Morality  
January 23, 2014

In 2013 Pope Francis sent a message “to the bishops, clergy, consecrated persons and he lay faithful,” which may not have been read by most of us who are not members of those groups. Most of the Pope’s message dealt explicitly with religious matters, but much didn’t. What follows are excerpts which convey his economic views:

We can only praise the steps being taken to improve people’s welfare in areas such as health care, education and communications.... The hearts of many people are gripped by fear and desperation, even in the so-called rich countries.... Just as the commandment “Thou shalt not kill” sets a clear limit in order to safeguard the value of human life, today we also have to say “thou shalt not” to an economy of exclusion and inequality. Such an economy kills. How can it be that it is not a news item when an elderly homeless person dies of exposure, but it is news when the stock market loses two points? This is a case of exclusion. Can we continue to stand by when food is thrown away while people are starving? This is a case of inequality. Today everything comes under the laws of competition and the survival of the fittest, where the powerful feed upon the powerless. As a consequence, masses of people find themselves excluded and marginalized: without work, without possibilities, without any means of escape....

Some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naïve trust in the goodness of those wielding economic power and in the sacralized workings of the prevailing economic power. Meanwhile, the excluded are still waiting. To sustain a lifestyle which excludes others, or to sustain enthusiasm for that selfish ideal, a globalization of indifference has developed. Almost without being aware of it, we end up being incapable of feeling compassion at the outcry of the poor, weeping for other people’s pain, and feeling a need to help them, as though all this was someone else’s responsibility and not our own. The culture of prosperity deadens us; we are thrilled if the market offers us something new to purchase. In the meantime all those lives stunted for lack of opportunity seem a mere spectacle; they fail to move us....

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The Widening Gap  
March 6, 2014

As is often the case, the most interesting news in yesterday's *Times* appeared in the business section. I learned that last year a Francis Bacon painting sold for \$142.4 million, a 1967 Ferrari for \$27.5 million, and a dozen bottles of 1978 wine for \$476,405. I also learned that there are 1682 billionaires in the world (80 percent more than a decade ago), of whom 417 are Americans. Credit Suisse refuses to reveal the names of most depositors, so the total may be larger.

The list surely includes the seven Americans who head the four largest publicly traded private equity firms, and who were paid a total of \$2.6 billion in 2013, with Leon D. Black of Apollo Global Management taking home \$546.3 million and Stephen A. Schwarzman of the Blackstone Group took (or was he given) \$452.7 million. Schwarzman deserves praise for knowing whom to thank. He said, "Thank you, Ben Bernanke." Throughout the recession and recovery, Bernanke was chairman of the Federal Reserve. Everything that the Fed did saved the banking system and the wealthiest Americans. Contrast that with the fact that most Americans are less well-off today than before the recession, and they were less well off then than they had been in the decades between the end of World War I and Ronald Reagan's election as president, when we were told that government is not the solution; it is the problem. So the government did little to prevent either the economic meltdown or the subsequent expansion of financial power.

**How great is the economic divide in America today?** The most objective definition of poor is to define it as less than half of the median income, which in 2012 came to anything less than \$25,500. The middle class may be neutrally defined as incomes between fifty percent less and fifty percent more than the median, which in 2012 would have been between \$25,000 and \$75,000. Many would be surprised to learn that their incomes place them far above the middle class. The Census Bureau calculates that a \$95,000 income is necessary for a two-parent, two-child family to maintain an adequate living standard in New York. Even though the cost of living is less outside Manhattan and for long-time home owners and rent-controlled renters, New York is otherwise a city for the prosperous and the poor. (By contrast, the cost for a similar family in St. Louis would be about \$65,000, two-thirds as much as New York.)

Skipping over the mathematically challenging concept of the "upper middle," which most modestly prosperous Americans would probably rather call themselves, the top **ten** percent of income-earners earned more than half (50.4 percent) of all household income in 2012, the first time that ten percent of income earners received more than the remaining ninety percent since income records began being kept in 1917. This happened because the top one percent of income earners (1,152,000 households) earned more than \$395,000 in 2012, which tops the previous one-percent record (in 2012 dollars) set in 1927. During the 2007-2009 recession, the one percent had lost more than 36 percent of their income, while everyone else lost an averaged 11 percent. In the following two years, the top one percent gained 31 percent, recovering 95 percent of their loss, while the rest had an average gain of four-tenths of one percent. In 2012, the one percent accounted for more than 19 percent of all household income, and the gap grew still wider.

Income in the United States is higher and more concentrated in a smaller proportion of the population than has ever been recorded before. Most Americans are less well-off than prior to the 2007-08 recession, and most were less well-off then than in the 30-plus years of narrowing inequality between the end of World War II and the late 1970s. Post-recession laws that tightened financial rules and an increase in the top income tax rate have not cut the growing gap.

**Does the great and growing divide matter?** Yes, it does, far more than the Gross Domestic Product, which is often unrelated to desirable outcomes. Among rich countries (Australia, New Zealand, Israel, Canada, the U.S. and all of Europe except the east), the United States ranks below 18 rich countries and ahead of only 3 in UNICEF's index of children's well-being. The United States ranks below 15 rich countries and above 5 in the Program for International Student Assessment's standardized tests in mathematics and literacy for 15-year-olds. Similarly, rich countries in which income is more equal do better in physical health and life expectancy; more unequal countries, including the U.S., do worse in drug and alcohol addiction, infant mortality, teenage births, homicide and imprisonment rates. What must be most disappointing is the evidence that we lag behind so many other nations in social mobility. The next presidential election may determine whether we revive a declining infrastructure, adopt higher and more progressive taxes, and eliminate tax havens and other dodges. The prospect for change is not bright, but the course we are on is bleak.

The Income Gap  
April 29, 2014

**When did the income and wealth gap become America's most critical domestic political issue?** Reducing that gap would contribute to resolving issues of race, sex and demography. Now, Thomas Piketty's *Capital in the Twenty-first Century* has created an interest unprecedented in this generation for a book on economics. If you find it painful to read so many numbers, try to think of the pleasure with which some people will read them.

The income tax rate for the highest incomes peaked at 94% after the Second World War. It was above 90% through the 1950s and early 1960s. Of course, no one actually paid that much. Between 1964 and 1980, the top rate was 70% and higher. It is important to note that the highest-paid Americans did very well in this period, and the rest of us did okay. As a result, the gap between the rich and middle class narrowed. In the Reagan presidency, the top rate dropped to 50%, and by the end of the 80s, it fell to 28%. It is now 39.6. This means that only taxable income over \$450,000 pays it. In reality, after deducting entitlements, exemptions, and subsidies, there isn't very much difference in the actual tax rates paid at all income levels.

In 2011, the top 1 percent paid an average of 29.0%; the next 4 percent: 30.4%; the next 5: 30.3%; the next 10: 29.5%. (It is worth noting that those close to the top often pay a greater percentage than the very top.) The next fifth 28.3%; the middle fifth 25.2%; the next-to-lowest fifth: 21%, the bottom fifth: 17.4%. This hardly qualifies as progressive taxation. Because of loopholes, 280 of the most profitable Fortune 500 companies averaged 18.5% or less over five years, 2008-2012. Of these, 78 paid nothing. General Electric made \$81 billion profit in ten years (3003-2011), but paid a tax of only 2.3%. By contrast, from the Reagan presidency to this year, most Americans have either not gained ground or suffered a decline in real purchasing power.

In 45 years (1968-2012), the richest fifth increased their income share from 42 percent to 50 percent (the top 5% received 22%), the middle fifth declined from 17 to 15 percent, and the poorest fifth was down from 5.6 to 3.4 percent. If we define the middle class as those who have incomes within 50% of the median, in 1970 it consisted of half of all Americans (50.3%), and has continued to decline until only 41.2% were in it in 2010.

There have been other periods and places in which income and wealth have been concentrated, but never before in the hands of a financial class, one that spends its working lifetime hunched over computer screens buying and selling commodities and stocks that they have never seen with money that they have not held. (Not yet.) Of course, legal and political professionals that aid and abet the financial class share in the gain. Skilled technicians, mechanics, artisans and artists earn a fraction as much. Never before has any group other than landowners in aristocratic societies received more income from the money that their money makes (in capital gains, dividends, rent, interest, and unreported or untaxed investments) than from labor.

Greed is an inadequate word for the desire to not only get as much as possible, but to insure that the have-nots get even less than they now do. Since the Eisenhower presidency,

prosperous Americans have done better in periods of liberal reform than they have in conservative administrations, but so have Americans with more modest incomes. Consider opposition to the minimum wage, which today (at \$7.25) has less purchasing power than it had sixty years ago. Before we shed tears for the jobs that may be lost if it is raised, experience instructs us that an increase would result in millions of low-income employees earning more than they do now, their spending all of it and creating more jobs, and a small narrowing of the income gap.

A similar concentration of income has not taken place in Germany, France, Scandinavia or Japan. In these countries, trade unions retain clout, universal health coverage is taken for granted, and other social welfare policies promote a more nearly equal society. There are constitutional, geographical and ethnic obstacles to achieving a more egalitarian America. The price we pay for a very unequal society includes higher health costs and homicide rates, and lower social mobility and educational performance. It's a high price. Is a low level of economic inequality un-American? In the country's early decades, Jefferson, Adams and Madison spoke out against economic inequality. It is an older and better American tradition than unbridled greed.

Guns  
June 1, 2014

After the Sandy Hook school murders, I thought that we had reached the point at which the opposition to gun control in America would evaporate. I realized that I was mistaken when I was assured that “there’s another side.” I’ve looked for that other side but haven’t found it, not in the Second Amendment, not in the changed nature of multiple-shot firearms, not in the condemnation of most other nations, certainly not in the irrefutable evidence outlined below.

On average, 32 Americans are murdered with guns every day and 140 are treated for gun assault in an emergency room. Every day on average, 51 people kill themselves with a firearm and 45 people are shot or killed in an accident with a gun. The U.S. firearm homicide rate is 20 times higher than the combined rates of 22 nations that are our peers in wealth and population. A gun in the home is 22 times more likely to be used to kill or injure in a domestic homicide, suicide, or unintentional shooting than to be used in self-defense. American children die by guns 11 times as often as children in other high-income countries. Firearm homicide is the second-leading cause of death (after motor vehicle crashes) for young people 1-19 in the U.S. In 2007, more pre-school-aged children (85) were killed by guns than police officers were killed in the line of duty. Medical treatment, criminal justice proceedings, new security precautions, and reductions in quality of life are estimated to cost U.S. citizens \$100 billion annually. The lifetime medical cost for all gun violence victims in the United States is estimated at \$2.3 billion, with almost half the costs borne by taxpayers. Ninety percent of Americans, including most NRA members, agree that we should have universal background checks. Since the Brady Law was initially passed, about 2 million attempts (half by felons) to purchase firearms were blocked due to a background check. Our background check system only applies to about 60% of gun sales, leaving 40% (online sales, purchases at gun shows, etc.) without a background check. [References: <http://www.cdc.gov/injury/wisqars/index.html>; Kristin Goss, *Disarmed: The Missing Movement for Gun Control* (2000); Children’s Defense Fund, *Protect Children, Not Guns* 2013; Brady Campaign to Prevent Gun Violence]

In the wake of the Santa Barbara murder spree and with great embarrassment for living in a country that gives the world the impression of valuing human life less than the right to own weapons that can kill innocent people, I will no longer cast a vote for any candidate who opposes gun controls that have been adopted and are enforced in civilized nations.

**Building the Keystone XL pipeline would irreversibly damage the U.S. environment and economy.** The U.S. will be the world’s largest oil producer and energy independent by 2015. Against this, the Keystone XL pipeline would transport tar sands oil – dirtier and more corrosive than conventional oil – from Alberta to Texas to be refined and exported. The energy and water used to extract tar sands bitumen – a low-grade, high-sulfur crude oil that must be extensively refined to be turned into fuel would generate three times the global warming pollution of conventional crude production. Leaks and spills that would spoil waterways and cities could never be reversed. Facing probable ecological disaster, it is indecent to even consider dubious economic gains. U.S. State Department estimates that the

Keystone pipeline would create at most 6500 temporary construction jobs; Transcanada, the firm that would build it, claims that it will create “hundreds” of permanent jobs, and a Cornell University study concluded that, by reducing investment in clean energy, it would kill more jobs than it creates. Environmental and energy security require clean energy, fuel efficiency, and factual accuracy, not a corroded pipe dream of converting tar sands filth into liquid gold.

**A personal note to past and future correspondents.** I derive both personal pleasure and intellectual stimulation from the e-mail that I receive. At the same time, I take seriously the volume of mailings by my City colleagues that carry the e-mail addresses of other persons. (I have been guilty of the same offense.) Just as the commercial mail that we receive does not carry any address other than our own and that of the sender, personal mail should “bcc” the names of other correspondents. I will no longer answer e-mail that carries the names of other recipients. I enjoy and benefit from communicating with others, never more than when they enhance my understanding or question the merit of my views. I will limit my bcc (blind carbon copy) mailing list to those who respond to this or any future first mailing. I look forward very much to hearing from those who might look forward to hearing from me.

*Stanley*

Obituary for Lillian Gobitis  
September 7, 2014

**Dear City Colleague, who may reminisce with me, and reflect on how far we still have to go.**

I have just read (September 7) the obituary for Lillian Gobitis in this morning's *Times*, and it brought back memories of the dramatic division on the Supreme Court when, three years after the *Gobitis* decision, Jackson wrote the eloquent opinion overturning it in *Barnette* and Frankfurter, dissenting, movingly reaffirmed the earlier verdict. (I wonder if an extension of Jackson's view and a secular counterpart to Frankfurter's can provide a starting-point for considering how far anyone, say Edward Snowden, can go in challenging U.S. security..... I will leave that for another day.) My personal conclusion was, and still is, freedom requires the freedom to differ. For former students who may recall our classroom discussion long ago, here is what I wrote decades ago.

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A thoughtful consideration of what Americanism should mean took place in two United States Supreme Court decisions three years apart in the 1930s. Two children, Lillian Gobitis, twelve, and her brother William, ten, were sent home one day in 1936 from school in Minersville, Pennsylvania, with a message from the principal that they would no longer be allowed to attend the public school because they refused to salute the flag at each day's opening exercises. They and their parents were members of Jehovah's Witnesses, who believed that the Word of God, as written in the Book of Exodus, Chapter 20, verses 3 through 5, forbade them from bowing down before a graven image. Other religious groups, including Mennonites, also refused to salute the flag.

In an 8-1 decision in *Minersville School District v. Gobitis*, the Supreme Court upheld the state's right to compel the flag salute. Justice Felix Frankfurter wrote the opinion of the Court: "National unity is the basis of national security.... The ultimate foundation of a free society is the binding tie of cohesive sentiment.... It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances."

Within a week of the decision, the Justice Department received reports of hundreds of physical assaults on Jehovah's Witnesses. Fervently patriotic Americans burned a Witnesses meeting hall in Kennebunkport, Maine, attacked a Bible meeting in Rockville, Maryland, beat and drove from town a lawyer defending Witnesses in Connersville, Indiana, banned Jehovah's Witnesses in Jackson, Mississippi, overturned a caravan of Witnesses' automobiles in Litchfield, Illinois, and had Jehovah's Witnesses children in several states declared delinquents and committed to reformatories.

In 1941, the West Virginia state board of education commanded that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the flag," and children who refused to salute the flag would be expelled, declared "unlawfully absent" and subject to proceedings as a "delinquent," and their parents or guardians would be subject to fines and jail terms. Ordinarily, the Supreme Court would not have consented



to hear another case involving the same issues as the *Gobitis* case shortly after having rendered a clear decision by an overwhelming majority, but in 1942, three Justices who had been in the majority in *Gobitis* took advantage of a case involving license taxes on religious publications to indicate that they had had a change of heart. This prompted the Court (it takes four Justices to agree to hear a case, when it is within the Court's discretion) to hear the case of *West Virginia Board of Education v. Barnette* in 1943.

The lone *Gobitis* dissenter, the three switchers, and two new Justices composed a new six-member majority in *Barnette* reversing the decision three years earlier. The drama of this about-face was matched by the eloquent expression of opposing views. A new Justice, Robert Jackson, wrote the opinion of the Court, which has become a basic text for those who question the Americanism of those who criticize the un-Americanism of others. Justice Jackson wrote: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guarantees the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not in his mind.... Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Almost exactly three years after announcing the nearly-unanimous *Gobitis* decision, Justice Frankfurter was now defending it in a dissent shared by only two other Justices. It is easy to appreciate the depth of his personal feelings. The only Jewish and foreign-born Justice wrote: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views of the Court's opinion, representing as they do the thought and action of lifetime.... The constitutional protection of religious freedom.... gave religious equality, not civil immunity.... One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs."

Because Americanism is often identified with our faith in God and God's faith in us (we sing that He sheds His grace on America), the Pledge of Allegiance was amended in 1954 to include the words "under God." Although God was already invoked by chaplains in Congress and by individuals giving testimony in courts, as well as inscribed on our coins, the amended pledge applied to all Americans in the most public displays of their Americanism.

In addition to members of Jehovah's Witnesses, others have moral convictions that conflict with an oath to God, including Buddhists, whose faith is in Buddha, who is not a god; disciples of Shinto, who believe that there are innumerable gods present in innumerable places; believers in other religions that are not monotheistic or reject the concept of God; atheists, who do not believe in God; agnostics, who believe that the existence of a Supreme Deity is, at best, not proven; non-believers who are persuaded that belief in God is a matter of moral indifference, because there is no correspondence between one's faith or lack of faith and one's morality, and members of all religions who believe that the enforced

expression of religious conviction produces more hatred and persecution than it does love and respect.

At the heart of Frankfurter's upholding of a compulsory flag salute in 1940 and Jackson's denial of it in 1943 is not the question of religious exercise, but the permissibility of state action to inculcate and compel national loyalty. Although the 1943 decision has never been reversed, some states and school districts continue to require the recitation of the pledge of allegiance and flag salute, and "under God" remains in the pledge.

Torture  
December 11, 2014

The shame we must feel for America's use of torture in the past is incalculable, but if our admission of guilt makes America's future use of "enhanced interrogation techniques" (the honest non-bureaucratic English word is "torture") more unlikely in the future, a very important purpose has been served. The United States has been a better nation for our past acknowledgment of the crimes committed against the original natives, racial minorities, religious dissenters, and political radicals.

The Report of the Senate Select Committee properly emphasized not only our moral failure in permitting, justifying, and lying about our inhumane treatment of captives (usually without any formal charges against them), but the clear evidence that, in doing so, we did not enhance our security against terrorists. We cannot be exonerated for the evil acts that we have committed or continue to commit by keeping individuals who have never been charged with any crime in confinement in Guantanamo or secret prisons. But we make take some sad solace in recognizing that the United States, unlike many nations, has had the courage to confront and apologize for grave errors in its past.

Whatever hostility is aroused by our candid admission of past moral failures, our vow that we can and must do better reasserts our imperiled first principle that all persons are created equal. It is what distinguishes those who believe in democracy from those who disparage it.

\* \* \*

The following items are a very brief summary of the Senate Select Committee's conclusions, a list of the enhanced interrogation techniques that were used by the CIA, and Sen. John McCain's Senate floor remarks in support of the Senate Committee report.

**1 Torture didn't stop a single terrorist attack.** "At no time did the CIA's coercive interrogation techniques lead to the collection of imminent threat intelligence, such as the hypothetical 'ticking time bomb' information that many believe was the justification for the use of these techniques."

**2 The CIA lied about the success of torture in obtaining intelligence.** Even though the CIA cited numerous examples of success, the report found that those instances could not be attributed to torture and that "[i]n some cases, there was no relationship between the claimed counterterrorism 'success' and any information provided by a CIA detainee during or after the use of the CIA's enhanced interrogation techniques." Ultimately, the "CIA representations were inaccurate and contradicted by the CIA's own records. The CIA's internal review also identified numerous inaccuracies in the CIA's effectiveness representations—including representations to the President." The CIA also misrepresented the reactions of senators who objected to the torture program, like Sens. John McCain (R-AZ) and Ron Wyden (D-OR). The CIA "informed the Justice Department's Office of Legal Counsel in classified settings that no senators had objected to the enhanced interrogation techniques that the CIA then sought to use against detainees."

**3 Not everyone approved of the torture policy.** “Internally, CIA officers regularly called into question the effectiveness of the CIA’s interrogation techniques, noting how the techniques failed to elicit detainee cooperation or produce accurate intelligence.”

**4 The torture methods were far more brutal than originally reported.** The “CIA applied its so-called enhanced interrogation techniques in near non-stop fashion for days or weeks at a time.” Detainees were forced to stay awake for up to 180 hours while “standing or in painful stress positions, at times with their hands shackled above their heads.” Some were kept in a “dungeon” that was completely dark and were “constantly shackled in isolated cells with loud noise or music and only a bucket to use for human waste.” At least one detainee was told he could only leave CIA custody “in a coffin-shaped box.” The government also rectally force-fed detainees.

**5 Water-boarding caused physical harm.** Even though the CIA told the Department of Justice that water-boarding did not physically harm detainees, the report concludes that it induces “convulsions and vomiting.” During one session, Saudi Arabian al Qaeda-linked Saudi citizen Abu Zubaydah became “completely unresponsive with bubbles rising through his open full mouth.”

\* \* \*

A May 30, 2005 Justice Department memo to the CIA listed thirteen "enhanced interrogation techniques": **1. Abdominal Slap** — The purpose was to cause the detainee to feel fear and despair, to punish certain behavior and humiliate or insult the detainee, according to a description in government documents, obtained by the American Civil Liberties Union in 2009. The interrogator stands about a foot from the detainee's stomach, and slaps the detainee with the back of his hand. The interrogator's hand is held with the fingers together and straight and slaps the detainee's abdomen. The CIA was using this technique prior to 2004 without approval by the Justice Department. **2. Attention Grasp** — The interrogator grabs the detainee by the collar, with two hands, and pulls him closer in, according to a description of the technique by former CIA acting general counsel John Rizzo. Rizzo described this technique being used on al-Qaida operative Abu Zubaydah in his recent book, "Company Man." **3. Cramped Confinement** — The interrogator would put the detainee in a box, sometimes big enough to stand in, for up to 18 hours, or one only big enough to curl up in for up to two hours, Rizzo said in his book. The interrogator had the option to put a "harmless" insect inside the small box when the technique was used on Zubaydah, because he hated bugs. **4. Dietary Manipulation** — This technique involved switching from solid foods to liquid. For instance, in August of 2002, Zubaydah was put on a liquid diet that consisted of Ensure and water, the Senate report said. **5. The Facial Hold** — The interrogator holds the detainee's head so it can't move and puts one hand on each side of the detainee's face, keeping fingertips away from the detainee's eyes, Rizzo explained in his book. **6. The Facial Slap/Insult Slap** — The interrogator slaps the detainee in the face, with fingers spread, striking between the chin and earlobe, Rizzo explained in his book. The idea, Rizzo said, was to startle or humiliate the detainee, Zubaydah, and "disabuse him of the notion that he wouldn't be physically hit." **7. Nudity** — For instance, a detainee would be forced to stand for prolonged periods while nude. **8. Stress Positions** — The purpose of these techniques are to stimulate mild discomfort from extended muscle use, according to a description in a government document obtained

by the ACLU. Two such positions, used on Zubaydah, were to have him sit on the floor with his legs stretched out in front of him and his arms above his head, or kneeling on the floor while leaning back at a 45-degree angle, Rizzo said in his book.

**9. Sleep Deprivation** — Detainees were kept awake for up to 180 hours, often standing or in a stress position, the Senate report said. Sometimes, the detainees' hands would be shackled above their heads. At least five detainees had "disturbing hallucinations" during this technique, and in two of those cases, the CIA continued the practice. One detainee, Arsala Khan, hallucinated after 56 hours of standing sleep deprivation in October 2003. After this, the CIA came to the conclusion that he ""does not appear to be the subject involved in... current plans or activities against U.S. personnel or facilities." After about a month of detention and interrogation, the CIA recommended he be released to his village, but interrogators instead transferred him to the U.S. military, where he remained in custody for four years.

**10. Wall Standing** — A detainee faces a wall, standing about four feet away. The interrogator has the detainee reach out his arms toward the wall so that his fingers are touching it. The detainee would have to hold that position indefinitely, according to a description by Rizzo about this technique used on Zubaydah.

**11. Walling** — Interrogators slam detainees against a wall. In one instance, Zubaydah was slammed against a concrete wall. On 3/22/03, al-Qaida leader Khalid Sheikh Mohammed underwent "intense" questioning and walling. Giving up no new information, interrogators water-boarded him. After an hour of that, he said he was "ready to talk," the CIA said.

**12. Waterboarding** — The detainee is strapped to a board or bench, and water is poured over the detainees face to simulate drowning. According to the Senate report, the technique brought on convulsions and vomiting, immediate fluid intake and involuntary leg, chest and arm spasms. Abu Zubaydah became "completely unresponsive, with bubbles rising through his open, full mouth." Zubaydah was described as "hysterical" after these sessions and "distressed to a level that he was unable to effectively communicate." At one point, Khalid Sheik Mohammad was water-boarded 65 times between the afternoon of March 12, 2003 and the morning of March 13.

**13. Water Dousing** — Naked detainees were held down on a tarp on the floor, according to the Senate report. The tarp would be pulled up around them to make a bathtub. Cold or refrigerated water would be poured on them. In some cases, detainees were hosed down over and over again as they were naked and shackled, standing in a sleep deprivation pose.

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Senator John McCain said this on the floor of the Senate immediately after Sen. Dianne Feinstein announced the release of the Intelligence report on CIA interrogation methods:

"Mr. President, I rise in support of the release — the long-delayed release — of the Senate Intelligence Committee's summarized, unclassified review of the so-called 'enhanced interrogation techniques' that were employed by the previous administration to extract information from captured terrorists. It is a thorough and thoughtful study of practices that I believe not only failed their purpose — to secure actionable intelligence to prevent further attacks on the U.S. and our allies — but actually damaged our security interests, as well as our reputation as a force for good in the world.

“I believe the American people have a right – indeed, a responsibility – to know what was done in their name; how these practices did or did not serve our interests; and how they comported with our most important values.

“I commend Chairman Feinstein and her staff for their diligence in seeking a truthful accounting of policies I hope we will never resort to again. I thank them for persevering against persistent opposition from many members of the intelligence community, from officials in two administrations, and from some of our colleagues.

“The truth is sometimes a hard pill to swallow. It sometimes causes us difficulties at home and abroad. It is sometimes used by our enemies in attempts to hurt us. But the American people are entitled to it, nonetheless.

“They must know when the values that define our nation are intentionally disregarded by our security policies, even those policies that are conducted in secret. They must be able to make informed judgments about whether those policies and the personnel who supported them were justified in compromising our values; whether they served a greater good; or whether, as I believe, they stained our national honor, did much harm and little practical good.

“What were the policies? What was their purpose? Did they achieve it? Did they make us safer? Less safe? Or did they make no difference? What did they gain us? What did they cost us? The American people need the answers to these questions. Yes, some things must be kept from public disclosure to protect clandestine operations, sources and methods, but not the answers to these questions.

“By providing them, the Committee has empowered the American people to come to their own decisions about whether we should have employed such practices in the past and whether we should consider permitting them in the future. This report strengthens self-government and, ultimately, I believe, America’s security and stature in the world. I thank the Committee for that valuable public service.

“I have long believed some of these practices amounted to torture, as a reasonable person would define it, especially, but not only the practice of waterboarding, which is a mock execution and an exquisite form of torture. Its use was shameful and unnecessary; and, contrary to assertions made by some of its defenders and as the Committee’s report makes clear, it produced little useful intelligence to help us track down the perpetrators of 9/11 or prevent new attacks and atrocities.

“I know from personal experience that the abuse of prisoners will produce more bad than good intelligence. I know that victims of torture will offer intentionally misleading information if they think their captors will believe it. I know they will say whatever they think their torturers want them to say if they believe it will stop their suffering. Most of all, I know the use of torture compromises that which most distinguishes us from our enemies, our belief that all people, even captured enemies, possess basic human rights, which are protected by international conventions the U.S. not only joined, but for the most part authored.

“I know, too, that bad things happen in war. I know in war good people can feel obliged for good reasons to do things they would normally object to and recoil from.

“I understand the reasons that governed the decision to resort to these interrogation methods, and I know that those who approved them and those who used them were dedicated to securing justice for the victims of terrorist attacks and to protecting Americans from further harm. I know their responsibilities were grave and urgent, and the strain of their duty was onerous.

“I respect their dedication and appreciate their dilemma. But I dispute wholeheartedly that it was right for them to use these methods, which this report makes clear were neither in the best interests of justice nor our security nor the ideals we have sacrificed so much blood and treasure to defend.

“The knowledge of torture’s dubious efficacy and my moral objections to the abuse of prisoners motivated my sponsorship of the *Detainee Treatment Act of 2005*, which prohibits ‘cruel, inhuman or degrading treatment’ of captured combatants, whether they wear a nation’s uniform or not, and which passed the Senate by a vote of 90-9.

“Subsequently, I successfully offered amendments to the *Military Commissions Act of 2006*, which, among other things, prevented the attempt to weaken Common Article 3 of the Geneva Conventions, and broadened definitions in the *War Crimes Act* to make the future use of waterboarding and other ‘enhanced interrogation techniques’ punishable as war crimes.

“There was considerable misinformation disseminated then about what was and wasn’t achieved using these methods in an effort to discourage support for the legislation. There was a good amount of misinformation used in 2011 to credit the use of these methods with the death of Osama bin Laden. And there is, I fear, misinformation being used today to prevent the release of this report, disputing its findings and warning about the security consequences of their public disclosure.

“Will the report’s release cause outrage that leads to violence in some parts of the Muslim world? Yes, I suppose that’s possible, perhaps likely. Sadly, violence needs little incentive in some quarters of the world today. But that doesn’t mean we will be telling the world something it will be shocked to learn. The entire world already knows that we waterboarded prisoners. It knows we subjected prisoners to various other types of degrading treatment. It knows we used black sites, secret prisons. Those practices haven’t been a secret for a decade.

“Terrorists might use the report’s re-identification of the practices as an excuse to attack Americans, but they hardly need an excuse for that. That has been their life’s calling for a while now.

“What might come as a surprise, not just to our enemies, but to many Americans, is how little these practices did to aid our efforts to bring 9/11 culprits to justice and to find and prevent terrorist attacks today and tomorrow. That could be a real surprise, since it contradicts the many assurances provided by intelligence officials on the record and in

private that enhanced interrogation techniques were indispensable in the war against terrorism. And I suspect the objection of those same officials to the release of this report is really focused on that disclosure – torture’s ineffectiveness – because we gave up much in the expectation that torture would make us safer. Too much.

“Obviously, we need intelligence to defeat our enemies, but we need reliable intelligence. Torture produces more misleading information than actionable intelligence. And what the advocates of harsh and cruel interrogation methods have never established is that we couldn’t have gathered as good or more reliable intelligence from using humane methods.

“The most important lead we got in the search for bin Laden came from using conventional interrogation methods. I think it is an insult to the many intelligence officers who have acquired good intelligence without hurting or degrading prisoners to assert we can’t win this war without such methods. Yes, we can and we will.

“But in the end, torture’s failure to serve its intended purpose isn’t the main reason to oppose its use. I have often said, and will always maintain, that this question isn’t about our enemies; it’s about us. It’s about who we were, who we are and who we aspire to be. It’s about how we represent ourselves to the world.

“We have made our way in this often dangerous and cruel world, not by just strictly pursuing our geopolitical interests, but by exemplifying our political values, and influencing other nations to embrace them. When we fight to defend our security we fight also for an idea, not for a tribe or a twisted interpretation of an ancient religion or for a king, but for an idea that all men are endowed by the Creator with inalienable rights. How much safer the world would be if all nations believed the same. How much more dangerous it can become when we forget it ourselves even momentarily.

“Our enemies act without conscience. We must not. This executive summary of the Committee’s report makes clear that acting without conscience isn’t necessary, it isn’t even helpful, in winning this strange and long war we’re fighting. We should be grateful to have that truth affirmed.

“Now, let us reassert the contrary proposition: that is it essential to our success in this war that we ask those who fight it for us to remember at all times that they are defending a sacred ideal of how nations should be governed and conduct their relations with others – even our enemies.

“Those of us who give them this duty are obliged by history, by our nation’s highest ideals and the many terrible sacrifices made to protect them, by our respect for human dignity to make clear we need not risk our national honor to prevail in this or any war. We need only remember in the worst of times, through the chaos and terror of war, when facing cruelty, suffering and loss, that we are always Americans, and different, stronger, and better than those who would destroy us.”

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My Last Word on Charlie Hebdo  
January 16, 2015

I had written an essay beginning “Je ne suis pas Charlie Hebdo,” but put it aside when I read the comments of Muslim journalist Mehdi Hasan in the *Huffington Post UK* (January 13), who, writing to an anonymous journalist, said more than I had said and said it better. I have excerpted the following from his essay:

In the wake of another horrific terrorist attack, you appear to have updated Dubya's slogan: either you are with free speech... or you are against it. Either vous êtes *Charlie Hebdo*... or you're a freedom-hating fanatic. I'm writing to you to make a simple request: please stop. You think you're defying the terrorists when, in reality, you're playing into their bloodstained hands by dividing and demonising. Us and them. The enlightened and liberal west v the back-ward, barbaric Muslims. The massacre in Paris on 7 January was, you keep telling us, an attack on free speech....

In the midst of all the post-Paris grief, hypocrisy and hyperbole abounds. Yes, the attack was an act of unquantifiable evil; an inexcusable and merciless murder of innocents.... It was a crime - not an act of war - perpetrated by disaffected young men; radicalised not by drawings of the Prophet in Europe in 2006 or 2011, as it turns out, but by images of US torture in Iraq in 2004.... We all agree there are always going to be lines that, for the purposes of law and order, cannot be crossed; or for the purposes of taste and decency, should not be crossed. We differ only on where those lines should be drawn. Has your publication, for example, run cartoons mocking the Holocaust? No? How about caricatures of the 9/11 victims falling from the twin towers? I didn't think so (and I am glad it hasn't)....

Let's be clear: I agree there is no justification whatsoever for gunning down journalists or cartoonists. I disagree with your seeming view that the right to offend comes with no corresponding responsibility; and I do not believe that a right to offend automatically translates into a duty to offend. When you say “*Je suis Charlie*”, is that an endorsement of *Charlie Hebdo's* depiction of the French justice minister, Christiane Taubira, who is black, drawn as a monkey? Of crude caricatures of bulbous-nosed Arabs that must make Edward Said turn in his grave?

Lampooning racism by reproducing brazenly racist imagery is a pretty dubious satirical tactic. Also, as the former Charlie Hebdo journalist Olivier Cyran argued in 2013, an “Islamophobic neurosis gradually took over” the magazine after 9/11, which then effectively endorsed attacks on “members of a minority religion with no influence in the corridors of power.”

It's for these reasons that I can't “be”, don't want to “be”, *Charlie* - if anything, we should want to be Ahmed, the Muslim policeman who was killed while protecting the magazine's right to exist. As the novelist Teju Cole has observed, “It is possible to defend the right to obscene... speech without promoting or sponsoring the content of that speech.”...

Did you not know that *Charlie Hebdo* sacked the veteran French cartoonist Maurice Sinet in 2008 for making an allegedly anti-Semitic remark? Were you not aware that Jyllands-Posten, the Danish newspaper that published caricatures of the Prophet in 2005, reportedly rejected cartoons mocking Christ because they would "provoke an outcry" and proudly declared it would "in no circumstances... publish Holocaust cartoons"?

Muslims, I guess, are expected to have thicker skins than their Christian and Jewish brethren. Context matters, too. You ask us to laugh at a cartoon of the Prophet while ignoring the vilification of Islam across the continent (have you visited Germany lately?) and the widespread discrimination against Muslims in education, employment and public life - especially in France. You ask Muslims to denounce a handful of extremists as an existential threat to free speech while turning a blind eye to the much bigger threat to it posed by our elected leaders.

Does it not bother you to see Barack Obama - who demanded that Yemen keep the anti-drone journalist Abdulelah Haider Shaye behind bars, after he was convicted on "terrorism-related charges" in a kangaroo court - jump on the free speech band wagon? Weren't you sickened to see Benjamin Netanyahu, the prime minister of a country that was responsible for the killing of seven journalists in Gaza in 2014, attend the "unity rally" in Paris? Bibi was joined by Angela Merkel, chancellor of a country where Holocaust denial is punishable by up to five years in prison, and David Cameron, who wants to ban non-violent "extremists" committed to the "overthrow of democracy" from appearing on television.... Apparently, it isn't just Muslims who get offended.

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After reading Mehdi Hasan, I recalled how difficult it often is to both understand "the other side" and be aware of the hypocrisy on my side. There is no "other side" for a True Believer. Perhaps that's why the joke I most cherish is the one usually told about a Jew who, upon being rescued from his desert island, must explain why he built two synagogues: This is the one he attends and the other is the one he stays away from. That joke is nearly enough to constitute the basis of a humane philosophy. *Charlie Hebdo* is the publication of one more church that I do not attend. I unreservedly defend its right to exist, but it will remain unattended by me.

I Was a College Teacher  
August 23, 2015

I was a college teacher for fifty-one years. When I began, I thought that college teaching is an honorable profession, but I was wrong. I had confused the much-honored profession of College Professor with the insecure and largely ignored occupation of college teaching, a very large proportion of which is done by people who have no job security or benefits and very little of which is honored at all.

College teachers could reverse the disappointing performance and reduce the escalating cost of American higher education, but colleges and universities are unlikely to be easily persuaded to change their values and rewards. That's a harsh judgment, and I will attempt to support it by briefly recounting the career of a college teacher who tried and failed to achieve professional success in that occupation. I am that teacher.

American colleges spend a great deal of time, money and effort on remedial courses to make up for the failure of the states to provide an adequate level of general education; they often focus on intercollegiate sports programs designed for a small proportion of students who often barely meet a college's minimum standards, and they are biased in favor of the children of alumni and prosperous parents. None of these practices offers the hope of providing better higher education for millions of less-advantaged students who would benefit from receiving it. What American colleges and universities do not do is recruit, retain and reward teachers to provoke, stimulate, educate and inspire their students to achieve the highest levels of intellectual understanding and insight.

I became a teacher of politics by chance. Not long after my graduation from The City College of the City of New York, Professor Walter Rice Sharp, chairman of its Government Department, sent me a note asking if I might be interested in becoming the department Fellow for the 1947-48 academic year, and I eagerly accepted the invitation. In the second semester of the first of my two years as Fellow, I was offered an evening session basic course. In succeeding semesters, I was given larger teaching schedules.

That first chance appointment proved to be a very happy one. Although I had avoided several undergraduate courses in American politics because they were taught by a dull teacher, I had already developed an abiding interest in politics. After graduating from City College in 1946, I was involved in practical politics, actively campaigned for candidates for public office, became the legislative director of a liberal organization, wrote its national platform, and testified before a Senate committee on federal aid to public education.

Upon my employment as Fellow in City College's Government Department, I enrolled in graduate studies in Columbia University's Department of Public Law and Government. For several years, I spent hundreds of hours in the Main Reading Room of the New York Public Library updating the research of Zechariah Chafee, Jr. (the First Amendment scholar whose profound insights earned Senator Joseph R. McCarthy's condemnation as "dangerous") and Alexander Meiklejohn on the inexhaustible subject of "How Free Can Free Speech Be?," which I had chosen as my Ph.D. dissertation subject.

Despite the increasing likelihood that I would not complete that dissertation long after I had completed the required sixty graduate credits and passed my oral examinations, City College continued to employ me. My position as a full-time lecturer enabled me to teach many American politics elective courses, with more students, more classes, and much less than half of the salary of my professorial colleagues.

My reason for accepting this status was that I had discovered my vocation. I was convinced that, if the college rewarded tenure to Ph.D. professors with limited teaching talent, it would surely be receptive to successful teachers who lacked the graduate degree. I learned that I was mistaken, but I never wavered in my conviction that higher education is wrong in its denigration and disregard of the primary importance of teaching and learning.

I enjoyed the challenge of synthesizing and analyzing complex material in ways that excited, informed and motivated students. I didn't allow either my students or myself to take widely-held opinions and conclusions for granted. Students who sought to avoid demanding courses were unlikely to sign up for my electives after being asked to read a page that listed the many required paperbacks or a multi-page syllabus that raised questions that would be considered my courses on political parties, the presidency, the legislative process, and American political thought.

Instead of students seeking an easy course, the young men and women who enrolled in my elective classes were mostly bright, knowledgeable, thoughtful, and as eager to learn as I was to teach. Many went on to become successful professionals and committed citizens. Whether my teaching style was Socratic or that of the devil's advocate, my students discovered that their judgments would be treated respectfully but critically.

I believe that a teacher's role does not end at the end of class. I was the faculty advisor for a student-edited journal and undergraduate political parties and participated in debates on political issues. At the invitation of Buell Gallagher, President of The City College, I served as chairman of student-faculty committees on the student government and the student press, and wrote reports on these subjects. When President Gallagher left the college, I was elected by the college's Faculty Senate to be one of three faculty members to meet with members of the New York City Board of Higher Education to choose his successor.

My department continued to reappoint me even after it failed to reappoint my officemate, who had also failed to complete a doctoral dissertation. From conversations with him and his students in our shared office, I knew that he had been an effective teacher. I wondered whether I was retained because I was willing to teach new courses, because I had taken over the teaching schedule of a very ill senior faculty member, or because I appeared to gratefully accept my status.

Whatever the reasons why I wasn't let go, it was many more years before I was given tenure and became an Assistant Professor, and still more years before I became an Associate Professor. I refrained for many decades from declaring what I am now writing because I feared that my motive would be dismissed as vanity or jealousy of the success of others. I now risk that embarrassment in order to expose the irrationality of the academic profession

and to explain why I chose the contrary path that led to my early departure from City College.)

I continued to participate in college affairs throughout my tenure. When the City College was occupied by self-styled Black and Puerto Rican Militants in 1969, I played an active role in faculty meetings that considered how to deal with the college's shutdown. The Faculty Senate, of which I was not then a member, elected me to be one of four faculty members to negotiate the successful resolution of the militants' takeover of the college. (James Traub has written about this crisis and my role in resolving it in *City on a Hill: Testing the American Dream at City College*.)

During my teaching career, I was less than candid when I stated that teaching quality is as important as the professor's published scholarship. The truth is that I believed then and still believe that superior teaching is vastly more important for an undergraduate, who benefits little from a professor's specialized publications, and whose parents in the 2014-2015 academic year had a college budget that averaged \$23,410 in an in-state public college or \$46,272 in a private college.

That cost, enough to bankrupt working-class families, is designed to help pay for much of the institution's operating costs, including deans and other administrators, and widely-varying faculty salaries, ranging from Assistant Professors, with a median salary of \$55,000 to full Professors, with a median salary of approximately \$80,000, with many at prestigious universities earning twice as much. Because few senior university faculty members spend much time teaching undergraduates, a majority of new faculty appointments are for non-tenure-track positions, resulting in an increasing proportion of classes taught by underpaid Teaching Assistants and part-time instructors.

I spent thirty-five years as a member of the faculty of The City College of New York, for four of which I was the director of City University's Program of Study Abroad in Great Britain, teaching American politics to British students at the University of Leeds and placing Americans for one year in British universities. What began with ten American students at the University of Leeds increased to my placing fifty-five American students four years later at many universities in England, Scotland and Wales, at very little cost to the students.

A detailed college-wide survey was undertaken and published only once during my more than three decades of teaching at City College. In it, I received the highest marks of any member of the faculty. I blush to mention this, because I realize that there is no 'best' given the differences in subject-matter, teaching techniques, and class objectives. I simply suggest that this survey provided further evidence regarding which teachers were most successful, evidence which played no part in determining which teachers were most rewarded.

I retired from City College in 1982 after being rejected several times as a candidate for promotion to Full Professor. I found it personally humiliating and contrary to the objectives of higher education to continue in an environment in which promotions were given to colleagues who had taught both less and less well, and who had made lesser or no contributions to the college. I accepted a poorer-paying position in a college that attracted few highly motivated students and few opportunities to teach advanced courses.

In 1978, George McKenna and I saw the publication of our first edition of *Taking Sides: Clashing Views on Controversial Political Issues*. Nearly forty years and eighteen editions after we began that collaboration, our sentiments remain those we expressed in our dedication: “In memory of Hillman M. Bishop and Samuel Hendel, masters of an art often neglected by college teachers: teaching.” As it happens, one of the teachers in that dedication was a conservative, the other a liberal, as has been true for Professor McKenna and me. We sought to avoid personal political bias in our teaching, unlike some colleagues who neither encouraged nor tolerated disagreement in their classes.

The pleasure that I derived from student approval has been enhanced by the fact that many years later, former students still favorably assess my teaching and the influence it has had in their lives. One day in 1983 shortly after I left City College, I received a telephone call inviting me to have lunch with five students of the early ‘60s. They had met once before for lunch and were now inviting me, their former teacher, to join them. With an increasing number of students, we have met bi-monthly (often skipping the summer) ever since, with that generation of students, usually in one of the large conference rooms of the law firms with which many former students were now affiliated.

Regarding these bi-monthly freewheeling “conferences,” Joseph Berger, a former student, wrote an article, “An Influential Mentor 50 Years Ago, and Today,” which was published in *The New York Times* on September 30, 2006. Berger and I received flattering e-mails and letters from former students. I am embarrassed to have felt the need to write these paragraphs that so immodestly describe my City College career, but I have done so principally to make clear my conviction that being a college teacher is not an acknowledged profession and the quality of teaching and learning have little or no relevance to a college teacher’s status.

Nothing diminishes my great respect for the scholars whose research and writing provided much of the material, knowledge and insight that I required in my teaching, or my admiration for the reporters who illuminate complex events and the behavior and motives of political leaders. Some scholars and reporters can compellingly communicate what they discover or learn, but research and reporting are not substitutes for teaching. The special (not unique, but necessary) attributes of a successful college teacher are the intellectual skills of analysis and synthesis, and the articulation, stimulation and exchange that can only take place in the close contact that is possible in the classroom or conversation in conference.

The indifference of the academic institutions to teaching is illustrated by their increasing reliance on part-time teaching by adjuncts. Non-tenure-track positions now account for three-fourths of all new instructional staff appointments. More than half of all faculty members hold part-time appointments. To earn enough, part-time faculty often try to teach at several colleges. Their classification as part-time employees overlooks the fact that those who succeed in obtaining several part-time appointments teach much more classes and more students than tenured faculty, but without out-of-class contact with students, without office space, without participation in academic decisions, without retirement and other institutional benefits, and without continued contact with their students.

Professors are aware of the different emphasis that colleges place on the importance of research and teaching. In 2007, a Harvard University Task Force on Teaching and Career Development reported: “Basic instructional duties tend, inexorably, to tilt toward the younger and less powerful members of the community – or to become the appreciated but somewhat marginalized province of senior faculty perceived as inherently talented or especially caring instructors.” After proclaiming that it valued research and teaching equally, the Harvard Task Force betrayed its unwillingness or inability to consider “the extensive instructional contributions of preceptors, teaching assistants, lecturers, and other off-ladder teachers,” who do so much of the teaching.

The fact is that scholarly research is as closely linked to teaching and learning as musical composition is to performance, as playwriting is to acting, or as any other creative artistic or intellectual work is to its performance or demonstration. That close and no closer. An insightful researcher may be an effective teacher, but these talents are not interchangeable. Teaching conveys knowledge, integrates it into a larger area of understanding, applies it to circumstances or conditions that the discoverer may not have contemplated, and helps us to understand how it alters what previously had been believed.

I know of no other occupation regarding which it can be stated that on-the-job performance counts for so little. It can be persuasively argued that it often counts for nothing at all, because most former students can recall more than one Professor who was so full of himself or incompetent or indifferent or couldn’t inspire admiration for or love of the subject, but possessed the obligatory credential of the Ph.D. In the real academic world, it doesn’t matter that one’s academic colleagues don’t know the topic, let alone the contents, of another’s dissertation. It matters only that the colleague is now a “Doctor,” whatever the professor’s capacity to communicate effectively, analyze provocatively and persuasively, or inspire a desire for further learning.

How common is this failing of professors to be successful teachers? A website, *Rate My Professors*, compiles the anonymous ratings of millions of students at thousands of colleges and universities. These ratings do not differentiate between serious and unmotivated students, but they do reveal which professors are widely respected for their ability to communicate and motivate, and which are not. There is no correlation between a teacher’s title and student evaluation of how well the teacher taught and how well students learned.

Anyone who takes the effort can distinguish between the appraisals of serious and casual students, as well as between teachers who ask more of and give more to their students and those who ask for and get less. Any college graduate can recall the intellectual excitement of our own college experience or can ask present students who are eager to learn. The person not to ask is the professor who vies for the shortest teaching schedule and who puts in the least time preparing for class, because teaching is not that academic’s professional priority.

The advice to “take teachers, not courses” can cynically minimize the effort and learning required to obtain a degree, or it can maximize the intellectual breadth and depth to which a student will be exposed. Unfortunately, avoiding the mediocre teacher my mean missing subject-matter that is essential in mastering the academic discipline.

It is clear that chance, nepotism, bias, and other factors may influence the success of a doctor, cabinet maker, musician, lawyer, or chef, but on-the-job knowledge, skill and dedication remain the greatest measures of achievement in these occupations. After all, once one is in a position to practice one's occupation, it matters little at what school a practitioner learned the craft, or whether it was learned at school at all. We do not care whether a novelist took creative writing classes or if the clothing or computer designer is self-taught.

There may be other occupations in which professional performance is wholly overshadowed by extraneous considerations, but I don't know what they are. The best proof of the apparent irrelevance of university teaching is that, unlikely professions in which those who are highly regarded are rewarded with the greatest opportunities to work, the higher one climbs the academic ladder, the less one is required to teach.

A college professor inherits a work-year that is almost unlike any other. Most college teachers teach between three and twelve fifty-minute hours a week for fewer than thirty hours a week, and many receive a fully-paid sabbatical year free of any duties. The actual norm for professors at colleges granting B.A. and B.S. degrees is approximately two classes meeting for four to six hours of classroom contact. By contrast, successful professionals in other occupations work many more hours, and self-employed persons and business owners cannot count the number of hours that they work. Just as most college professors do, professionals in other occupations that demand constantly refined skills must read scholarly journals and reports, study current research and acquire new skills throughout their careers.

A typical American college is based on a semester system, with two terms of approximately fourteen-to-fifteen weeks. If college teaching were designated as a profession, it would be hard to justify the twenty-plus holiday weeks that college professors receive. Even that doesn't take into account the fact that college professors rarely teach more than three days a week when they do teach.

If colleges recruited, retained and rewarded teachers on the basis of their success in teaching, they would recognize the value of encouraging the interrelated functions of teaching and learning in a longer school year. Imagine a trimester program of study in which students attended classes for three fifteen-week terms. College teachers could be teaching in classrooms, lecture halls, laboratories, rehearsals, practice sessions, and obligatory one-on-one conferences for a total of twelve hours each week.

This would come to an average of not more than four contact hours on three days of the week, for forty-five weeks, doubling or tripling the workload of college teachers, and permitting many more people to acquire a college education at much less cost. This would leave every teacher seven weeks a year of off-time without formal academic responsibilities. That's more time off than engineers, computer programmers, physicians, laboratory scientists, office workers, electricians, shopkeepers, and most employed people can hope to enjoy.

The quality of a college education depends upon the goals that it sets, the environment that it establishes, the circumstances in which it takes place, the services and equipment that it provides, the atmosphere that it fosters, and above all, the criteria that we



apply in recruiting, retaining and rewarding college teachers. All of these factors influence the quality of college education, but none more than or as much as teaching and learning.

Alfred North Whitehead, one of the last century's most noted philosophers, mathematicians, and teachers, stressed that it was not enough to impart knowledge; it was necessary to do it imaginatively. He recognized the importance of publication, although he cautioned that we should measure the weight of the thought, and not the number of words. Above all, he exalted teaching. In an essay, "Universities and Their Function," Whitehead wrote:

It must not be supposed that the output of a university in the form of original ideas is solely to be measured by printed papers and books labeled with the names of their authors. Mankind is as individual in its mode of output as in the substance of its thoughts. For some of the most fertile minds, composition in writing, or in a form reducible to writing, seems to be an impossibility. In every faculty you will find that some of the more brilliant teachers are not among those who publish. Their originality requires for its expression direct intercourse with their pupils in the form of lectures or personal communication. Such men exercise an immense influence; and yet, after the generation of their pupils has passed away, they sleep among the innumerable unthanked benefactors of humanity. Fortunately, one of them is immortal – Socrates.

P.S. This is a personal postscript addressed to the former students whom I long ago began to call my City Colleagues. Upon reading what I have written here I recognize that this letter is an attempt to explain why I persisted in fifty years of teaching in what others might see as a quixotic tilting at windmills. It is also an acknowledgement of my indebtedness for the knowledge, intellectual insight, and friendship that you gave me.

Stanley

For the Past 35 Years  
September 23, 2015

For the past 35 years, American economic productivity has soared while real income has declined. The top one percent now receives nearly one-quarter of all income, more than in the roaring twenties. Last year, the 100 highest-paid CEOs of large public companies received more than \$17.5 million each. Eight hedge fund managers received more than a half-billion (b as in bloated) dollars each. Excessive pay leads to increasing concentration and declining competition, tax evasion in anti-tax havens, polarization of economic classes and, among other consequences, a sharp decline in moderately-priced housing. What can we do about it?

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One modest reform would be to hold corporate executives responsible for covering up errors. General Motors discovered a problem with the ignition switch for the Saturn Ion before the start of production in 2001. In 2004, it learned that the ignition switch would unexpectedly turn off, cutting power to the engine and disabling the power steering, power brakes and airbags. In 2005, GM engineers proposed to fix the defect, but management rejected it. According to the *Detroit News*, the replacement part would have cost \$2 to \$5. The Center for Auto Safety found that 303 front-seat occupants died 2003-2012 in non-rear impact crashes in Chevrolet Cobalts and Saturn Ions when the air bags failed to deploy. More than a decade after the flaw was discovered, GM recalled 2.6 million Chevrolets and other cars.

Since then, General Motors questioned whether it can be tried for illegal actions taken before its 2009 bankruptcy. The new GM is not responsible under the terms of its bankruptcy exit for legal claims relating to incidents that took place before July 2009. Suits against the “new” GM argue that both the new and old GM engaged in “active concealment.” (And you and I thought that, after Citizens United, corporations merely had the rights of persons. In fact, they can bury their criminally liable selves and be reborn shed of any guilty past!) It now appears that General Motors will pay a fine of under \$1 billion, and no officers will be prosecuted because the law requires proof that the executives who knew intended to defraud, not just that they knew of, went along with, or profited from fatal errors.

\* \* \*

Even where deception is sufficient to demonstrate criminal wrongdoing, the government often imposes fines that are easily absorbed by major corporations, instead of prosecuting those who deliberately defraud or engage in coverups of criminal practices. When Charles Ferguson, director of “Inside Job,” accepted that movie’s 2011 Academy Award for Best Documentary, he said that no one responsible for the “horrific crisis caused by financial fraud has gone to jail.” Four years later, Ferguson’s sad reflection remains true.

Companies may no longer may pay the tax bills for golden parachutes or adopt supplemental pension plans regardless of corporate performance. Regina Olshan, head of executive and change their ways.” But, despite the Supreme Court’s revision of human biology, corporations are not persons capable of shame. Only executives who participated

in illegal behavior can be shamed, and only if they are tried, convicted and imprisoned. Shame on us for letting them get away with it. No wonder Americans are so cynical.

**Is there anything to say about gun violence that hasn't been said and said again many times before?** There isn't, so forgive me for once again apologizing for our nation's shame and pleading for reform. In a ten-year period (2004-2013), more than 30,000 people died every year by guns in the United States, more than 11,000 homicides, 19,000 suicides, and 36 in domestic acts of terrorism. In a UN survey of 14 other developed nations, all required gun licensing and all but one had gun storage laws; by contrast, the U.S. has neither. American children are 13 times more likely to be murdered with guns and 4 times more likely to commit suicide with a gun than children in other developed countries. Between 2000 and 2006, there were an average of 6.4 active shootings per year (defined by the FBI as "an individual actively engaged in killing or attempting to kill people in a confined and populated area"). In the following seven years (2007-2013), that number jumped to an average of 16.4. The number keeps going up. Higher populations, more immigrants, and more mental illness are not correlated with gun violence. But state gun controls (assault weapons bans, trigger lock requirements, storage requirements) have significantly lower firearms deaths. Reexamining the Second Amendment's sole qualification that justifies the right to bear arms because of the outdated need for "a well regulated militia," or amending it to apply to the limited single-shot "arms" of the Constitution's adoption seems futile in the face of the irrational zeal of gun worshippers. I will not vote for any candidate who does not support any rational effort to reduce the sale or private ownership of firearms.

Robert Scheer on Hillary Clinton  
October 21, 2015

*Robert Scheer, editor of Truthout, dissented from widespread praise of Bernie Sanders' dismissal of Hillary Clinton's private emails as a campaign issue. As a City College student, Bob expressed the uncompromising liberal positions of the radical democratic element of the Democratic Party. He still does.*

Scheer blew it. By embracing rather than confronting Hillary Clinton, Sen. Sanders fell into the trap of sellout mainstream politics, improving his personal brand as an appealing but ultimately non-threatening advocate for the downtrodden while studiously avoiding any suggestion that the smiley-faced woman standing next to him is deeply complicit in Wall Street's rape of the nation.... He pointedly ignored the Clinton family's role in deregulating Wall Street, and in doing so he allowed Hillary Clinton to cast gun regulation as the key issue that divides her from him. Forgotten was Bill Clinton's selection of Goldman Sachs honcho Robert Rubin to be his treasury secretary, an appointee who with President Clinton's complicity presided over the dismantling of New Deal limits on financial greed. The Clinton family tradition of sucking up to Wall Street is why Hillary and Bill and the foundation their daughter heads have been rewarded with millions in lecture fees and donations that are the basis of Hillary's rags-to-riches fairy tale.

Yes, Bernie Sanders has an immensely honorable record of waging the good fight for struggling Americans. On issues of economic justice, he is second to none, but that makes his stumble in this debate so depressing. I have long admired the man, but his failure to directly hold the Democratic leadership accountable for the bipartisan hollowing out of the American workforce was disappointing. The destruction of the hardworking, decently paid middle class was abetted by lousy trade deals like NAFTA and more recently the Trans-Pacific Partnership, which Hillary Clinton called the "gold standard" until it became politically inconvenient to insist on that absurdity.

Sanders' eagerness to forgive Clinton for any malfeasance in her email scandal was the debate's most celebrated but disgraceful moment. Ignoring her outrageous hypocrisy in endorsing the government's right to read personal emails of everyone in the world, including the leaders of Germany and Brazil, but not her own. "Let me say this," Sanders declared as he cut into the applause for Clinton's dismissal of the email controversy as simply partisan contrivance. "Let me say ... something that may not be great politics. But I think the secretary is right, and that is that the American people are sick and tired of hearing about your damn e-mails!" Of course it was great politics, creating a kumbaya moment among the assembled Democrats, with an appreciative Clinton murmuring, "Thank you. Me, too. Me, too." Suddenly Sanders had morphed into a Tony Blair complement to the Margaret Thatcher wannabe standing next to him.

Sanders remains proud of his opposition to the Patriot Act, still supported by Clinton—which authorized mass surveillance by the NSA. So why didn't he point out the hypocrisy of a Cabinet member not trusting the government with her personal emails but feeling perfectly fine about the most intimate private data of the rest of us being subject to a vast and secret system of government spying? Spying that Clinton knew all about, but that

was concealed from the American public until it was revealed by a brave whistleblower whom Clinton wants to imprison.

We learned of domestic spying, since limited by an act of Congress, only through the disclosures of Edward Snowden, whose motives and patriotism Clinton continues to castigate. Repeating her persistent denigration of a young man who served the needs of a democracy as Clinton so abjectly betrayed our Constitution, Clinton stated that Snowden must come back and “face the music.” Once again, as she has done repeatedly, Clinton falsely claimed that Snowden could have sought whistleblower protection when she should know that such protection is only for government employees, not a contractor as Snowden was. And she again smeared Snowden for taking refuge in Russia, as if that was his choice rather than the result of the State Department stripping his passport while he was in transit at the Moscow airport.

One should have no expectation that Clinton will be anything but deceitful in beating the drum for the “impostures of pretended patriotism” that George Washington warned about in his farewell address. Her hawkishness is ingrained, and the smug satisfaction she brings to an appraisal of the wreckage she has encouraged in Iraq, Libya, Afghanistan and Syria was on full display during the debate’s painfully shallow consideration of foreign policy choices. That the former Goldwater Girl is a devotee of peace through bombing is not news, but her unctuous satisfaction with the results of her warmongering tenure as secretary of state is a depressing harbinger of worldwide chaos should she be elected president. And don’t lecture me about the future of a Supreme Court in the hands of someone who would hang Edward Snowden if she could work it for the polls. *Et tu*, Bernie?

How One Young Man Became a Lawyer  
January 24, 2016

Frank Askin sent me his op-ed essay that was printed in The Washington Post on January 1st. Frank was a City College student who has since been professor at Rutgers Law School, director of its Constitutional Rights Clinic, general counsel of the American Civil Liberties Union, and author of *Defending Rights: A Life in Law and Politics*. I thought that both my legal and lay City colleagues would enjoy his recollections as much as I have.

It may seem passing strange for a general counsel at the American Civil Liberties Union to be celebrating the 120th birthday today of J. Edgar Hoover, but in fact the dreaded founding director of the FBI has been a godsend for me. In an age when ubiquitous surveillance makes a mockery of personal privacy, my experience shows there can be an upside to massive government data collection.

Johnson may have had Boswell, but I have had the Federal Bureau of Investigation. For 20 years beginning when I was a 16-year-old in Baltimore, FBI agents tracked my comings and goings. But unlike the many who have suffered greatly from such FBI surveillance, I have found it to have been a great benefit.

Here's one example: My wife took me on a mystery ride for our 25th wedding anniversary. We drove through her old neighborhood in the Bronx, and when we passed the "Welcome to Harrison, N.Y.," sign, I realized she was retracing the path of our elopement.

However, when we reached our destination, the only thing either of us could remember was that we were married by a justice of the peace named Venezia. We could not find a house that looked familiar. The telephone book listed no Venezias, and no one at the police station remembered him.

My wife's mistake was not having told me about the trip in advance. If she had, I could have consulted my FBI file, an expurgated copy of which I had obtained under the Freedom of Information Act in the late 1970s. A belated search revealed, as I had suspected, that the FBI knew all about Charles Venezia, who married us in his living room at 3 Calvert Place in Harrison.

No, the FBI did not accompany us on our elopement. Agents discovered a report of the event on the New York Times social page, which listed the names of my new in-laws. A telephone call to my mother-in-law by an agent posing as an old friend from Baltimore provided other relevant details for the FBI's insatiable files, including the revelation of a proud mother that her daughter "was attending a graduate school of Columbia University under a scholarship."

My FBI file also comes in handy under various other circumstances, such as when filling out government security forms. By a twist of fate, I had to seek security clearance from the FBI in the late 1980s when I was serving as special counsel to a congressional committee that had oversight over the nation's intelligence services.

The form asked me to list every address where I had ever lived and every job I had ever held. For most people my age, that would have been a real headache. But I just let my fingers do the walking - all the information was right there in my FBI file.

What was the reason for my inclusion in the FBI's Security Index, the catalog of dangerous radicals who might be rounded up and interned in the event of a national emergency? I have never been accused of a crime. But at 16, I became a civil rights advocate in Jim Crow Baltimore, leading sit-ins and other protests against racial segregation in schools and recreation programs and at restaurants and lunch counters. In the late 1940s, in Hoover's United States, it was not politically correct to be for civil rights.

However, I am most thankful to Hoover for keeping me out of the Korean War. I was drafted all right, but I was unceremoniously discharged after six months, even though I was one of the few men in my barracks not actively trying to find a way out. I told my curious comrades in arms that I had a politically connected uncle - leaving out that I meant my Uncle Sam. Indeed, my uncle gave me something called a general discharge, which I later had to sue to change to honorable, since I had done nothing to warrant it.

I must note that I was unusually lucky in being able to transform this lemon of FBI surveillance into lemonade. Indeed, it eventually led me to law school and a career as a civil liberties teacher and lawyer. After discovering the First Amendment in my constitutional law class, I started to question where the FBI got the authority to gather information and keep dossiers on individuals like me for doing nothing more than exercising our constitutional rights. And the first major lawsuits I ever brought on behalf of the American Civil Liberties Union challenged that authority all the way to the U.S. Supreme Court. Those challenges were ultimately dismissed on technical grounds, and the underlying legal issues remain unresolved to this day, although the Federal Privacy Act now appears to forbid such surveillance.

But there can be no doubt that J. Edgar inspired my life's mission and a very rewarding career. Maybe one upside of today's overly intrusive FBI and National Security Agency is that they could inspire the next generation of civil libertarians to take up the mantle.



The United States is Undertaxed  
March 3, 2016

**The United States is the least taxed of the industrial countries.** (Anyone who says that the U.S. has high taxes is either deliberately deceitful or too ignorant of difference between the nominal and real rates to discuss economics.) In the most recent year for which the OECD (Organization for Economic Cooperation and Development) has complete data, 31 OECD countries collected a greater proportion of the Gross Domestic Product in taxes. Only two OECD countries (Chile and Mexico) taxed less, while eight European countries each collected more than 40% of their nation's GDP. The United States, including states and local bodies, collects only 24% of the our GDP. These low tax rates have existed for the last forty years.

Statistics in the last century showed that, whenever the U.S. has collected a higher proportion of the Gross Domestic Product in taxes, every major income group prospered more, including the highest-earning fifth. The top fifth always do well, but never better than when all the other income groups also benefit. Clearly, the last third-of-a-century has not been such a time. A minority of high-income earners and investors have prospered in recent decades in which America's wealth has grown, but a majority of working Americans have suffered a decline in their living standards. I cannot think of anything harsher that I can say about contemporary economic reality in the United States than that we have an economic class that apparently opposes sharing greater prosperity with most other Americans. It is so astounding that I blush to write it.

The need for higher taxation is seen in the failure of the United States to provide the funding for basic scientific (including medical) research, and other areas in which the national government is uniquely able to encourage exploration and development. This is most obvious in the shortcomings of America's infrastructure. The quadrennial report card of the American Society of Civil Engineers (ASCE) is sharply critical of aging and underfunded waterways, highways, water mains, waste systems, hazardous waste plants, transit systems, public schools, bridges, and the National Park System. ASCE estimates that we have to spend \$3.6 trillion by 2020 in these areas, \$1.6 trillion more than current funding levels allow. That money can only be found by taxation, and we and succeeding generations would all benefit from it.

Anyone who speaks of cutting taxes is ignorant of our urgent needs, as well as the economic benefits that would follow. The stupidity of demagogic appeals is nowhere better demonstrated than when candidates are cheered when they vow to eliminate the IRS. Clear evidence demonstrates that every dollar that is invested in the IRS earns more than four dollars more in additional tax revenues. Taxing all income from all sources at a higher rate is the single best way to enable America to prosper. How much higher? Surely as high as in the half-century before we cut top tax rates.

Is this socialism? No, but it is social justice. Free enterprise is wonderful, but it doesn't provide clean drinking water for the citizens of Flint, Michigan or much else without which our society would be less safe, less prosperous, and less free. No, government is not the solution, but liberal democratic government is an indispensable ingredient in helping to create a fairer, more prosperous America.

The 2016 Election  
May 26, 2016

Donald Trump's unprecedented path to the Republican presidential nomination broke every convention of political campaigning. It often seemed as if he expressed whatever thought had just occurred to him, and if it sounded good, he repeated it as if saying it again constituted proof of its merit. His speech was reckless, shocking and vulgar, but despite (or because of) all this he won the support of previously untapped discontented segments of the electorate. Lacking coherence or consistency, he acquired support from both secular and evangelical conservatives who didn't know where else to turn, but almost no support from party leaders, business executives, members of Congress, and conservative journalists.

Trump's voters are largely European-descended non-Hispanic whites who are aware that they are about to lose their majority status in the next quarter-century, and resent it. In the late nineteenth century, economic turmoil led to widespread Populist racism, which found fuller expression later in the mid-twentieth century's union of white supremacy and corporate conservatism. The Trump promise to "make America great again" is a plea for what his supporters believed were unchanging standards of right and wrong, the work ethic, sexual relations, and privacy rights, all of which, to their dismay, have changed.

Trump's supporters believe that the deck is stacked against them, they don't get the respect that they deserve and, in their own crude words, they have been screwed. They also know that their children start the race far behind the Ivy League children of the upper classes. Some lucky working-class children will "make it," but most people who have to work to pay their current bills are no longer fooled by the rags-to-riches myth in a nation that has less social mobility than it had a half-century ago.

Trump's scattershot rhetoric rarely connects one sentence with the next. Nothing dissuades him from insulting women, other races or religions, foreign nationalities and unfamiliar beliefs, yet we listen with astonishing awe: What can he possibly say today that is more outrageous than what he said yesterday? For some, it is enough that he speaks his mind and doesn't engage in self-censorship to avoid offending anyone. His supporters' proudest claim is that "he tells it like it is," even if a fact-check will demonstrate that he doesn't.

I have long suspected that Trump is ambivalent in his presidential aspirations. He wants to win the election, but has no more commitment to assuming the office of President than he has had of managing any other enterprise to which he lent his name. He has been neither more cautious nor less offensive since winning his party's nomination. He cannot be accused of conciliation, compromise, or any calculation destined to increase his popularity. That may turn out to be a winning strategy, but he may be compelled to undermine his chances of winning if that necessitates governing. Imagine for one shuddering moment what it would do to this man's ego to be disregarded by Congress, rebuked by an independent agency, or reversed by a federal court.

Trump's targets are so numerous and broad that he is bound to score some bull's-eye hits. This is true of his attack on trade agreements from NAFTA to the Trans-Pacific

Partnership, which benefit powerful financial interests in foreign countries and the U.S., but lower the standard of living of most Americans. The same effect is achieved when American industries and corporations move abroad. Despite Trump's valid criticisms of these actions, he cannot recognize how low-tax economic policies have lowered the standard of living of most Americans. (As for his own tax payments, he says that they're none of our business. What other wealthy aspirant for high office has ever so candidly expressed his private opinion of the American people?)

The common element that characterizes the very different shifts in both major parties this year is the changing nature of the American workplace, with far fewer employees in contact with others, the precipitous decline of organized labor, and the widening gap between those at one end of the economic spectrum who have no share of the new wealth and those at the other end who have too much, which is to say, more they can sensibly spend or invest in the future of their families. Prosperous cities were once home to all the workers employed in them. Now an increasing number of new urban residences are owned by wealthy non-residents (including foreigners living abroad), while younger middle-income citizens commute long distances to work in the city.

Bernie Sanders' candidacy, like Trump's, challenges conventional party policies, but it doesn't reject party politics. The Democratic left criticizes their party's leadership for not going far enough or fast enough to create an equality of chances and a lesser inequality of results. That's why, along with the harsh lessons learned from Ralph Nader's third-party candidacies, Sanders' supporters will not abandon their party, despite their reservations regarding Hillary Clinton's candidacy. Although she falls short of being the progressive candidate that they want, they are likely to be persuaded by Senators Warren, Whitehouse, Brown, Levin, a reelected Russ Feingold and other members of the soon-to-be-elected Democratic Senate majority, to build the progressive movement that their party never before had.

That majority will support a constitutional end to the gerrymandering that decides most congressional elections before any votes are cast, a minimum wage that's tied to the median income (so that it doesn't fall in value every following year), and the taxation of all income from all sources, with maximum levels close to those that prevailed in the prosperity that most Americans shared for a third-of-a-century following the Second World War. Just as a more progressive electorate has moved to enlarge the boundaries of social and cultural freedom, it will embrace income and tax policies designed to create a more level political field. Most women, racial minorities and young adults starting their working lives don't want to make America great again. They want to fulfill the promise of America's democracy for the first time.

I won't respond to complaints of how utopian and unimaginable these changes would be from those who so recently knew for certain that the widespread enactment of same-sex marriage could not be achieved in our lifetime or were even more recently convinced that the United States could not accept transgender access to toilets. That includes most of us, including me. It's time that we acquired the humility to recognize that the timetable of democratic change can no longer be published because the change may occur soon after we

acknowledge its likelihood. Hillary Clinton's presidency may or may not provide leadership for a more democratic and equitable future, but it will not prevent our moving closer to it.

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Changing the Government  
July 18, 2016

Last night I saw a rebroadcast of this past Wednesday's Prime Minister's Questions. It was David Cameron's last appearance before his resignation. Although I am in the dark when the questions, alternating between the party in power and the opposition parties, sometimes refer to local issues, I am often impressed both by an MP's succinct statement and the PM's informed response. Any comparison between this interplay and the so-called morning speeches by members of our Congress before otherwise empty House or Senate chambers is downright embarrassing to us. The congressional speeches are delivered or printed strictly for the benefit of the few constituents who will pay attention to them.

By contrast, most MPs attend the Prime Minister's Questions. (The House of Commons was redesigned after the Second World War to have fewer seats than it had members, with the result that some members are left standing when the House is full. But that's another story.) What was most impressive in this last appearance by Cameron was the mutual expression of high regard and warm wishes on his departure. I'm not sure of their sincerity, but I envy their civility.

Even after having lived in England for five years, I retain my American inability to cherish a hereditary monarchy, but I admire the democracy and simplicity with which a British election takes place on one day and a new government enters 10 Downing Street (just an ordinary address!) the next, without pomp or ceremony. I look forward to how Great Britain negotiates becoming a lesser Britain when Scotland and perhaps Northern Ireland leave it. We can learn a few lessons in democracy from them.

Letter to the Editor  
November 13, 2016

To the Editor:

There have been five presidential elections in this century. The Democratic candidate received more votes than the Republican in four, yet the Republican candidate was the winner of three.

In the four earlier elections, the Democrat averaged more than two-and-a-half million votes more than the Republican, a gap that may be as great this time. Even that impressive margin will be far less than it would have been had there not been new state restrictions on voter registration, intimidation and rejection of would-be voters at the polls, and discouragement of voters at overcrowded polling places, all of which diminished the possibility of a popular victory.

I feel like the gambling addict who knows that the rules and actions of the casino are created and manipulated to make his loss more likely, but who continues to play because it's the only game in town. I have too much invested in this country to leave, so I shall do everything I can to democratize the rules, find a place for everyone at the table, and equalize the odds. I will not support cheaters or those who abet them. I will not wittingly patronize places or buy products that contribute to the wealth of those who benefit from this undemocratic result. At bottom, the issue is the same issue that in the past led to American independence, woman's suffrage, civil rights, and other movements for social justice. It will be a step in the direction of majority rule, without which no one's rights are secure.

The Presidential Election  
November 17, 2016

**There have been five American presidential elections in this century. The Democratic candidate received more votes than the Republican candidate in four of these elections, yet the Republican was the winner of three.**

In the four most recent presidential elections before this one, the Democratic candidate received an average of more than two-and-a-half million more votes than the Republican candidate. When the official count is recorded this year, the gap may be as great. Even such an impressive margin will be far less than it would have been if there had been no new state restrictions on voter registration, no intimidation of would-be voters, and no discouragement at overcrowded polling places. These undemocratic actions diminished the potential vote, particularly in urban areas with large Democratic populations.

The consequence in this election was the presidential election of the most narcissistic individual I have ever known or known about, so vain that he is incapable of begging pardon or expressing regret when he recognizes that he has made a serious mistake, so cruel that he makes fun of people who do not measure up to his ludicrously immodest and false impression of himself, so subject to attention deficit disorder that he appears incapable of uttering three consecutive spontaneous sentences on any serious subject, so greedy that there is a seemingly endless line of people whom he has stiffed when they sought full payment for the contracted services that they had provided, so vulgar that I can hardly utter some of the demeaning and disgusting things that he has said, and so mentally unstable that he is unaware of contradicting himself on successive occasions.

I feel like a gambling addict who knows that the rules and actions of the casino were created and manipulated to make his loss more likely and larger, but who continues to play because it's the only game in town. I am too invested in this country to leave, so I must do everything that I can to democratize the rules, find a place for everyone at the table, and equalize the odds. You must too, because without majority rule, no one's rights are secure.

Why I Cannot Respect The Presidency Of Donald Trump  
December 25, 2016

One. Clinton received 2,900,000 more votes than Trump. Democratic candidates received more votes in 4 of the last 5 presidential elections, but lost 3.

Two. Contrary to a constitutional prohibition, Trump plans to continue to receive financial and other benefits from foreign nations and their leaders.

Three. Departing from long-standing practice, Trump has not separated himself from influencing or being influenced by sources of his wealth.

Four. Despite Trump's claims, the Supreme Court has repeatedly denied presidential exercise of inherent powers or executive privilege.

Five. The Constitution states that the President "shall take care that the laws be faithfully executed," but Trump's appointments oppose laws they will administer.

Six. Because his narcissism renders him incapable making a decision except for how it affects himself, Trump cannot faithfully execute the duties of the President.

Seven. Trump is incapable of defending the American faith in the equality of all persons irrespective of sex, race, religion, nationality or political beliefs.

Eight. Trump's character permits him to originate and repeat lies, denigrate women and races other than his own, stiff his creditors, and never apologize.

After Donald Trump is sworn into the office of President on January 20, 2017, I will obey the law insofar as I can reconcile his presidential conduct with my dedication to the democratic ideals that I have studied, taught, and sought to practice. But no further than that.

*I invite confirmation or refutation of these charges, as well as recommendations as to how to deal with the Trump presidency, the greatest domestic threat to America's freedom.*



Letter to the Editor  
January 22, 2017

To the Editor:

Yesterday, January 21, 2017, was an unprecedented day in American history, and this morning's New York Times did not see fit to fairly cover it. It was a day on which several million people in the United States, joined in solidarity by many citizens of foreign nations, publicly declared their opposition to the president who had been installed the day before. What was sponsored as a Women's March on Washington became an outpouring of angry dissent against the political legitimacy and democratic values of both the new president and the process by which he had obtained power. Never in recorded history has there been such a widespread, peaceful and nearly spontaneous reaction against what is normally a conventional and solemn act of government.

The evolution of a 228-year-old system that gave power to this president was contradicted by the preference of a significant majority of the American people. Yesterday's demonstrations provided eloquent and persuasive evidence of both the legal reality of the transference of power and popular resistance to it.

A hundred Times correspondents and photographers should have reported the demonstrations and marches that took place in so many of America's cities and towns. In the face of a national leader who disparages the truthfulness and accuracy of the press, it has never been more important for The Newspaper of Record -- a distinction that The New York Times has long cherished -- to be an instrument of true and accurate reporting. It failed today in that undertaking.

Stanley Feingold

Savannah, Georgia

## Japanese Exclusion

February 19, 2017

Seventy-five years ago today, February 19, 1941, Executive Order 9066 was signed by President Franklin D. Roosevelt. As President and Commander-in-Chief, Roosevelt gave unlimited discretion to Secretary of War Henry L. Stimson and military commanders "to prescribe military areas...from which any or all persons may be excluded," or required to enter or to remain in, or leave. Although no federal statute authorized the first mass detention of American citizens on American soil. They were often given only forty-eight hours to sell or abandon their homes and other possessions. By late Summer, 110,000 persons of Japanese ancestry on the west coast, many of whom were American citizens by birth, were removed to eleven relocation centers in western states. Persons of Japanese ancestry who lived in Hawaii were so integrated and so important to Hawaii's role, there was never any consideration that their freedom would be curtailed, despite the real threat of invasion. Not one case of espionage or sabotage was ever filed against any person of Japanese ancestry in the United States at any time during the war. There are obvious parallels with the more brutal forced resettlement and confiscation of property owned by native tribes who had inhabited this country for centuries before the United States was created. A great deal has changed in the past three-quarters of a century, but racial prejudice survives.

## Publications

- Taking Sides: Clashing Views on Controversial Political Issues, co-edited with Professor George McKenna.
- The National Law Journal, "Supreme Court Takes a Big Step Backward," June 5, 2000.
- “Gay Marriage Battle Rocks Union’s Foundations,” January 27, 1997.
- “The Framers Would Scorn Nixon Pardon,” September 12, 1994.
- “Hate Crime Legislation Muzzles Free Speech,” July 12, 1993.
- “Sure It’s Politics; When Wasn’t It?: The Senate’s role in Supreme Court nominations,” September 1, 1991.
- Congress Monthly, “The Long Voyage Home” [on the work of Primo Levi], July-August 1998.
- “The Primary Failure: Why We Don’t Get the President We Deserve,” November-December 1997.
- “For Whom The Bell Curve Curves: Are All Mean and Women Really Created Unequal?,” March-April 1995.
- “What Can We Do About Hate?,” November-December 1994.
- “Leni Riefenstahl: The Survival of Her Will,” April-May 1994.
- “Leonard Jeffries and Academic Freedom,” July-August 1993, CONG. MONTHLY, July-Aug. 1993, at 10, 11.
- “Chaim vs. Hersh,” November-December 1993.
- “The Insatiable Appetite of PAC-Men (and Women),” June 1983.
- Reporter-Dispatch and Gannett Westchester newspapers, “Delve into morals of our presidents,” September 4, 1998.
- “Time to study up on Electoral College,” October 28, 1992.
- “Get new president into office quickly: World does not stand still for changing of the guard,” January 3, 1993.
- “Questions to resolve before the U.S. moves into Bosnia,” June 20, 1993.
- The Christian Science Monitor, “Clinton Faces the Prophetic 100 Days,” February 5, 1993.
- Suburban Metro College News, “Review of Roger Kimball, Tenured Radicals,” February 1991.

## Lectures and Conference Papers

- Prof. Stanley Feingold: Guest Lecture on the Thomas Picketty book, "Capital in the 21st Century," The Colin Powell School for Civic and Global Leadership, Tuesday, March 17, 2015 from 12:00 PM to 2:00 PM New York, NY.
- “Does Equal Protection Require Equal School Financing?,” at the Fortieth Annual Convention of The National Organization on Legal Problems of Education, November 19, 1994, at Hotel Hyatt Islandia, San Diego, California.
- “Against All Orthodoxies: Reviving the Liberality of Liberal Education” at the Conference of the Association for General and Liberal Studies on October 19, 1991 in Seattle.
- Among a number of lectures given at Brown University, in Providence, Rhode Island were, 1988 on “The Judicial Nominating Process,” “The Role of Religion in American Politics, 1988,” April 18, 1991, New York City politics and November 15, 1993 on the politics of President Clinton’s health care reform proposals.
- Rikkyo Daigaku in Kyoto, one of the oldest private universities in Japan, Department of International Studies, Professor Feingold lectured on July 14, 1992 on American presidential politics.
- Professor Feingold frequently addressed community organizations. In 1992 he introduced an Israeli film, “Late Summer Blues,” led a discussion of the film at the Westchester Reform Temple in Scarsdale; on October 14, he addressed the Northern Westchester chapter of the American Association of University Women on “Why We Don’t Get the President We Deserve,” and on November 30, he was the joint speaker with his wife, Fumiko Ikeda Feingold, before the Brandeis Women Alumni Association, on the status of women in contemporary Japan.
- He taught for thirty-three years before coming to WCC, principally at The City College of New York, but also at the University of Leeds in Great Britain, the University of California at Los Angeles, and the School of General Studies at Columbia University. Other relevant experience includes: teaching a series of television classes titled “Seminar,” broadcast on PBS, commentating as election night analyst for several years on WNYC-TV, teaching a course in politics and ethics at The Ethical Culture Society of New York, lecturing in fifteen Japanese cities under the auspices of the U.S. Information Services, delivering scholarly papers at conferences in the United States and Japan, directing the CUNY Program of Study Abroad in Great Britain, and establishing and directing film societies in Westchester County.

# Gay Marriage Battle Rocks Union's Foundations

By Stanley Feingold SPECIAL TO THE NATIONAL LAW JOURNAL

THE PROSPECT that Hawaii may soon allow single-sex marriages has been heralded as the extension of equal protection of the laws to homosexual couples and denounced as a violation of the sacred and ancient vows of marriage. Anticipating the decision in Hawaii's courts, Congress adopted the 1996 Defense of Marriage Act, and 16 states enacted similar measures barring same-sex marriages. If these actions are upheld by the Supreme Court, the objective of those who oppose such marriages will be accomplished—at the price of allowing states to disregard the "full faith and credit" clause of the Constitution when they believe that honoring the laws of another state contradicts their legislative convictions.

If states can disallow a marriage law, they can disregard a divorce law. Or, as another example, any state could declare that the incorporation law of Delaware is contrary to its public policy. The consequence could be the fragmenting of the national unity that was the primary objective underlying the creation of American federalism.

Understandable focus on the issue of whether homosexuals have a right to marry should not obscure the fact that establishing exceptions to full faith and credit would deal one more blow to the constitutional relationship among the states and between the states and national government. In two major decisions during the past two years—*U.S. v. Lopez* in 1995 and *Seminole Tribe of Florida v. Florida* in 1996—a slim Supreme Court majority went a long way

toward reversing the understanding of power within the federal system that had held for six decades.

The prevailing theory of federal power was that of Chief Justice Harlan F. Stone, writing in 1941 of the commerce power: "That power can neither be enlarged nor diminished by the exercise or non-exercise of state power." When the court in *Wickard v. Filburn*, 317 U.S. 111 (1942), upheld national regulation of wheat consumed on the farm on which it was grown, it appeared that any exercise of federal power is valid unless expressly prohibited.

The challenge to national power was renewed in *U.S. v. Lopez*, 115 S. Ct. 1624 (1995), when a 5-4 division voided the Gun-Free School Zones Act of 1990, rejecting the government's contention that this law regulated commerce because of the adverse effect on productivity caused by violence and its negative effect on learning. The Supreme Court had not struck down a statute as exceeding Congress' commerce power since 1936.

One year later, in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the same 5-4 division overturned congressional authorization of a suit against a state by its own citizens. The 1988 Indian Gaming Regulatory Act authorized such a federal suit if the state refused to participate in good-faith negotiations with Native American tribes about certain gambling operations.

Chief Justice William H. Rehnquist's opinion relied on "the background principle of state sovereign immunity embodied in the 11th Amendment." Contrary to Mr. Rehnquist's reading, what the 11th Amendment does is withdraw the power given to federal courts in Art. III to try cases in which citizens of a state or foreign country bring a suit against another state. It contains no language barring a

federal suit against a state by a citizen of that state.

*Lopez* reduced the delegated powers of Congress. *Seminole Tribe* reduced its power to allow a citizen's suit against a state for its failure to enforce federal rights. How far will the logic of these opinions be extended in limiting the powers of the federal government?

Justice Clarence Thomas, concurring in *Lopez*, suggested that the regulation of a trivial transaction in *Filburn* granted Congress power inconsistent with the intent of the Framers. After *Filburn*, the assumption was that anything goes; after *Lopez* and *Seminole Tribe*, nothing can be taken for granted.

## Many-Pronged Attack

The campaign to undermine national supremacy is being waged on many fronts. In 1992, a federal law compelling the states either to dispose of low-level radioactive waste or to assume legal ownership was struck down by the court on the ground that the states cannot be compelled to undertake the enforcement of federal regulations. *New York v. U.S.*, 112 S. Ct. 2408 (1992). A related issue was posed in December 1995 before the Supreme Court on behalf of sheriffs who question whether they can be compelled to enforce the Brady Act's requirement of a check of criminal records before a handgun purchase.

Is the movement away from national supremacy constitutionally justified? The Constitution makes clear that the federal government can make all laws "necessary and proper" for carrying out its delegated powers, and that these laws are "the

**The ban on same-sex marriages may be achieved at the price of allowing states to disregard 'full faith and credit.'**

supreme law of the land." Chief Justice John Marshall's memorable characterization of national power in *McCulloch v. Maryland*, 17 U.S. 316 (1819), has been forgotten or rejected by the present court majority: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the

Constitution, are constitutional." And no less an authority on the meaning of the Constitution than James Madison recognized that the constitutional powers of the states are not reserved but are residual—that is, those powers that remain after the valid exercise of federal power.

The view of the Framers and Chief Justice Marshall did not prevail for much of our constitutional history. The Supreme Court in 1918 asserted that the federal power "was not intended to destroy the local power always existing and carefully reserved to the States in the 10th Amendment to the Constitution."

This view was abandoned when the court upheld the farthest extensions of federal power undertaken by the New Deal. Now the Supreme Court is returning to an interpretation of federalism that contradicts the language of the Constitution, the intention of the Framers (as evidenced in *The Federalist*) and the direction set by Chief Justice Marshall. Given the nature of conservative forces supporting this change, it becomes clear that the objective is not a new balance between national and state power but the reduction of government altogether. □

Mr. Feingold holds the Carl and Lily Pforzheimer Chair for Business and Public Policy at Westchester Community College.



# The New York Times

## Miss America Pageant: 'Hypocrisy' for All to See

To the Editor:

When the Republican Party's leaders at the 1920 Chicago convention interviewed Senator Warren G. Harding for their party's Presidential nomination in the now-legendary "smoke-filled room," they asked him if there was any episode in his life which would embarrass the party. Harding, who had conducted a 15-year affair with one woman and fathered the child of another, lied and said there were none.

I don't know if the Miss America Pageant officials put such a question to Vanessa Williams, or what she replied if they did. If her transgression was no worse than having posed for nude photographs several years earlier, we are obliged to rethink our criteria for moral turpitude.

We now know that Harding was not the only President who violated prevailing codes of behavior. Luckily for them, they had access to powerful forces which could keep the American people from learning until after their deaths the details of their socially disapproved behavior.

In Harding's day, the careers of movie stars were ruined by scandal. In our day, these scandals fill the publications at supermarket checkout counters and are read avidly by fans whose

devotion is unswayed by the outrageous, and sometimes true, accounts.

Although the world has changed, the Miss America Pageant offers itself as almost the last bastion of traditional values. It pretends, often in inane verbal exchanges, that talent and intelligence count, but the vast television audience knows better. For the viewers, the bathing-suit competition is the high point of a display of social hypocrisy that cannot utter the word "sex," which is the unspoken underpinning of the competition.

Vanessa Williams was hailed as the first black woman to win the title of Miss America, after 60 years of a racial bias more offensive to public morality than anything Miss Williams could have done. She turned out to be not only attractive but also intelligent and thoughtful, articulating her beliefs in a manner which transcended any condescension deriving from the acknowledgment that she was a "first."

From the hindsight of winning the title, posing for nude photographs several years earlier was a mistake. But from the perspective of a very young woman seeking a performing-arts career, it must have seemed a possible break that would bring her to the notice of a wider public.

Miss Williams's behavior, a minor indiscretion at most, and one committed sometime ago, should be contrasted with that of so many public officials, television and movie stars, and Olympics athletes, who often flout all standards of decency while they bask in public adulation.

Let the sponsors of the Miss America Pageant consider their own behavior in promoting a crassly commercial contest to choose a beautiful woman, so pure that she cannot even date a young man during her tenure and so true that she may not utter a controversial thought or engage in an unconventional act. The contemporary obsession with female sexuality finds no older, more powerful or more immature expression than in the Miss America Pageant.

Vanessa Williams appears to have conducted herself in her 10 months as Miss America in an exemplary manner. In dismissing her, the pageant committee has not done as well. Miss Williams must now feel great sorrow, but perhaps she will later derive consolation from the fact that inadvertently she has become another "first" — the first to expose so completely the hypocrisy of the pageant and the title.

STANLEY FEINGOLD  
Chappaqua, N.Y., July 21, 1984

# The New York Times

## *An Influential Mentor 50 Years Ago, and Today*

By JOSEPH BERGER SEPT. 20, 2006

<http://www.nytimes.com/2006/09/20/education/20EDUCATION.html?ex=1316404800&en=57ed2e8b5b07182&ei=5090&partner=1userland&emc=rss>

Once, they were fresh-faced students bewitched by courses in political science they were taking with a young professor, Stanley Feingold. He provoked them with uncomfortable questions, made them see other sides to smugly held beliefs.

Now in their 60's and 70's, these two dozen alumni of Bronx and Brooklyn walk-ups and the City College of New York are high-powered lawyers and other professionals. They range from pro-Bush Republicans to A.C.L.U. Democrats.

Most have had more real-world experience in government and politics than their mentor. Yet they continue to meet with their old professor over lunch as they have for the past 20 years, to hear his unsettling questions once more. At 80 years old, he flies in especially from Seattle five times a year, and they find the chance for a spirited exchange of ideas under his adventurous steering, a priceless grace in their lives.

Last week, the topic, not surprisingly, was Iraq. Several of the more conservative members argued for staying the course. Responding, Professor Feingold told them, with a mock reproach, that he was "appalled by my failure as a teacher."

"We have no formula for victory," he said. "That Shiites, Sunnis and Kurds will form a common government? That is not happening." Along the way, he confided his support for reinstating the draft, suggesting that if more American families had been forced to sacrifice sons and daughters, "we never would have gone to war."

SPARKLES flaring in some eyes indicated he had once again punctured some beliefs, as he did a half-century ago. "We deal all day with clients, their concerns, their money and their welfare and get involved in minute points of law and the kind of things lawyers argue about," said Barry Brett, Class of '61, a partner in the Troutman Sanders law firm. "But with Stanley we're talking about issues of constitutional interpretation, and his knowledge and ability to challenge us is extraordinary."

There probably aren't that many similar gatherings around the country where adults recapture the zestful engagement of a seminar with the same professor who taught it ages

ago. Some experts contend that the odds against such mentor relationships are mounting because stimulating teaching is not as valued as publication and research.

Donald Kagan, dean of Yale College from 1989 to 1992, points out how little professors actually teach — two courses, or one, in many elite colleges, half the load of his student days 50 years ago. Basic classes often are taught by graduate students. Faculty senates strive to let professors teach what they wish, resulting in fewer core courses that students have in common. “When everybody is reading the same books; that fact alone provides educational opportunities that are crucial,” Mr. Kagan said.

Still, students at today’s City College reeled off names of modern Mr. Chipses whom they could imagine revisiting. Judith Castillo, 22, lauded Dulce M. Garcia, her Spanish literature professor, who invites students to her home to drink in the poetry of Lope de Vega and gives them “the freedom to have your own opinion and not be afraid you’re saying something wrong.”

“If it weren’t for the professors, I would have dropped out and probably worked at Wal-Mart,” she said. Sana Shahid, 22, recalled a class taught by Marina Fernando, director of international studies, about what it means to be American. The professor turned to her and asked, “What makes you Pakistani?” Given her region’s history, Ms. Shahid said simply, “If you’re not Indian you’re Pakistani.” That made the class think reflect on the elusive meaning of nationality.

Yet students acknowledged that the tenure chase snatched time from inventive instruction and that charismatic teachers were not as revered in a post-1960’s universe. Next to Google, a professor may seem like a hoary vessel of knowledge indeed.

But at the luncheons, Professor Feingold — who taught this writer 40 years ago — is as up-to-the-minute and inescapable as a prick from a thorn. The lanky professor springs physically and cerebrally about as nimbly as always. He started teaching at City College in 1948. Although he completed his doctoral classes at Columbia, he never wrote a dissertation because he wanted to tackle big thoughts advisers turn down. (One proposal was “How Free Can Free Speech Be?”) He never scaled the academic ladder, but was a faculty star all the same. “I respected students, but you were always wrong,” he said. “Whatever you would say I would take the opposite side, especially if I agreed with you.”

IN the 60’s when liberal whites comforted themselves with support for integration, Mr. Feingold, a lifelong liberal himself, provocatively prodded one class to ponder if they would be willing to live in a black neighborhood. One student, assuming he was a National Review conservative, gave him Ayn Rand’s “Atlas Shrugged.”

“You couldn’t tell what his politics were by being in his class — he was so good at arguing both sides and getting us to see both sides,” said Malcolm Lewin, class of ’62 and a trial lawyer. Mr. Feingold looks back on his career with some regret, which may be disingenuous but makes a telling point.

“I dedicated myself to teaching, which I think was a mistake,” he said. “I know of no other profession where your on-the-job performance counts so little.”



He has been rewarded, though, for his mistake with the loyalty of acolytes, and with the luncheons.

“When friends ask me, ‘Why do you go to New York five times a year to have lunch with former students?’” he said, “my response has always been — and it’s a truthful response — ‘because it’s cheaper than therapy.’”

# The New York Times

## Decades Away, but Still Drawn to C.C.N.Y.'s Embrace

By Joseph Berger - June 22, 2011

<http://cityroom.blogs.nytimes.com/2011/06/22/decades-away-but-still-drawn-to-c-c-n-y-s-embrace/>

The Stanley Feingold Luncheon Group meets every other month — an argumentative gathering of City College graduates and the provocative political science professor who taught them a half-century ago.

The meetings are usually held in the sky-view conference rooms of prestigious law firms, where some of Mr. Feingold's former students now toil.

But on Tuesday, for the first time in the 25-odd years since they formed, the group — which includes academics, journalists, social agency administrators, a former parks commissioner (Henry Stern), and a political consultant (Sid Davidoff) — convened at City College itself.

The members are all in their 60s and 70s, and some had not seen the Gothic-inspired campus, which is spread around 137th Street and Convent Avenue in Harlem, since they slipped out of their graduation robes. Francis Madallon/City College of New York Stanley Feingold met with some of his former students on the City College campus. They were much slimmer then and the presidents were Eisenhower and Kennedy.

Ronald Goldbrenner, an intellectual-property lawyer, and the group's unofficial maître d', set the wistful tone by showing up in a C.C.N.Y. sweatsuit.

On a whirlwind campus tour, the three dozen former Feingold students and a few ringers were accompanied by a still lanky and vigorous Mr. Feingold, who is in his mid-80s and flew in from his home in Seattle, as he does for each gathering.

The tourists were impressed by the North Academic Center, a seemingly Pentagon-size behemoth where many of the humanities classes are held. Yet they wondered, where was Lewisohn Stadium, where they had been serenaded by the likes of Leonard Bernstein and Oscar Levant? Its ghost lay under the North Academic Center. And where was the Morris Raphael Cohen library, named after the great City College philosopher? Absorbed inside the North Academic Center itself.

At the cathedral-like Shepard Hall, the former Feingoldians — including this reporter, Class of 1966 — marveled at the restored splendor of the rough stones and gargoyles and the evocative W.P.A. mural in the majestic Great Hall. They went down to the

cafeteria and wondered which alcoves had been apportioned among the Trotskyites, Stalinists and other left-wing devotees during the 1930s — the hangouts of future intellectual heavyweights like Irving Howe, Daniel Bell, Irving Kristol and Nathan Glazer, who gobbled up their tuna fish sandwiches while they “argued the world.”

The Feingold group members were dazzled by a new architecture building and two new science research buildings still under construction. But where were the cluster of brownstone South Campus buildings and the expansive lawn where they had studied French and algebra, plucked folk guitars and experienced their first romantic entanglements on the grass?

After lunch, there were greetings from Jerald Posman, the college’s vice president for finance and administration, and the college’s new president, Lisa Staiano-Coico. She reveled in past glories but extolled the current students and faculty of City College as befitting a school that has long prided itself as the Harvard of the poor. She told the luncheon group that while the college’s students may no longer “look like them” they will similarly be heading to rewarding careers just as the members of the Feingold group did 50 years ago.

Then it was time for the political discussion, where the members of the luncheon group — who range from George W. Bush Republicans to New York Review of Books liberals — tend to debate with the same lack of tact and diplomacy they exhibited around the cafeteria tables of the 1950s. Mr. Feingold, visibly moved, told them that when he gets together with them he never sees them as accomplished, graying professionals but as his college students.

“I have the feeling you’re still 18,” he said.

Final Examination - Spring 1962

Political Science 21: The Legislative Process in Congress  
Spring, 1962 Mr. S. Feingold  
FINAL EXAMINATION

The examination consists of five parts, three in Question I, and two in Question II. Each of the five parts counts for twenty points, so that approximately twenty minutes should be allowed for each part. Please follow the instructions. Be specific, and to the point. Don't filibuster! Debate is limited to two hours.

I. Answer three (3) of the following questions, with specific reference to the reading we have done, appropriate Acts of Congress, opinions of the Supreme Court, and other relevant material. If necessary, give your answer in outline form, but stick to the significant facts and the conclusions to which they lead.

- (1) Analyze the constitutional limitations upon Congress's investigative power, in the light of Watkins v. United States (1957), Barenblatt v. United States (1959), Wilkinson v. United States (1961), and Braden v. United States (1961). Examine the major criteria of the Court in the Watkins case in the light of the later decisions.
- (2) Outline, without elaboration, the legislative and non-legislative aids upon which judges will rely in resolving problems of statutory interpretation. In what ways can Congress hope to minimize the significance of the non-legislative criteria?
- (3) Examine legislative attitudes toward executive secrecy from the House-keeping Act of 1789 to the present time, with particular attention to statutory policy and the degree of success or failure on the part of investigative committees in scrutinizing the conduct of the executive branch of government.
- (4) What does David Truman ("The Congressional Party") conclude regarding the intraparty cohesiveness of the Democrats and Republicans in the House and Senate? What factors would seem to explain the differences between the two parties and between the two houses?
- (5) Survey the relationship between the Senate and the President in both of the following areas: (a) the treaty power, with regard to the support for the Bricker Amendment, in response to the assumed implications of Missouri v. Holland (1920); and (b) the confirmation of appointments, with reference to Senate action on the appointment of Lewis L. Strauss to be Secretary of Commerce.

II. Describe and analyze the development and present status of presidential-congressional relations in two (2) of the following areas, with appropriate reference to Jaffe, Newman and Surry, Schwartz, Fenno, Wilmerding, etc.

- (a) delegation of legislative power to the executive branch, particularly to the President and the independent regulatory commissions;
- (b) legislative oversight of administration, both prospective and retrospective, with regard to substantive policy, and
- (c) legislative control as exercised in the appropriations process.

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Final Examination - Spring 1963

Political Science 9:

Mr. S. Feingold

AMERICAN POLITICAL THOUGHT II: PURPOSE

Spring, 1963

FINAL EXAMINATION

PART I (40 points)

Answer four (4) of the following questions, limiting your answer to one page of the examination book for each question. Be specific, and to the point.

- (1) According to Schaar (Loyalty in America), what is the relationship between loyalty, patriotism, and obligation?
- (2) On the basis of Thoreau and Aaron (Man of Good Hope), what is the basis of compatibility between transcendentalism and democracy?
- (3) How can Sections 241 and 242 (concerning civil rights conspiracy) of Title 18 of the United States Code be employed in the enforcement of civil rights, in the analysis of Blaustein and Ferguson?
- (4) What is the philosophical significance of the points at issue between Lewis Mumford on the one hand and John Dewey and the pragmatists on the other?
- (5) Develop the logical relationship between Jackson's opinion in the second flag salute case (West Virginia State Board of Education v. Barnette) and the theory of democracy developed in class.
- (6) State, without elaboration, the qualities of Lippmann's "Good Society" that distinguish it philosophically and politically from New Dealism.

PART II (60 points)

Riesman's lonely crowd and Hayek's serfdom both reflect disturbing judgments regarding the character and values of democratic society. To what extent do these criticisms stem from the egalitarianism of American society? To what extent are these criticisms in conflict with that egalitarianism? To what extent do they bear out Tocqueville's assessment of the importance of equality for American society?

Does it follow that democracy is destined to seek out the equality of mediocrity, sacrificing the superiority of excellence? How would Henry Alonzo Myers (Are Men Equal?) respond? How can Thorson's analysis of "The Logic of Democracy" be reconciled with the objective of excellence?

Both Riesman and Hayek conclude on a paragraph of spiritual uplift, Riesman suggesting that man's capacity "can become valued by the individual himself," and Hayek stating that we can "build a better world." Implicit in both views is the impression that this better world can be--indeed, must be--a democratic world. Do you agree?

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