

**DEMOCRACY
& JUSTICE
COLLECTED
WRITINGS
BRENNAN
CENTER
FOR JUSTICE**

Volume Four

HOW RESILIENT IS
AMERICAN DEMOCRACY?

Frederick A.O. ("Fritz") Schwarz, Jr.

REFORM AFTER
CITIZENS UNITED

Monica Youn, Michael Waldman

VOTER REGISTRATION
IN THE DIGITAL AGE

Wendy Weiser

HOW PROSECUTORS CAN
EASE RACIAL GAPS

Nicole Austin-Hillery and Melanca Clark

PLUS:

JUSTICE FOR SALE?

Hon. Sandra Day O'Connor

THE RISE AND FALL
OF JUDICIAL RESTRAINT

Hon. Richard Posner

CURING CONGRESS

Sen. Tom Harkin, Richard Pildes

MONEY, POLITICS
AND THE CONSTITUTION

Rep. Donna Edwards, Geoffrey Stone,
Burt Neuborne, and Floyd Abrams

THE ORIGINS OF THE
NATIONAL SECURITY STATE

Garry Wills and Eric Alterman

WHAT TO READ?

President Bill Clinton, Jonathan Franzen,
Adam Liptak, Dahlia Lithwick, Ted Sorensen,
Sean Wilentz, Alice Walker, and Tom Wolfe

The Brennan Center for Justice at NYU School of Law

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution—part think tank, part public interest law firm, part advocacy group—the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

About Democracy & Justice: Collected Writings 2010

The material in this volume is excerpted from Brennan Center reports, policy proposals, and issue briefs; we've also excerpted material from public remarks, legal briefs, Congressional testimony, and op-ed pieces written by Brennan Center staff in 2010. The volume was compiled and edited by Jeanine Plant-Chirlin, with the assistance of Jim Lyons. For a full version of any material printed herein, complete with footnotes, please contact her at jeanine.plant-chirlin@nyu.edu.

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Introduction from the Executive Director

This January marked the one-year anniversary of *Citizens United*—the Supreme Court ruling that upended decades of law. We have only begun to see its impact on our politics. Plainly, it will worsen a political and governmental system that already is far too dysfunctional, far too divided, and far too paralyzed by special interests. This broken government helped cause the economic crisis, and now makes it far harder to meet the country’s long-term challenges of recovery and renewal.

But our democracy has never faced a challenge that could not be met by more democracy. We believe more passionately than ever that if we want to solve the problems facing ordinary Americans, we must fix our systems.

This volume is a sample of the Brennan Center’s work on all fronts in the fight for democracy and justice in 2010. We stepped forward to lead the legal defense in the wake of *Citizens United*, as an armada of lawsuits sought to destroy the rest of campaign finance law. We enlisted the nation’s top constitutional experts in a movement to develop and advance a new voter-centric legal doctrine. Our advocacy led seven states to implement parts of our Voter Registration Modernization plan, resulting in hundreds of thousands of new voter registrations with lower costs and reduced risk of fraud. And with Congress paralyzed, we focused on the Obama administration and state courts to press for improved access to justice, especially for racial and language minorities.

We are proud of our work and proud of how we do it. We write reports, draft legislation, litigate cases before the Supreme Court, provide Congressional testimony, publish op-eds, convene top thinkers, and build bipartisan coalitions. We are independent, nonpartisan, and fact-based.

We continue the fight in 2011. We will defend strong campaign laws, including the case before the high court considering the constitutionality of a public financing system for the first time in 35 years. Our experts will continue to develop innovative policy reforms to make government work better and more transparently. We will fiercely fight efforts to curb voting rights and access to justice. And we will engage in the broader public debate over the courts, the Constitution, and the role of government.

This time of contention can be a clarifying moment in the long drive toward a “more perfect union.”

A handwritten signature in black ink, reading "Michael Walden". The signature is fluid and cursive, with a long horizontal line extending to the right from the end of the name.

Executive Director

Democracy & Justice: Collected Writings 2010

Table of Contents

Democracy Today	7
<i>Is American Democracy Always Resilient?</i> Frederick A.O. (“Fritz”) Schwarz, Jr.	8
Money In Politics	19
<i>The First Citizens United Election</i> Michael Waldman	20
<i>Public Financing at Stake?</i> Monica Youn and Mimi Marziani	22
<i>The Reform Landscape After Citizens United</i> Monica Youn	26
<i>Building a New Jurisprudence: First Steps</i> Rep. Donna Edwards, Richard Briffault, Floyd Abrams, Burt Neuborne, Samuel Issacharoff, Geoffrey Stone, and Deborah Hellman	29
<i>Where are the Shareholders?</i> Ciara Torres-Spelliscy	39
<i>Small Donor Public Financing: The NYC Experience</i> Angela Migally and Susan Liss	42
Voting Rights & Elections	47
<i>Crossing the Line: When “Ballot Security” Becomes Voter Suppression</i> Wendy Weiser and Vishal Agraharkar	48
<i>Voting Machine Failures</i> Lawrence Norden	50
<i>Voter Registration in a Digital Age</i> Christopher Ponoroff and Wendy Weiser	54
<i>A Citizen’s Guide to Redistricting</i> Justin Levitt and Erika Wood	56
<i>Jim Crow in New York</i> Erika Wood	58

Fixing Congress, The Broken Branch	61
<i>Hyperpartisanship</i> Richard H. Pildes	62
<i>End the ‘Tyranny of the Minority’</i> Senator Tom Harkin	68
<i>Filibuster Abuse</i> Mimi Marziani and Susan Liss	74
The Courts	81
<i>Bar Tab: The Judicial Election Money Spiral</i> Hon. Sandra Day O’Connor	82
<i>Is Justice for Sale?</i> Susan Liss and Adam Skaggs	83
<i>The Tea Party Meets the Constitution</i> Michael Waldman	85
<i>The Rise and Fall of Judicial Self-Restraint</i> Hon. Richard Posner	87
<i>The People’s Court</i> Barry Friedman	93
<i>Judicial Activism Then and Now</i> Michael Waldman	95
Liberty and National Security	97
<i>Classification and Consequences</i> Liza Goitein and David Shapiro	98
<i>As Executive Power Grows, So Does Secrecy</i> Eric Lane, Frederick A.O. (“Fritz”) Schwarz, Jr., and Emily Berman	100
<i>New FBI Powers Pose New Risks</i> Emily Berman	104
<i>The Bagram Loophole: No Habeas Corpus</i> Faiza Patel	108
<i>The Origins of the National Security State</i> Garry Wills and Eric Alterman	111

Continues on next page

Closing the Justice Gap	115
<i>Prosecutors Aiding Defendants?</i> Robert Morgenthau	116
<i>Paying Twice: Criminal Justice Debt</i> Alicia Bannon, Mitali Nagrecha, and Rebekah Diller	118
<i>Foreclosure in the Dark</i> Melanca Clark	122
<i>Fighting the “Civil Justice Gap”</i> Rebekah Diller	124
<i>The Right Language for the Justice Department</i> Laura Abel and Michael Mulé	127
<i>Ending Racial Disparities in Federal Prosecutions</i> Nicole Austin-Hillery and Melanca Clark Foreword by James E. Johnson	129
Just Books	131
<i>What Should I Read?</i> Bill Clinton, Sandra Day O’Connor, Adam Liptak, Ted Sorensen, Richard Revesz, Sean Wilentz, Geoffrey Stone, Alan Dershowitz, Jonathan Franzen, Alice Walker, Tom Wolfe, Elizabeth Alexander, and more	132
<i>Bathtub Conversions</i> Dahlia Lithwick	135
<i>An Essential Understanding of FDR</i> Jeff Shesol	137

DEMOCRACY TODAY

Is American Democracy Always Resilient?

Frederick A.O. ("Fritz") Schwarz, Jr.

Our democracy is our source of great strength and a beacon to the world. But our system is under intense new strain. In a lecture delivered in Berlin, our chief counsel takes the long view.

America is by far the longest-lasting democracy in history. While there have been flaws, American democracy has shown the capacity to change, grow, and improve. Who in the eighteenth century could have possibly imagined that a black man could be elected as president, or that his fiercest competitor would be a woman?

Nonetheless, today there are some new challenges to American democracy.

Crisis and its cousin, fear always make it tempting to ignore the wise restraints that keep us free. That is not new. But America has been living in an atmosphere of crisis for an unusually long time. The crisis atmosphere has lasted since World War II, broken only by the end of the Cold War, symbolized by the fall of the wall that divided this city. But then, the 9/11 terror attacks brought back crisis and fear.

With crisis and fear, America has become a National Security State. This brings with it many threats to democracy—including a secrecy culture. Excessive secrecy saps democracy's strength because it deprives citizens of the information needed to fulfill their role as "the primary control on the government."

In addition, the yeast of democracy—how the voting process actually works—is increasingly being burdened by barriers to participation. Finally, the most basic test for American democracy is whether becoming an unparalleled economic giant, with an enormous military and intelligence establishment eyeing security fears and obligations around the world, will drain democracy in America—just as those factors ruined Rome centuries ago.

Later, I assess these threats and dangers. But first, let's review how American democracy grew from the Revolution to today.

These remarks were delivered at the John F. Kennedy Institute for North American Studies at the Free University of Berlin on November 11, 2010.

The Expansion of Democracy in America

The Founding Documents

Excessive secrecy saps democracy's strength, because it deprives citizens of the information needed to fulfill their role as "the primary control on the government."

The Declaration of Independence planted the seed of democracy. As Thomas Jefferson put it in the Declaration, governments “deriv[e] their just power from the consent of the governed.” Beneath Jefferson’s simple eloquence lie two profound questions. First, how should the consent of the “governed” be determined? By a vote, it was assumed. And, second, who are the “governed” entitled to express their “consent” by voting? In eighteenth century America, most assumed the answer would be white males—and many believed only white males with property.

The Constitution came 11 years after the Declaration. Except for its soaring preamble, the Constitution falls short of the Declaration’s eloquence, and has little bearing on democracy. While the Constitution assumes elections of some sort, its innovations were controlling power (through checks and balances), and dividing power (through federalism). Indeed, part of the impetus for the Constitution was concern about possible irresponsibility, or even tyranny, of temporary majorities. Moreover, in making the compromises needed to win consensus, the Constitutional Convention limited democracy. For example, the Senate’s composition vastly overweighs the power of states with small populations.

Although the Declaration and the Constitution are both revered in America, it is fitting that two of our greatest speeches are rooted not in the Constitution’s rules and compromises, but in the Declaration’s soaring democratic promise.

Thus, the first words of Abraham Lincoln’s Gettysburg Address are:

“Fourscore and seven years ago, our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.”

It was the Declaration that was four score and seven years before Gettysburg. So, while a war was being fought to hold the country together, Lincoln rededicated the country not to the rules of the Constitution, but to the Declaration’s vision of equal opportunity and democracy. Then, in closing his short Gettysburg speech with reverence for government “by the people,” Lincoln called for a “new birth of freedom” so that:

“[G]overnment of the people, by the people, for the people, shall not perish from the earth.”

One hundred years later, speaking on the steps of the Lincoln Memorial, Martin Luther King, Jr., in his “I Have a Dream” speech, also harked back to the Declaration. It was a promissory note covering “in-

alienable rights of life, liberty and the pursuit of happiness.” This promissory note was payable to “all men, yes, black men as well as white men.” But, America, as King said in 1963, had “defaulted on this promissory note as far as her citizens of color are concerned.”

Just two years after King spoke, Congress passed the Voting Rights Act that helped make real the promise of black voting. And then, 45 years after King’s speech, Barack Obama was elected as America’s 44th President.

Some of you may have seen on television the huge rally in Chicago where Barack Obama spoke the night he won the election. Tears were streaming down the face of Jesse Jackson—who had been with King the night he was shot. It is sad that Dr. King was killed long before he also could have cried tears of joy.

The Growth of Democracy After the Founding

Winning the vote for blacks was one of a series of struggles that widened the franchise, and deepened our democracy.

Earlier, right after the Constitution was ratified, there had been a sharp divide over whether America should be a “republic,” or also a democracy. Should well-born, rich, and well-educated gentlemen control? Should British aristocratic and hierarchical, political habits continue to be the norm? Or should the new nation be more open with much greater political participation? Jefferson and his supporters favored a wider, more open democracy.

However, the Federalists, who led the new nation for its first 12 years, generally supported the more hierarchical view. (They often derided democracy as “mobocracy.”) Thus, Governor Morris—the man who actually wrote the words of the Constitution—contended that only people with property should vote. Why? Morris’s argument was if you “give the votes to people who have no property . . . they will sell them to the rich.” While Morris’s proposal did not make it into the federal constitution, most states in America’s early years did have property qualifications for voting.

The development of democracy in America’s early years went far beyond legal questions such as qualifications for voting. As one founder observed, while the Revolution had “changed the forms” of government, the new nation still needed “a revolution in our principles, opinions and manners, so as to accommodate them to the forms of government we have adopted.”

As the new nation developed, there was, in fact, such a revolution. That second revolution came in the form of an information revolution in the early nineteenth century—when newspapers, post offices, schooling, and voluntary societies all exploded.

This information revolution was strengthened by democracy and was a democratizing force in itself.

By the time the young French aristocrat Alexis de Tocqueville wrote his *Democracy in America* in the mid-1830s, property qualifications for voting were gone. Despite noting that blacks, Indians, and women did not have the vote, Tocqueville still expressed wonder at the vitality of American democracy. Tocqueville found that the most powerful explanation for that vitality rested on customs and institutions outside of government. Of these, Tocqueville singled out as essential to American democracy the number of newspapers and of voluntary associations, adding that “newspapers make associations, and associations make newspapers.”

Tocqueville's book is widely known. Scarcely known at all is a similarly magisterial book, written in 1837, by a German diplomat, Frances J. Grund, who had lived in America for 15 years. According to Grund, Americans were "the most reading people on the face of the earth." As had Tocqueville, Grund emphasized newspapers' importance to American democracy, saying: "[I]t baffles all attempts at computation," for "there is hardly a village" "without a printing establishment and a paper." Grund also emphasized the importance of voluntary associations.

I stress the significance of newspapers and voluntary associations to American democracy in the 1830s because in today's America, both newspapers and voluntary associations are faring less well.

As one founder observed, while the Revolution had "changed the forms" of government, the new nation still needed "a revolution in our principles, opinions and manners, so as to accommodate them to the forms of government we have adopted."

Returning now to democracy's growth, Lincoln's hope for a "new birth of freedom" was carried forth by the Fifteenth Amendment, which protected citizens' right to vote free from discrimination based on "race, color, or previous condition of servitude."

For a few years thereafter, during what was called Reconstruction, the Fifteenth Amendment's promise was realized even in the former slave states of the South. Former slaves voted and blacks were elected to office including the United States Senate. However, Reconstruction ended as part of a compromise of the disputed 1876 presidential election—a dispute even more drawn out than the Bush-Gore contest in 2000. Thereafter, violence, coupled with legal trickery, and abetted by regressive decisions by the Supreme Court, suppressed—indeed almost totally extinguished—black voting in the south. It took 90 years, until protests, picketing, marching, and dying by the Civil Rights Movement, coupled with leadership by a southern President (Lyndon Johnson) and action by a relatively bipartisan Congress, led to the Voting Rights Act that implemented the Fifteenth Amendment's promise.

In the meantime, women pressed for and won the right to vote.

From the beginning, women were influential in America. Among many examples, two different women stand out: Abigail Adams, who was a powerful influence upon her husband John throughout his long and varied career, including as our second president; and Harriet Beecher Stowe, who wrote the widely read *Uncle Tom's Cabin*. (President Lincoln later greeted her at the White House as "the little woman who wrote the book that made this big war.").

But, however strong women's influence, the vote was not theirs.

After the Civil War, women hoped their right to vote would be linked with blacks. But this was not to be.

Women then began to band together to press for the vote. Success came quickly in a few states. For example, Wyoming gave the vote to women in 1869. Then, after women suffragettes—as they were known—suf-

fered injury and insult while protesting from across the country to the gates of the White House, the Constitution in 1920 was finally amended to protect women’s right to vote in every state.

American democracy expanded again in 1971 when the Constitution was amended to lower the voting age from 21 to 18.

America’s long effort to widen the franchise was far from steady. As I mentioned, hard-won voting rights were snatched away from blacks for 90 years, starting in the 1870s. Similarly, when waves of immigrants came to America in the late 1800s, nativists changed voting laws to hinder their voting. But despite such setbacks, the story of America has generally been a story of a widening circle of participation.

Nonetheless, we now face new challenges.

The Growth of the National Security State— And Its Threat to Democracy

In the second half of the twentieth century—roughly at the time when America took major steps forward to widen democratic participation—democracy began to be challenged by the development of a National Security State.

Throughout American history, crisis and fear have often temporarily shifted power to the presidents, who have ignored the Constitution’s wise restraints.

To understand this we have to go back to the beginning again. Throughout American history, crisis and fear have often temporarily shifted power to presidents who have ignored the Constitution’s wise restraints. But because earlier presidents generally acted openly, they did not tarnish democracy at the same time. Now, however, executive acts in response to crisis and fear are debasing democracy. They do so most importantly because the actions are carried out without public knowledge. At the same time, the permanent national security apparatus has grown exponentially.

The first example of overriding the Constitution’s wise restraints was in 1798 when President John Adams and his Federalist allies in Congress passed the Sedition Act, which criminalized speech critical of the government. Then, during the Civil War, President Abraham Lincoln unilaterally suspended habeas corpus—although he sought and obtained congressional ratification when Congress next met. In World War I, President Woodrow Wilson prosecuted war critics, resulting in, for example, a 15-year prison sentence for a Vermont minister who cited Jesus as a proponent of pacifism. Then, after the war, Wilson’s Attorney General launched dragnet raids against immigrants, arresting and deporting thousands of innocent people without warrants or access to counsel. Finally, during World War II, President Franklin Delano Roosevelt ordered the internment in “relocation camps” of 117,000 Japanese-American citizens without evidence of a single act of espionage, sabotage, or treasonable activity.

All of these actions—however wrong—were taken in the open. Therefore, voters had the ability to judge the actions. And courts had the power to stop them, if they had the will.

But then, during the Cold War, and again after 9/11, similar actions were taken. But this time they were hidden. While some secrets are legitimate, many actions during the Cold War and after the 9/11 attacks were kept secret not to protect America but to keep embarrassing and improper information from Americans. For example, among the secrets I helped bring to light as Chief Counsel for a Senate Committee, the FBI tried to coerce Martin Luther King, Jr. to commit suicide; the CIA hired the Mafia to kill Cuba's Fidel Castro; and, for 30 years, the National Security Agency obtained copies of every telegram leaving the United States. And then, during the Bush-Cheney administration, many policies, such as torture, were adopted and implemented in secret.

Today, as part of our National Security State, we have a secrecy culture. More and more is made secret. And what is made secret is kept secret for far too long.

Excessive secrecy is inconsistent with democracy's premise. How can voters judge their leaders' character and their country's conduct when so much is hidden?

America is becoming, I fear, a democracy in the dark.

Our most analytical founder, James Madison, foresaw this danger when he perceptively wrote:

“A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. ... [A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Becoming a National Security State has incubated and supported another rising threat to democracy: excessive secret money dominating politics.

In his farewell address in January 1961, President Dwight Eisenhower warned of dangers from the newly powerful “military-industrial complex.” He worried that the “conjunction of an immense military establishment and a large arms industry” with huge influence in the country might “endanger our liberties or democratic processes.” Echoing Madison, Eisenhower reminded us that “only an alert and knowledgeable citizenry” can counter that risk.

The dangers to democracy that Eisenhower foresaw have grown greater in the past 50 years. Corporations have become much bigger, much richer, much more powerful, and much more involved in politics than ever before.

A subheading to that danger is the increasingly dominant role of money in politics in America today.

Other Threats to Democracy Today

1. Money in Politics

Today, billions of dollars are being spent in American elections—in this past election (with no presidential race), some \$4 billion. Some of this money is garnered the old-fashioned way by individual donations to candidates or political parties. While dialing for those dollars occupies far too much time of legislators and potential legislators, at least the names of the donors must be made known to the public, and the law limits the size of individual contributions.

But there are also hundreds of millions of dollars being poured into political advertising in which the donors' names are kept secret, and the amounts they can give are unlimited. Most of these big-money ad campaigns support negative, sound bite advertising—ugly assaults on the character of candidates.

In 2010, the Supreme Court helped release this flood of money by ruling in a 5-4 decision that corporations (and labor unions) have the same rights in politics as living, breathing human beings. (The Court's decision overruled several of its prior decisions, and overturned laws that dated back to the 1940s and, really, to a statute pushed by Theodore Roosevelt in 1907.) Congress then compounded the problem created by the Court by failing to require disclosure of the sources of the secret money. Fifty-nine out of 100 Senators voted to require disclosure—but that was one vote short of the number needed to break a filibuster by the minority party. So the measure died.

Money does affect elections. And, clearly, politicians believe it does. Therefore, lobbyists representing powerful corporations and other wealthy donors are increasingly able to influence legislation—indeed all too often those lobbyists control legislation.

The long-term result of the flood of money, and its influence, is to dilute the voice of the average citizen who votes. In turn, this adds to corrosive cynicism, which is likely to result in reducing citizen participation.

2. The Radical Change in How Citizens Obtain Information

Another threat to American democracy can be seen in the sharp decline of newspapers, and of objective journalism that once helped citizens sort through the many messages coming at them, especially during elections. Today, the news cycle in America, as all over the world, is non-stop: no time for reflection or analysis; fewer and fewer journalists who can offer a longer term perspective on the meaning of unfolding events; everything boiled down to catchy, supposedly “newsworthy,” crises and accusations.

In this climate, secrecy, and its friend falsity, flourish. The internet could be a useful tool for disclosure, but to date, that has seldom been the case. Even when formerly secret information is revealed on the internet, it needs to be analyzed to be understood. Old fashioned muck-raking reporting that digs deep enough to reveal secrets and then explains them will need to return if our democracy is to fulfill its promise.

3. Changes in How Citizens Relate to Each Other

Democracy has also suffered from a decline in civic engagement. In the mid-1990s, a book called *Bowling Alone* showed there are fewer organizations that bring people together, a significant change from the American past as highlighted by Tocqueville. Places of worship, community organizations, and labor union halls—to give a few examples—served those purposes, but now seem less important as more people turn to individual computer screens to communicate. This weakening of the fabric of social networks will bring many changes to democracy. On the one hand, internet communications make it easier to rally supporters, to alert people to come to events, and even to raise money for campaigns. On the other hand, internet interactions all too often can be misinterpreted; the screen and keyboard are no substitute for looking into the face of a fellow citizen and grappling with a tough issue. The screen and keyboard also make it easier to fling falsehoods; person-to-person, that's tougher.

4. Barriers to Voting

The long-term result of the flood of money, and its influence, is to dilute the voice of the average citizen. In turn, this adds to corrosive cynicism, which is likely to result in reducing citizen participation.

Amazingly, even after centuries of struggle for voting rights for all Americans, there are still many barriers to voting. Many of you may recall the Florida fiasco that ultimately led to the Supreme Court deciding the presidential election of 2000. That fiasco reflected flaws in how votes were counted. But there are much more profound problems with voting in America. Indeed, in some ways our rules are making it harder, not easier, to vote.

This starts with voter registration. In America, voters have the burden to place themselves on the voting rolls. About 65 million Americans who meet all the criteria for voting are not registered. (And, according to a study by MIT and Harvard, in the 2008 election, three million citizens, who were registered to vote, were barred from voting because of problems with their registration.)

Many citizens do not become interested in elections until the eve of voting. If registration were automatic, they could vote. In many countries, including Germany, the government automatically places voters on the rolls when they are old enough to be eligible.

Revealingly, America did not have registration requirements until after blacks got the vote and immigrants began flooding our cities. The cause and effect relationship is strongly suggested by the fact that the first registration law in my state (New York) covered only New York City, but not the rest of the State.

Moreover, in a disturbing new trend, political operatives are starting to police the voting process and challenge voters they suspect of being ineligible. As one court recently found, this inevitably leads to voter intimidation and vote suppression at the polls. In many cases, these challenger laws were originally intended to provide an alternative means of disenfranchising newly-enfranchised blacks. While states have eliminated overt bias from their statutes, the challenge process is still susceptible to discriminatory targeting and application.

Other recent malign tactics designed to suppress voting include: misleading advertisements of the date of the election, deceptive threats of fines and imprisonment for voting in the wrong place, and even placing intimidating people in front of polling places.

In another disturbing new trend, several states are beginning to require onerous identification at the polls before a registered voter can actually cast a vote. The supposed justification for these laws is prevention of voter fraud. Surprisingly, some courts have upheld these restrictive laws even though there is virtually no evidence of voter fraud. The theory is that people might think there is voter fraud and thus be discouraged from voting if there were not onerous requirements. This should not hold water. But the Supreme Court said it did.

Finally, there is another little known reality that prevents people from voting. In many states, after a person has served time for a criminal conviction, that person is not entitled to vote unless he or she makes extraordinary efforts to be allowed to register again. A disproportionate number of these Americans are black men. These disenfranchisement laws have been on the books since after the Civil War when blacks—in theory at least—won the right to vote.

5. Making it Hard to Legislate

Also, as I mentioned earlier, the compromises necessary to produce the Constitution diluted majority votes. Thus, today, Wyoming, with a population of 544,000, has the same two Senators as California, with its population of 37 million. This is exacerbated by a long-standing Senate rule that requires 60 (of 100) votes to cut off debate in order to allow legislation to pass or nominees to be confirmed. This rule regularly allows the political minority to control. (At its most extreme, it would allow about 10 percent of the country to control the Senate.)

Should We Be Optimists, Pessimists, or Reformers?

Foolish Optimism

American democracy has generally been resilient. Often, “the system works”—as President Gerald Ford said about the end of the “long national nightmare” caused by his predecessor, Richard Nixon, writhing to escape Watergate.

But given all the dangers to our democracy, it will not do—indeed, it is feckless—to indulge in ancestor worship about our founders, or to rely on historical examples showing that “the system works.” History does not automatically repeat itself.

There are clear and present danger signals—and not only the things I have already mentioned. Two other trends harming democracy are new to America.

For the first time in American history, the gap between rich and poor has been widening. But, as Justice Louis Brandeis once warned, “[W]e can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can’t have both.” The combination of this growing gap with high unemployment, and with big money dominating elections, is indeed toxic.

Second, America’s long-standing lead in education is drifting away. A vibrant democracy depends on education—all the more so when the airwaves are flooded with demagogic and misleading political ads masquerading as the truth.

Yes, American democracy has made comebacks before. But, take care, particularly when the forces on the other side are so powerful, so well-financed, and so determined. Many Americans worry that our system, so flexible and capable of renewal before, may have less resilience now, particularly with the growth of poisonous partisanship.

Helpless Pessimism

But helpless pessimism is equally as feckless as foolish optimism. It will not do to follow Achilles and just go sulk in our tents.

Practical Reform

America still has the potential for positive change. Here are some keys to rebuilding American democracy.

We must start by recognizing our problem, not turning a blind eye to them, or naively wishing them away

Having recognized the problems, we need a sustained and effective campaign to convince the public that their freedoms and America's democracy are at risk.

Then, we must conceive and implement practical solutions.

Here are some of them.

- First, we need to count our population accurately. The Census, required by the Constitution to be taken every 10 years, is used to apportion representatives among the states and within the states. The problem: the Census systematically undercounts the poor, the less well-educated, city dwellers, and minorities. For example, more than 40 percent of young black men in cities are missed.

There is a simple solution, easy in the twenty-first century. Just use a statistical adjustment of the scientifically valid kind that is used by businesses all over the world.

The Census Bureau now says this can be done. Politicians have refused to let it be done.

- Second, follow the lead of other countries, including Germany, and modernize our registration systems to have the government automatically register people. This would add more than 60 million to those eligible to vote.

Some states are doing this. But Congress has been too partisan or too scared to require it for all states.

- Third, even without automatic registration, we should make voting easier by allowing anyone still not on the election rolls to register on election day. Eight states have done this, leading to an increase in participation of about five percent.
- Fourth, remove political operatives from polling places, and be tough in investigating and prosecuting attempts at voter suppression.
- Fifth, America must confront the problems caused by money in politics.

While the Supreme Court might, with the change of just one member, reverse itself again and squish the idea that corporations and labor unions have the same rights to spend on elections as living, breathing people, this cannot be counted on; nor would it solve all the problems.

But there are other available reforms.

Congress should pass the DISCLOSE Act, which would end the practice of million dollar donations being kept secret.

Moreover, following the lead of New York City and a few states, governments should provide candidates a multiple match for small donor contributions. This frees candidates from relying on big money, and has the side benefit of engaging more people in campaigns.

- Finally, to return to the subject of excessive secrecy, we must start with the recognition that there is far too much secrecy, and that that harms democracy. Then, we should take on the tough job of reducing the secrecy, resolving that:

Instead of the silence of secrecy, let freedom ring; and
Instead of the darkness of secrecy, let the light shine.

...

And now let me close with a Lincoln speech directed to German immigrants.

Abraham Lincoln gave one of his most famous speeches in July 1858. He was running for the Senate in Illinois and spoke to the immigrant voters of his day—including a crowd of German-American citizens (like my great-grandfather), who had recently immigrated to the United States after the Revolution of 1848. Lincoln harked back to the “glorious epoch” of our country’s Revolutionary generation, saying that while the German immigrants had no ties of “blood” to that earlier epoch, still they could find that in the Declaration “those old men” had said “we hold these truths to be self-evident that all men are created equal.” This truth, Lincoln said, the immigrants:

“have a right to claim ... as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration. And so they are.

“That is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world.”

Today, 15 decades after Lincoln spoke those words to the German immigrants, the electricity of American democracy is being short circuited by too much secrecy and by barriers to voting.

Let us all now go forth hoping that we Americans repair the “electric cord” that ties us to the soaring idealism of the Declaration of Independence. ■

MONEY IN POLITICS

The First *Citizens United* Election

Michael Waldman

In early 2010, the Supreme Court's Citizens United decision upended a century of law and doctrine and attracted fierce controversy. But what impact would it have? As the November election approached, one answer came into view: it had unleashed torrents of secret money and given lobbyists a powerful new weapon with which to persuade. The next impact will be to distort policymaking.

We now approach the first general election of the *Citizens United* era. That ruling upended decades of precedent and nearly a century of settled law to hold that corporate campaign spending limits violate the First Amendment. The opinion was the most controversial in years. By the time President Obama finished scolding the justices at the State of the Union address, polls showed public disapproval of the ruling by 80-20.

Critics warned it would tilt the playing field of American politics. But others, with worldly cynicism, shrugged that it wouldn't change much. Corporations would be intimidated and fearful of angering customers. *Plus ça change.*

Just this once, the Chicken Littles were onto something. *Citizens United* has loosed a tide of massive—and alarmingly sneaky—spending. For all the Tea Party hubbub, this election's major factor could be cold, anonymous cash.

Labor unions were the first to take advantage of the new rules, spending \$10 million in an Arkansas U.S. Senate race. Then Target Corp. reaped consumer boycotts after it gave money to an anti-gay referendum campaign in Minnesota. Perhaps the fear of public backlash would hold spending in check after all.

Alas, it was not to be so. *Citizens United* came after years where the Court chipped away at existing, needed campaign laws. Now the new ruling has

unlocked massive campaign spending, much of it through front groups, cutouts, and nonprofits, without disclosing who is paying the bill. Money talks, but refuses to leave its name. Target routed its controversial funding through the blandly named MN Forward. In West Virginia, mining executives are setting up “527 groups” (which can delay disclosure until after November 2) to help elect coal-friendly candidates. The U.S. Chamber of Commerce, which does not disclose its backers, has pledged to spend \$75 million in the midterm elections. When political funders skirt the rules, few fear a regulatory response. *Citizens United* seems less a doctrine than a starter pistol.

This year, the anonymous funding vastly favors the GOP. Other years, the money may favor Democrats. But there can be little doubt it will warp policymaking. Lawmakers who vote on bank regulation, say, will know that a pro-consumer stance could be punished with sudden, secret spending for a foe. Lobbyists have a new bludgeon with which to persuade.

What to do? The simplest step is to strengthen disclosure. Yet last week, new rules were blocked by a unanimous GOP vote in the Senate—even though Republicans once championed disclosure as an alternative to spending caps. We can require corporate managers to give shareholders a meaningful say before spending on campaigns, and encourage responsible firms to hold back. We can boost the power of small donors through voluntary public financing of cam-

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paigns. A House panel just passed this plan, setting the stage for a new drive for change. In coming years, we must push back against the judicial approach that says the First Amendment protects the power of special interests, but offers little protection for the rights of voters to have fair and participatory elections. If all else fails, a Constitutional amendment may be needed. And we will have to redouble efforts to expose the new flow of fishy money.

So: Did *Citizens United* matter? The answer is yes—significantly. And unless remedied, the ruling points toward a truly dystopian future, when candidates, campaigns, and parties are drowned out by special interest funding as loud as it is stealthy. ■

Public Financing at Stake?

Monica Youn and Mimi Marziani

*In 2011, the U.S. Supreme Court will consider a challenge to Arizona’s Clean Elections campaign finance law. At issue in *McComish v. Bennett* is the claim that the program’s “trigger matching funds” chill the speech of non-participating candidates. How the Court rules on the narrow issue is likely to determine the viability of public financing systems more generally – and shape reform efforts for decades to come. The Brennan Center is actively litigating in defense of the law. Here, after a federal court of appeals panel unanimously upheld Arizona’s statute, we urged the Supreme Court not to take the case.*

Statement of the Case

I. The Citizens’ Clean Elections Act

For over a decade, Arizona’s unique voter-enacted Citizens’ Clean Elections Act (the “Act”) has promoted free speech and helped combat corruption and the appearance of corruption in Arizona government, while protecting the public treasury. The Act offers candidates a carefully tailored public funding alternative to the traditional approach of raising potentially corrupting private contributions.

The Act, which was passed in 1998, is the Arizona electorate’s carefully considered response to one of the worst state-level corruption scandals in this nation’s history. In the early 1990s, elected officials in Arizona were caught on tape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. AzScam, as the scandal came to be known, received widespread coverage, including newspaper headlines like “Videotapes Show Payoffs” and candid quotes from state legislators such as “We all have our prices,” “I sold way too cheap,” and “There’s not an issue in this world I give a [expletive] about.” Unsurprisingly, AzScam fostered a widespread perception of political corruption, even among state capitol insiders.

...

Excerpted from the Center’s brief submitted in October 2010 to the Supreme Court in opposition to petition for a writ of certiorari. The brief was submitted with Bradley S. Phillips, Grant A. Davis-Denny, and Elisabeth J. Neubauer of Munger, Tolles & Olson. In 2010, the Brennan Center stopped an effort to freeze Maine’s public funding system, and persuaded a federal appeals court to uphold most of Connecticut’s landmark law.

As the plain language of the Act makes clear, Arizona voters passed the Act in response to their finding that the then-existing “election-financing system ... [u]ndermine[d] public confidence in the integrity of public officials.” The Act was intended to “improve the integrity of Arizona state government ... encourage citizen participation in the political process, and ... promote freedom of speech under the U.S. and Arizona Constitutions.”

Petitioners did not uncover evidence of any chilling effect from triggered matching funds.

Under the Act, in exchange for agreeing to abide by expenditure limits, candidates forgo potentially corrupting private fundraising, and participate in public debates; and those who qualify by collecting a specified number of five-dollar contributions (to demonstrate a base of support among voters) can receive public funding for their statewide and state legislative campaigns. Arizona’s model for distributing limited state monies to candidates who choose public funding is innovative and thoughtfully designed. The program gives candidates sufficient resources to run competitive campaigns and avoids wasting limited state funds on non-competitive races. Thus, it provides eligible candidates with a base grant equal to only one-third of the maximum per candidate funding allotment. If a publicly funded candidate’s traditionally funded opponent spends more than the initial base grant on his or her campaign, or if the publicly funded candidate is targeted by independent expenditures, the publicly funded candidate receives additional triggered matching funds up to twice the amount of the initial grant.

In short, by assuring candidates that they will have enough funds to run viable campaigns in competitive races, Arizona’s model encourages participation in the public-funding system and thereby reduces the potential for *quid pro quo* corruption or its appearance. At the same time, Arizona’s approach protects the public treasury against unnecessarily high public-funding grants in races that are not competitive.

II. The Lawsuit, Discovery, and the Lower Court Decisions

A. The Complaints

Petitioners are non-participating candidates and independent spenders who are ideologically opposed to public financing in all its forms. Although this Court has long held that public financing “furthers, not abridges, pertinent First Amendment values” (*Buckley v. Valeo*), Petitioners allege that the Act’s triggered matching funds provision, which provides additional monies for campaign speech, violates the First Amendment. Petitioners do not and cannot allege that the Act prohibits them from spending as much as they want in support of their campaigns; the Act does not limit expenditures by either non-participating candidates or independent expenditure committees. Petitioners assert instead that the potential that their spending might trigger matching funds for publicly funded opponents has a chilling effect on their speech. Petitioners allege also that the triggered matching funds provision violates the Equal Protection Clause.

B. Triggered Matching Funds Have Not Chilled Speech

Despite having access to both incumbent officeholders and candidates in Arizona and having conducted extensive discovery, Petitioners did not uncover evidence of any chilling effect from triggered matching funds during the decade that they have been in effect. In fact, discovery revealed that Petitioners and other traditionally funded candidates did not spend less money on their campaigns because of triggered matching funds. Rather, they regularly exceeded the triggered matching funds threshold. For instance, state Senator Robert Burns testified that while running for office he paid no attention to his opponents' receipt or expenditure of triggered matching funds. In 2008, Senator Burns and independent groups spent freely above the threshold for triggering matching funds for his opponents, resulting in \$28,250 of triggered matching funds to finance additional speech. State Representative Richard Murphy conceded at deposition that triggered matching funds never led him to turn away a contribution, and his campaign consultant testified that Murphy never stopped fundraising out of fear of triggering matching funds.

Expert Donald Green, Director of the Institute for Social and Policy Studies at Yale, found that triggered matching funds do not have an effect on candidate spending in Arizona. Professor Green reported that spending by traditionally funded candidates with participating opponents does not cluster just below the triggering threshold of \$17,918, which is the spending pattern that would be expected if triggered matching funds had actually chilled their spending—that is, non-participating candidates would be expected to spend up to, but not beyond, the triggering threshold. Rather, of the 46 traditionally funded legislative candidates who faced a participating opponent in 2006, 39 candidates spent less than \$15,000 (almost \$3,000 short of the threshold), demonstrating that their expenditure levels were controlled by factors unrelated to triggered matching funds; and six candidates spent well above the threshold, showing that they were not deterred by triggered matching funds. Only one candidate spent between \$15,000 and \$26,000. In sum, the factual and expert evidence in this case revealed that triggered matching funds do not, in fact, suppress candidate spending in Arizona.

...

C. The District Court's Summary Judgment Findings and Ruling

On January 20, 2010, the district court entered an order finding that Petitioners' evidence concerning the alleged burden imposed by the Act was "somewhat scattered" and "vague" and did not "definitively establish a chilling effect." The court further found that the Act's supposed "burden" was "that [Petitioners'] speech will lead directly to more speech." As the court correctly noted, "it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on [Petitioners]."

The district court nonetheless concluded that this Court's decision in *Davis v. FEC*, although it did "not answer the precise question" raised by the Petitioners, "require[d] [the district court to] find [Petitioners] have established a cognizable burden." Applying strict scrutiny, the district court held that the Act is not narrowly tailored to serve the State of Arizona's anti-corruption interest because, although that interest "supports some aspects of the Act . . . Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech [with triggered matching funds]."

While it reached the merits of Petitioners' First Amendment claim, finding in favor of the Petitioners, the district court declined to decide the merits of Petitioners' Equal Protection claim. On January 21, 2010, the district court entered judgment for Petitioners.

D. The Court Of Appeals' Findings and Ruling

Respondents appealed the district court's grant of summary judgment for Petitioners to the United States Court of Appeals for the Ninth Circuit. On May 21, 2010, after considering the parties' written and oral submissions, and the over 6,300-page record, the court unanimously held that Arizona's triggered matching funds provision does not violate the First Amendment. The panel's thorough and carefully reasoned 31-page decision included a separate concurrence by Judge Kleinfeld.

In sum, the factual and expert evidence in this case revealed that triggered matching funds do not in fact suppress candidate spending in Arizona.

The principal opinion found that the Act should be subject to intermediate, not strict, scrutiny because it “imposes only a minimal burden on First Amendment rights” (*McComish v. Bennett*). The court then found that the Act “survives intermediate scrutiny because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption [and the] appearance of *quid pro quo* corruption to the electorate . . .”

In reaching its conclusion that the Act imposes only a minimal burden on speech, the Court of Appeals “agree[d] with the district court's observation that ‘Plaintiffs’ testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.’” The Court of Appeals also pointed to specific instances in the record where, for example, Plaintiffs had testified that they had been willing to trigger matching funds in previous elections, could not recall whether they had triggered matching funds, or had their testimony contradicted by their own campaign consultants. The Court of Appeals held that the “burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*” to which this Court had applied intermediate scrutiny. The Court of Appeals also considered at length and rejected Plaintiffs' contention that *Davis*, a case about discriminatory contribution limits, decided the fate of triggered matching funds.

The principal opinion declined to reach the Equal Protection claim in the first instance and remanded the case to the district court for further proceedings.

In his concurring opinion, Judge Kleinfeld reasoned that the Act “imposes no limitations whatsoever on a candidate's speech” and found that *Davis* was “easily distinguished.” Thus, Judge Kleinfeld concluded that it was unnecessary to apply even intermediate scrutiny to the Act. ■

The Reform Landscape After *Citizens United*

Monica Youn

As Justice John Paul Stevens warned in his dissent, the five-justice majority in *Citizens United* “shunned the First Amendment value of protecting public participation in political debate.” What can Congress do? Weeks after the ruling, the Brennan Center testified before Congress about steps that could begin to right the balance.

Since its creation in 1995, the Brennan Center has focused on fundamental issues of democracy and justice, including research and advocacy to enhance the rights of voters and to reduce the role of money in our elections. That work takes on even more urgency after the United States Supreme Court’s decision in *Citizens United v. Federal Election Commission* on January 21, 2010. *Citizens United* rivals *Bush v. Gore* for the most aggressive intervention into politics by the Supreme Court in the modern era. Indeed, *Bush v. Gore* affected only one election; *Citizens United* will affect every election for years to come.

By largely ignoring the central place of voters in the electoral process, the *Citizens United* majority shunned the First Amendment value of protecting public participation in political debate. To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses four steps to take back our democracy:

- Promote public funding of political campaigns
- Modernize voter registration
- Demand accountability through consent and disclosure
- Advance a voter-centric view of the First Amendment.

This five-vote majority on the Supreme Court has imposed a radical concept of the First Amendment, and used it to upend vital protections for a workable democracy. We must push back against this distorted version of the Constitution. We must insist on a true understanding of the First Amendment as a charter for a vital and participatory democracy. And there are other values in the Constitution, too, that justify strong campaign laws—values such as the central purpose of assuring effective self-governance. The Court blithely asserts that unlimited corporate spending poses no threat of corruption. That is simply not the case. We urge, above all, that this Committee build a record to expose the actual workings of the campaign finance system. Such a record is vital for the public’s understanding, and even more to make clear to Justices in future litigation that a strong record undergirds strong laws.

Excerpted from Monica Youn’s testimony before the U.S. House Judiciary Subcommittee hearing, “The First Amendment and Campaign Finance Reform After *Citizens United*,” held on February 2, 2010.

1. The Political Stakes of *Citizens United*

Last week, the Supreme Court's decision in *Citizens United v. FEC* undermined 100 years of law that restrained the role of special interests in elections. By holding—for the first time—that corporations have the same First Amendment rights to engage in political spending as people, the Supreme Court re-ordered the priorities in our democracy—placing special interest dollars at the center of our democracy, and displacing the voices of the voters. There is reason to believe that future elections will see a flood of corporate spending, with the real potential to drown out the voices of every-day Americans. As Justice Stevens warned in his sweeping dissent, American citizens “may lose faith in their capacity, as citizens, to influence public policy” as a result.

After news of the *Citizens United* ruling sent shock waves through political, legal, and news media circles throughout the nation, some commentators took a jaundiced view, arguing, in essence, that since the political system is already awash in special-interest dollars, this particular decision will have little impact. It is undoubtedly true that heretofore, corporations have engaged in large-scale spending in federal politics—primarily through political action committees (PACs) and through more indirect means such as lobbying and nonprofit advocacy groups. However, the sums spent by corporations in previous elections are miniscule in comparison to the trillions of dollars in corporate profits that the Supreme Court has now authorized corporations to spend to influence the outcome of federal elections. The difference, in short, changes the rules of federal politics.

Prior to *Citizens United*, a corporation that wished to support or oppose a federal candidate had to do so using PAC funds—funds amassed through voluntary contributions from individual employees and shareholders who wished to support the corporation's political agenda. Such funds were subject to federal contribution limits and other regulations. Now, however, the *Citizens United* decision will allow corporations that wish to directly influence the outcome of federal elections to draw from their general treasury funds, rather than PAC funds, to support or oppose a particular candidate. This difference is significant enough to amount to a difference in kind rather merely a difference in degree.

...

Perhaps the most troubling aspect of *Citizens United*—worse than its political implications, worse than its aggressive deregulatory stance—is that the Court embraces a First Amendment where voters are conspicuously on the sidelines. At the start of the *Citizens United* opinion, Justice Kennedy correctly noted that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” As the opinion proceeded, however, it became evident that the majority was in fact taking a myopic view of campaign finance jurisprudence, one that focuses exclusively on campaigns—candidates, parties, and corporate interests—at the expense of the voting citizenry. The Court's ultimate judgment held, in effect, that whatever interest is willing to spend the most money has a constitutional right to monopolize political discourse, no matter what the catastrophic result to democracy.

This aspect of *Citizens United*—like many others—constitutes a break with prior constitutional law. The Court has long recognized that “constitutionally protected interests lie on both sides of the legal equation.” Accordingly, our constitutional system has traditionally sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers.

It is crucial that this Committee, and Congress, recognize the Roberts Court's one-sided view of the First Amendment as a distortion—one that threatens to erode First Amendment values under the

guise of protecting them. In truth, our constitutional jurisprudence incorporates a strong First Amendment tradition of deliberative democracy—an understanding that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate. This is why our electoral process must be structured in a way that “build(s) public confidence in that process,” thereby “encouraging the public participation and open discussion that the First Amendment itself presupposes.”

In this post-*Citizens United* era, a robust legislative response will be critical. It is similarly imperative, however, that we reframe our constitutional understanding of the First Amendment value of deliberative democracy. In the longer term, reclaiming the First Amendment for the voters will be the best weapon against those who seek to use the First Amendment for the good of the few, rather than for the many. ■

Building a New Jurisprudence: First Steps

The Brennan Center launched a jurisprudential movement to counter the deeply-entrenched, decades-long conservative drive to roll back campaign finance regulation. We gathered what The New York Times called “A-list First Amendment scholars” to ponder critical questions: Does the First Amendment limit reform of money in politics? Do voters have First Amendment interests at stake in the financing of political campaigns? Are elections different? Below are excerpts from the conversation: Rep. Donna Edwards, Richard Briffault, Floyd Abrams, Burt Neuborne, Samuel Issacharoff, Geoffrey Stone, and Deborah Hellman reflect.

Rep. Donna Edwards (D-MD)

I remember when *Citizens United* came down, and we were in the midst of deciding whether we were going to go forward with health care. I recall that some of my colleagues actually talked about what that might mean for elections: “Well, if I say such and such, does that mean that a pharmaceutical corporation, an insurance company, someone who’s doing business in my state might decide that they’re going to engage in unlimited corporate expenditures in my next election?” And so I can already foresee that there could be a real chilling effect on the legislative process as we go forward.

...

So I think it’s going to be a difficult environment going forward to think about how this will impact our elections and how it will impact voters and participation in the process. I did read the decision a couple of times, and really talked with a number of people... about what to do next. I decided, and some of my colleagues decided to as well, to introduce a constitutional amendment. In looking at the decision, I concluded that the Court didn’t really leave a lot of avenues open.

I suppose if we were to go back in the process and figured out a way to construct a corruption argument around independent expenditures, that that could have been an avenue. I know others are trying some ideas around shareholder resolutions, additional disclosure. I’m all for that. I think I signed on to a number of the bills that have been introduced already to try some of these corrective measures to ameliorate the impact of *Citizens United*. But ultimately, I think the Court was saying to all of us very, very

“Money, Politics, and the Constitution: Building a New Jurisprudence” was held on May 27, 2010 at NYU School of Law. Other symposium participants included Yale Law’s Dean Robert Post, Harvard Law’s Lani Guinier, and UC Irvine School of Law’s Dean Erwin Chemerinsky. Later this year, we will publish a book based on the conference.

clearly: If you're going to come to us, it's really about the Constitution. So I don't think there are many avenues open.

...

What I'd like to see is that body of constitutional scholarship that allows us to embrace the Constitution in a way that gives some vibrancy to voters, to our electorate and to our politics.

"I think that we have to create an environment in which public financing can survive."

- Rep. Donna Edwards

But I don't think that's all we have to do because even if corporations were not allowed to spend directly out of their treasuries to impact elections with independent expenditures, we have other problems with our electoral system. We have problems of a person like me who's not of independent wealth, who has to take a leave from her nonprofit job to run for Congress, realizing that the hurdle was so high to raise money, to get a message out, and to actually even exercise any bit of speech in an environment in which incumbents, obviously, dominate the process. And so many of you would be surprised that a challenger who had five percent name recognition could come back and beat a then-eight term incumbent member of Congress. But that shouldn't be unusual. That should happen, whether it happens in primaries or our general election. And part of the reason that it doesn't is because of the way our campaigns are financed, because of the complexity of having to go out and raise money, spending, like some of my colleagues who, like me, spending 10, 15 hours a week on the telephone, calling the people we know to raise money from them.

So in addition to what we might need to do around the more immediate problem of what we need to do around *Citizens United*, I think that we have to create an environment in which public financing can survive. That means finding creative ways to fund publically funded campaigns so that we don't run afoul of constitutional protections. But it also means then, making sure that we have a regulatory framework in place that enables those challengers like me and otherwise to separate the serious ones from the not-so-serious ones, so we use our public dollars wisely. It also means making sure that we have regulations in place that ferret out corruption and potential for corruption in the political process.

Richard Briffault, Columbia Law School

My point is that the Supreme Court has made a hash of campaign finance law; its campaign finance jurisprudence has been marked by closely divided decisions, fragmented majorities, sharp shifts in the law, and doctrinal incoherence.

This is not surprising. The Constitution gives no concrete guidance concerning the rules of how to govern the regulation of election finance, nor does democratic theory. Indeed, democratic theory points us in multiple and often potentially conflicting directions with no clearly required right answer.

Nor does the political science of campaign finance tell us much definitively about the influence of contributions on government, the influence of money on elections, or the influence of campaign law on democratic practices. And even if it did, there is little reason to believe that the Court could make better judgments about the empirical workings of campaign finance than Congress or the state legislatures.

We would be better off if campaign finance law were de-judicialized and left to the political processes of Congress, the fifty states, and thousands of local governments to consider. This would not involve complete judicial abdication. The courts could still set the outer bounds of permissible regulation. But much of the balancing of competing democratic values – of equality and free speech, of transparency and privacy, or prevention of corruption and of opportunities for influence—as well as the more practical concerns about the relative roles of corporations and unions, individual donors, parties and non-party activists—would be left to multiple political processes.

...

The counterpart to the argument that campaign finance is too political to be left to the politicians is that only politicians can understand how it works in practice. Today we have a Court in which not a single justice ever ran for or held elective office. It is perhaps not surprising that some of the justices most sympathetic to campaign finance regulation were justices who held elected office, like Justice O'Connor or a justice who managed an election campaign, like Justice White. Campaign finance regulation entails empirical judgments about the practical impact of contribution limits, spending limits, public funding rules, and disclosure requirements for which there is little clear political science guidance, which judges are not clearly better to make than elected officials.

In some sense, the campaign finance problem is another instance of the constitutionalization of democracy, whose written constitution says very little about the specific issue. The question then becomes whether the principles of democracy provide the courts with guidance for developing legitimate, workable rules for structuring the political process.

It can be argued that the “one person, one vote” doctrine for legislative apportionment did this. While not clearly required by either the constitution or democracy per se—which could permit representation for discrete groups—it clearly had powerful resonance with the value of political equality, did not offend any comparably powerful opposing value, was workable, earned rapid popular acceptance, and quickly produced a fairly coherent doctrine.

But the Court has failed to produce a comparable rule for campaign finance. Instead, we have incoherence and inconsistency. To be sure, the Court has begun to move in the last five years in a more consistent, coherent direction. Incoherence may be less of a problem, but at the price of forcing out of the law equality concerns that clearly merit a place in thinking about campaign finance.

Despite Justice Kennedy's angry denunciation of complexity in *Citizens United*, some complexity in campaign finance law is inevitable given the need to hold together free speech, freedom of association, political equality, the prevention of undue influence on government, lowering barriers to entry for candidates, voter information, and administrability concerns. But that complexity should come from the political process since the balances and compromises that need to be structured are inevitably political and not judicial. There is no one right rule for holding them together. Although important principles are involved, balancing those principles and making the empirical judgments critical to setting the balance is the domain of politics, not principle.

...

Campaign finance needs to be de-judicialized and returned to the democratic experimentalism of Congress, the states, and the cities.

Deborah Hellman, University of Maryland School of Law

What are the reasons for thinking that restrictions on spending money might be restrictions on speech? Money facilitates the exercise of speech, money incentivizes speech, and the giving and spending of money themselves can be expressive activities.

The first thing to note is that only the third one—that giving and spending money can be expressive—is uniquely connected to the First Amendment. Because, of course, money facilitates and incentivizes the exercise of almost any constitutional right that you can think of. That’s because money is useful, right?

Well, the Court is surely right that money facilitates the exercise of speech. But money facilitates the exercise of other constitutionally protected rights, too. For example, money facilitates the right to abort a previously viable fetus; you pay an abortion provider to give you an abortion. Money facilitates the right to own a handgun; if you don’t already have one, you need to buy one. Money facilitates the exercise of procreative liberty; if you’re infertile and you want to pay a surrogate to gestate a child or, indeed, if you’d like to buy a baby, that would be facilitated by money. Money would certainly facilitate the exercise of the right to vote. If we were to pay people to vote, then surely more people would show up. It could also facilitate the exercise of the right to vote if you could take a taxi to the polls—it’s less cumbersome. And that’s just a few examples—for almost any right we could think of, money could facilitate or incentivize the exercise of it. Obviously there are tons more I could give you.

“The Court is surely right that money facilitates the exercise of speech. But money facilitates other constitutionally protected rights too.”
- Deborah Hellman

In the case of some of them, our intuitions might say the right to spend money in connection with that right ought to be protected within the penumbra of the underlying right. But in others, we would say no, no, no, it wouldn’t be protected as part of the penumbra. If that is true—if we don’t think that restrictions on the right to pay people to show up to vote constitute an infringement of the right to vote, but we do think that a limitation on the right to buy a handgun would be a restriction on the right of gun ownership—then the first conclusion is this: That money facilitates the exercise of a right is not sufficient, on its own, to establish that the right in question includes any penumbral right to spend money. We need something more than simply noting that money facilitates the exercise of the right.

...

The first point I want to make is: when do constitutional rights include a penumbral right to spend money? Obviously this would have implications

for the First Amendment and for campaign finance, but it's not uniquely connected to the First Amendment.

...

First, the decision by democratic decision makers about what goods are to be allocated via the market and what goods are to be allocated via some other distributive mechanism strikes me as an incredibly important one. It is almost an identity-defining decision for a community to make. Therefore, it is very important for democratic decision-makers to retain that power.

...

*"I have been struck by the fact that journalists—with the exception of the particularly right-wing-oriented ones—have denounced the Citizens United opinion."
- Floyd Abrams*

The solution I want to propose is an answer to the overarching question. Democratic decision makers can decide on the appropriate distributive mechanism for various goods, market or not. But, if a good is distributed via the market, as medical services are (especially abortion services in our current regime), then the right dependent on that good must include the right to spend money as part of the penumbra of the right. If a good is not distributed via the market, say the way votes are not, then the right that depends on that good does not include the right to spend money to effectuate it. Voting is a good example because votes are distributed on the basis of age and citizenship; thus, the right to vote doesn't include the right to spend money.

Now, this approach obviously has implications for campaign finance reform but they're not clear-cut. It depends a lot on what, in fact, democratic decision-makers do, but I think the approach provides some kind of roadmap or method of analysis for thinking about what would be permissible in the campaign finance realm.

Floyd Abrams, Cahill Gordon & Reindel

I'm going to talk in the main today about press-related subjects—press coverage, the Press Clause, and the like. Having represented the press reasonably often in my career, I have been struck by the fact that journalists, newspapers, magazines and the like—with the exception in general of particularly right-wing oriented ones—have denounced the *Citizens United* opinion. These are the same journalists who would go to the barricades to defend the right of Nazis to march in Skokie, or who would write editorials of the strongest, strongest sort defending the rights of pornographers to put their stuff on the Internet, or people engaged in the vilest sort of hate speech to have their say on the Internet, or who would support the right of journalists not to reveal confidential sources under any circumstance.

Those journalists have sort of coalesced around the proposition that this decision is awful. They've done it, I think, for a few reasons. One is quite consistent with the view of those who are critical of the opinion because they believe that money in politics is dangerous and that the decision significantly cuts back the ability of our society to deal with that problem. They do it also, I think, because they are suspicious—even disdainful—of the five members

of the Supreme Court who wrote and joined the majority opinion. I think they do it as well because they are frustrated by the fact that their loss in the case, so to speak, was in the name of the First Amendment, which they often think belongs to them.

Consider the number of cases cited by the Supreme Court in Justice Kennedy's opinion for the proposition that corporations do receive, have received, and therefore perhaps ought to continue to receive, broad and sweeping First Amendment protection when they engage in political speech. Justice Kennedy cited 25 cases for the general proposition that corporations have received broad First Amendment rights when they engage in such speech. Seventeen of the 25 cases involved the press in one form or another—newspapers, broadcasters, magazines, and the like.

Now, in my view, the Court cited and reaffirmed prior rulings to the effect that political speech does not lose First Amendment protection “simply because the source is a corporation.” From *Pacific Gas & Electric*, it quoted: “[T]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” The majority of the Court was therefore reaffirming the viability of these quite press-protective rulings.

Indeed, the Court in *Citizens United* went further, concluding that the anti-distortion rationale of the *Austin* case, which the Court rejected in *Citizens United*, would “produce the dangerous and unacceptable consequence that Congress could then ban the political speech of media corporations.” To which I would add that I think a contrary decision would have at least put at risk decisions such as *Mills v. Alabama* and *Miami Herald Publishing Co. v. Tornillo*, which both involve the press. In the *Mills* case, the press was banned in Alabama, just on election day, for the purpose of having clean elections. Just on election day, for raising some new issue in an editorial not previously raised, so that the public wouldn't be confused because it wouldn't have the chance to hear the answer. Nine-nothing, the Court struck that law down as alien to the First Amendment. In *Miami Herald*, in an election context, the Court said, although the idea of allowing someone to respond if you attack him is interesting, that requirement violated the First Amendment on its face. Both were unanimous decisions.

The dissenting opinions' response to these articulations in *Citizens United* seemed so brief, so perfunctory, so nonresponsive—a paragraph in Justice Stevens's 90-page opinion—that it's worth reviewing. Justice Stevens wrote a single paragraph addressing an issue that the majority had gone on about for pages. He wrote that the majority had “raised some interesting and difficult question about Congress's authority to regulate electioneering by the press,” that it was “not at all clear” that *Austin* would permit the press to be covered by the statute in light of its unique role, but that, since the statute itself contained an immediate exemption, the dissent need not address those issues.

...

Citizens United did its documentary about Hilary Clinton, denouncing her. It costs money, by the way, to make a documentary or anything else that appears in a film. Suppose that it had not been *Citizens United* but Time Warner that had made precisely the same documentary. Time Warner could show it on television and be protected by the media exemption in the statute. *Citizens United* could not because it would not be protected. So the question would be, what about the First Amendment? Time Warner would presumably be protected by the First Amendment. The dissenters in *Citizens United* did not believe that *Citizen United* itself was protected by the First Amendment for doing precisely what Time Warner would have been protected for doing. I find that very disturbing.

Burt Neuborne, New York University School of Law

Now, of course, the Court has to change. We're not going to persuade Kennedy to change his mind, but it is not outside the realm of possibility that we will see a shift in the Court, especially if it is a two-term president. And that we'll be talking about the need to give the new Court a theory on which it can reverse *Citizens United* and reverse it within appropriate doctrinal limits. And the theory is, I think, a theory of bounded speech.

...

There is no such thing as a single First Amendment. We have First Amendments, and what the Court has done is create what I call "speech submarkets", and regulated speech within the speech submarkets to make sure each speech submarket performed at an optimum level.

...

So what does that say about *Citizens United*?

The fact that we don't allow electioneering near the polls is an example of noting that there is something about an election as a bounded sphere where special regulations can take place where they couldn't take place otherwise. Otherwise, we wouldn't have an Australian ballot, or a secret ballot, or bans on cross endorsement, or bans on writings. It's a process that gets regulated in order to optimize its performance.

Now, the answer is, so what? What is there about corporate speech that is likely to create a suboptimal performance in the electoral sphere? Kennedy's position is: "What are you talking about? All of this is going to be more information. More information is going to be pumped out there. It's going to be pumped out there about politics. It's going to be pumped out there in the context of an election." And that kind of information is exactly the raw material for the best operation of a democratic process. The worst operation of the democratic process is to let the government get its hands on the flow of information just before the election. That's got to be the most dangerous point, and that's the point we should be most worried about.

And that leads me to ask a couple of questions. Because in order to know whether I want to regulate within this bounded sphere, in order to know whether there is a problem within the bounded sphere that would justify regulation, it seems to me we have to ask a couple of questions.

One, what are corporations likely to do with this new power? Are they likely to run rampant with it? Are they likely to all of a sudden rise up and pour billions of dollars into an electoral process two or three days before an election, in ways that completely distort the operation of democracy?

...

And what are the effects of corporate spending?

...

But the doctrinal question is: How sure do we have to be to know that that problem exists? Is it an intuition that we should go on? What kind of empirical data do we need? If we came back to the Supreme Court and we made an empirical showing of what kind of effect this was having on the democratic process, I think we'd win. And I think we don't have that now, mostly because the corporations haven't

been spending, and because it has been inhibited for so many years—we have a situation in which it’s a new world now. The nature of *Citizens United* validates this corporate behavior in ways that allow the corporate executive to say, “Hey, it’s the American way for me to spend my money. I have a First Amendment right to do it and the Supreme Court has said I can do it, and therefore, I’m going to do it.”

So we’re going to see an upsurge in corporate spending. The question is: Is that upsurge going to have the deleterious effects that we think it’s going to have? Or is it going to be partially cancelled by an upsurge in union spending and partially cancelled due to the fact that within the corporate world, there are divisions? The cable company is going to fight with Verizon, and they’re not necessarily going to have the same electoral position.

So while I’m very nervous about *Citizens United*, I think it was decided wrongly, I think it has put our democracy at risk. The question of whether that risk will actually come to fruition I think is one of the issues that people like the Brennan Center and people who care about this issue deeply have got to focus their attention on. And I’ll leave it at that.

Samuel Issacharoff, New York University School of Law

I am not sure that corporations want to enter the electoral sphere. In about half the states in the United States, corporations are able to participate in political life, they’re able to contribute to candidates, they’re able to have independent expenditures. The best data I’ve seen is from California, where when you look at the top 10 spenders over half the decade of the 2000s, it turns out that there wasn’t a single corporate interest there. There were unions, public employee unions, a couple of Indian tribes, a couple of rich people, but corporations weren’t there.

No individual corporation filed an amicus brief in *Citizens United*. It’s not clear to me that corporations want this power that’s being assigned to them. The electoral arena is messy, it’s noisy, people get pissed off for the wrong reasons or the right reasons, and it’s generally not the way to get things from government or corporations. They use lobbying. And the amounts spent on lobbying compared to the electoral arena are orders of magnitude different.

So what’s my concern about corporations and corporate money? My concern is not so much that they want to give, but that they don’t want to give and will be forced to. And they will be forced to in a kind of push/pull system. When they want to give, and there will be occasions when they do, it will be because they have concentrated, particular interests in public choice. But most often, if they have contracts with the government, if they are regulated by government actors who are elected, they are subject to extortion. Give us money, or don’t come talk to us if we get into office.

...

“So what’s my concern about corporations and corporate money? My concern is not so much that they want to give, but that they don’t want to give and will be forced to.”
- Samuel Issacharoff

So the argument now is not so much about the distortion or the corruption or the wrongfulness of the electoral outcomes, but it's about the potential distortion in our governmental policy. It's not the inputs of who goes into government, but it's the concern that the outputs will now be distorted because of the shakedown effect. Because the people in power will now look to promulgate policies that will give them the maximum leverage over the place where it's easiest to get money, which will be corporations or unions.

Geoffrey Stone, University of Chicago School of Law

How would one make the argument that elections are different? It seems to me that there are three difficulties that one encounters in making the argument that we should treat elections the way we treat trials and legislative sessions and press conferences.

“What we want to do is create the concept of elections as a First Amendment matter in order to regulate speech, rather than because we’ve already independently defined it as a separate sphere.”
- Geoffrey Stone

First is that the boundary between free speech in public discourse and speech in elections is very elusive. As demonstrated by the challenge of drafting McCain-Feingold and the *McConnell* and *Wisconsin Right to Life* decisions, the line between election speech and issue speech is not an easy one to draw. And unlike the situations in classrooms and appeals and legislative sessions and the like, it's not so easy to demarcate where one slips over from speech about the war to speech about who the president should be. It's not impossible to do that, but it's much more difficult to do it in this context than it is in all of the others in which we have recognized the special applications.

The second problem I think is that in all of these other situations, those contexts exist independently of the issue of regulating speech—that is, first we create things like classrooms or press conferences or town hall meetings and then later we figure out how we apply the principles of speech to those sort of pre-existing concepts or ideas. But in the election context we've dealt with elections for a very long time and have not had intrusive rules of the sort we're talking about here, and so, tradition, in this context, cuts in the other direction. We don't have a sort of natural tradition of regulating elections in intrusive ways the way we regulate in trials or press conferences or public debates. Instead, what we want to do is create the concept of elections as a First Amendment matter in order to regulate speech, rather than because we've already independently defined it as a separate and distinct situation.

So that's sort of backwards, and backwards in a way that should make us suspicious, because now we're really trying to transform something that has historically been subject to general free speech principles into something that's not. And that's really not the situation with respect to most of the other contexts that have been recognized under the First Amendment.

And the third obstacle here is that, in all of the other situations, the regulations are thought to be necessary, either in order to maintain order or because there's limited time or limited resources. So that there's a need, a real need for the regulation in order to parcel out limited time or to maintain a certain order that's necessary.

But in the election situation, we want to restrict speech even though there is no external need to do so, in terms of considerations like limited time or limited resources or the need to preserve order. Rather, we want to regulate speech here entirely, because in this context we don't trust the marketplace of ideas to operate, even though we trust it to operate in other circumstances. And so the reason for regulating it in this situation, unlike the others, is really not legitimately justified by these other constraints of time and resources and so on. It's really just about saying, we don't think we like the way this market operates here, so for its own sake we want to change it to make it better. In principle that's a much tougher sell.

...

If we're persuaded that elections really are distinct, that they're really not just a part of general public discourse, but there's something about them that justifies regulation and attention different from public discourse and makes them analogous to these other circumstances, then I think the thing to do is not to start with campaign finance regulation but to start with other regulations that one would then consider, once one made the intellectual leap to say that elections are like trials.

And that would mean, for example: Should we support a law that makes it a crime for anyone to make a knowingly false statement in the context of an election campaign, that would be like perjury in a trial?

...

Would we accept that in an election context?

...

Once we start thinking of elections as special bounded spheres that should require government intervention to produce the right kind of process, then presumably we should prevent individuals from disclosing unduly prejudicial information. But that might be, of course, obviously very contentious, just as I suppose it is in the trial context. So should that be something that we think about regulating?

...

So my point about this is simply to say, the right way to think about this analytically and to build a strong argument is to separate it to some extent from the issue of campaign finance regulation and see whether we think a credible argument can be made for the claim that elections should be treated the same way we treat trials and classrooms and so on. And then to ask what regulations follow from that, which are good, which are not good, and then to finally get to the question of campaign finance regulation. ■

Where are the Shareholders?

Ciara Torres-Spelliscy

When newly empowered corporate managers spend on elections, they are using what Justice Louis Brandeis memorably called “other people’s money.” What rights do shareholders have?

Ever since *Citizens United*, I’ve discussed the outcome with voter groups throughout the United States. I tell them that the decision grants corporations the right to spend unlimited amounts in elections and that CEOs can use corporate checkbooks (instead of their own) to buy political ads. In the case of a publicly-traded company, a CEO can use other people’s money to promote his or her own political agenda. And corporations could outspend every private contributor in future elections.

After I say this, the dismay among audiences, from Montana to D.C., is palpable. I feel like a grief counselor instead of a lawyer. In the question-and-answer sessions, people inevitably ask, “How could the Supreme Court get corporate rights so wrong?” Polls show roughly 80 percent of Americans disagree with the decision.

Lawrence Lessig puts his finger directly on the majority’s error in the case — a narrow fixation on bribery, which ignores important and broader problems such as institutional corruption. By giving corporations and unions the constitutional right to spend treasury funds on both independent expenditures and “electioneering communications,” *Citizens United*, without a doubt, damages our democracy. Under a convoluted theory of corporate free speech, the Court has granted corporations and unions permission to run ads directly before an election, attacking or praising candidates for their positions on issues. These same groups now also have the ability to run classic election ads that explicitly urge the public to vote for or against a candidate. McCain-Feingold had prevented sham issue ads and 1947’s Taft-Hartley Act had prevented corporate independent expenditures, but in *Citizens United* the Court threw out these protections.

Yet Lessig is fighting the last war by pointing out the decision’s flagrant flaws. We are going to live with the new paradigm for a long time, so we need to focus on what policy solutions are available.

This article originally appeared in the September / October issue of *The Boston Review*.

The good news in *Citizens United*, although hard to find, is that eight of the nine justices concluded that *Citizens United* could be constitutionally subject to disclosure and disclaimer requirements because of voters' interest in knowing who is behind a political ad. The Court doubled down on this pro-transparency stance in *Doe v. Reed*, a decision last June in which the Court upheld disclosure in the context of ballot initiatives. These cases suggest that one way to address corporate political spending is to upgrade corporate law to keep pace with the new political rights. If corporations are political actors, then the United States needs to democratize corporations through improved transparency and meaningful shareholder consent.

Congress is not the only institution at risk. Corporations themselves may be corrupted by political spending.

In the wake of *Citizens United*, corporate law should be changed to empower shareholders to limit corporate managers' urge to splurge on politics. *Citizens United* itself supports this role for shareholders. As Justice Kennedy wrote for the majority, "Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative." Yet, under the current real-world rules of corporate governance, shareholders cannot exercise their new *Citizens United* spending rights. Rather, that power belongs to corporate managers with their hands on the purse strings and nearly unfettered leeway to spend under the "business judgment rule."

While Lessig is rightly concerned about institutional corruption, Congress is not the only institution at risk. Corporations themselves may be corrupted by political spending. As Harvard Law Professor Lucian Bebchuk has noted, corporate meddling in politics is potentially bad for capitalism because managers may seek to water down corporate-governance rules to the detriment of investors. Moreover, given that shareholders likely will hold a range of political convictions, corporate managers' spending inclinations may not match up with shareholders' preferences.

Corporate-governance problems come down to two essentials: (1) shareholders don't have a meaningful way to consent (or object) to corporate political spending, and (2) loophole-riddled campaign finance-reporting schemes make it unlikely that shareholders even will know which candidates are being supported by the companies they own and in what measure.

These corporate-governance flaws can be addressed either with changes to the federal securities laws or state corporate laws. The British have a corporate-law model that Americans can follow. Since the amendments to the Companies Act in 2000, the United Kingdom has required that corporate managers obtain shareholder approval before spending corporate money on political campaigns. The same law requires that managers disclose past corporate political spending to shareholders. The Shareholder Protection Act, introduced in the House by Representative Mike Capuano, would adopt both requirements. Analogous bills have been introduced at the state-level in New York, Massachusetts, and California.

In the wake of "Citizens United," corporate law should be changed to empower shareholders to limit corporate managers' urge to splurge on politics.

Shareholders don't have a meaningful way to consent—or object—to corporate political spending.

As Columbia Law Professor John Coffee testified before Congress, the goals of corporate-governance reform should be to:

(1) increase managerial accountability to shareholders in a very low visibility context where managerial and shareholder interests are not well aligned, and (2) spread the sunlight of full disclosure over the very opaque process by which corporations today indirectly subsidize electioneering expenses.

Giving shareholders salient information and a say in corporate political spending won't be the same as the earlier corporate-spending ban, but it could have real impact. After the United Kingdom implemented the new Companies Act, the flow of corporate money dropped from a gush to a trickle.

However, better corporate governance alone will not restore voters to their rightful place in our elections. As Lessig suggests, Congress needs to embrace the Fair Elections Now Act, which would empower small donors by matching their contributions to candidates with public dollars. Adopting the Fair Elections model would be the ultimate response to the escalation of privately funded or even corporate-funded elections. And just like more muscular disclosure rules and improvements to corporate governance, the Fair Elections approach is perfectly constitutional. ■

Small Donor Public Financing: The NYC Experience

Angela Migally and Susan Liss

In recent years, the explosion of small contributions has been a thrilling, positive trend. How can public funding boost the power of participation? In New York City, an innovative system melds grassroots organizing with campaign fundraising. It is now a model for reform proposals across the country.

Anecdotal evidence and hard data confirm that the multiple match has boosted giving by donors.

New York State is notorious for its dismal donor participation rates. According to a recent study, of the 34 states that had statewide and legislative races in 2006, New York State had the lowest donor participation rate in the country—only 0.59 percent of the voting age population contributed to state campaigns. Participation by New York City donors in state elections was even worse—only 0.34 percent of the voting age population in New York City contributed to state elections.

Donor participation rates in New York City elections are a completely different story. In 2005, 1.39 percent of the voting age population in New York City contributed to city campaigns, more than triple the participation rates of city residents in state campaigns.

Several candidates attribute the City's higher donor participation rate to the multiple match system. Indeed, the incentives created by the system are so powerful that candidates often use the multiple match as the centerpiece of their fundraising pitches.

- City Councilmember Brad Lander (District 39, Brooklyn), the highest spending candidate in a five-candidate primary and a three-candidate general election, said: “Our fundraising pitch was based on the multiple match. When we explained to donors that their contributions would be matched six-to-one, it seemed to resonate with them.” Lander used this pitch to raise over \$121,000 from 558 contributors, 89 percent of whom gave \$250 or less.
- “Regular New Yorkers...who never thought of contributing, now get very excited about contributingThey don't feel dwarfed by big money interests,” observed Stephan DiBrienza, a four-term City Councilmember, during his failed 2001 bid for Public Advocate. In that election he raised an astonishing \$735,000 from 3,020 contributors, 83 percent of whom gave \$250 or less.

Excerpted from *Small Donor Matching Funds: The NYC Election Experience*, September 2010.

- Former Public Advocate Betsy Gotbaum, who raised more than any other candidate in her successful 2001 bid for office, (\$1.76 million from 2,136 contributors), explained, “The [match] seems to have created a kind of enthusiasm for political giving and participation that I have not previously seen.”

The data demonstrates that the number of donors has generally expanded after the enactment of the multiple match. Between 1997 (the last election under the one-to-one match) and 2009 (the first election under the six-to-one match) the number of donors who gave to participating candidates grew by 35 percent. The pool of small donors grew by 40 percent. These increases occurred notwithstanding the economic downturn in 2008.

During the 2009 election campaign, political fundraisers were concerned that asking for contributions in an economic downturn “would be alienating for voters,” explained Public Advocate Bill de Blasio. To his surprise, de Blasio found that the six-to-one match not only prevented such feelings, it encouraged many New Yorkers to contribute. He explained:

Even people who were not very interested in politics were energized by the possibility that they could play such a role in the campaign because of the effect the multiplier had on their smaller contribution. When people who didn’t understand that there was a six-to-one match learned about the match, it was huge for them. Someone who would never have given \$175 to a campaign would do it with the match. It empowered them by empowering their money.

...

By supercharging small donations, campaigns now can be built using the support of many more small donors. In 2009, the typical participating City Council candidate had more than double the number of contributors than a typical non-participating City Council candidate. Four years earlier, with fewer competitive races, the typical participating candidate had 51 percent more contributors than did the typical nonparticipating candidate.

Participating candidates rely not just on more donors, but on more small donors. In 2009, the typical participating City Council candidate enlisted the support of almost triple the number of small donors than did her non-participating counterpart; four years before, participants garnered support from more than double the small givers than non-participants.

This increased reliance on small donors drove down the average contribution size for participating candidates as compared to non-participants. In 2009, the average contribution to a participating City Council candidate was \$199, less than one-third the \$690 average contribution for non-participating candidates. In 2005, the average contribution to participating City Council candidates was \$321, significantly lower than the \$804 average contribution for non-participants.

“Our fundraising pitch was based on the multiple-match.”
 - City Councilmember
 Brad Lander

...

Both newcomers and veteran politicians alike state that the system leads to more competitive races.

- City Council Speaker Christine Quinn noted that “the system makes it much more likely that a candidate who only has access to small donors will run for office.”
- City Councilmember Mark Weprin commented: “The system definitely accomplishes the goal of making it easier to have a competitive race. [My opponents] probably had a lot more resources because of the system and the matching funds. Because we all raised money right up to the spending limit, we were operating with almost the same amount of resources. It was harder for me but good for the district.”
- Councilmember Jumaane Williams, one of five City Council candidates to defeat an incumbent in 2009, explains how the matching system made his victory possible. “My opponents had access to big money in a way that I do not, but the matching fund helped me keep up with them in fundraising. The availability of matching funds absolutely makes it easier for someone like me to run for office in New York, particularly given that I was challenging an incumbent. Without matching funds, winning would have been more difficult if not impossible.” Ultimately, Williams was able to raise more money—much of it in small contributions—than his incumbent opponent.

Nicole Gordon, the former director of the Campaign Finance Board, clarified that the purpose of the system is not to unseat incumbents, but to foster better representation:

One of the most important things we can hope for from a better campaign finance system is not that incumbents get thrown out and maybe not that there are narrow margins of victory, but simply the regular presence of opposition and the threat that someone might have the wherewithal to make a meaningful run for office. This is very important because it forces elected officials to focus on what the voters want, keeps the officials from becoming complacent about the power of incumbency, and, I hope, not distracted by all the other pressures placed on them.

In 2009, the system helped a crop of challengers actually defeat incumbents. All five incumbents who lost re-election in 2009 were defeated by candidates who participated in the program. Again, many factors contribute to electoral outcomes—including public anger over the change in term limits and the effects of the economic recession. It is impossible to parse the precise role the matching system plays in unseating incumbents. But in all five cases, the participating candidates nearly matched, equaled or exceeded the funds raised by the doomed incumbents.

“The system definitely accomplishes the goal of making it easier to have a competitive race.”
- City Councilmember
Mark Weprin

Opponents of public funding insist that only self-financing candidates (or those able to raise huge sums) can effectively dislodge incumbents. In fact, the record of successful public funding systems shows a different reality. Under the presidential public funding system, which worked well for two decades, three challengers defeated incumbent presidents. New York City’s system adds to the data suggesting that if nothing else, public funding boosts competition.

...

This report demonstrates that a multiple matching system can shift the dynamic of political fundraising. The New York City system engages voters early in an election campaign, and encourages them to stay connected to candidates. For this reason alone, it promotes the core values inherent in our elections—to produce government bodies that represent “We the People” and not just special interests. Candidates report that when they fuse voter outreach with fundraising from small donors, they are rewarded with early support and sufficient funds to run competitive campaigns. Careful oversight by an independent agency, combined with thorough review after each election, promotes public confidence in the system, and provides information on how the system can be improved. In New York City, we have found ample evidence that this model of campaign financing works—for the candidates, but most importantly, for the voters.

The introduction of the Fair Elections Now Act and the Presidential Funding Act of 2010 demonstrates that interest in the multiple match system—and in particular, its innovative offspring, the small donor multiple match—has developed significant new momentum.

Small donor multiple matching has recently been endorsed by prominent academics Anthony Corrado, Michael Malbin, Thomas Mann, and Norman Ornstein. In their recent report, they argue that a system that provides a multiple match for only small donors would create the strongest possible incentive for candidates to seek out small donors.

Several factors are driving this next generation multiple match.

One is technology: The rise of Internet fundraising makes plausible, for the first time, a culture of small giving as the engine of campaign financing. However, technology alone cannot unilaterally transform campaign fundraising. The small donor revolution of 2008 was real, but incomplete. Although small donors made headlines in the presidential race, the small donor revolution remains just a rumor on Capitol Hill. Congressional candidates still are raising their funds the old-fashioned way: in large amounts, flowing overwhelmingly to incumbents, from individuals and political action committees with a direct economic interest in legislation. Small donor matching systems will provide the needed incentives to make the possibility of small donor fundraising a reality.

Another reason for interest in the multiple match is the recent trend of Supreme Court litigation. Opponents of reform are raising an armada of challenges to campaign finance reform generally. Given *Buckley v. Valeo*'s approval of the matching system in presidential elections, the small donor multiple match is currently a constitutional safe harbor.

The small donor multiple match has advantages over other approaches, and drawbacks as well. The multiple match boosts the voices of ordinary citizens and incentivizes candidates to organize voters, fusing fundraising and organizing. A match for only small donors will only amplify this effect.

On the other hand, one of its drawbacks is that candidates must continue to fundraise, imposing a severe time drain on lawmakers. There is no golden moment when fundraising no longer matters, and candidates can focus solely on communicating with voters.

In addition, a multiple matching fund system would require skilled administration and enforcement. It requires campaigns to create and maintain accurate records, and requires already overburdened FEC staff to process significant amounts of information showing multiple small gifts in order to approve funding grants. The current FEC does not have the staff or infrastructure to handle these increased demands.

We encourage Congress to use the evidence and policy considerations set forth in this report to bolster efforts to transform the current federal regulatory morass into a new model that promotes citizen engagement and fair elections. ■

VOTING RIGHTS & ELECTIONS

Crossing the Line: When “Ballot Security” Becomes Voter Suppression

Wendy Weiser and Vishal Agraharkar

In 2010, some political activists – many associated with the Tea Party – threatened to police the polls to prevent supposed “voter fraud.” When does vigilance become vigilantism?

“Ballot security” is an umbrella term for a variety of practices that are carried out by political operatives and private groups with the stated goal of preventing voter fraud. Far too often, however, ballot security initiatives have the effect of suppressing eligible votes, either inadvertently or through outright interference with voting rights.

There is nothing intrinsically wrong with investigating and preventing voter fraud, despite the fact study after study shows that actual voter fraud is extraordinarily rare. But democracy suffers when anti-fraud initiatives block or create unnecessary hurdles for eligible voters; when they target voters based on race, ethnicity, or other impermissible characteristics; when they cause voter intimidation and confusion; and when they disrupt the voting process.

Unfortunately, historically and in recent elections, “ballot security” operations have too often had these effects. One federal court recently found that ballot security operations planned or conducted in recent years have largely threatened legitimate voters. As the court found, not only have such initiatives often targeted eligible voters for disenfranchisement, but they also disrupt polling places, create long lines, and often cause voters to feel intimidated. These effects are disproportionately felt in areas with large concentrations of minority or low-income voters, where such operations have typically been directed.

This election season, there has been a marked increase in efforts to organize “ballot security” initiatives and otherwise mobilize activists to police against voter fraud. Political groups and activists across the country have been pouring substantial resources into such programs and are encouraging and training their members and private citizens to serve as voter challengers or poll watchers and to take steps to deter or prevent voter fraud. This is occurring to an extent we have not seen in years. Based on past experience, there is a significant risk that ballot security operations will result in vote suppression and voter intimidation during the November 2010 elections, regardless of whether or not this is their intended result.

Excerpted from *Ballot Security and Voter Suppression: Information Citizens Should Know*, October 2010.

This paper addresses four types of conduct that often accompany ballot security initiatives:

Voter challenges: formal challenges lodged by political operatives or private citizens to the eligibility of persons presenting themselves to vote, either at the polls or prior to Election Day;

Voter caging: efforts to identify and disenfranchise improperly registered voters solely on the basis of an undeliverable mailing;

Voter intimidation: conduct that intimidates or threatens voters into voting a certain way or refraining from voting; and

Deceptive practices: the dissemination of misleading information regarding the time, place, or manner of an election.

Because this conduct has the potential to interfere with the lawful exercise of the franchise, it is important for everyone involved in the process to have a clear understanding of what is permissible and what is not permissible conduct. Specifically, voters should be armed with the knowledge that federal and state laws afford protections against ballot security efforts when they are discriminatory, intimidating, deceptive, or when they seek to disenfranchise voters on the basis of unreliable information. Those who participate in ballot security programs should take care to ensure that their initiatives do not encroach upon the rights of eligible voters and run afoul of state and federal laws. ■

Voting Machine Failures

Lawrence Norden

What happens when voting machines are lemons? Surprisingly, they break often – and governments who buy them have few tools to learn of problems. Manufacturers do not have to report defects. In fact, they are not even required to alert other jurisdictions using the same defective machines. A solution: a national public database where manufacturers would be required to report machine defects and problems.

Failed voting machines, frustrated voters, and lost votes: these have been a constant in news reports following every recent major election cycle. That should not be surprising. The voting systems used in the United States today are complicated machines; each runs on tens of thousands of lines of software code. As with automobiles and airplanes, automatic garage door openers and lawnmowers, occasional malfunctions are inevitable—even after rigorous product testing.

When it comes to system failures, however, voting machines are different from automobiles and airplanes and other products in at least one important respect: for the vast majority of voting systems in use today, (1) manufacturers are not required to report malfunctions to any government agency, and (2) there is no agency that either investigates such alleged failures or alerts election officials and the general public to possible problems (let alone requires voting system manufacturers to fix such problems).

As this report demonstrates, the consequence of this lack of oversight is predictable. Voting systems fail in a particular county in one election, and then again later, under similar circumstances, but in a different locale. These repeated failures disenfranchise voters and damage public confidence in the electoral system.

The Brennan Center reviewed hundreds of reports of problems with voting systems in the last eight years, and closely studied 14 of them. Our study shows that election officials and the public are often completely reliant on the private companies that sell and service this voting equipment and related service contracts to voluntarily keep them aware of potential problems with these systems.

Excerpted from *Voting System Failures: A Database Solution*, September 2010. After the report's publication, the California legislature passed a bill creating a statewide database. Gov. Arnold Schwarzenegger signed it into law, despite previously vetoing similar proposals.

As one election official we interviewed noted, “[V]endors are in the business of selling machines, and often don’t have an incentive” to inform present and future customers of certain problems with their systems.

The core thesis of this report is simple: We need a new and better regulatory structure to ensure that voting system defects are caught early, officials in affected jurisdictions are notified immediately, and action is taken to make certain that they will be corrected for all such systems, wherever they are used in the United States.

Based on our review of regulatory schemes in other industries, we are convinced that the focal point for this new regulatory system must be a clearinghouse—a national database, accessible by election officials and others, that identifies voting system malfunctions that are reported by voting system vendors or election officials. If this database is going to have any real benefit, voting system vendors must be required to report all known malfunctions and election officials must have full access to the database.

The Election Assistance Commission (EAC), the relatively new federal agency charged with the task of creating a testing program for new voting systems has, within its limited federal mandate, made great strides in the last two years increasing quality control for some of the country’s newest voting systems.

However, to fully address the problem of underreported and unaddressed voting system problems, the EAC or another federal agency should be given statutory authority and resources to fully implement the kind of database recommended in this report. Such a database would make our electoral system stronger.

It would be easier for election officials and others to ensure that their equipment is as user-friendly and accurate as possible. It would also make voting machine vendors more accountable to public officials and taxpayers, incentivizing manufacturers to enhance internal controls. Given the billions of dollars spent by federal and local governments to purchase and maintain new voting equipment over the last several years, this is no small thing.

Three fundamental findings result from our study of past reported problems, review of current law and contracts for the use and regulation of voting systems, and interviews with election officials:

1. There is no central location where most election officials can find comprehensive information about problems discovered with their systems before each election.

- State and local election officials we interviewed tell us that they must rely almost exclusively on the voting system vendors for information about malfunctions, defects, vulnerabilities, and other problems that the vendors have discovered, or that have occurred with their voting systems in other states.
- A change in election administrators can sometimes mean a loss of knowledge about all of the potential problems with a voting system as well as procedural safeguards necessary to prevent those problems.
- There are approximately 4,600 separate jurisdictions across the United States that administer elections.

2. Vendors are frequently under no legal obligation to notify election officials or the public about problems with their systems.

- While purchase or service contracts sometimes bind election officials to inform vendors of malfunctions, vendors are not always similarly obligated to inform officials of problems reported to them.
- Voting system vendors are under no legal obligation to notify any federal agency of problems they discover with the vast majority of their systems in use in the United States today, despite the fact that hundreds of millions of federal dollars have been spent to purchase such equipment.

3. The same failures occur with the same machines, in one jurisdiction or another, election after election.

- Most of the election officials we interviewed in connection with our review of reported problems claimed to have had no prior warning of the issues we discuss. By contrast, in most cases, the vendors were (or should have been) aware of the problems—often because the same problem had been reported to them earlier by another election official.
- Frequently, these malfunctions—and their consequence, disenfranchisement—could have been avoided had election officials and/or public advocates known about earlier problems and had an opportunity to fix them.

Central Recommendation: Creation of A National Database for Voting System Problems

Given the nature and importance of voting systems to our democracy, we need a new regulatory structure to ensure that voting system defects are caught early, disclosed immediately, and corrected quickly and comprehensively. Accordingly, this new regulatory system must center around a mandatory national clearinghouse, administered by a federal agency empowered to investigate violations and enforce the law.

Based upon our interviews with election officials and regulatory experts, and our review of analogous regulatory structures in other important industries, we conclude that the clearinghouse must include four key elements to work effectively:

1. A Publicly Available, Searchable Centralized Database

Election officials, in particular, would benefit from a publicly available, searchable online database that includes official (i.e., election official-reported or vendor-reported) and unofficial (i.e., voter-reported) data regarding voting system failures, and vulnerabilities, and other reported problems, and establishes criteria for the database's contents and organization.

2. Vendor Reporting Requirements

Vendors must be required to notify the appropriate government agency of any known and suspected voting system failures and vulnerabilities, and other reported problems, including customer (i.e., election official) complaints, warranty claims, legal actions, and/or actions taken by the vendor to satisfy a warranty or investigate a reported problem.

3. A Federal Agency with Investigatory Powers

The best way to ensure that vendors address potential problems in a timely manner is to empower the appropriate government agency to investigate all voting system failures and vulnerabilities listed on the database, grant the agency subpoena power to facilitate its investigations, and require vendors to, among other things, maintain records that may help the agency determine whether there are indeed voting system failures or vulnerabilities and whether the vendor has taken appropriate action to address the failures or vulnerabilities.

4. Enforcement Mechanisms

The appropriate government agency must have the power to levy civil penalties on vendors who fail to meet the reporting requirement or to remedy failures or vulnerabilities with their voting systems. ■

Voter Registration in a Digital Age

Christopher Ponoroff and Wendy Weiser

In the first in-depth survey of the most recent innovations in modernized voter registration, the authors found that, above and beyond saving money and improving accuracy, they also boost registration rates.

Millions of Americans register to vote each year, and millions more update their registration information. Between 2006 and 2008, states received more than 60 million voter registration forms, most on paper. This labor-intensive paper system swamps election officials, burdens taxpayers, and creates a risk for every voter that human error—a misplaced form, a data entry slip—will bar her access to the ballot box.

A comprehensive national study found that registration problems kept up to three million people from voting in 2008. A paper-based system may be the best the nineteenth century had to offer, but it is out of step with the higher-tech approach in other spheres of American life, and the approach in other democracies.

Fortunately, paper-based voter registration has quietly begun to go the way of ticker tape. Now at least 17 states electronically transfer voter registration data from Departments of Motor Vehicles (DMV) to election authorities; in some states, the process is entirely paperless; in others, officials use paper forms solely to obtain some information, like signatures. Secure online voter registration is now available in seven states, and is under development in at least five more. In the past two years alone, 11 states have developed paperless systems, and many others have begun to consider reform.

This report is the first in-depth survey of these registration innovations—“automated” voter registration, in which government offices like DMVs collect and transfer voter registrations electronically, and online voter registration, in which citizens submit voter registration applications over the Internet. Based on documentary research and interviews with election officials in 15 states, this report explains how paperless voter registration works, reviews its development, and assesses its impact.

The bottom line: paperless voter registration yields substantial benefits for voters and governments alike.

Excerpted from *Voter Registration in a Digital Age*, July 2010.

Key Findings

1. Paperless voter registration is cost-effective and saves states millions of dollars each year

- It cost Arizona less than \$130,000 and Washington just \$279,000 to implement both online voter registration and automated voter registration at DMVs.
- Delaware's paperless voter registration at DMVs saves election officials more than \$200,000 annually on personnel costs, above the savings they reaped by partially automating the process in the mid-1990s. Officials anticipate further savings. Our paper-based voter registration system may be the best the nineteenth century had to offer, but it is out of step with the higher-tech approach in other spheres of American life.
- Online and automated DMV registrations saved Maricopa County, Arizona over \$450,000 in 2008. The county spends 33¢ to manually process an electronic application, and an average of 3¢ using a partially automated review process, compared to 83¢ for a paper registration form.

2. Paperless voter registration is more accurate and reliable than paper forms

- Officials consistently confirm that paperless registrations produce fewer errors than paper forms and reduce opportunities for fraud.
- A 2009 survey of incomplete and incorrect registrations in Maricopa County, Arizona found that electronic voter registrations are as much as five times less error-prone than their paper-based counterparts.

3. Paperless voter registration increases voter registration rates

- DMV voter registrations have nearly doubled in Washington and Kansas, and increased by even more in Rhode Island.
- Seven times as many South Dakotans submitted voter registrations at DMVs after the state implemented an automated system.
- Registration rates among 18 to 24 year-old citizens rose from 28 to 53 percent after Arizona introduced online and automated registration.

Given the clear benefits, it makes sense that more and more states have begun to adopt paperless registration. Although Congress is currently considering reforms along these lines, this paper focuses on state-based reform efforts. The movement online provides additional state-by-state information. In a field often subject to partisan bickering, it is noteworthy that state voter registration innovations have earned praise from Republicans and Democrats alike, as well as from election officials and agency personnel. Paperless voter registration is the wave of the future. ■

A Citizen's Guide to Redistricting

Justin Levitt and Erika Wood

Re-issued and updated to coincide with the census, this easy-to-use guide demystifies the complex issues of redistricting and ensures that citizens can meaningfully monitor and participate in the reapportionment process.

The coming year will bring an enormous political event about which the American public is almost completely unaware: redistricting. Once per decade, every state in the country re-draws its districts for Congress, state legislatures, and local government. At the most basic level, redistricting ensures that about the same number of people live in each district and, as a result, that each person is equally represented in our government.

Redistricting brings with it tremendous opportunities, and tremendous challenges, for creating fair and equal representation in government. In past cycles, legislative districts have often reflected sophisticated calculations executed in the back-room far from the public eye. The resulting districts often split cohesive communities and produce legislatures that neither meaningfully represent constituents, nor reflect the diversity and views of the public. In contrast, an open and transparent redistricting process can help ensure that those who are elected actually serve citizens. Sunlight will inspire confidence in a process and outcome recognized as fair.

The current process in many states continues to be opaque: The public pays little attention to the problem, and legislators who stand to benefit from the status quo have every incentive to leave the issue in the dark.

The Brennan Center is working to make this redistricting cycle more transparent and responsive to communities than ever before. Based on our research and advocacy, we have identified two key failings of the current redistricting system:

- First, the process is marked by secrecy, self-dealing, and backroom logrolling among elected officials. The public is largely shut out of the process. Our work, first and foremost, seeks to give advocates and the media tools to crack open the door and bring public pressure to bear on an often impermeable process.

Excerpted from *A Citizen's Guide To Redistricting, 2010 Edition*, November 2010. The Brennan Center drafted the new law to end prison-based gerrymandering in New York. In the next redistricting cycle, people in prison will be allocated to their home communities rather than where they are incarcerated.

- Second, we believe that the redistricting process must be more responsive to communities. For communities of all kinds to be fairly represented in our government, the redistricting process needs to recognize and be accountable to real communities. Communities can take on many different forms and can be defined, both by description and boundary, in myriad ways. But every community has some shared interest—and it should be the members of that community who decide what that is, not legislators in a back room cherry picking their constituents, trolling for donors or carving out challengers.

These goals reinforce: A truly representative outcome will only come if the redistricting process is open and transparent, allowing for public engagement, and if the public is educated, organized, and ready to engage. If advocates are successful in getting legislators to hold hearings, the chamber needs to be full and community members need to be armed with plans, opinions, and ideas to share.

This Guide will provide engaged citizens with the knowledge and tools they need to get involved with this round of redistricting, and to work towards continuing reform to open up the redistricting process in decades to come. If you care about representation, political power, or public policy, then you care about redistricting. ■

Jim Crow in New York

Erika Wood

New York's current felon voting bar can be traced to a century-long effort to keep African-Americans out of the voting booth.

Most people do not realize that Jim Crow laws once existed in the North, perhaps most notably in New York. A law enacted nearly 140 years ago—intended to disenfranchise African-Americans—is still in effect here today.

New York's election laws disenfranchise people who are in prison or on parole. More than 108,000 New Yorkers are disenfranchised under those laws; 80 percent of those who have lost the right to vote are people of color.

Here is the history.

Starting with the first state constitution in 1777, New York lawmakers found various ways to keep African-Americans from voting. First, there was slavery. After emancipation, two laws continued to be especially effective. One required blacks—and only blacks—to own a certain amount of real property in order to vote. The other allowed counties to disenfranchise those convicted of “infamous crimes.”

African-American suffrage was the subject of much debate at the 1821 and 1846 state constitutional conventions, and the transcripts contain some astounding racist rhetoric. A recurring theme was an alleged criminal propensity among African-Americans as a reason to restrict the black vote. Delegate Samuel Young implored in 1821: “Look to your jails and penitentiaries. By whom are they filled? By the very race whom is now proposed to cloth with the power of deciding upon your political rights.”

By 1872, New York was the only state to make property ownership a voting requirement exclusively for African-Americans. But the 15th Amendment to the Constitution forced New York to revisit its constitution.

Gov. John Hoffman convened a few dozen “eminent citizens” to figure out what to do. Hoffman's commission eliminated a few sections and added some words here and there. The result was a Jim Crow “bait and switch” that remains the law today.

In 1874, the state Legislature had no choice but to accept the commission's recommendation and eliminate the property requirement from the constitution. However, the commission also recommended a barely noticed change to the criminal disenfranchisement provision that had an enormous—and lasting—adverse impact on African-American suffrage.

During slavery and the period when property requirements were imposed on African-Americans, the state constitution let counties decide whether to disenfranchise those with criminal convictions. When the property requirements were eliminated in 1874, the constitution was amended to require disenfranchisement of anyone convicted of an “infamous crime.”

Between 1865 and 1900, 19 other states passed similar laws. By 1900, 38 states had some type of criminal voting restriction. This national movement, together with New York's notorious history

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of deliberate efforts to disenfranchise African-Americans, the enduring and widespread belief among policy makers that blacks were more likely to commit crimes, and the timing corresponding with the elimination of the black property requirements, all lead to the same conclusion: The amendment was intended to suppress the African-American vote in New York.

The same law is on the books today, and its intended effects continue.

There is a broadening consensus across the country that restoring the right to vote to people living in the community is not just important for

our democracy, but that giving people a voice in the community makes them stakeholders and less likely to commit future crimes.

We cannot erase this history, but we must learn from it and work to correct centuries of discrimination and disenfranchisement.

The Legislature should pass bills pending before it that would restore the right to vote to people who are out of prison living in the community. If the Legislature does not act, Governor David Paterson should issue an executive order to do just that. This relic of Jim Crow cannot continue to live in the laws of New York. ■



FIXING CONGRESS,
THE BROKEN BRANCH

Hyperpartisanship

Richard H. Pildes

Congress has been torn by a rise in fierce partisanship. Why did American politics grow so divided? In his Jorde Symposium at Princeton University, a top expert in the law of democracy identifies a surprising factor in today's hyperpartisanship: the 1965 Voting Rights Act. The white Southern Democrats moved to the GOP, while new black voters joined the Democrats — and the country moved to a system of two ideologically distinct parties, often deeply at odds. Will this change? Not anytime soon — and maybe it shouldn't.

American democracy over the last generation has had one defining attribute: extreme partisan polarization. We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century. Moreover, this dramatic polarization, though perhaps now so familiar as to be taken for granted, is actually relatively recent. Only over the past generation has it emerged. Before then, most of twentieth century American politics, while driven by its own conflicts, had nothing like the political-party polarization that arose and has endured throughout our era. As one of the most popular books on the subject puts it, on major issues, now nearly all Republicans and Democrats “line up against each other with regimented precision, like nineteenth-century armies that marched shoulder to shoulder onto the battlefield.” Even in the Senate, the most conservative Democrat is now more liberal than the most liberal Republican. The parties have become purer distillations of themselves. They are internally more unified and coherent, and externally more distant from each other, than any time over the last 100 years. A center in America's governance institutions has all but disappeared.

Politics as partisan warfare: that is our world. Nor is this extreme polarization limited to the halls of Congress. Assessing citizen views about politics is trickier than gauging voting records in Congress, but at least by some measures, Americans as a whole have become dramatically more partisanly divided over the last generation, too. Over the last generation, voters have sorted themselves out so that their party affiliation and their ideology are far more aligned now than 30 years ago: Most self-identified conservatives are now Republicans, while liberals are Democrats. Split-ticket voting has declined sharply: More voters consistently vote for the same party, whether

NYU Law Professor Richard Pildes delivered our spring Thomas M. Jorde Symposium, held at the Woodrow Wilson School at Princeton. The remarks were the basis for this essay, excerpted from a forthcoming issue of the *California Law Review*. The Jorde Symposium was created in 1996 by Brennan Center Board Member Thomas M. Jorde to foster top-rate scholarly discourse from an array of perspectives.

for House, Senate, or the Presidency. Voters who have become sorted in this way are more strongly attached to their party affiliation; these party loyalties are manifested in various ways that shape policy and elections.

Take, for example, whether citizens approve of the President's performance. From the Eisenhower years through the Reagan ones, the 1950s-1980s, citizens who identified themselves with one party or the other gave Presidents of their own party higher approval ratings, of course, than citizens who supported the other party. But the gap was modest, ranging from 22-39 points between how much supporters of the party in power approved the President and how much his opponents did. In the 1980s, though, that gap shot up to 60 points (80 percent of the party in power's voters approve of the President's performance but only 20 percent of other party's voters do), where it has more or less remained ever since. Now we have entered the Obama era, a partisan transition in the Presidency. One year in provides an apt opportunity to reassess how temporary or enduring is dramatically polarized democracy in America. To the extent anyone (particularly liberals) thought it was the Bush presidency that was exceptionally divisive—or even intentionally polarizing—and hence the cause of this extreme polarization, we have transitioned to a new moment. Yet if the thought was that the election of President Obama would be a magic elixir, healing and dissolving these divisions, the signs suggest these divisions are not softening. If anything, they continue to harden. Consider within Congress: The two major legislative issues of the Obama Presidency thus far have been economic stimulus and health care. In February 2009, the massive stimulus bill was enacted without a single Republican vote in the House and only three Republican votes in the Senate; on the other side of the coin, not a single Democrat in the Senate voted against it and only seven in the House did so. Healthcare legislation was enacted in the face of even more extreme partisan division: Not a single Republican in either House or Senate voted for the most far-reaching piece of domestic legislation in 45 years.

*Politics as
partisan warfare:
that is our world.*

Or consider the public more generally: Those affiliated with opposing parties continue to have vastly divergent views of President Obama's performance. The partisan gap in approval ratings for President Obama is larger than it has even been for a President at this stage; one year in, only 18 percent of Republicans, but 82 percent of Democrats, approve of Obama's performance—a gap of 64 points. From the Eisenhower through the Carter years, this gap in one-year approval ratings never exceeded 34 points; since then, it has averaged 48 points. Another perspective on these measures: Before Reagan, no President had averaged more than a 40 point gap in approval rating during his term; starting then, only the elder George Bush has averaged less than a 50 point gap. As difficult for Obama supporters as it may be to believe, those opposed to him are as vehemently opposed as Democrats were to George W. Bush. For a generation now, Americans of different parties have lived in different worlds, and do so today, when they look at the President. This general polarization appears to be driven from the top down, rather than the bottom up: As political elites (those who hold office) have become more sharply polarized, voters have become identified themselves more strongly and consistently in partisan terms.

The aim of this lecture is to explore whether the extreme polarization that has characterized our politics over the last generation is likely to continue to endure for years to come, and whether we can do anything about it, should we choose to. Assessing this momentous question concerning our political future depends on understanding what has caused the rise of extremely polarized American democracy. If the causes are deep, structural transformations in American politics and life, there is little reason to expect the nature and dynamics of our politics to change. Nor could we do anything about it, even if we wanted to. If the causes do not lie so deep, but instead rest on specific features of the way politics has come to be organized and institutionalized, then hyperpolarization is not inherent to democracy in America today. If we could identify the specific features of the way politics has come to be organized that account for extreme polarization, we could, in principle, change those features and restore a center to American politics. And if the cause of polarization is more a matter of particularly polarizing and divisive political leaders, rather than anything either in deep structural transformations of American politics or anything about specific institutional features of the way democracy is currently organized, then we could escape extremely polarized partisan divisions by finding and choosing leaders who seek to forge broad-based consensus around a revitalized center.

Three principal types of causes have been offered for the eruption of American politics into radically divided, warring partisan armies. These potential causes are persons, history, and institutions, as I will call them. I want to explore these potential explanations in order to suggest whether American democracy is likely to continue to remain hyperpolarized for years to come and what, if anything, can be done to re-create the kind of center that existed in American politics before the last generation. At the end, I conclude with some brief thoughts on the consequences of radical polarization for American government. If the causes of polarization cannot be changed, is there some way to manage the likely consequences? At the opposite end of the spectrum of possibilities are large scale structural transformations in the foundations of American democracy. These transformations can be traced, in a sense, to a single Act of Congress, the Voting Rights Act of 1965 (VRA), a statute I have written about for many years. More specifically, it is due to what I call the first generation of the VRA's implementation.

The VRA is undoubtedly the most important and most effective civil-rights statute ever enacted. It also unleashed forces that, building on themselves over several decades, have caused a tectonic shift in the underlying foundations of American politics. The culmination of this shift is perhaps the major cause of the kind of hyperpolarized, party politics we now have. If this view is right—as I think it mostly is—it means we should see the practice of democracy before the current era as, in some sense, “unnatural.” Thus, the twentieth century figures we associate with moderation, compromise, and appeals to the center should perhaps be viewed as manifestations of an earlier, less mature stage of American democratic development. Conversely, the hyperpolarization of the last generation should be understood as the steady-state of American democracy, the manifestation of a more mature American democracy, and hence likely to be enduring.

If this sounds topsy-turvy, it is because many people fail to appreciate that from roughly 1890-1965, the South was a one-party political regime, much like one-party authoritarian states around the world. Nor was the complete monopoly the Democratic Party had on the South throughout those years the product of routine forces of political competition, as if the Democratic Party in the South was merely the Microsoft of its era. Instead, that monopoly came about through a sequence of purposeful actions taken at the end of Reconstruction, which included violence, intimidation, informal manipulation, and fraud during elections, eventually culminating in long-term, lasting legal changes in statutory law and state constitutions that redefined and massively contracted the Southern electorate. These legal changes effectively eliminated or drastically reduced African American electoral participation, and, though this consequence is less well appreciated, also reduced the white electorate by perhaps as much as one-third in some states. Although we tend to see this process through the lens of race, and view this history as

about the assertion of white supremacy, it is also a story about political competition and its suppression. The Democratic Party in the South, by using laws and state constitutions to redefine the Southern electorate in its own image, succeeded in destroying the foundation for any politically effective challenge to the Party's domination. The one-party South was not the "natural expression" of "Southern" political preferences; it was an artificial monopoly created through the use of state power to eliminate competitors. I am not sure what the right analogy would be in the economic sphere. It's not just as if Microsoft were to get laws passed that made it impossible for Apple to compete effectively; it's as if Microsoft got laws passed that eliminated potential Apple consumers from being able to participate in the marketplace. The projection of this Southern pathology onto the national political landscape were political parties incoherently divided internally. Partisan loyalties did not neatly track ideological ones (as they do today). The Democratic Party was a coalition of Southern Democrats, extremely conservative on race or any issue that even conceivably touched on race, along with moderate to liberal Democrats from other parts of the country. This in turn enabled the Republican Party to sustain its own divided coalition of liberals and moderates, mostly from the Northeast and the West Coast, and much more traditional, old-line conservatives from the Midwest and other rural areas. Political scientists describe the country as having a "four-party system," particularly from 1937 on. As one study shows, during this era, even though Democrats formally controlled the House, the largest bloc was almost always conservative Republicans; then liberal Democrats; then conservative Democrats; and finally, moderate Republicans (the same was true for the Senate). None of these groups were large enough to pass legislation; doing so required strong support from at least two of the groups. As a result, any significant legislation required compromise and bargaining across party lines. This is the era being looked back to nostalgically by those who exalt a prior generation's political leaders who were able to forge "compromises" and transcend party divisions. Such figures existed not as a matter of individual personality in isolation, but because the structural environment of parties and politics then meant that compromises existed to be had—and that compromise was recognized by all to be essential to legislate at all.

As an example, even when the Democratic Party controlled all three of the House, Senate, and Presidency during the Kennedy and Johnson administrations, the party was fragmented and not coherent on many major issues, especially, of course, those that touched on race. Much of the major legislation of this period required bipartisan support from majorities of moderate and liberal Republicans and Northern Democrats to defeat a "conservative coalition" dominated of Southern Democrats and Republicans: the Civil Rights Act (1960), the Higher Education Act (1963), the Civil Rights Act (1964), the Voting Rights Act (1965), the Immigration Act (1965), and the Open Housing Act (1968). Even Alaskan and Hawaiian statehood (1958 and 1959) required bipartisan coalitions to overcome concerted Southern Democratic opposition, because southerners viewed these new states as likely to elect representatives supportive of civil rights legislation. As this era was being forced to a close, the political scientist James MacGregor Burns, in his 1963 book, *The Deadlock of Democracy*, was able to write that "[t]he consequence of the four-party system is that American political leaders, in order to govern, must manage multi-party coalitions just as the heads of coalitional parliamentary regimes in Europe have traditionally done."

The 1965 VRA, and related changes in the era in constitutional doctrine and law, began the process of unraveling this system. The VRA began what might be considered the "purification" or "maturation" of the American political system. Put another way, the VRA initiated the rise of a genuine political system in the South, which meant the destruction of the one-party monopoly and the emergence, eventually, of a more normal system of competitive two-party politics. Just as the peculiar structure of the one-party South had projected itself onto the shape of national political parties, so too the dramatic transformation of Southern politics in turn reshaped the essential structure of the national political parties. As the VRA and related measures broke down the barriers to electoral participation in the South—literacy tests, poll taxes, manipulative registration practices, durational residency requirements—a massive infu-

Rather than entering a post-partisan stage, we are probably still in the midst of the process of party purification.

sion of new voters, mostly black but whites as well, entered and reconfigured Southern politics. These voters were, on average, much more liberal than the median white voting Southerner had been before 1965. No longer could conservative, one-party political monopoly be maintained. Over the next generation, these new voters ripped asunder the old Democratic Party of the South, eventually fragmenting it into two parties: A highly conservative Republican Party, into which many of these formerly Democratic Southern voters fled, and a new, moderate-to-liberal Democratic Party that was more in line ideologically with the rest of the Democratic Party nationwide. There was, of course, a self-reinforcing feedback dynamic to this whole process as well; as the Democratic Party became more liberal in the South, more conservatives fled it; as more conservatives fled, the Democratic Party became even more liberal.

Starting in the 1990s, a new feature of the recently amended VRA, the requirement that safe minority districts be created, added new fuel to this process. By concentrating Southern black voters into the majority in certain districts and removing them from most others, the effect was to eliminate districts in which white-black coalitions had controlled outcomes (districts in the 30-45 percent African American range, which had been electing moderate white Democrats). In Congress and state legislatures, white Democratic representatives were decimated; instead, representatives tended to become either very liberal Democrats, typically minority representatives elected from safe minority-controlled districts, or Republicans. Of course, these effects then fed back as well into the dynamic of party competition, increasing the separation of conservatives and liberals into two parties with increasingly coherent, and distinct ideologies. Safe districting was not the main cause of the emergence and polarization of two-party competition in the South, which was inevitable once the 1965 VRA was enacted, but it might have accelerated that process by a decade.

For those skeptical that a 1965 statute could control the shape of democratic politics today, the key is to understand the gradual, though inexorable, nature of the profound transformation at work. It took years after 1965 before a robust two-party system, with a newly born Republican Party in the South, emerged. Not until roughly the mid-1990s did the South, for the first time in a century, become a genuine two-party system with robust, regular competition regularly taking place between them. From 1874-1994, for 60 consecutive elections, the Republicans were a minority of the southern delegation in the Senate and House; in 1994, that flipped in both chambers. Thus, the Republican Party became a genuinely national party for the first time since Reconstruction (as some historians note, not since Whigs fought Democrats in the 1830s and 1840s has American politics rested on a thoroughly nationalized two-party system.). This process only just began in 1965; the citizens the VRA newly empowered first had to start registering and turning out to vote; candidates had to begin appealing to those votes; the power of those votes had to manifest itself; pressure had to begin to be felt by the Democratic Party of the South to respond; as that party moved left, the Republican Party had to be reborn; candidates had to start to be willing to run under that banner; voters had to be willing to change their

party affiliation; existing officeholders had to become willing to change their party identity. The process of changing party affiliation, for both voters and officeholders, is an enormous, once-in-a-generation experience, if that. At some point in this dynamic, a tipping point gets crossed. Conservatives who had long thought of themselves as Democrats decide they are Republicans, and there is a cascade among others who perceive themselves the same. If one had to date that tipping point, it was probably in the years leading up to 1994, when what experts characterize as a “surge” of Republican officeholding occurred in the South—a surge that enabled Republicans nationally to take control of the House. It took about a generation, from 1965 to 1995, for the massive political restructuring wrought by the VRA to work its way through American democracy.

Rather than entering a post-partisan stage, we are probably still in the midst of the process of party purification. We have not reached equilibrium yet and party polarization might well increase further in coming years. Some of the Southern Democrats still in the House were elected nearly 20 years ago, in districts that are strongly Republican in national elections; they remain in office due to personal popularity and incumbency. When they retire, those seats will likely be filled by Republicans. The Democratic Party will be “purified” of some of its more moderate or conservative members. The “purification” process continues on the Republican side, as well, as primaries or their threat continue to push remaining moderates like Arlen Specter out of the party, and general elections become nationalized, so that entire regions are represented in the House by only one party—as became true of New England when Chris Shays, a moderate Republican from Connecticut, was defeated in 2008 by his Democratic opponent. Moreover, the more Americans participate in politics, the more polarized and partisan they become. And after decades of worrying in popular and academic commentary about the political passivity of Americans, over the last five years, Americans are participating much more, both in terms of voter turnout and other means of participation. Indeed, polarization among the public might have increased more in the last generation than among members of Congress. As one major analyst puts it, “Far from being disconnected from the public, Democratic and Republican candidates and officeholders are polarized precisely because they are highly responsive to their parties’ electoral bases.”

We are dealing with transformational historical forces here, forces as large as the end of American apartheid. The political realignment launched by the VRA was 30-40 years in the making. It has helped produce a world of political parties internally more coherent and unified and externally more differentiated and polarized from each other than in the pre-VRA world. Instead of thinking of this world as aberrational, or as the creation of a few polarizing figures, I suggest we should see it as likely to be the normal, ongoing state of American party politics. The period before the VRA, shaped by massive disenfranchisement in the South that sustained an artificial Democratic Party monopoly, was the aberrational one.

That is why I say that the poisonous state of hyperpolarized partisan politics over the last generation might be, paradoxically, a reflection of the full maturation of the American political system. And as such, it is likely to endure. ■

End the ‘Tyranny of the Minority’

Senator Tom Harkin (D-IA)

In the third annual Living Constitution Lecture at NYU School of Law, a senior senator decries the abuse of the filibuster — which has created a de-facto supermajority requirement for Senate legislative action.

Before the Bill of Rights and the Civil War Amendments—each containing vital protections for individual rights and liberties—the Founders enacted the Constitution to ensure that our citizens, through their democratically elected government, could effectively address problems facing the American people. As Justice Breyer wrote: “The Constitution is a document that trusts people to solve the problems of a community for themselves. And it creates a framework for a government that will help them do so. That framework foresees democratically determined solutions, protective of the individual’s basic liberties.”

However, the harsh reality today is that, in critical areas of public policy, our Congress is simply unable to respond effectively to the challenges that confront the United States today. Consider the major issues that the Senate has tried and failed to address: climate change and energy policy, labor law reform, and immigration reform, to name just a few.

And, more than 100 Obama nominees, 85 percent of whom were reported out of committee with overwhelming bipartisan support, are being prevented from even being considered by the full Senate. At this time in George W. Bush’s presidency, only eight nominees were awaiting confirmation.

Quite frankly, the unprecedented abuse of Senate rules has simply overwhelmed the legislative process. As Norman Ornstein, a leading political scientist, wrote in a 2008 article titled *Our Broken Senate*, “The expanded use of formal rules on Capitol Hill is unprecedented and is bringing government to its knees.”

Let me give you just a few examples. In February 2010, one Senator blocked confirmation of every single executive branch nominee. This past winter, one Senator insisted that a 767-page amendment be read out loud and in its entirety—also preventing the Senate from conducting other business for many hours. In March 2010, the minority even used arcane Senate rules to block routine committee hearings.

Senator Harkin delivered these remarks at the Brennan Center’s third annual Living Constitution Lecture, underwritten by the former clerks of Justice William J. Brennan, Jr., June 2010.

Let's be clear, these rules are not new, they have been around for a long time. What is new is the level of abuse. I have been in the Senate for a quarter century. Throughout my career, while there have certainly been ideological differences and policy disagreements, the leadership of the minority—sometimes Democrats and sometimes Republicans—while working to protect the broad interests of the minority, worked with the majority to make the system work. And there have been moderates willing to compromise and interested in the act of governing—of turning a bill into a law.

But, today, that is not the case. Some members of the minority party are so reflexively anti-government that in their mind, there can be no compromise. Rather than responsibly use the rules, they are willing to abuse Senate procedures in order to sabotage and grind the entire government to a halt. This is the case with just a handful of minority members—but that is enough. And, with the support or acquiescence of the caucus's leadership, they are able to prevent the Senate from acting. They are able to fulfill William F. Buckley's rather extreme description of a conservative as someone who stands "athwart history yelling stop."

In no area is this more pronounced than the abuse of the filibuster, which has been used in recent years at a frequency without precedent in the history of our country.

Historically, the filibuster was an extraordinary tool used only in the rarest of instances. When many people think of the filibuster, they think of the climax of the classic film "Mr. Smith Goes to Washington." There, Jimmy Stewart's character singlehandedly uses a filibuster to stop a corrupt piece of legislation favored by special interests. The reality, however, is that in 1939, the year Frank Capra filmed "Mr. Smith Goes to Washington," there were zero filibusters in the Senate.

Over a 52 year period, there was an average of less than one filibuster a year. In contrast, during the last Congress, 2007-2008, the majority was obliged to file a record 139 motions to end filibusters.

For the entire nineteenth century, there were only 23 filibusters. From 1917—when the Senate first adopted cloture rules for ending debate—until 1969, there were fewer than 50. In other words, over a 52 year period, there was an average of less than one filibuster a year. In contrast, during the last Congress, 2007-2008, the majority was obliged to file a record 139 motions to end filibusters. Already in this Congress, since January 2009, there have been 98 motions to end filibusters.

Let me give you another comparison. According to one study, in the 1960s, just 8 percent of major bills were filibustered. Last Congress, 70 percent of major bills were targeted.

The fact is, in successive Congresses—and I must admit, neither party has clean hands—Democrats and Republicans have ratcheted up the level of obstructionism to the point where 60 votes have become a de facto requirement to even bring up a bill for consideration. What was once a procedure used rarely and judiciously has become an almost daily procedure used routinely and recklessly.

...

The problem, however, goes beyond the sheer number of filibusters.

First, this once rare tactic is now used or threatened to be used on virtually every measure and nominee, even those that enjoy near-universal support. As Norm Ornstein wrote, “The Senate has taken the term ‘deliberative’ to a new level, slowing not just contentious legislation but also bills that have overwhelming support.”

In this Congress, the Republican minority filibustered a motion to proceed on a bill to extend unemployment compensation. After grinding the Senate to a halt, from September 22 through November 4, the bill passed 98-0. In other words, the minority filibustered a bill they fully intended to support just to keep the Senate from conducting other business. Likewise, for nearly eight months, the minority filibustered confirmation of Martha Johnson as Administrator of the General Services Administration, certainly a relatively non-controversial position; she was ultimately confirmed 96-0. And, for nearly five months, the minority filibustered confirmation of Barbara Keenan to the Fourth Circuit Court of Appeals; she was ultimately confirmed 99-0.

Second, the filibuster has also increasingly been used to prevent consideration of bills and nominees. Rather than serve to ensure the representation of minority views and to foster debate and deliberation, the filibuster increasingly has been used to assert the tyranny of minority views and to prevent debate and deliberation. It has been used to defeat bills and nominees without their ever receiving a discussion on the floor. In other words, because of the filibuster, the Senate—formerly renowned as the world’s “greatest deliberative body”—cannot even debate important national issues.

I mentioned that there have already been nearly 100 filibusters in this Congress. That is not a cold statistic. Each filibuster represents the minority’s power to prevent the majority of the people’s representatives from debating legislation, voting on a bill, or giving a nominee an up-or-down vote. Under current rules, if 41 senators do not like a bill and choose to filibuster, no matter how simple or noncontroversial, no matter that it may have the support of a majority of the House, a majority of the Senate, a majority of the American people, and the President, that bill or nominee is blocked from even coming before the Senate for consideration.

In other words, because of the filibuster, even when a party has been resoundingly repudiated at the polls, that party retains the power to prevent the majority from governing and carrying out the agenda the public elected it to implement.

...

At issue is a principle at the very heart of representative democracy—majority rule. Alexander Hamilton, describing the underlying principle animating the Constitution, wrote that “the fundamental maxim of republican government . . . requires that the sense of the majority should prevail.”

The Framers, to be sure, put in place important checks to temper pure majority rule. For example, there are Constitutional restraints to protect fundamental rights and liberties. The Framers, moreover, imposed structural requirements. For example, to become law, a bill must pass both houses of Congress and is subject to the President’s veto power.

The Senate itself is a check on pure majority rule. As James Madison said, “The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popu-

lar branch.” To achieve this purpose, citizens from small states have the same representation in the Senate as citizens of large states. Further, Senators are elected every six years.

These provisions in the Constitution are ample to protect minority rights and restrain pure majority rule. What is not necessary, what was never intended, is an extra-Constitutional empowerment of the minority through a requirement that a supermajority of Senators be needed to enact legislation, or even to consider a bill.

Such a veto leads to domination by the minority. As former Republican leader Bill Frist noted, the filibuster “is nothing less than a formula for tyranny by the minority.”

In fact, the Constitution was framed and ratified to correct the glaring defects of the Articles of Confederation—which required a two-thirds supermajority to pass any law, and unanimous consent of all states to make any amendment. The experience under the Articles had been a dismal failure—and one that the Framers were determined to remedy under the new Constitution. It is not surprising that the Founders expressly rejected the idea that more than a majority would be needed for most decisions.

In fact, the framers were very clear about circumstances where a supermajority is required. There were only five: Ratification of a treaty, override of a veto, votes of impeachment, passage of a Constitutional amendment, and the expulsion of a member.

It seems clear, to those who worship at the shrine of “original intent,” that if the Framers wanted a supermajority for moving legislation, they would have done so.

But, a supermajority requirement for all legislation and nominees would, as Alexander Hamilton explained, mean that a small minority could “destroy the energy of government.” Government would be, in Hamilton’s words, subject to the “caprice or artifices of an insignificant, turbulent, or corrupt junta.” I would not call the Republican minority in the Senate a “turbulent or corrupt junta,” but Hamilton’s point is well taken.

...

At this point, I do want to digress for a moment and discuss the current Republican minority. Much of the fault lies with the Minority Leader. In the past, Republican leaders have had to deal with extremists in their ranks who wanted to block everything—Jesse Helms is a good example. But, leaders, including Bob Dole, Trent Lott, and Bill Frist, while giving members like Helms a long leash, at some point said “enough!” They made clear that the Senator was acting outside the goal posts and that it would not be tolerated. What is different, today, is that the Minority Leader is not willing to constrain the most extreme elements within his caucus.

At issue is a principle at the very heart of representative democracy — majority rule. Alexander Hamilton, describing the underlying principle animating the Constitution, wrote that the “fundamental maxim of republican government...requires that the sense of the majority should prevail.”

I do not see how we can effectively govern a twenty-first century superpower when a minority of just 41 senators, potentially representing less than 15 percent of the population, can dictate action—or inaction—to the majority of the Senate and the majority of the American people.

James Madison also rejected a requirement of supermajority rule to pass legislation. He said “it would no longer be the majority that would rule, the power would be transferred to the minority.”

Unfortunately, because of the filibuster, Madison’s warning has become the everyday reality of the Senate. And, because of the reckless use of the filibuster, our government’s ability to legislate and address problems is severely jeopardized.

That is why I have introduced legislation to amend the Standing Rules of the Senate to permit a decreasing majority of Senators to invoke cloture on a given matter. On the first cloture vote, 60 votes would be needed to end debate. If the motion does not get 60 votes, a Senator can file another cloture motion and two days later have another vote; that vote would require 57 votes to end debate. If cloture is not obtained, a Senator can file another cloture motion and wait two more days; in that vote, 54 votes would be required to end debate. If cloture is still not obtained, a Senator could file one more cloture motion, wait 2 more days, and—at that point—just 51 votes would be needed to move to the merits of the bill.

Under my proposal, a determined minority could slow down any bill for as much as eight days. Senators would have ample time to make their arguments and attempt to persuade the public and a majority of their colleagues. This protects the rights of the minority to full and vigorous debate and deliberation, maintaining the very best features of the United States Senate.

As Senator George Hoar noted in 1897, the Constitution’s Framers designed the Senate to be a deliberative forum in which “the sober second thought of the people might find expression.”

...

I also believe my proposal would encourage a more robust spirit of compromise. Right now, there is no incentive for the minority to compromise; they know they have the power to block legislation. But, if they know that at the end of the day a bill is subject to majority vote, they will be more willing to come to the table and negotiate seriously. Likewise, the majority will have an incentive to compromise because they will want to save time, not have to go through numerous cloture votes and 30 hours of debate post-cloture.

At the same time, this reform would end the current tyranny of the minority, and it would restore a basic and essential principle of representative democracy—majority rule in a legislative body. At the end of ample debate, the majority should be allowed to act; there would be an up-or-down vote on legislation or a nominee. As Henry Cabot Lodge stated, “To vote without debating is perilous, but to debate and never vote is imbecile.”

And, there is nothing radical about the proposal I have introduced. The filibuster is not in the Constitution. Until 1806, the Senate had a rule that allowed any Senator to make a motion “for the previous question.” This mo-

tion goes back to the British Parliament and permitted a simple majority to stop debate on the pending issue and bring an immediate vote.

Further, there is nothing sacrosanct about requiring 60 votes to end debate. Article I, Section 5, Clause 2 of the Constitution—the Rules of Proceedings Clause—specifies that “[e]ach House may determine the rules of its proceedings.” Using this authority, the Senate has adopted rules and laws that forbid the filibuster in numerous circumstances. For example, the Senate has limited the filibuster with respect to the budget, war powers, and international trade acts.

Similarly, my legislation, far from being an unprecedented and radical change, stands squarely within a tradition of updating Senate rules as appropriate to foster an effective, smoothly operating government. For example, beginning in 1917, the Senate has passed four significant amendments, the latest in 1975, to its Standing Rules to limit the filibuster.

It is long past time for the Senate to again use its authority to restore its ability to govern effectively and democratically and for the majority of the Senate to exercise its constitutional right.

I have introduced my proposal, this year, as a member of the majority party. The proposal, however, is one I first introduced in 1995, when I was a member of the minority party. Thus, to use a legal term, I come with clean hands. So I want to be clear that the reforms I advocate are not about one party gaining an undue advantage. It is about the Senate as an institution operating more fairly, effectively, and democratically.

Even though I was in the minority in 1995, I introduced this legislation then because I saw the beginnings of an arms race, where each side would simply escalate the use of the filibuster. You filibustered 20 of our bills, we are going to filibuster 40 of yours, and so on. And, should the Democrats find themselves in the minority, I would not be surprised if there is a further ratcheting up. It is time for this arms race to end.

...

Justice William Brennan eloquently wrote that “[t]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”

The Founders adopted the Constitution to enable the American people, through their elected representatives, to govern. As Chief Justice Marshall made clear in *McCulloch v. Maryland*, any enduring Constitution is designed to, and must be able to, “respond to the various crises of human affairs.”

Unfortunately, I do not see how we can effectively govern a twenty-first century superpower when a minority of just 41 senators, potentially representing less than 15 percent of the population, can dictate action—or inaction—to the majority of the Senate and the majority of the American people. This is not democratic. Certainly, it is not the kind of representative democracy envisioned and intended by the Constitution. ■

Filibuster Abuse

Mimi Marziani and Susan Liss

In late 2010 and early 2011, a group of younger senators pressed for reforms of the filibuster. At one point all Democratic senators urged an end to the “current abuse of the rules.” Most proposals were deflected, but a new drive for institutional accountability was launched. This white paper set out the rationale for change.

When the history of the 111th Congress is written, the inability of the Senate to function as the deliberative body envisioned by the Founders will be at the center of any analysis. Time and again, the Senate failed to vote—or even deliberate—on bills that could address the serious issues facing our nation. Presidential appointees, federal judicial nominees, legislation addressing unemployment benefits, the environment, disclosure of political campaign contributions, and myriad other critical issues have been stalled or shelved. Why? Because the arcane rules of Senate procedure have repeatedly prevented crucial issues like these from reaching the Senate floor.

In recent years, a minority of senators have used these rules to engage in relentless obstruction, imposing a de facto 60-vote requirement for all Senate business that brings the body far from its constitutional ideal. The Framers of our Constitution clearly did not intend for 60 votes to be the norm. We are caught in a procedural arms race where stalemate often results. What has been accomplished has been riddled with unprincipled concessions to appease filibustering senators that distend the final product.

The current situation is simply unsupportable. There can be no doubt that the anger and frustration expressed by so many Americans about the inability of government to make their lives better can be directly attributed to the Senate’s repeated failure to act.

...

Over the last decade, Senate procedures have increasingly been used to prevent decision-making rather than to promote deliberation and debate. The threat of a filibuster—coupled with a 60-vote requirement to force any substantive vote—has affected nearly every action in the Senate during the last several years, under both Republican and Democratic majorities. As a result, the Senate has effectively ceased operating as the majoritarian institution our founders intended for it to be. For the first time in history, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary to conduct regular Senate business.

Excerpted from *Filibuster Abuse*, December 2010.

This de facto supermajority voting rule takes the Senate far from its constitutional ideal.

...

[T]he consequences of the relentless obstruction that plagues today's Senate are serious indeed. As explained below, the modern filibuster—constant and unprincipled—has grave effects upon our democracy. As it currently operates, the filibuster devalues the Senate as an institution, disrupts Congress's proper operation, threatens to derail governmental checks and balances, and blunts legislative accountability. These problems are exacerbated by the filibuster's close cousin, the indefensible practice of "holds" that allows a single senator to stop legislation or nominations from reaching the Senate floor. Indeed, holds placed for no reason other than to obstruct are, for all practical purposes, indistinguishable from a threat to filibuster.

Many fear the Senate is perilously close to total breakdown.

Even more alarming, the frequency of filibusters continues to rise. Throughout the 1990s, there were, on average, about 29 identifiable filibusters per congressional session. This number is ever-increasing: There were 32 filibusters in the 107th Congress, 27 in the 108th, and 36 in the 109th. In the 110th Congress, there were approximately 52 filibusters—a 44 percent spike from the previous session. While filibusters used to be reserved for controversial issues, almost all business in today's Senate is affected by the filibuster, routinely thwarting noncontroversial actions like appropriations bills and low-level executive appointments.

Unsurprisingly, recent years have also seen an unprecedented number of cloture motions filed—the only way under the Senate's current rules to end obstruction and force an up-or-down vote. Under Rule XXII, three-fifths of the entire Senate (currently, 60 senators) must vote to invoke cloture. And, as obstructionists can filibuster the same bill at several points during the legislative process, several cloture motions may be necessary to reach a substantive vote on any particular measure. Amazingly, the 125 cloture motions that have been filed this Congress (as of November 23, 2010) exceed the total number of cloture motions filed from 1919, when the Cloture Rule was first enacted, until 1975. This number is also more than double the average number of cloture motions filed per session from 1975 through 2005.

Each cloture motion consumes hours and hours of the Senate's valuable time. In addition to the time it takes to properly file each cloture motion and conduct a vote, the Senate Rules allow obstructionists to insist upon 30 hours of further consideration after a successful vote for cloture. In total, even for a measure that most senators support, a determined minority can usually delay passage for as much as two weeks.

Many fear that the Senate is perilously close to total breakdown.

...

The Framers intended the Senate to be a deliberative institution, different from the House of Representatives in both function and character. With a smaller assembly of older members with longer, staggered terms of service, the Senate was intended to balance the “tendency to err from fickleness and passion” expected from the House. Proponents of the filibuster paint it too as a feature of the Senate’s original design, one that facilitates deliberation and compromise by extending the period for debate. A right to unlimited debate was not, however, envisioned by the Framers. Moreover, and perhaps more importantly, the modern filibuster seldom fosters deliberation and compromise.

In the contemporary Senate, the filibuster is relentlessly wielded as a tool of obstruction, driven by partisan or strategic motives. In the fall of 2009, for instance, a filibuster blocked a bill to extend unemployment benefits for weeks, even after the House approved the measure with substantial bipartisan support. The hold-up had little to do with the merits of the benefits—senators were apparently squabbling about unrelated issues. Incredibly, when the bill finally reached the Senate floor, it passed unanimously.

...

Not only does the modern filibuster routinely fail to advance substantive deliberation, it often discourages public debate. Today’s stealth filibuster does not require debate from, or even the presence of, the filibustering senator. Instead, the mere threat of a filibuster prevents votes from reaching the floor. If discussion occurs at all, it is blocked from public view; deals are struck in backrooms behind closed doors, with no official record of the proceedings.

...

Often, to overcome paralysis, the majority must appease individual senators whose votes are needed to reach a supermajority. This provides substantial leverage to these pivotal few and concessions are regularly made that do not promote the collective good. For instance, before agreeing to supply the 60th vote for the recent health care reform bill, one senator notoriously negotiated special federal funding for the cost of Medicare expansion in his home state. As this example and others show, a legislative process held hostage by the filibuster repeatedly yields incoherent and compromised results.

Finally, the modern filibuster has spurred an obsession with procedure that threatens to take precedence over substantive lawmaking. For example, as witnessed in the recent health care reform debate, legislators increasingly force bills through alternative procedural routes—like reconciliation—in order to beat the filibuster. The majority party also frequently employs a procedural tactic called “filling the amendment tree.” Because Senate Rules restrict the number of amendments pending at any given time, the majority leader can shut out all other, potentially germane, amendments by offering one amendment after another, i.e., occupying all available branches of the tree. In these ways and others, time that should be spent on policy deliberation is wasted on an endless game of procedural chess, in which success is measured not by the passing of effective legislation, but by the advancement of individual or party goals.

Relentless obstruction devalues the Senate, leaving it far from the distinguished institution envisioned by our Framers. Even worse, however, is that the Senate’s dysfunction is uncontrollable; it taints Congress as a whole.

...

*Today's filibusters
are silent, private
affairs.*

For our democracy to properly function, the American people must be able to monitor elected officials and hold them responsible for their decisions. We do this by voting and through other forms of political participation— for instance, by speaking out in favor or in protest of government action, by lobbying elected officials, and by asking the courts to check unlawful governmental activity when it harms us. But, to properly exercise these rights, voters must be able to weigh the choices made by their legislators.

The Senate's current system, marked by constant filibustering, seriously undermines legislative accountability. To start, filibusters blur who is responsible for the Senate's failure to address problems. Voters are left to wonder: Should we fault the majority for failing to override the filibuster, or should we hold the minority responsible for obstructing the majority's will? Who is truly to blame?

Similarly, a successful filibuster prevents senators from engaging in genuine decision-making. Rather than being forced to take a stand on a particular policy, senators cast a procedural vote concerning whether to invoke cloture and force an up-or-down vote. When cloture fails and a substantive vote is never taken, constituents are left to guess how their representatives would have voted on the underlying policy matter, thereby furthering the information deficits that already plague the electorate. Moreover, as we saw in the recent debate over health care reform, a relentless focus on procedure can overshadow more important discussion about substance.

Even worse, today's filibusters are silent, private affairs. No longer do filibustering senators take the floor and speak until they are physically unable to filibuster any longer. Accordingly, in any given situation, it can be very difficult—if not impossible—to discern who is behind the obstruction. This routine lack of transparency diffuses legislative accountability even further.

To properly exercise our right to choose, voters must be able to weigh the choices made by legislators. A dysfunctional system marked by gridlock, paralysis, and minority vetoes makes genuine choice impossible, rendering a serious blow to the core democratic value of accountability.

As senators have become increasingly frustrated by rampant obstructionism—and the resulting gridlock—the practice of holds has come under particular scrutiny. A “hold” refers to the informal custom by which a single senator can indefinitely and anonymously stop legislation or nominations from reaching the Senate floor. Temporary holds can play a minor, but useful role. They may be requested on a temporary basis for a specified reason—for instance, to accommodate a senator's travel schedule or to give a senator additional time to review a long bill. In the contemporary Senate, however, holds are too often placed indefinitely and wielded as tools for obstruction—they are, for all practical purposes, indistinguishable from a threat to filibuster. Such holds do nothing to foster substantive debate; instead, they are used to prevent bills or nominees from ever being publicly discussed. Even worse, Sen-

ate “etiquette” allows these indefinite holds to be placed anonymously, thereby shielding obstructionists from being held accountable for their actions. There is little doubt that indefinite and anonymous holds dishonor democratic values.

...

[I]ndefinite holds regularly prevent the type of substantive deliberation that leads to compromise and collaboration. Rather than persuading colleagues about the merits of proposed legislation or the credentials of a certain nominee, a senator can just halt progress on a bill or appointment she finds objectionable. Senators also frequently use holds to gain leverage over unrelated matters, preferring hostage-taking to engaging in actual debate...When these hostage ploys are successful, individual senators benefit—sometimes at the expense of the greater good. Such a flawed process rarely yields anything but flawed results.

Finally, the practice of secret holds shields obstructionists from political accountability, repudiating a core democratic value. With little risk of external sanctions, there is little to constrain the use of holds and other dilatory devices. As one political scientist has pointed out, after examining the increasingly routine use of holds, “For legislation on which the political sanctions would otherwise be negative, this is a significant change in the calculus of obstruction.” The result is what we have seen in recent years—a seemingly endless rise in holds and filibusters.

...

In December 2010, the entire Republican Senate caucus signed a letter pledging to filibuster all legislative measures—thereby preventing them from reaching the Senate’s floor—until the upper chamber considered about-to-expire tax cuts and pending budget legislation. And yet, there was no real need for this. The Senate already agreed with the Administration that they must reach agreement on these top-priority issues by the end of the term. In other words, there was never any serious doubt that these questions would be resolved. Nothing more than an aggressive act of procedural brinkmanship, the letter underscores just how dysfunctional the Senate has become. By sending that letter, members of the minority party boldly stated that they will not permit debate on the myriad other important issues pending before the Senate—including repealing the widely unpopular “Don’t Ask, Don’t Tell” legislation that silences gay men and woman in our armed forces and approving an important new arms control treaty with Russia. In other words, rampant, unprincipled obstruction once again prevented the “world’s greatest deliberative body” from deliberating—or, for that matter, from doing very much at all.

Clearly, the time for reform is upon us.

At the start of the next Congress in January 2011, the Senate must make procedural reform its very first priority. We the People deserve a Senate with fair and equitable rules meant to facilitate debate, deliberation, and, eventually, substantive decision-making. At most, there should only be one opportunity—one bite at the apple, so to speak—to filibuster any given measure or nomination. And, as noted previously, the rules should allow the minority party ways to meaningfully participate, including the right to offer germane amendments. Furthermore, it should be difficult for obstructionists to delay action preferred by the majority—in other words, the Rules should place a burden upon filibustering senators. This could be done by amending the Senate Rules to require a certain number of votes to sustain a filibuster rather than requiring a supermajority vote to break a filibuster. In a similar vein, filibustering senators could be forced to stay on the Senate floor and actually debate, like filibusters of the past. Changes like these would go a long way towards reducing the frequency of filibusters—bringing us back to a Senate where the filibuster was an extraordinary tool reserved for matters of extraordinary importance.

Ultimately, once all senators have had a reasonable opportunity to express their views, every measure or nomination should be brought to a yes-or-no vote in a timely manner. This is, after all, what our Framers intended—a Senate where elected representatives debate important issues and then make decisions. For the sake of our democracy, the Senate’s rules must be reformed to bring us closer to that ideal. ■



THE COURTS

Bar Tab: The Judicial Election Money Spiral

Hon. Sandra Day O'Connor

The vast majority of judges in the United States sit in state courts. And the greatest threat to judicial independence is the rapid rise in special interest campaign spending and contributions — an unprecedented flood of funds that threatens to undermine the public trust.

We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. Whether or not these contributions actually tilt the scales of justice, three out of every four Americans believe that campaign contributions affect courtroom decisions.

This crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.

To avoid this outcome, states should look to reforms that take political pressure out of the judicial selection process. In recent years, I have advocated the system used in my home state of Arizona, where a bipartisan nominating committee recommends a pool of qualified candidates from which the governor appoints judges to fill vacancies. Voters then hold judges accountable in retention elections. Other promising state initiatives have included public financing of judicial elections, campaign disclosure laws, and recusal reforms.

We all have a stake in ensuring that courts remain fair, impartial, and independent. If we fail to remember this, partisan infighting and hardball politics will erode the essential function of our judicial system as a safe place where every citizen stands equal before the law. ■

The retired Associate Justice of the U.S. Supreme Court wrote this foreword to *The New Politics of Judicial Elections, 2000-2009: Decade of Change*, jointly published by the Brennan Center, the Justice at Stake Campaign, and the National Institute on Money in State Politics.

Is Justice for Sale?

Susan Liss and Adam Skaggs

In the 2010 elections, longstanding trends grew sharply worse.

Members of Congress aren't the only ones sweating about their prospects in November. An unprecedented number of incumbent state judges are facing a flood of special interest dollars aiming to kick them off the bench. Money-drenched judicial elections undermine fair and impartial courts: The justice system suffers when judges are afraid that a bang of the gavel might unleash a barrage of negative attack ads or when they make decisions with any eye on their campaign coffers instead of by applying the law to the facts of a case.

But it is increasingly difficult for judges to resist campaign pressures. A comprehensive report on campaign spending in judicial elections released in mid-August showed that, from 2000 to 2009, judicial candidates raised about \$206.9 million—more than twice the \$83 million raised in the 1990s. The lion's share of this cash—99 percent—poured into the war chests of judicial candidates facing off against opponents in contested elections

Just one percent—\$2.2 million—was raised by candidates in unopposed “retention” elections, in which judges appear alone on the ballot, and voters simply vote “yes” or “no” to keep them in office. Retention elections have historically been low-key affairs with minimal electioneering. Retention rates were uniformly high. So retention candidates had little need to fundraise. This year, though, as special interests mobilize, the money that has flooded contested elections promises to reach previously sedate retention contests.

In Kansas, the anti-abortion group Kansans for Life is aiming for Justice Carol Beier with a “Fire

Beier” campaign that claims Beier's conduct has been “more reminiscent [sic] of an aggressive abortion industry defense attorney, than [an] impartial judge.” Social conservatives have also set their sights on three Iowa justices who voted to strike down the state's ban on same-sex marriage. One conservative partisan established a group called Iowa for Freedom to unseat them. A bipartisan group called Iowans for Fair and Impartial Courts is fighting back, and with dollars pouring in to both sides, the elections look to be the state's most expensive ever.

Bread-and-butter economic issues are also fueling attacks on judges. A group called Clear the Bench Colorado is attacking four justices it accuses of using underhanded tactics to ratify higher taxes. And an Illinois justice, Thomas Kilbride, is in the hot seat after angering the business lobby by striking down a law that capped certain medical malpractice claims. One group, Vote No Kilbride, says that Kilbride must go because he is the court's swing vote on issues like “tort reform.” Media reports suggest that the Kilbride race is already “flooded with money,” and with campaign spending snowballing, Cindi Canary of the Illinois Campaign for Political Reform aptly suggested that it's time to “put on your seat belts, it's going to be nasty.”

Although high spending is a new phenomenon for retention elections, the report issued last month demonstrates that it is the norm for contested judicial elections. That report, issued by three nonpartisan groups—Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics—shows that 20

This op-ed originally appeared in *The National Law Journal*, September 6, 2010.

of 22 states with contested supreme court elections set spending records in the past 10 years and that spending on television ads in these races—including the kind of mudslinging found in other races—has steadily grown.

Primarily responsible for the escalating dollars are trial lawyers and business groups struggling over tort reform. In a series of John Grisham-style attempts to buy control of state courts, they have transformed the tort wars into “court wars”—and they’ve become the attack dogs of judicial elections: In 2008, special interests and political parties paid for 87 percent of all negative ads. The special interests underwriting ever costlier judicial elections are opening their checkbooks because they’ve come to believe that it is not only as useful to capture the bench as it is to influence Congress or the statehouse, but it’s more cost-effective: After all, as one union official said, “[I]t’s easier to elect seven judges than to elect one hundred and thirty-two legislators.”

To counter these cynical attempts to tilt the scales of justice, states that elect judges should adopt public financing systems to get judges out of the business of dialing for dollars. They should enforce strict disclosure and disqualification rules, so we know who pays for judicial campaigns, and ensure that judges don’t hear the cases of campaign contributors. Other states may choose to heed the advice of Sandra Day O’Connor, who advocates scrapping contested elections in favor of merit systems in which candidates are chosen based on qualifications and experience—not the ability to raise cash.

Even if judges don’t consciously favor campaign supporters, three out of four Americans believe that campaign contributions affect courtroom decisions. This perception corrodes the legitimacy of our justice system. If not addressed, it can only undermine the rule of law which sets our country—and our democracy—apart. ■

The Tea Party Meets the Constitution

Michael Waldman

In 2010, the rip-roaring grassroots conservative movement claimed the mantle of the Constitution. But what do they really think of our founding document?

These days, conservatives proudly proclaim their love for the Constitution. Yet many seem unsure whether to revere it or repeal it, plank by plank. Such constitutional nihilism extends well beyond the drive to strike down the U.S. health-care law, a jarring move by those long opposed to judicial activism. It reflects a deep discomfort with the country's growth toward a thriving, coast-to-coast democracy.

But as for the actual Constitution, as we have lived it for two centuries, some are itching to pull out their quill pens and start furiously crossing things out.

To be sure, these activists insist they only want to show they revere our founding document. Earlier in the year, 80 groups issued the "Mount Vernon Statement." "The federal government today ignores the limits of the Constitution, which is increasingly dismissed as obsolete and irrelevant," it said. Representative Michele Bachmann, a Republican from Minnesota and head of the Tea Party caucus in Congress, recently said she would start another caucus for "Constitutional Conservatives." One expects them to show up on C-SPAN in powdered wigs.

But as for the actual Constitution, as we have lived it for two centuries, some are itching to

pull out their quill pens and start furiously crossing things out.

Some advocates want to rewrite the 14th Amendment, a landmark of the Constitution—indeed, of human freedom. The amendment guaranteed equal protection of the law and due process to former slaves. Under its provisions, if you were born in the U.S. you had the rights of a citizen. The amendment was enacted by the Radical Republicans, which meant something very different back in 1868.

Now Senators John Kyl and Lindsey Graham have suggested rewriting this core part of the national charter. Children born here are not in fact citizens, they argue, if their parents crossed the U.S. border illegally.

In addition to punishing innocents for what their parents have done, this would rewrite a central provision of the Constitution for the sake of a temporary solution to a barely existent problem. To punish a few "anchor babies," they would redo the handiwork of the great Civil War amendments.

Other conservatives decry the 16th Amendment, which authorized the income tax. Until Glenn Beck floated the idea of its repeal last year, it was known mostly to high school students studying for an SAT subject test.

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After a Gilded Age Supreme Court declared it unconstitutional to tax income from property and other sources, it proved necessary to enact a constitutional change to fund the federal government. This was a breakthrough in the drive for a strong country. As Supreme Court Justice Oliver Wendell Holmes said at the time, “Taxes are the price we pay for civilization.”

A movement born as a populist squall seems oddly uncomfortable with the very mechanisms that give ordinary citizens the loudest voice.

Most baffling of all, many Tea Party backers want to overturn the 17th Amendment, which created direct public election of U.S. Senators in 1912. This was a key political reform of the Progressive Era, and a major step forward for democracy.

For the country’s first century, state legislatures chose senators. The process grew deeply corrupt. By the late-nineteenth century, lawmakers were notoriously, flagrantly for sale. It was said that John D. Rockefeller’s Standard Oil Co. did everything to the Pennsylvania legislature but refine it. Turn-of-the-century state officials routinely picked senators who were little more than front men for newly flush corporations.

Those who want to end direct election of senators say the step would return power to the states. Certainly, it would give state legislators more power—and the lobbyists and party bosses who make governing such a treat in so many capitals. The thought of Albany or Sacramento choosing senators doesn’t exactly inspire confidence. Lobbyist power would make us pine for the good old days of earmarks.

More fundamental, why would voters want to give away the power to choose their own representatives? The original Tea Party called for “no taxation without representation.” This Tea Party seems to pine for “taxation with no representation.”

As they target past amendments, self-designated constitutional conservatives have one of their own. Representative Eric Cantor, a Virginia Republican in line to become House majority leader next month, is among the backers of a so-called Repeal Amendment, which would give two-thirds of the states the power to nullify federal laws.

As legal journalists Dahlia Lithwick and Jeff Shesol wrote Dec. 3 in Slate, “American history reveals precisely what happens when state or regional interests are allowed to trump national ones,” noting that this would threaten civil rights and environmental laws, as well as moves that benefit one region (such as repairing New Orleans after Katrina).

This amendment, if passed, would mark the dismantling of the strong national government that has helped make the U.S. the most powerful nation in world history. It would turn back the clock not to before the New Deal, but to before the Civil War.

Strikingly, these constitutional forays would repeal some of the greatest advances in democracy. A movement born as a populist squall seems oddly uncomfortable with the very mechanisms that give ordinary citizens the loudest voice.

It is genuinely heartening that people care about the Constitution. The rhetoric, at least, denotes a craving for a meaningful national identity, a yearning for core values that we should all applaud. But may I suggest to our overheated fellow Americans: Don’t stop at reading the Constitution. Try the Declaration of Independence too: “All men are created equal.” ■

The Rise and Fall of Judicial Self-Restraint

Hon. Richard Posner

At the fall Jorde Symposium at Boalt Hall School of Law, one of the nation's premier jurists surveyed the development of "judicial restraint" — a label he finds devoid of meaning in American law today. "The terms 'judicial restraint' and 'judicial self-restraint' survive, but as vague, all-purpose compliments; 'judicial activist' survives as a vague, all-purpose pejorative." The original meanings have largely been lost, Posner says.

You want the Court to comb through nineteenth century history and find a mandate for unfettered capitalism? Vote Republican. You want it to impose welfare rights, with a heavy dose of judicial empathy? Vote Democratic. And hope for well-timed vacancies and long-lived justices who share your policy preferences. Meanwhile, the notion of constitutional rights as immutable principles protecting our liberties from majoritarian tyranny morphs into rule by whichever faction happens to have a one-vote majority on the Supreme Court.

I. The term "judicial self-restraint" is a chameleon. Of the many meanings that can be assigned to it, three stand out: (1) judges apply law, they don't make it (call this "legalism," or "the law made me do it"); (2) judges defer, to a very great extent, to decisions by other officials—appellate judges defer to trial judges and administrative agencies, and all judges to legislative and executive decisions ("modesty," or "institutional competence," or "process jurisprudence"); (3) judges are highly reluctant to declare legislative or executive action unconstitutional—deference is at its zenith when action is challenged as unconstitutional ("constitutional restraint").

(3), which is my subject, is a subset of (2), though as a rule differently motivated; (2) is motivated by notions of comparative institutional competence, (3) by respect for the elected branches of government, though that respect is sometimes based on a belief that legislatures do policy better than courts do. (3) is therefore distinct from (4), "judicial minimalism," though overlapping it. Minimalists advocate narrow decisions and the avoidance of ambitious theorizing, and so are a school of self-declared judicial restraint. But the aim is to get judges to avoid mistakes by acknowledging the limitations of their knowledge (and so they are to feel their way rather than make bold leaps), rather than to redraw the boundary between

Seventh Circuit Judge Richard Posner delivered our fall Thomas M. Jorde Symposium, held on October 5, 2010, at the University of California Berkeley Boalt Hall School of Law. The remarks were the basis for this essay, excerpted from a forthcoming issue of the *California Law Review*. The Jorde Symposium was created in 1996 by Brennan Center Board Member Thomas M. Jorde to foster top-rate scholarly discourse from an array of perspectives.

the judiciary and the other branches of government. (That is the theory, but in practice minimalism is the covert pursuit of activist judicial agendas.)

(1) and (3) are in conflict. The Constitution is law, and applying it may be inconsistent with a policy of reluctance to declare a statute or executive decision unconstitutional. The more you believe (or pretend to believe) in (1), the less you'll be moved by (3). But the reverse is also true. The less you believe in (1), the more open you will be to (3). One can put this more strongly: Rejecting (1) creates acute pressure for (3), to discourage judges from spinning completely out of control and becoming just another legislative body.

Both (2) and (3) embody internal contradictions: A judge may face a choice between deferring to one court, agency, or branch of government and refusing to defer to another, and then the restrained course may be unclear, as when there is a clash between presidential and congressional prerogatives in national security cases. Another example: The doctrine that statutes should be interpreted to avoid raising constitutional questions reduces the frequency with which statutes are held unconstitutional, but does so by reducing the scope of legislation and thus the power of legislatures.

II. The best-known and best-developed version of (3) has a clear beginning and end, and I'll organize my discussion around its 81-year history. It begins with an 1893 article by Harvard law professor James Bradley Thayer, in which he argued that a statute should be invalidated only if its unconstitutionality is "so clear that it is not open to rational question." (Thayer seems not to have been concerned with judicial review of executive action; the executive branch was of course much smaller and weaker when he wrote than it is today.) I do not mean that the advocacy of constitutional restraint begins in 1893; it is, as Larry Kramer explained in his comment on the lecture version of this paper, much older. But I shall limit my discussion to the Thayerian concept.

The distinction between what is merely incorrect, and what is unreasonable or, equivalently, clearly erroneous or an abuse of discretion, is familiar in other legal contexts. Examples are appellate review of a trial judge's findings of fact, or of his rulings on objections to the admission of evidence, or of his management decisions, such as deciding whether to limit the number of witnesses at trial. Judges in a number of the cases that Thayer cited in support of his formula (for his originality consisted in organizing and rationalizing scattered judicial remarks supportive of type (3) restraint, rather than in inventing it) had gone so far as to say that a law should not be invalidated unless its unconstitutionality was clear "beyond a reasonable doubt," which is a stricter standard than clear error or unreasonableness.

Thayer's "not open to rational question" formula, which he had derived from the standard for reversing a judgment entered on a jury verdict, underscores the tension between the first and third versions of judicial self-restraint. A judge who thought a statute unconstitutional, but was not sure he was right, would be required by Thayer's formula to uphold the statute and thus would be upholding a law that he believed, albeit with less than complete confidence, to be unlawful. A type (1) restraintist, in contrast, would condemn the statute, believing that his duty is to apply the law as he understands it, even if he acknowledges to himself that his understanding may be imperfect. If he allows doubt to change his decision, he is allowing something that is not law (at least in a narrow sense of the word) to influence a judicial outcome. Thayer and his followers, not surprisingly—I am tempted to say inevitably—were not type (1) restraintists.

Thayer's immediate successor as the leading advocate of type (3) restraint was Holmes. Then came Brandeis, then Frankfurter—the most emphatic expositor of self-restraint in Thayerian terms—and then Alexander Bickel. There are others in this lineage but these are the main figures and the only ones I need to discuss at length.

Some think legislatures are so much better at making policy than courts that judges should leave legislation entirely alone—a posture of total deference.

A number of other scholars and judges have been skeptical of the competence (in the sense either of legitimacy or ability) of courts to make difficult or consequential decisions, but have not looked to Thayer for inspiration. Some think legislatures are so much better at making policy than courts that judges should leave legislation entirely alone—a posture of total deference that goes beyond Thayer. One provocatively titled piece—it has “Thayerian” in the title—argues for giving Congress an institutional makeover so that it can perform better, which might obviate the need for any judicial second-guessing. But as the article notes, Thayer himself did not discuss institutional design, nor did the Thayerians whom I’ve mentioned.

Skeptics of judicial competence often are strict constructionists, in the sense of hewing close to the semantic surface of statutes. They are type (1) restraintists, defining their role in a way that enables them to apply the law with confidence (“plain meaning”). That is not the character of the Thayerians either; they were, as we’ll see, loose constructionists.

Thayer based his concept of judicial restraint on several claims:

1. Authorizing courts to invalidate laws enacted by the national legislature was an American innovation with a thin basis in the constitutional text, and was still controversial when he wrote. This argued for prudential restraint; courts must be wary of going head to head with the other branches of government.
2. Often a law goes into effect years before the courts get a case in which its constitutionality is challenged or is ripe for adjudication. Thayer argued that this implied that the legislature had to make an independent constitutional judgment—especially the federal legislature, because federal courts refuse to issue advisory opinions and so Congress has to decide for itself whether a statute that it wants to enact would be constitutional. (He reinforced this argument by reference to Article VI, clause 3, of the Constitution, which requires the members of Congress, among others, to take an oath to support the Constitution.) Congress is thus a kind of constitutional court. The English had gone so far as to deem Parliament the nation’s supreme court—an act of Parliament had the force of a constitutional amendment. Thayer was advocating a modified version of the English approach.
3. Questions relating to the power of the different branches of government are inescapably political, and so courts have perforce to use political, rather than just legal, criteria in answering them. Thayer thought that such criteria would generally favor restraint.
4. Most important (and implied by Thayer’s first two points), if courts enforced constitutional limitations to the hilt, legislators would stop thinking about the constitutionality of proposed legislation and just think about how the courts would react. Legislative deliberations would thus be bobtailed and legislatures trivialized:

“The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent...Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.” Or as he later put it, “The tendency of a common and easy resort to this great function [judicial review of legislation], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is not a light thing to do that.” We might compare this to one of the arguments for deferential appellate of factfindings by trial courts: It encourages trial judges to be more thoughtful. The analogy is imperfect, however, because appellate review of trial-court determinations of pure legal issues is plenary.

Thayer seems to have had a high opinion of legislative deliberation if the courts didn't disrespect it by according little weight to the products of that deliberation. These are two separate points: One can think that legislatures do a good job, and so shouldn't be penned in tightly by the courts, without thinking that legislators are like judges and deliberate in a responsible and creative fashion about the constitutionality of proposed legislation. Thayer believed both things. Both beliefs appear to be false, or at least weakly supported. (More on this later.) So Thayerism got off to a shaky start.

...

Modern constitutional theories—whether Scalia's originalism, Easterbrook's textualism, Breyer's active liberty, or the living Constitution—are designed to tell judges, particularly Supreme Court Justices, how to decide cases correctly rather than prudently.

The evanescence of type (3) judicial restraint, both generally and in its Thayerian form, is related to the rise of constitutional theory, stimulated to a significant degree by *Roe v. Wade* and a conservative backlash against the Warren Court, in a sense quite different from Thayer's theory. (Robert Bork is a key figure here.) Modern constitutional theories—whether Bork's or Scalia's originalism, or Easterbrook's textualism, or Ely's representation reinforcement, or Breyer's active liberty, or the Constitution as common law, or the living Constitution, or the moral reading of the Constitution, or libertarianism, or the Constitution in exile, or anything else (including minimalism, despite surface affinities to Thayerism)—is designed to tell judges, particularly Supreme Court Justices, how to decide cases correctly rather than prudently. Its pretensions are summarized in Ronald Dworkin's insistence that even the most difficult—the most indeterminate-seeming—legal questions have “right answers.” He acknowledges that the right answer may not always be ascertainable with sufficient confidence to still doubts. But judges, if not told what to do if they can't find the right answer to a question that a case presents to them, will be reluctant to acknowledge an inability to find it. Judge Easterbrook has said that “the power to countermand the decisions of other governmental actors and punish those who disagree depends on a theory of meaning that supposes the possibility of right answers.” Easterbrook thinks the correct theory is textualism. It was textualism's cousin, originalism, that emboldened Justice Scalia and his colleagues to render the notably activist decision in *Heller*.

If there is a demonstrably right answer to even the most difficult constitutional question, it is natural to suppose that that's the answer the judge

But can a judge really decide a case without a theory of how to decide a case correctly? Paradoxically, the answer is yes.

must give, that any other answer would be lawless. As I said at the outset, the stronger one's belief in type (1) judicial restraint (judges apply, they do not make, law), the less one can embrace type (3) restraint, which, as in Thayer's formulation, directs the judge to uphold a law even if he thinks it unconstitutional, provided he's not certain that it is, or at least almost certain. Modern constitutional theory gives the theorists the required certitude, and they proceed to ignore Holmes's dictum that certitude is not the test of certainty. So "Scalia and Thomas insist that the apparent tension between their sharp demands for restraint in some areas and their sweeping exercise of activism in others is resolved by the written Constitution itself." Their motto should be: The Constitution made me do it. Prudence came to seem a cop-out.

It's not that modern constitutional theory is inherently incompatible with type (3) restraint. An originalist, a textualist, a living-Constitution buff, etc., might acknowledge a class of cases to which his theory gave no clear answer. Maybe, for example, the original meaning of some constitutional provision just couldn't be determined with any confidence; that would be a case in which an originalist Justice would need a tie-breaker, and he might decide that the tie should go to the legislature. But Justices are reluctant to acknowledge the limited reach of their constitutional theories. And deferring to legislatures in cases of uncertainty is not Thayerism. Thayer wanted judges to have their thumb on the scale, so that even if they were originalists and thought that the original meaning of some constitutional provision pointed to invalidating a statute, the statute would have to be upheld unless no reasonable person could doubt its invalidity. No originalist, or any other judge committed to a constitutional theory (other than, of course, Thayer's theory, or some variant of it), would be likely to embrace such a position—would say, I think the original meaning of the Second Amendment is that people have a right to own guns for self-defense, and the challenged statute or ordinance doesn't permit that, but reasonable persons might disagree with my reading of history, so I'll vote to uphold the enactment. That approach would have resulted in upholding the District of Columbia gun ordinance invalidated in the *Heller* decision, because the dissenting Justices' interpretation of the amendment's original meaning, whether correct or not, was at least reasonable. There are no Thayerian originalists on the Supreme Court—no Thayerians on the Court, period.

....

The precondition to a judge's embrace of Thayer's standard is having no theory of how to decide whether a statute or an executive action violates the Constitution. For if you have such a theory yet fail to apply it, you'll feel you're being lawless, and you won't be able to take refuge in the analogy to reviewing a trial judge's factfindings for clear error. I think that none of the advocates of type (3) restraint had any idea how legal analysis would yield an answer to a question arising under one of the many vague or archaic provisions of the Constitution. Larry Kramer puts it well, albeit with reference to an earlier era: "Everyone essentially believed that the Constitution could and should be interpreted using the same, open-ended

process of forensic argument that was employed across legal domains—marshaling (as applicable, and in relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion.” In contrast, strict construction of the Constitution is an example of a decision theory that tends to limit the invalidation of statutes; but the Thayerians were loose constructionists, including Thayer himself. And loose construction, when applied to a provision of the Constitution, is not a theory, but rather a license to read into the provision a judge’s views of sound policy responsive to modern problems. It is when judges have such a license that there is pressure for a doctrine of judicial self-restraint. (I see loose construction as more natural than strict, and also as enlarging rather than diminishing legislative power, since difficulty of foresight makes strict construction a form of “gotcha” jurisprudence.)

But can a judge really decide a case without a theory of how to decide a case correctly? Paradoxically, the answer is yes. Faced with a case that is indeterminate from the standpoint of conventional legal reasoning, the judge cannot throw up his hands and say, “I can’t decide this case because I don’t know what the right answer to the question presented by it is.” The judges who never adopt a legalistic algorithm are what I call “pragmatists,” not in some pretentious philosophical sense but in the sense of an approach to decision making that emphasizes consequences over doctrine, or, stated otherwise, fits doctrine around consequences. Thayer, Holmes, Brandeis, and Bickel were pragmatists. (I don’t know how to characterize Frankfurter.) ■

The People's Court

Barry Friedman

The Court is not immune to popular consensus, NYU Law's Vice Dean Barry Friedman argues. "[T]he justices' opinions in the big cases have tended over time to come into line with popular opinion." While that conclusion may come as relief to some, Friedman probes deeper: If the justices embrace the prevailing view, can they act as "protectors of minorities and constitutional liberty"?

For the first time in years, as the Supreme Court winds up its "busy" season—when most of the big decisions come down as the justices scramble to finish their term for the summer and get out of town—the justices are already the center of serious controversy and attention. January's *Citizens United* decision brought condemnation from the President, a dust up with the Chief Justice, and relentless attention from the media, the blogs, and members of Congress. Then, to put icing on the cake, Justice Stevens announced his retirement, Elena Kagan drew fire as the President's nominee as we await the start of yet another summertime confirmation hearing.

What can we expect in the months ahead?

My book ends just as Chief Justice Roberts and Justice Alito took the bench in 2005. Things were quieter then, but predictions from the left were equally dire. So much so, that I began the conclusion with a prediction of my own: "[T]he long-run of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line." I stand by that prediction, as well as the sentence that followed: "Whether or not this is a good thing—the question typically is obscured by passionate debates over the proper role of judges in a democracy—is far more difficult to say."

The Will of the People is a history of the relationship between the Supreme Court and popular opinion, from 1776 to 2005. It is written against the claim, prevalent in both academic and popular discourse for over two hundred years, that the justices are impervious to popular control and thus an uncontrollable and anti-democratic force in American democracy. What I show is that ultimately the justices are accountable to the public. Many weapons have been employed throughout history against the Court when its decisions were perceived as threatening or beyond the mainstream. The Court has been "packed;" its jurisdiction stripped, its members threatened with impeachment, their salaries frozen; the justices have been burned in effigy!

This essay originally appeared on Just Books, June 2010.

As a consequence, the justices understand the limits of their power. Since Franklin Roosevelt lost the battle and won the war in his fight with the Supreme Court, the justices' opinions in the big cases have tended over time to come into line with popular opinion. Which is why I believe the most likely outcome of this busy June is that the Roberts Court will hold its fire. And that if it doesn't, and if the public disagrees, some correction will be brought to bear.

How we should feel about this, though, is complicated—and this complications should weigh equally on the political left and right alike. There is another longstanding view of the Supreme Court, one that sees the justices as protectors of minorities and constitutional liberty. Just as my book calls into question the assertion that the Supreme Court is a starkly independent institution, immune from popular control, it also raises doubts whether the justices ordinarily can or do fulfill this heroic mission.

I ultimately conclude that the highest function the Court fulfills is in stirring precisely the sort of controversy we see today. It forces the body politic to decide what it believes is the proper interpretation of the Constitution. The Supreme Court ought not to be a meter registering the latest Gallup Poll. But if the justices' decisions lead us to debate the proper meaning of the Constitution, and if over time the justices adopt the "considered judgment" of the American people on such questions, then this might just be a function worth having in a democracy. ■

Judicial Activism Then and Now

Michael Waldman

For years, conservatives decried what they saw as overreaching by liberal judges. Now a conservative bench faces a progressive president. Have the two sides switched robes?

When the U.S. House of Representatives voted to repeal the health-care law last week, everyone knew the tally was only symbolic. But within the next year or so will come a vote that counts—when the Supreme Court has its say.

At issue: Can the federal government require individuals to buy health insurance, the mandate at the heart of the overhaul? A constitutional clash is brewing, one that might define political debate for a decade.

We have entered an era when a conservative federal judiciary feels emboldened to strike down social legislation enacted by the elected branches. If the courts deem the health-care law unconstitutional, we can expect progressives to rail against judicial activism, much as conservatives have since *Roe v. Wade* ruling legalized abortion.

Wait. Aren't conservatives the ones who demand judicial restraint? They are provided you assume our stances are frozen in the 1960s, when the Supreme Court, led by Earl Warren, expanded rights—and found a few new ones. Far more often since the nation's founding, it was liberals who urged judicial modesty, while conservatives used the courts and a narrow vision of the Constitution to advance an intensely ideological legal theory.

A century ago, judges often blocked social legislation, ranging from the income tax to the minimum wage. Among the best known was the 1905 *Lochner* decision, in which the Su-

preme Court ruled that a law limiting bakery working hours violated “liberty of contract.” So dubious was this sophistry that the period was known as the *Lochner* era.

During the Great Depression, the high court overturned many New Deal laws, until Franklin Roosevelt threatened to add as many as six new liberal justices.

Starting in 1937, the Supreme Court agreed that the federal government had ample powers under the Commerce Clause governing interstate economic activity. Labor laws, Social Security, environmental and consumer protections, all got a green light.

Many conservatives see the court's approach since 1937 as a grand historical mistake, and pine for what Judge Douglas Ginsburg called the “Constitution in exile.” The Constitution, they argue, sharply limits the federal government's power. Now the Roberts Court, hailed by *Fortune* magazine as the most pro-business bench in years, will have a chance to test these theories.

Just two years ago it seemed far-fetched that the courts might threaten the health bill. After all, the individual mandate had long been a routine Republican talking point. When Mitt Romney, then governor of Massachusetts, won passage of an individual mandate in 2006, it was constitutionally noncontroversial. The law was never seriously challenged in federal court, and a state judge upheld it.

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Now a similar health plan is the law of the land, though it has yet to take effect. Already it faces an armada of lawsuits. Foes argue the government lacks the power to require individuals to buy insurance, especially from private firms. It would be like forcing every American to buy a General Motors car, they say.

To the law's backers, this misses the point. The endlessly interconnected health system isn't a car lot. We all use health care, and uninsured people pass their costs on to the rest of us when they get sick. Congress plainly has the power to set insurance rules, and the mandate is "necessary and proper" (in the Constitution's words) for that to happen. As Justice Antonin Scalia wrote in an earlier case, "[W]here Congress has authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective."

Without the mandate, for example, the ban on discrimination against those with pre-existing conditions is empty. Moreover, they argue, fees levied on those who don't buy minimal insurance are like a constitutionally-permitted tax.

So far, four federal trial judges have upheld the law, while one struck it down. More rulings are due soon. Twenty-six states have joined the suits. Already, armchair litigators are counting votes on the high court. While it is likely the justices would uphold the law, one certainly could imagine a different result.

If so, there is thick irony. Democrats could have sought a more dramatic plan. A Canadian-style single-payer system—demonized in this country

as "socialized medicine"—would rely on the tax power, while the public option would have given patients the option of buying insurance from a public plan, not just private providers.

Democrats instead opted for a complex, sometimes opaque approach. To avoid the stain of a tax increase, they stumbled into a constitutional thicket.

Republicans would gloat. But a dramatic ruling would make it more likely, not less, that the country would ultimately turn to a public plan to expand coverage and curb costs.

Ultimately, America has grown stronger when active citizens, organized pressure groups, and accountable politicians wrestle with large policy challenges. The results often aren't pretty, and can resemble a Rube Goldberg machine more than an iPad. But far better to have social policy set through a messy, noisy democracy than through a pinched reading of the Constitution.

Let's heed Justice Oliver Wendell Holmes' memorable dissent in *Lochner*. "A constitution is not intended to embody a particular economic theory," he wrote, "whether of paternalism ... or of laissez faire." Even when judges are shocked by a law, he said, the court "ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." ■

LIBERTY AND NATIONAL SECURITY

Classification and Consequences

Liza Goitein and David Shapiro

Secrecy should be justified, not automatic — especially now.

Got a plan to open up government? The president wants to give you a prize. A new memo from the Office of Management and Budget says federal agencies should hand out awards to those who come up with ideas to roll back government secrecy. Similar contests, says the memo, brought fresh thinking on such things as lunar landers, space elevators, and astronaut gloves.

President Barack Obama should be commended for encouraging open government. But while prizes may spur innovation, we need sticks as well as carrots to reduce government secrecy. Any meaningful reform must include a vital element that has been lacking for decades: consequences for those who wrongly hide information from the public. In particular, consequences would limit needless classification of documents by curbing overuse of the “SECRET” and “TOP SECRET” stamps.

In December 2009, Obama replaced the Bush administration’s executive order on the classification and declassification of documents with one of his own. Now, the government cannot classify a document if “significant doubt” exists about the need to hide it, and “no information may remain classified indefinitely.” Obama ordered agencies to review their policies on secret documents. These are important steps in the direction of reform.

But Obama did not touch the part of the Bush order called “Sanctions,” nor did he require officials to supply reasons for classifying documents. Government employees can still block disclosure merely by invoking talismanic categories, such as “foreign government information.”

The incentives remain skewed toward secrecy. Officials risk little when they classify documents. Some do so to avoid embarrassment. The Bush administration, for example, classified General Antonio Taguba’s chilling report on Abu Ghraib, and thus kept the public in the dark about acts of torture. Others veil records because they fear rep-

As the 9/11 Commission warned, excessive secrecy stymies information exchange between federal agencies and makes it harder to connect the dots.

rimand for revealing too much, but not for concealing too much. And officials sometimes find it easier to conceal entire documents—including pages of harmless information—rather than spend time segregating the sensitive parts from the non-sensitive ones. All of this feeds massive over-classification. Experts of all political stripes say nine in 10 secret documents should not be classified.

Pointless secrets threaten our safety by blocking the flow of information within government. It is important to protect the privacy of law-abiding Americans. But information about true threats to security must be available to the appropriate governmental officials. As the 9/11 Commission warned, excessive secrecy stymies information exchange between federal agencies and makes it harder to connect the dots.

What’s more, secrecy keeps voters in the dark. The Bush administration held on to classified Justice Department memos that signed off on water-

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boarding and other forms of torture. A classified program shunted people off to secret prisons in foreign countries, where they suffered even more brutal interrogations. A classified program let the government spy on phone calls without warrants. Government by the people can exist only if the people know what their government is doing, but the “TOP SECRET” stamp has become a tool of closed institutions.

There is a better way. First, officials should be required to justify their use of secrecy. To accept a stock phrase like “foreign government information” is to enable lazy thinking and a system of classification by default. By contrast, people compelled to detail in writing their reasons for classifying documents must think through—and justify—their choices. At times, the very act of trying to articulate a reason would convince an official that the reason was not powerful enough to warrant hiding information.

Second, there should be a system in place to audit the classifiers and impose consequences where necessary. Those who secrete papers away without sufficient reason must face discipline—training or a note in their personnel file at first, but in extreme or recurring cases, revocation of their classification authority or even dismissal.

The window for change remains open—an executive branch office must still issue a directive to implement Obama’s order. As reform moves ahead, the administration should bear in mind the words of the 9/11 Commission, which concluded that the lack of consequences for excessive secrecy left us exposed to attack: “There are no punishments for not sharing information.” ■

As Executive Power Grows, So Does Secrecy

Eric Lane, Frederick A.O. ("Fritz") Schwarz, Jr., and Emily Berman

Everyone remembers U.S. v. Nixon as the case in which the Supreme Court rejected Richard Nixon's claims of "executive privilege" for the Watergate tapes. The ruling cost Nixon the presidency. But as this law review article points out, the Nixon case actually codified executive privilege as a constitutional prerogative. As executive operations grow — such as fighting terrorism — so does executive privilege, and with it, executive secrecy.

And liberty cannot be preserved without a general knowledge among the people, who have a right, . . . an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge—I mean, of the characters and conduct of their rulers.

- John Adams

Introduction

On the second day of his presidency, Barack Obama signed two memoranda for the heads of executive departments and agencies, through which he committed his administration "to creating an unprecedented level of openness." His purpose was to "strengthen our democracy and promote efficiency and effectiveness in Government." Many presidents, at the start of their terms, have rhetorically committed themselves to openness as a fundamental principle of democracy. Yet again and again these commitments have been broken. In 2000, former Senator Patrick Moynihan described the executive branch's attraction to secrecy as "the great fear . . . for our democracy," an "enveloping culture of [governmental] secrecy and the corresponding distrust of government." Likewise, a 2007 report on governmental secrecy found:

In the past six years, the basic principle of openness as the underpinning of democracy has been seriously undermined and distrust of government is on the rise.

The Administration has taken an extreme view of the power of the presidency. In its view, its powers to operate are largely unchecked by the Congress, courts, states, or the public. The number of secrets generated has substantially increased, while release of information has declined.

And even President Obama's recommitment to openness, some watchdog groups contend, has already been compromised. This expansion of the culture

Excerpted from "Too Big a Canon in the President's Arsenal: Another Look at *United States v. Nixon*," which appeared in the Spring 2010 issue of the *George Mason Law Review*.

of secrecy has paralleled the expansion of both the jurisdiction and size of the federal government—particularly since the Depression. Modern presidential administrations are entrusted with a far broader array of administrative responsibilities than the Founders ever could have envisioned. More information about government activities than ever before is housed in the executive branch. As the volume and scope of this information have grown, so too have executive efforts to control its dissemination.

A critical element in the legal and rhetorical foundation for the institutionalization of secrecy is *United States v. Nixon*, the Supreme Court decision that recognized executive privilege as an executive prerogative rooted in Article II of the Constitution. The reasoning of the *Nixon* decision contains significant flaws. And, in large part because of these flaws, the Supreme Court's decision in *Nixon*—while nominally addressing only executive privilege—has enabled a culture of executive branch secrecy to take hold.

The *Nixon* case arose when President Nixon declined to comply with a subpoena for tapes of Oval Office conversations between Nixon and his aides. Executive privilege, he claimed, protected him. He wrote: “The independence of the three branches of our government” made it “inadmissible” for the courts to compel any “particular action from the President.” The Court found differently. The claim of executive privilege, the Court unanimously held, must yield to the courts’ “demonstrated, specific need for evidence in a pending criminal trial.” And so President Nixon surrendered the tapes. The Court was right to reject President Nixon's claim. It was not the Constitution's integrity that motivated him. It was political survival. The once-protected tapes revealed that President Nixon was part of a conspiracy to cover up White House participation in the Watergate burglary. One tape even captured the president ordering the CIA to obstruct an FBI investigation into the burglary.

The Court's decision to require compliance with the subpoena effectively ended the presidency of Richard Nixon. But, ironically, the *Nixon* case enhanced the power of future presidents to hide facts from Congress and the American public. According to the Court:

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . [Executive] privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. The decision thus created a presumption of secrecy for presidential communications.

This article demonstrates that this presumption is wrong; the Court's reasoning in creating it was flawed. The presumption fails to take account fully of the motivations for government secrecy, which are only partially related to the exploration of valid policy alternatives. It fails to address the dangerous uses to which secrecy is so often put, as well as the natural human tendencies that lead government officials to seek the cover of secrecy. And finally, it dis-

Nixon's presumption of secrecy—especially when applied to congressional requests for information—is inconsistent with the constitutional structure envisioned by the Framers.

regards the constitutional problems the presumption creates: When secrecy is used to keep information from Congress, it prevents effective application of the Constitution's system of checks and balances.

Of course, sometimes protecting information through secrecy protects our national interests and values. One example is secret military or diplomatic strategies. In 1976, a Senate Select Committee (the Church Committee) noted that “details about military activities, technology, sources of information and particular intelligence methods are secrets that should be carefully protected.” This would include such information as the identities of spies, troop movements during wartime, and technological know-how for building a nuclear bomb. In addition, secrecy may serve our constitutional commitment to individual rights by protecting the identities of individuals under investigation or by protecting personal data such as social security numbers.

Frequently, however, secrecy is about empowering the secret-holder at a cost to the national interest. In a 1987 commentary on the government's growing “secrecy system,” Arthur Schlesinger, Jr., identified secrecy as “a source of power and an efficient way of covering up the embarrassments, blunders, follies and crimes of the ruling regime.” The costs of secrecy thus come from both the general degeneration of the democratic process and the specific damage that a policy cloaked in secrecy can cause.

The *Nixon* Court failed to consider these costs. True, as we describe in Part I of this Article, the Court did check the president's exercise of power, but so reluctantly, almost apologetically, that the decision now is read both judicially and politically as support for expanding claims of executive privilege based on the separation of powers doctrine rather than for the openness on which an effective system of checks and balances depends.

Undoubtedly, in our modern administrative state, the role of the president will continue to grow. Americans, as they have since the Depression, and especially in times of war or crisis—World War II, the Cold War, and in the face of international terrorism—will look to the president to address the many problems they face. But as executive branch responsibilities grow, the executive branch may also grow increasingly impatient with a governing system requiring executive branch officials to submit their policy proposals to the checks and balances of Congress, the public, and the courts. Secrecy, of course, is one way to circumvent these checks. And because the *Nixon* presumption offers a legal and rhetorical justification for this circumvention, any meaningful effort to preserve the proper constitutional balance must challenge the wisdom of this presumption. Our task is therefore to explain why the presumption should be reversed in favor of a presumption of openness.

At the outset, it is also important to note one thing that we do not suggest. Not every meeting between the president and his advisors should be open to the media or broadcast live on C-SPAN. Nor should the transcripts of such meetings be posted online at their conclusion. Rather, when Congress has a legitimate need for information about executive branch deliberations or activities, that information should be made available to the legislature.

In Part I, the *Nixon* decision is examined. In Part II, we explain how Nixon failed to balance the costs and benefits of secrecy in policy making, overvaluing the benefits of secrecy and discounting its costs. In this part, we undertake the more nuanced look at secrecy eschewed by the *Nixon* Court, exploring both its attraction to policymakers and its potentially harmful consequences. This examination leads, as we explain in Part III, to the inevitable conclusion that Nixon's presumption of secrecy—especially when applied to congressional requests for information—is inconsistent with the constitutional structure envisioned by the Framers. When it threatens to thwart legitimate congressional inquiry, the power

that secrecy represents must be amenable to the structural checks embedded in the Constitution. To effectuate this goal, we recommend replacing the Nixon presumption with a different one, one that favors openness. Thus when Congress determines that it has a legitimate need—either for its legislative or oversight responsibilities—for information generated or shared in the course of executive branch deliberations, Congress should be able to obtain that information. In Part IV, we offer several approaches for effecting this recommendation. ■

New FBI Powers Pose New Risks

Emily Berman

With the rising threat of homegrown terrorism, ever more counter-intelligence work is done by federal, state, and local law enforcement. In late 2008, Attorney General Michael Mukasey issued new guidelines governing the FBI's activities in domestic intelligence. The Obama administration essentially adopted those rules. Here, the first comprehensive assessment of these guidelines warns that they expand the FBI's investigative reach while curtailing oversight. This could make breaches of civil liberties easier, while alienating the very Muslim community groups whose cooperation is central to the fight against terrorism.

Successful domestic counterterrorism policy is vital to keep the homeland safe. In this effort, policymakers must resist the oft-exhibited tendency to overreact to the threats we face. This overreaction, time and again, takes a similar form: In the face of a perceived existential threat, we expand the scope of the government's powers while simultaneously diminishing oversight of and accountability for the use of those powers. We fail to ensure that these powers will be employed in a manner consistent with our fundamental values. Civil liberties—such as privacy and freedom of expression, association, and religion—are often curtailed. In the wake of 9/11, government action exhibited this tendency across a wide range of counterterrorism policies.

To his credit, President Obama acknowledged this overreaction in several areas, implementing much-needed modifications to inherited policies, which improved procedural protections, guarded against civil liberties violations, and increased transparency. But in many respects, the Obama administration's counterterror efforts resemble those of the Bush administration's second term. This is especially true in the context of countering domestic terrorism threats.

One key example: The Obama administration's choice to rely upon rules drafted by its predecessor to increase the FBI's authority for domestic investigations, including probes into terrorist threats. We believe these rules, known as the Attorney General's Guidelines for Domestic FBI Operations ("Attorney General's Guidelines" or "Guidelines"), tip the scales too far in favor of relatively unchecked government power, allowing the FBI to sweep too much information about too many innocent people into the government's view. In so doing, they pose significant threats to Americans' civil liberties and risk undermining the very counterterrorism efforts they are meant to further.

Excerpted from *Domestic Intelligence: New Powers, New Risks*, January 2011.

And while some may doubt the severity of these threats, nobody can argue that such broad powers in the hands of government officials should not be monitored regularly to ensure that they are not being abused.

The Guidelines, implemented by Attorney General Michael Mukasey in December 2008, are considerably more permissive than earlier versions implemented by previous Attorneys General. This permissiveness raises two concerns. First, the Guidelines expand the FBI's discretion to investigate individuals and groups while simultaneously limiting oversight requirements and thereby risk opening the door to invasions of privacy and the use of profiling on the basis of race, ethnicity, religion, national origin, or political ideology. In so doing, they also risk chilling constitutionally protected activities. Second, the Guidelines could render the FBI's counterterrorism efforts less effective. Some perceive investigations under these Guidelines to impact disproportionately the freedom of expression and association of law-abiding members of certain groups. This perception risks undermining any otherwise beneficial aspects of the Guidelines by alienating the very communities whose cooperation is most essential. Moreover, the sheer volume of information collected raises the concern that it will elude meaningful analysis.

These changes are not merely cosmetic. They grant the FBI license to employ intrusive techniques to investigate Americans when there is no indication that any wrongdoing has taken place.

The Mukasey Guidelines significantly loosen the restrictions on the FBI's investigative powers that had been in place for decades—restrictions that remained even in the Guidelines implemented by Attorney General John Ashcroft in the wake of 9/11—in the following ways:

1. They authorize “non-predicated” investigations—substantive investigative activity in circumstances in which there is no “information or . . . allegation indicating” wrongdoing or a threat to national security.
2. They permit intrusive investigative techniques—such as using informants, conducting interviews under false pretenses, and engaging in unlimited physical surveillance—during non-predicated investigations.
3. They encourage the government to collect, retain, and disseminate vast amounts of information about law-abiding individuals.
4. They weaken procedural safeguards—eliminating or reducing many of the requirements for supervisory approval of particular investigative techniques and temporal limits on investigative activity—that have been integral to the Guidelines' regime since it was first implemented in 1976.

These changes are not merely cosmetic. They grant the FBI license to employ intrusive techniques to investigate Americans when there is no indication that any wrongdoing has taken place. This means that FBI agents can collect and retain vast amounts of information, much of it about the innocent activities of law-abiding Americans. And it can then retain that information indefinitely and share it with other government agencies. It is thus crucial to ensure that sufficient limits, as well as meaningful internal and external checks, are imposed on this power.

We cannot know how much of this information-collection occurs, or how frequently it leads to the identification and neutralization of threats. But what we do know is that the Guidelines grant government officials significant discretion in making investigative decisions. In the absence of meaningful limitations on the FBI's authority, agents or informants may attend religious services or political gatherings to ascertain what is being preached and who is attending. They may focus their attention on particular religious or ethnic communities. They may gather and store in their databases information about where individuals pray, what they read, and with whom they associate—all with no reason to suspect criminal activity or a threat to national security. And then they may keep that information in their databases, regardless of whether it indicated any wrongdoing.

We also know that without sufficient limits and oversight, well-meaning efforts to keep the homeland safe—efforts that rely heavily on the collection and analysis of significant amounts of information about Americans—can adversely impact civil liberties. Indeed, history teaches that insufficiently checked domestic investigative powers frequently have been abused and that the burdens of this abuse most often fall upon disfavored communities and those with unpopular political views. Investigations triggered by race, ethnicity, religious belief, or political ideology may seem calibrated to address the threat we face, but instead they routinely target innocent people and groups. Beyond the harm done to individuals, such investigations invade privacy, chill religious belief, radicalize communities, and, ultimately, build resistance to cooperation with law enforcement.

Given the risks posed by placing such power in officials' hands, it is particularly important to ensure that the FBI's domestic authorities are designed and implemented in ways that they minimize these adverse effects and that the cost of any drawbacks that do persist is outweighed by what is gained. In other words, unless the Guidelines effectively enable law enforcement to counter the terrorist threat, the risks they pose to civil liberties are too high. It is therefore also critical to know how the Guidelines are being administered and whether they are effective.

In designing Guidelines that allow the FBI to combat the threat of terrorism while protecting our values, it is important to note one additional fact: The United States is not at war with Islam—indeed, to the contrary. Presidents Obama and George W. Bush both took great pains to disavow any implication that the U.S. struggle was against Islam as such. Policymakers past and present, scholars, national security experts, and terrorists themselves all recognize that any appearance that the U.S. views Islam as the enemy actually provides Al Qaeda and its allies propaganda that aids recruitment and creates additional risk for our armed forces. While a tiny minority of Muslims adopt a perverse version of their faith that encourages violence, the vast majority of American Muslims are law-abiding, patriotic, productive members of society. Any investigative scheme that singles out groups or individuals for government scrutiny based on the assumption that all Muslims in the U.S. are potential terrorists fosters an environment of suspicion and distrust and is likely counterproductive as well.

The current Guidelines can be modified relatively easily. A few changes will limit agents' discretion and increase oversight and accountability mechanisms.

Again, we do not know exactly how these powers are being used or whether they are being abused. Nor do we know what measures, if any, the Justice Department has taken to protect against such abuse. What we do know is this: The Guidelines, on their face, raise new and troubling concerns about possible violations of civil liberties on a wide scale. Ensuring that such abuses do not, in fact, take place requires two types of remedies. First, some of the powers extended to the FBI should be curtailed. In addition to any substantive changes, however, we must ensure that there are meaningful checks on the FBI's remaining powers—internal checks, such as supervisory approval requirements and regular reviews, as well as external checks, from both Congress and the public.

The current Guidelines can be modified relatively easily. A few changes will limit agents' discretion and increase oversight and accountability mechanisms. This report recommends two types of changes to the existing guidelines. First, procedural mechanisms should be put in place to ensure sufficient oversight of how the Guidelines are used, and whether they are effective. Such mechanisms must exist both within and outside the Justice Department. For example, Congress should undertake regular reviews of the Guidelines, the ways in which they are being implemented, and their level of effectiveness. Second, some of the most dramatic expansions of FBI power should be scaled back, both to ensure that intrusive investigative methods are used only when there are facts indicating a need for further investigation, and to guard against improper consideration of race, religion, ethnicity, national origin, or political ideology in investigative decisions. ■

The Bagram Loophole: No Habeas Corpus

Faiza Patel

The Supreme Court ruled in 2008 that detainees in Guantánamo Bay, Cuba had a right to challenge their detention in habeas corpus proceedings. But what about detainees held in Bagram Air Base in Afghanistan? To come to a different conclusion, the federal courts had to reach back ... as far as 1950.

One of the most fundamental legal issues to emerge since 9/11 is whether U.S. courts have the authority to review the President's decision to detain indefinitely individuals captured as part of the "war on terror." The question generated a slew of U.S. Supreme Court decisions culminating in *Boumediene v. Bush*, which held that detainees at the Guantánamo Bay, Cuba, Naval Facility have a constitutional right to challenge their detention in habeas proceedings in U.S. courts.

In the wake of *Boumediene*, the question remained whether individuals detained by the United States in other parts of the world were also entitled to habeas review. Detainees held at the U.S. military detention facility at Bagram Air Base in Afghanistan (Bagram) challenged their detention on the basis of *Boumediene*. Bagram presented several parallels to that of Guantánamo. As with Guantánamo, the U.S. exercised extensive control over Bagram. Additionally, like the Guantánamo detainees, several Bagram detainees were captured in one country and imprisoned in another. Unlike Guantánamo, Bagram is located in a theater of active hostilities.

The issue is particularly significant because the Obama administration is reportedly considering using Bagram for military detention of foreign terrorism suspects given that it no longer has a viable facility at Guantánamo and faces political resistance and legal obstacles to such detention in the United States itself. The results of the Guantánamo habeas reviews—so far 36 of the 50 detainees whose habeas petitions were heard have won the right to release—have undoubtedly increased pressure on the government to find a suitable facility. The issue will remain important even if the U.S. hands over control of Bagram to the Afghan government, as it has reportedly agreed to do in January 2011, [As of this writing, the U.S. has not turned over the base.] because the U.S. could hold detainees at its facilities in other parts of the world. The potential reviewability of such detention may well form part of the calculus of whether and where to do so.

Excerpted from "The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan," which appeared in the June 2010 issue of the *American Society of International Law Insight*.

District Court Decision in *Maqaleh v. Gates*

As discussed in a previous *ASIL Insight*, in *Maqaleh v. Gates*, Judge John Bates of the U.S. District Court for the District of Columbia found that he could entertain the habeas petitions of three foreign nationals who claimed to have been captured outside Afghanistan and imprisoned at Bagram. The government had opposed the petitions on the basis of Section 7(a) of the Military Commissions Act (MCA) of 2006, which purported to strip the court of habeas jurisdiction. Based on *Boumediene*, petitioners had argued that Section 7(a) of the MCA was an unconstitutional suspension of the writ. Applying the *Boumediene* test, the district court found that the Suspension Clause was applicable to non-Afghans brought to Bagram; thus it had jurisdiction to hear the contested habeas petitions.

Judge Bates certified his decision for interlocutory appeal. On May 21, 2010, a three-judge panel of the D.C. Circuit reversed and held that the reach of the Suspension Clause—and thus the right to petition for a writ of habeas corpus—did not extend to Bagram.

D.C. Circuit Decision in *Maqaleh v. Gates*

The decision of the three-judge panel of the D.C. Circuit begins by surveying the legal history of attempts to extend the writ of habeas corpus to non-citizens detained overseas. It starts with *Johnson v. Eisentrager*, a World War II case in which 21 German nationals, convicted by an American military commission in China for violations of the laws of war, petitioned for writs of habeas corpus. Petitioners had been repatriated to Germany to serve their sentences at Landsberg Prison, which was controlled by the U.S. as part of the Allies' post-war occupation. The Supreme Court held that habeas was unavailable to petitioners who were enemy aliens captured and detained outside the territory of the U.S.

...

Conclusion

Although the ultimate holding in *Maqaleh* is unsurprising, the court's emphasis on *Eisentrager*—rather than the more recent *Boumediene*—is striking. One explanation of this emphasis is that the court was leaving open the possibility of review when individuals were detained at U.S. facilities outside war zones. This rationale could also explain the court's insistence that the case turned on the location of Bagram in an active war zone, as opposed to relying more heavily on the limited U.S. control of the detention facility. Indeed, the court's suggestion that executive manipulation of detention could be considered in deciding on the reach of the writ may be a signal to the government that it ought not to push the limits of its overseas detention authority.

The court's reliance on *Eisentrager* also allowed it to avoid an in-depth analysis of the practical effect of extending the writ to a conflict zone like Afghanistan. The issue was discussed at length in *Boumediene* and in the decision of the court below and had been briefed by the parties and *amici*. Rather than evaluate the specific practical difficulties identified by the government, the D.C. Circuit instead chose to follow the path of *Eisentrager* and broadly concluded that dangers potentially present in a war zone weighed against extension of the writ to Bagram.

Another notable aspect of *Maqaleh* is its treatment of separation of powers concerns. While it is true, as the court noted, that separation of powers concerns did not feature in the application of the enumerated factors in *Boumediene*, such concerns clearly framed the issue and animated the Supreme Court's decision. *Maqaleh's* suggestion that these concerns could be addressed through an evaluation of executive manipulation may be regarded as a way to bring the issue more concretely into the *Boumediene* analysis.

On the other hand, a move away from potential separation of powers concerns to a focus on demonstrating manipulation by the Executive may place an insurmountable burden on petitioners.

The odds are high that *Maqaleh* will stand. It seems unlikely that an en banc review would lead to a different result. The panel, composed of judges spanning the ideological spectrum, was unanimous in its decision. Reversal by the Supreme Court is also a long shot. If *certiorari* were granted, the case would most likely be decided by eight Justices, either because Solicitor General Elena Kagan will have been confirmed to Justice Stevens's seat and will recuse herself for prior involvement, or because there will not yet be a replacement for Justice Stevens. Since four of these Justices were unwilling to extend the writ to Guantánamo, it seems unlikely that they would agree to expand its reach to Bagram. The Bagram petitioners could thus expect to garner, at most, four votes in their favor, and a 4-4 result in the U.S. Supreme Court has the procedural effect of an affirmance. Thus, at least for now, extension of the writ to overseas detention has stopped at Guantánamo. ■

The Origins of the National Security State

Garry Wills and Eric Alterman

Most observers date the beginning of the National Security State to the creation of the alphabet soup of intelligence agencies during the Cold War. But historian and Pulitzer-prize winner Garry Wills posits a new version of this history in his book, Bomb Power: The Modern Presidency and the National Security State. For Wills, the National Security State began with the Manhattan Project, the huge — and secret — effort to build an atomic bomb during World War II. “Most people don’t remember the Manhattan Project as illegal through and through,” says Wills in this conversation with Brooklyn College distinguished professor Eric Alterman.

Garry Wills: After most wars, there is a rush to demobilize, bring the boys home, re-convert the industries to peacetime. But, after World War II, that didn’t happen.

After most wars, emergency powers are recanted, sometimes by the Supreme Court, which, for example, essentially said, “Well, it was understandable you broke the law, suspended habeas corpus, or interned Japanese Americans.” But after World War II, in the national security area, the state of emergency continued. And the emergency powers not only continued, they increased on the model of the Manhattan Project.

Most people don’t remember the Manhattan Project as illegal through and through. Yet it was. It broke the Constitution, statutes, the military chain of command. It used unauthorized monies. It spied on American citizens and foreigners. It set out to kill Werner Heisenberg in Europe. It did all the things the CIA would later do, and nobody recanted that.

We went from the emergency of the war to the emergency of the Cold War, and now into the emergency of the War on Terrorism. And we created a range of new instruments unlike any created after World War I, the Civil War, or any other wars. The National Security Agency, the National Security Council, the Central Intelligence Agency, the massive prosecutions in secret, the massive clearance procedures, the massive loyalty investigations and tacit oaths—all of these were the creation of a National Security State in which the President was given authority never given to a president before.

It was decreed by the Congress in the Atomic Energy Act that only the President can initiate nuclear war. It had never been said that the President can initiate war. The Constitution says Congress has the power to declare war.

This Brennan Center conversation originally appeared on Just Books, April 2010.

The Atomic Energy Act gave the President the power to initiate nuclear war, and then, soon after, the power to initiate war in general.

When President Truman went into Korea, his Secretary of State, Dean Acheson, said, “This is not the nuclear war envisaged when you were given the power to initiate war, but in order to protect your power to initiate war, don’t ask Congress for any kind of authorization at all.” There has never since been a Congressional declaration of war. President Eisenhower proceeded to try to knock off five foreign governments without any kind of authorization from Congress, and without even notification or knowledge—and then to initiate secret wars of the kind President Nixon undertook in Cambodia. He invaded a country without even letting the Congress know he was invading it. It was called the Secret Bombing of Cambodia. It was not a secret to the Cambodians—only to Congress.

The Church Committee tried to cut back the powers of the CIA; the legislation it pushed has been routinely ignored.

Then, the Bush administration, through its Office of Legal Counsel, said, not only can the President initiate war, only the President can initiate war. Then John Yoo said: “Well, true, the Constitution says that the Congress has the power to declare war, but, ‘declare’ doesn’t mean ‘to initiate’ or ‘to authorize.’ It just means to publicize. It’s a way to let people know that the President has started a war.” So, there’s been a tremendous increase in the National Security State’s powers over the last half-century—and more. And there has been just as big an increase in the national effort to protect secrets, secrets that were used not primarily to fool the enemy—the Cambodians knew they were being bombed—but to fool the American people, Congress, and the press. The National Security State has taken on a life of its own, one that is a bit like a Frankenstein’s monster in that it is almost impossible to cut back.

The War Powers Act was an attempt to give Congress, at least partially, the job of declaring war, but it was ignored from the minute it was enacted. It has never been observed by any subsequent President. The Church Committee tried to cut back the powers of the CIA; the legislation it pushed has been routinely ignored. Remember, for example, that Senator Moynihan resigned from the Senate Foreign Intelligence Committee because, he said, the CIA regularly lied to the Committee. Even when the President wants the CIA to cooperate, it won’t; in response to the Church Committee, President Ford reluctantly told his team, “Okay, answer the subpoenas of the Church Committee,” and, when William Colby did, he was vilified by the members of his own agency. Meanwhile, Richard Helms lied to Congress and was glorified by the agency.

The agency now thinks that it has to protect the agency against the Congress and against the Constitution, against the press, and against the people. Even when somebody like President Obama comes in, he quickly reverses himself on signing statements, for example, which the President can use to declare parts of a law unconstitutional—although that’s the business of the Supreme Court. Obama’s appointees also said that they would consider continuing extraordinary renditions and cut off torture investigations. So even a President who seems to have good intentions finds his hands tied. I can imagine

why. Coming into office, he's told things he didn't know before—about our 800 military installations around the world, for example. And the security agencies come to him and say: "It took us many years to build this structure and to acquire all these assets—as they're called. Don't dismantle this. Don't undercut us. Don't destroy our morale. Don't question our loyalty because after all, we have all these assets and could start blabbing all these secrets of what we've been up to all these years." What does a President do in that case? He's told he has all these powers he didn't know he had and that he can't destroy them because he has to pass them on in their integrity to his successor, and that's how the monster lives.

Eric Alterman: Are there legal remedies to the problems of the National Security State?

GW: We need to find leadership in the Congress or elect leaders to the Congress who have spine. Congress has surrendered all along the line to these executive accretions. It should challenge signing statements. When the President says: "Well this is what Congress thinks is wrong, but I don't think it is. I'm not going to obey it," that's either a pocket veto or a nullification or a line item veto, or any of a number of things that have been rejected in the past. But Congress has not challenged the signing statements in any effective way. Congress should say, "What we say is the law, and if you don't agree, take it to the Supreme Court." Challenging the signing statements should be a first step.

President Obama came in and issued signing statements, and then said, "Well I won't issue reservations at signing, but if I've already said somewhere that if something is unconstitutional, I won't enforce it." That's worse. That's a stealthy signing statement. You don't even know what he's not going to enforce. Congress should stand up to that. We should try to elect people who will and to find people who will to challenge executive power and to glorify those who do and shame those who don't. You know, Al Franken had trouble trying to pass an amendment that said that our contractors in Iraq should not gang rape their fellow contractors and escape court procedures. He had trouble getting that passed.

Finding and electing good strong representatives is about the only thing we can do. We had wonderful changes in our laws from the bottom-up on things like labor law, feminist law, and other things. But the National Security State operates from the top-down and by tremendous secrecy. It's even hard to know even what you are supposed to object to because it's kept from you. Hence there's little that direct citizen action can accomplish. We can only work through our representatives and try to find them and promote them and elect them because there's no other way that we can break through the secrecy pact.

One of my favorite examples of how the secrecy pact works involves the first President Bush's decision to go into Kuwait. He asked for support from Congress, not a declaration or observances of the War Powers Act, but he asked Congress to go along with his plans. Congress held hearings. And

The National Security State operates from the topdown and by tremendous secrecy.

Admiral Powell, the former Chairman of the Joint Chiefs of Staff, went before a Congressional committee and said: “We haven’t provided much time for sanctions to work. Why not try sanctions for a longer period and see if we absolutely have to go to war?” After that, Secretary of State Jim Baker came before the committee and said: “Admiral Powell no longer has clearance. He can’t read the cables. Why should you listen to him?”

If you can’t listen to people like this, you can’t listen to anyone other than the priests of the secrecy. We have no way to judge them, direct them, correct them, and then, as Senator Moynihan, said, “All kinds of things are done by the executive without useful outside information because only the people who have clearance are listened to.” His example was the Bay of Pigs. He said the premise of the Bay of Pigs was to put a few people onto the shore and form a rebellion against Fidel Castro. “Well,” said Moynihan, “every academic expert, every poster, every journalist who had been there knew Fidel Castro was at the height of his popularity the moment after the successful revolution.” The idea that a few people could foment a rebellion is ridiculous. And Moynihan said, “Why didn’t the President heed the huge body of available information?” He said, “Because it was not classified.” If it’s not classified, it doesn’t matter.

EA: Are there any plausible avenues of action other than working to elect better representatives? Can there be an action suit or some sort of private inquiry led by organizations like the Brennan Center or similar groups?

GW: The only thing they can do is pressure Congress. The Courts are, for the time being, useless. One of the many extraordinary powers Vice President Cheney took upon himself was the vetting of the Supreme Court nominees. When he did that, people thought that he was going to make sure that they were conservative, largely on issues like abortion and gay rights, et cetera. However, what he was actually asking them was, “Do you agree with the unitary executive?,” which is the fundamental, theoretical position of this new presidential power. They did. And they proved that since they got on the Court. So for the time being, the Court is not going to be a corrective. If I were in Congress, the first thing I would do is draft a bill saying the President cannot issue signing statements that question the legality of the law. That has to go to the Supreme Court. That would be a very simple act of legislation. The Court is not going to overrule a law that implicates their power.

EA: This could come up at confirmation hearings if Justice Stevens retires, which seems likely. I think you’ve described a plausible first step scenario as there will be Senators who want to reassert some of Congress’s powers with regard to making law.

GW: When Sotomayor was confirmed, they asked her about all kinds of feminist and sexual matters but they didn’t ask her whether she believes in the unitary executive. That should have been the first thing they asked her, as well as the first thing they should ask anyone. ■

CLOSING THE JUSTICE GAP

Prosecutors Aiding Defendants?

Robert Morgenthau

Legal assistance for indigent defendants has fallen into such disrepair in New York counties that a key new group has weighed in for change: renowned prosecutors. The Brennan Center convinced this esteemed group to sign its brief to the New York Court of Appeals, the state's highest court, asking the lower courts to hear a suit for better defense services. Former Manhattan District Attorney Robert Morgenthau explains why he signed the brief.

Under normal circumstances, prosecutors are not the first to call for better legal defense services. But the quality of defense for the poor in many parts of our state has reached a crisis level.

A lawsuit currently in state court contains disturbing claims that in five counties in upstate New York and Long Island, indigent defendants often proceed to critical stages of prosecution—including bail hearings and arraignment—without counsel. Even when people in these counties are represented, their attorneys regularly lack adequate training and supervision, don't meet with their clients or answer their phone calls, fail to give them necessary information about their cases, and fail to investigate charges and prepare for trial.

The allegations, part of a lawsuit brought by the New York Civil Liberties Union, unnerved me so much that, along with 61 other former federal and state prosecutors, I joined a brief authored by the Brennan Center for Justice in which we are urging the New York Court of Appeals to declare that New York's courts must hear the claim for better defense services.

These kinds of deficiencies do not belong in twenty-first century America. As prosecutors, we recognize that ineffective defense attorneys not only

hurt poor defendants, but, more broadly, undermine the operation of our criminal justice system.

There's good reason the Miranda warnings read to someone upon their arrest include the words: "You have the right to an attorney. If you cannot afford an attorney, one will be appointed to you."

Chief Justice Warren Burger, one of the giants of modern American jurisprudence, described our justice system as a three-legged stool, supported by judge, prosecution, and defense. When any one of these legs is weak, the entire system wobbles. Deficiencies in defense services for the poor mean that prosecutors and the public cannot be confident that the guilty—and only the guilty—are punished. This shakes the very foundation of our justice system.

Yet despite glaring and growing problems in indigent defense, the New York Legislature has ignored this crisis for years. Most recently, in 2006, a commission of experts convened by New York State's chief judge concluded that large numbers of New Yorkers are denied effective assistance of defense counsel, a right protected by both the New York and United States constitutions.

To fix it, the commission called for a number of critical reforms, including establishing a state-

This op-ed originally appeared in the *New York Daily News*, February 11, 2010. Former Manhattan District Attorney Morgenthau led 62 former prosecutors in the call for better indigent defense. He was joined by former District Attorney Joseph Jaffe and former U.S. Attorneys Zachary Carter, Robert B. Fiske, Jr., John S. Martin, and Otto G. Obermaier. The Brennan Center submitted the brief with Lee S. Richards, III, Arthur S. Greenspan, and Eric Rosen of Richard Kibbe & Orbe LLP.

wide defender office, providing funding for defense services through the state's general fund rather than through individual counties, and eliminating disparities between prosecution and defense resources. These steps would go a long way toward ensuring adequate representation for defendants. Yet the Legislature failed to respond at all, much less implement any of the reforms detailed in the report.

I would prefer to see this crisis resolved through legislation, rather than by court decree. But constitutional rights cannot wait for a sleeping Legislature, particularly when the constitutional violations undermine our entire system of justice.

This suit should provide the wakeup call for lawmakers to finally do their duty and take on the challenge of providing all New Yorkers equal justice under the law. If not, I am confident that New York courts are capable of addressing this issue in a way that is fair to the state, the plaintiffs, all criminal defendants, and, ultimately to the cause of justice. ■

Paying Twice: Criminal Justice Debt

Alicia Bannon, Mitali Nagrecha, and Rebekah Diller

Two years ago, the Brennan Center began studying a disturbing new trend: piling fees onto criminal defendants. Surely this was some onerous new form of punishment. The reality, in a way, is more disturbing: States impose these fees to pay for their court systems and pad out their budgets. USA Today headlined: “Some States Charge Poor for Public Defenders.” The fees burden the very people who need help re-entering the workforce.

Many states are imposing new and often onerous “user fees” on individuals with criminal convictions. Yet far from being easy money, these fees impose severe—and often hidden—costs on communities, taxpayers, and indigent people convicted of crimes. They create new paths to prison for those unable to pay their debts and make it harder to find employment and housing as well as to meet child support obligations.

This report examines practices in the 15 states with the highest prison populations, which together account for more than 60 percent of all state criminal filings. We focused primarily on the proliferation of “user fees,” financial obligations imposed not for any traditional criminal justice purpose such as punishment, deterrence, or rehabilitation, but rather to fund tight state budgets.

Across the board, we found that states are introducing new user fees, raising the dollar amounts of existing fees, and intensifying the collection of fees and other forms of criminal justice debt such as fines and restitution. But in the rush to collect, made all the more intense by the fiscal crises in many states, no one is considering the ways in which the resulting debt can undermine re-entry prospects, pave the way back to prison or jail, and result in yet more costs to the public.

Key Findings

- **Fees, while often small in isolation, regularly total hundreds and even thousands of dollars of debt.** All 15 of the examined states charge a broad array of fees, which are often imposed without taking into account ability to pay. One person in Pennsylvania faced \$2,464 in fees alone, approximately three times the amount imposed for fines and restitution. In some states, local government fees, on top of state-wide fees, add to fee burdens. Thirteen of the fifteen states also charge

Excerpted from *Criminal Justice Debt: A Barrier to Re-entry*, October 2010.

poor people public defender fees simply for exercising their constitutional right to counsel. This practice can push defendants to waive counsel, raising constitutional questions and leading to wrongful convictions, over-incarceration, and significant burdens on the operation of the courts.

- **Inability to pay leads to more fees and an endless cycle of debt.** Fourteen of the 15 states also utilize “poverty penalties”—piling on additional late fees, payment plan fees, and interest when individuals are unable to pay their debts all at once, often enriching private debt collectors in the process. Some of the collection fees are exorbitant and exceed ordinary standards of fairness. For example, Alabama charges a 30 percent collection fee, while Florida permits private debt collectors to tack on a 40 percent surcharge to underlying debt.
- **Although “debtors’ prison” is illegal in all states, reincarcerating individuals for failure to pay debt is, in fact, common in some—and in all states new paths back to prison are emerging for those who owe criminal justice debt.** All 15 of the states examined in this report have jurisdictions that arrest people for failing to pay debt or appear at debt-related hearings. Many states also use the threat of probation or parole revocation or incarceration for contempt as a debt-collection tool, and in some jurisdictions, individuals may also “choose” to go to jail as a way to reduce their debt burdens. Some of these practices violate the Constitution or state law. All of them undercut former offenders’ efforts to reintegrate into their communities. Yet even though over-incarceration harms individuals and communities and pushes state budgets to the brink, states continue to send people back to prison or jail for debt-related reasons.
- **As states increasingly structure their budgets around fee revenue, they only look at one side of the ledger.** Strikingly, there is scant information about what aggressive collection efforts cost the state. Debt collection involves myriad untabulated expenses, including salaried time from court staff, correctional authorities, and state and local government employees. Arresting and incarcerating people for debt-related reasons are particularly costly, especially for sheriffs’ offices, local jails, and for the courts themselves. For example, Brennan Center analysis of one North Carolina county’s collection efforts found that in 2009 the government arrested 564 individuals and jailed 246 of them for failing to pay debt and update address information, but the amount it ultimately collected from this group was less than what it spent on their incarceration.
- **Criminal justice debt significantly hobbles a person’s chances to re-enter society successfully after a conviction.** In all 15 of the examined states, criminal justice debt and related collection practices create a significant barrier for individuals seeking to rebuild their lives after a criminal conviction. For example, eight of the 15 states suspend driving privileges for missed debt payments, a practice that can make

Criminal justice debt puts many individuals on the fast track to re-arrest and re-incarceration. At their worst, criminal justice debt collection efforts result in a new form of debtors’ prison for the poor.

it impossible for people to work and can lead to new convictions for driving with a suspended license. Seven states require individuals to pay off criminal justice debt before they can regain their eligibility to vote. And in all 15 states, criminal justice debt and associated collection practices can damage credit and interfere with other commitments, such as child support obligations.

- **Overdependence on fee revenue compromises the traditional functions of courts and correctional agencies.** When courts are pressured to act, in essence, as collection arms of the state, their traditional independence suffers. When probation and parole officers must devote time to fee collection instead of public safety and rehabilitation, they too compromise their roles.

Criminal justice debt puts many individuals on the fast track to re-arrest and re-incarceration. At their worst, criminal justice debt collection efforts result in a new form of debtors' prison for the poor.

In a startling number of jurisdictions, we found that individuals can face arrest and incarceration not for any criminal activity, but rather for simply falling behind on debt payments. Our research also uncovered a variety of ways in which criminal justice debt can be the first step toward new offenses and more jail time—all originating from the failure to pay off debt.

Some of these practices violate the Constitution or state law. All of them undercut former offenders' efforts to reintegrate into their communities. Even a short stint in jail can lead to harmful consequences such as job loss, family disruptions, and interruptions in treatment for addiction, all of which create a situation ripe for new and more serious offenses. And the costs of arrest and incarceration—passed on to the taxpayer—are often more than the state can ever hope to collect from debtors.

[Mecklenburg County, North Carolina] records indicate that in 2009, 564 individuals were arrested because they fell behind on debt and failed to provide the Fine Collection Department with updated address information. In order to be eligible for release from jail prior to a hearing before the court, they were required to pay the full amount of their debt. Of the 564 individuals arrested, 246 people did not pay and were held in jail for an average of about four days pending a compliance hearing—at which point their debts were often cancelled. This jail term alone cost more than \$40,000—while the county collected only \$33,476 from the individuals who had been arrested. Additional arrests also took place when individuals did not appear at debt-related hearings, costing the county even more money.

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Core Recommendations

In light of these findings, this report makes the following recommendations for reforming the use of user fees and the collection of criminal justice debt in state and local policy environments:

- Lawmakers should evaluate the total debt burden of existing fees before adding new fees or increasing fee amounts.
- Indigent defendants should be exempt from user fees, and payment plans and other debt collection efforts should be tailored to an individual's ability to pay.
- States should immediately cease arresting and incarcerating individuals for failure to pay criminal justice debt, particularly before a court has made an ability-to-pay determination.

- Public defender fees should be eliminated, to reduce pressures that can lead to conviction of the innocent, over-incarceration, and violations of the Constitution.
- States should eliminate “poverty penalties” that impose additional costs on individuals who are unable to pay criminal justice debt all at once, such as payment plan fees, late fees, collection fees, and interest.
- Policymakers should evaluate the costs of popular debt collection methods such as arrests, incarceration, and driver’s license suspensions—including the salary and time spent by employees involved in collection and the effect of these methods on re-entry and recidivism.
- Agencies involved in debt collection should extend probation terms or suspend driver’s licenses only in those cases where an individual can afford to repay criminal justice debt but refuses to do so.
- Legislatures should eliminate poll taxes that deny individuals the right to vote when they are unable to pay criminal justice debt.
- Courts should offer community service programs that build job skills for individuals unable to afford criminal justice debt. ■

Foreclosure in the Dark

Melanca Clark

Fifteen years ago, Congress imposed crippling restrictions on the Legal Services Corporation, which supports civil legal representation for the poor. One consequence — at least six out of 10 families facing foreclosure lack a lawyer. Now, it turns out that many foreclosures are pursued without the most rudimentary paperwork and legal authority. One solution to the crisis: help homeowners better represent themselves.

Late last month, President Barack Obama announced his administration's latest initiative for tackling the country's unrelenting foreclosure crisis. One and a half billion dollars will go to assist states that have experienced the greatest decline in home values to develop programs to help homeowners avoid foreclosure. These programs are sure to include incentives to lenders for modifying loans, a central component of the administration's existing Making Home Affordable Program.

Providing incentives to lenders to alter loan terms will undoubtedly help families keep the roof over their heads. But a comprehensive approach for addressing the foreclosure crisis requires both a carrot and stick approach.

We are in this mess in no small part because of irresponsible lending practices that many lenders either explicitly condoned or willfully ignored. Some of the more predatory and abusive practices—disproportionately targeted to low-income and minority communities—were illegal.

Despite this reality, the overwhelming majority of homeowners facing foreclosure do so without legal assistance, according to a recent Brennan Center for Justice study. As a result, wrongdoers are rarely held accountable for their misdeeds.

In Connecticut, 60 percent of defendants facing foreclosure did so without counsel. In Stark

County, a hard-hit county in Ohio, that figure was 86 percent; and in Queens County, N.Y., for homeowners in proceedings involving high-cost and subprime loans, it was as high as 84 percent.

These homeowners may have been victimized by unsavory lenders or by those engaged in mortgage fraud schemes. Without the threat of legal action, mortgage companies may have been particularly recalcitrant and unwilling to renegotiate loan terms. And families may have just needed an advocate in court to help scrutinize foreclosure filings for mistakes.

For most, however, the inability to pay for an attorney put legal assistance out of reach as there are not enough no- or low-cost publicly funded attorneys to meet the demand.

The economic collapse didn't cause this shortage, but it has exacerbated it. Even before the recession, more than 80 percent of the legal needs of the poor went unmet. That's part of the reason lots of families got duped into bad mortgages in the first place.

This isn't just the result of simple economics. Little-known federal restrictions placed on the Legal Services Corporation in the mid-1990s limit the type of representation that homeowners and others with civil legal cases may receive from lawyers in programs that receive federal funds. For example, lawyers in LSC-funded programs cannot bring class

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action suits and thus must challenge illegal and widespread practices on an inefficient case-by-case basis. They have also been prevented from initiating legislative advocacy on behalf of communities that are in dire need of changes in lending policy, notably a restriction not applied to the banks who received government bailout money.

The federal restrictions further burden the poor and undercut their counsel, who already do not have sufficient resources to meet the growing demand for assistance.

The resulting inequity is galling. Lawyers for mortgage lenders and banks rely on a full arsenal of legal tools to pursue homeowners, while homeowners on the receiving end of foreclosure proceedings often have no choice but to go it alone. And even when homeowners are represented, their lawyers must fight with one hand tied behind their backs.

The first needed fix is simple: more funding for foreclosure legal assistance. Additional federal

dollars should be dedicated to foreclosure legal assistance. State legislators need to step up to the plate as well. California saw fit to enact the Sargent Shriver Civil Counsel Act to provide legal assistance in high-stakes civil proceedings to low-income people in select jurisdictions, even in the face of that state's severe budget challenges. Other states should follow suit.

Congress must also lift the federal restrictions that impede delivery of legal services for the poor. The passage of legislation this past December lifting the restriction on LSC-funded attorneys' ability to collect statutorily authorized attorneys' fees was an important first step. But Congress should go further and remove the remaining burdensome federal constraints on legal aid providers' use of nonfederal funds. This year's LSC appropriation bill presents a ready vehicle.

When families have no legal representation, lenders are free to act with impunity. When they do, it damages not only foreclosed homeowners, but the rest of us as well. ■

Fighting the “Civil Justice Gap”

Rebekah Diller

The “Civil Access to Justice Act” would restore the Legal Services Corporation’s funding to what it was almost a generation ago.

One of our nation’s proudest traditions is that of “equal justice for all.” Yet, the unfortunate and persistent truth is that too many Americans are at a great disadvantage in the courts because they cannot afford to pay for attorneys on the private market to help them in civil cases. By most estimates, 80 percent of the legal needs of low-income people go unmet. The current recession, with its accompanying foreclosure epidemic, has made matters much worse by pushing more families into poverty and by creating expanded legal need for those homeowners facing foreclosure.

In the face of this challenge, nearly one million individuals receive help each year from a legal services program that works extraordinarily well. LSC-funded programs closed 889,155 cases in 2008, helping those individuals save their homes from eviction or foreclosure, resolve child custody disputes, gain protection from domestic violence, defend against scams that prey upon the poor, and resolve other life-changing legal problems.

By reauthorizing and strengthening LSC, the Civil Access to Justice Act would ensure that our legal aid program can serve more individuals more effectively. By setting authorized LSC funding at the level it had reached in 1981 (adjusted for inflation)—the last time that LSC was able to provide a minimum level of access for people in need across the country—the Act would lay the groundwork for helping significantly more people. By also restoring the balance on restricted activities achieved in the original LSC Act, the bill would enable clients of LSC-funded programs to obtain more efficient and effective assistance. Finally, the bill would improve oversight and governance of LSC and thus strengthen the legal aid infrastructure.

As growing numbers of people slip into poverty and homelessness during the current recession, the need to revitalize our nation’s civil legal aid system is more urgent than ever. At the same time that needs are rising, non-LSC sources of funding are drying up. Therefore, it is especially critical that Congress act now to reinforce our legal aid system.

Excerpted from Rebekah Diller’s testimony before a U.S. House Judiciary Subcommittee hearing, “The Civil Access to Justice Act of 2009,” held on April 27, 2010. Diller testified alongside Sen. Tom Harkin (D-IA) and Rep. Bobby Scott (D-VA).

Notwithstanding the clear benefits, the overwhelming majority of people who need legal aid are unable to obtain it, due, in large part, to funding shortages. Every year, almost one million cases are turned away by LSC-funded offices due to funding shortages. Study after study finds that 80 percent of the civil legal needs of low-income people go unmet. This “justice gap” keeps families in poverty and threatens the stability of our court system.

The recession has made matters worse. Nearly 54 million people were income-eligible for federally funded legal aid in 2008, up from about 51 million just one year before. In harsh economic times, civil legal conflicts increase in number and intensity, as do the adverse consequences of leaving them unresolved or resolving them unfavorably.

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Providing legal representation to people in trouble and otherwise unable to afford it has proven to be a success, both for the individuals and families that receive the services, and for our society. The benefits of legal aid reverberate far beyond individual cases. As Congress recognized in the original LSC Act when it stated that “providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice, for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws.”

Legal services lawyers provide a range of services that would otherwise be unavailable to families facing legal problems. In foreclosure cases, for example, lawyers help families stay in their homes or find livable, alternative solutions. In the area of family law, legal services lawyers help victims of domestic violence gain safety through protective and restraining orders and assist parents and other family members fighting for custody of a child. In consumer cases, lawyers protect the elderly and other vulnerable groups from unscrupulous or predatory lenders and help people manage and renegotiate their debt. Where families are hungry or homeless, legal services lawyers help people to appeal wrongful denials of government benefits, allowing for access to the crucial safety net they need.

Having a lawyer makes a measurable difference in a person’s case. Studies show that access to a lawyer often provides the critical boost that families need to avoid homelessness, and the key factor that can enable domestic violence survivors to reach safety and obtain financial security. Research reveals that a person with legal representation is more than five-times likelier to prevail in court than a self-represented person.

Legal services programs also serve a critical preventive function, fending off many of the harms that communities experience when representation is unavailable. Thus, by tackling clients’ mental health issues, education needs, and family disputes, they contribute to reducing re-arrests of clients with past criminal records. By fighting evictions and foreclosures, they help enable states and localities to reduce the costs associated with maintaining shel-

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ters, foster care, and a variety of other services for the homeless. And by helping clients to correct unsafe living and workplace conditions, they help to reduce government expenditures on health care.

...

However, the restrictions imposed in the 1996 appropriations process, and renewed with some modifications since then, marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. These restrictions cut deeply into low-income people's capacity to secure meaningful access to the courts, harming them unnecessarily in predatory lending cases, cases arising out of consumer scams, benefits problems, and other civil legal matters. Moreover, the appropriations rider took the extraordinary step of restricting every dollar that an LSC recipient receives from non-LSC sources, including state and local governments, private donors, IOLTA revenue, and other sources. By restricting how state, local and private funds are spent, the appropriations restrictions have squandered precious funds that could have gone toward serving more in need and have intruded on the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice.

The Civil Access to Justice Act would remove the most onerous of the 1996 appropriations restrictions while leaving in place and, in some cases, expanding the restrictions imposed in the original LSC Act. The legislation would restore efficiency to the legal aid system by alleviating the need for state and private funders to establish separate organizations to spend their funds free of the federal chokehold. And it would ensure that low-income individuals are not barred from using legal tools available to every other litigant. ■

The Right Language for the Justice Department

Laura Abel and Michael Mulé

Federal civil rights laws require that courts provide interpreters for the millions with limited English proficiency. How can someone have justice if they cannot understand the language in which courts operate? At the request of the Justice Department, together with the Empire Justice Center, we compiled Kafkaesque examples from America's courts.

A Mixtec-Speaking Man Spent Four Years in Prison Before It Was Discovered That He Had Not Understood the Spanish-Speaking Interpreter

Although Santiago Ventura Morales and several witnesses in the State of Oregon's criminal case against him spoke Mixtec, a Spanish-speaking court interpreter was appointed. Only after Mr. Ventura had served four years in prison was it discovered that he had not understood the interpreter. The prosecution eventually dropped the case, acknowledging that there was insufficient evidence against him.

Encarnación Is Fighting to Regain the Son She Lost After a Notice of Intent to Terminate Parental Rights Was Sent to Her in English

In a case in Missouri state court, Encarnación's parental rights over her young son were terminated after she was placed in immigration custody. Encarnación, a native of Guatemala, who worked at a poultry plant that was raided by the Department of Homeland Security, arranged for her son to be in her brother's care while she was detained by immigration. Through an unfortunate course of events, her son's teachers arranged for his adoption by another couple. Encarnación received papers written only in English informing her of the court's intent to terminate her parental rights and free her son for adoption. Encarnación is a native Spanish speaker who does not speak or understand English. The court proceeded to terminate Encarnación's parental rights without her presence in court. Her son has been adopted by another family, his name has been changed, and Encarnación does not know where he is. Encarnación was informed of her appeal rights only in English. Encarnación is still fighting to regain custody of her son.

Excerpted from a letter sent to Assistant Attorney General Thomas E. Perez in the Civil Rights Division of the U.S. Department of Justice. Spurred by our advocacy, the Justice Department in 2010 warned state courts to follow civil rights laws and provide adequate interpreters for non-English speakers.

Aarti Was Arrested and Placed in Immigration Detention After Trying to Report Domestic Violence

For several years, Aarti had been physically and sexually abused by John, who was the father of her child. During one incident, John pushed Aarti against the wall and beat her repeatedly. At one point, Aarti scratched John's face to prevent him from slamming the door on her hand. Aarti, who lived in North Carolina, then called the police. When the police arrived, they tried to communicate with Aarti without an interpreter, even though Aarti does not speak English. Because they could not understand what Aarti was saying, they arrested her instead of John. As a result of Aarti's arrest, DHS learned of Aarti's immigration status and placed her in immigration detention, while her child remained in John's custody.

Lack of Interpretation Led a Colombian Woman to Agree to Deportation to Mexico

A Colombian woman signed a stipulated order of removal written only in English. Because she has limited proficiency in English, and the order was never translated for her, she did not realize that by signing she was agreeing to be deported to Mexico, a country with which she has no ties. ■

Ending Racial Disparities in Federal Prosecutions

Nicole Austin-Hillery and Melanca Clark

Foreword by James E. Johnson

It is no secret that racial disparities exist in our criminal justice system. An uncomfortable truth: Prosecutors, making discretionary decisions, can unconsciously worsen those gaps. In 2010, the Brennan Center and the National Institute on Law and Equity updated recommendations from a dozen former federal prosecutors. We work with Justice Department leadership to achieve real reform.

Prosecutors and law enforcement officers have enormous power; they can make the difference between a community united by common aims and one riven by conflict. The men and women of the United States Department of Justice (DOJ) wield the power of the state to enforce the rule of law and keep our communities safe. Most discharge their duties in a vigorous and fair way, but neither human beings nor the institutions they run are perfect. As a result, our ability to reach a deep sense of fairness with criminal enforcement efforts is compromised by the racial and ethnic disparities that bedevil our criminal justice system and continue to damage individuals and communities. What is so exciting, today, is the new opportunity that exists to illuminate and address these disparities.

It is important that DOJ bring particular focus to these types of problems in our federal criminal justice system. In one of his first public speeches as Attorney General, Eric Holder encouraged all Americans to engage in conversations about race. The Brennan Center respectfully suggests that, as next steps, DOJ take the following actions. First, adopt the Guidelines included in this report. The product of collaboration between the Brennan Center and the National Institute on Law and Equity, these Guidelines set forth views of former U.S. Attorneys based on their experiences confronting the undercurrents of race and ethnicity in the federal justice system. Their recommendations include strategies for considering racially disparate impacts when setting office priorities, putting prosecutors in leading roles on task forces focused on the problem, improving training of prosecutors, tracking data, and supporting sentencing reform.

Second, DOJ should implement broad reform to enable the Department's own U.S. Attorneys to examine how race and ethnicity affect minorities throughout the criminal justice system at the federal, state, and local levels. Ideas for achieving reform in this respect are illustrated in the Justice Integrity Act (JIA) (the brainchild of former Senator Joseph Biden), which was re-introduced in 2009 in both the House and Senate. Some of the JIA's recommendations are similar to those proposed in this Brennan Center report.

Excerpted from *Racial Disparities in Federal Prosecutions*, March 2010.

Ideas such as increasing data collection and encouraging innovation at the state level are policies that DOJ could implement easily, at no or low cost, to make a significant difference.

The implications of this effort are promising. The momentum we are seeing in the states would be dramatically accelerated by federal leadership on this issue. There is no more powerful message for the entire criminal justice system than to have federal prosecutors lead the national effort to eradicate the impact of racial and ethnic disparities in the criminal justice system.

From the Introduction:

Racial disparities have been documented at every stage of the criminal justice system. African Americans and other racial and ethnic minorities are more likely to be arrested than white citizens, more likely to be charged once arrested, and more likely to be convicted and imprisoned once charged.

In 2005, the Brennan Center for Justice at NYU School of Law and the National Institute for Law and Equity brought together 12 former prosecutors, most of whom had served as United States Attorneys, to look hard at racial and ethnic disparities within the federal criminal justice system and begin to craft a solution to this long-standing and troubling problem.

All acknowledged that prosecutors wield great power throughout criminal prosecution. All agreed that it is essential to monitor the role that race and ethnicity play in each stage of the prosecutorial process. Together, the participants proceeded to draft guidelines for federal prosecutors in six distinct areas:

1. Prosecutorial Decision-Making:

Prosecutors should consider racial and ethnic disparate impacts when setting priorities and should partner with law enforcement to eliminate racial and ethnic bias in charging practices.

2. Law Enforcement and Task Forces:

Prosecutors should lead ethnically diverse task forces formed to promote equal treatment without regard to race and ethnicity.

3. Training:

Prosecutors should train staff and law enforcement to identify and eliminate racial bias at all phases of criminal prosecution process.

4. Management and Accountability:

Prosecutors and the Executive Office of United States Attorneys should collect data to identify systemic racial and ethnic disparities in the federal criminal justice system and should work to increase the racial and ethnic diversity of U.S. Attorney's staff.

5. Community:

Prosecutors should adopt practices to obtain views of community members on real or perceived disparate treatment by prosecutors based on race and ethnicity.

6. Influencing Legislation and Policy:

Prosecutors should support sentencing policy reforms designed to reduce racial and ethnic disparities in the federal criminal justice system. ■

JUST BOOKS

What Should I Read?

A signal fact of intellectual life is the decline of book reviews. Few newspapers now have a standalone section. In 2010, the Brennan Center tried an experiment: a lively book and ideas blog called *Just Books*, edited by Susan Lehman. A recurring feature: “Suggested Readings.”

What is the one book all students should read before they start law school?

Bill Clinton, 42nd President of the United States: The biography of Learned Hand, and other biographies of judges. There are especially good biographies of Justices Douglas and Blackmun.

Sandra Day O’Connor, Former Supreme Court Justice: *The Elements of Style*, Strunk & White.

Michael Mukasey, 81st United States Attorney General: Apart from the usual advice on what to read before one goes to law school, which is as much and as broadly as time and taste will allow, my one “must read” would be any collection of essays by George Orwell that included “*Politics and the English Language*,” which I used to have my law clerks read their first day on the job.

Adam Liptak, *The New York Times* Supreme Court reporter: Anthony Lewis’ *Gideon’s Trumpet*.

Ted Sorensen, Counsel to President John F. Kennedy: *A Man for All Seasons*, by Robert Bolt.

Robert M. Morgenthau, Former Manhattan District Attorney: Oliver Wendell Holmes wrote a terrific little book called *The Common Law*. It gives readers a very good idea about common law and how it worked before we added complicated statutes and all the rest.

Richard Revesz, Dean, New York University School of Law: Here is my nomination: *Simple Justice: The History of Brown v. Board of Education* and *Black America’s Struggle of Equality*, by Richard Kluger. It’s a great introduction to the power of law.

Richard T. Ford, George E. Osborne Professor of Law, Stanford Law School: Karl Llewellyn’s *The Bramble Bush* tells the potential law student what she needs to know to get started thinking like a lawyer. And it will make her happy to be joining the profession. Duncan Kennedy’s *Legal Education and the Reproduction of Hierarchy* got me through tough times at law school. This book will let students who find law school baffling and disorienting know they aren’t crazy or stupid.

What books are essential to understanding how the Supreme Court works and why the President's nomination for Justice Stevens' seat is so important?

Judith Resnik, Professor of Law, Yale University: Robert Cover's *Justice Accused*—about courts in the time of slavery—is the key book to understand that all judges and justices must struggle to decide what is “just” and therefore, that it matters who our justices are.

Orin Kerr, Professor, George Washington University School of Law: Alexander Bickel, *The Least Dangerous Branch*. Bickel's classic book considers the proper role of the Supreme Court in a democratic society. The book is almost 50 years old, but it remains very influential today.

Sean Wilentz, Professor of History, Princeton University: The most authoritative account of the court's evolution appears in the multi-volume Oliver Wendell Holmes *Devise History of the Supreme Court*, although the series is still a good way from reaching the modern era. For recent, up-to-date, accessible considerations, see the contrasting evaluations in Jeffrey Toobin's *The Nine*, which covers the court since the Reagan years and focuses on personalities, and Peter Charles Hoffer's *A Nation of Laws*, which discusses the court as part of the broad sweep of the history of American law and jurisprudence.

Geoffrey Stone, Professor of Law, University of Chicago: *Keeping Faith with the Constitution*, by Goodwin Liu, Pamela S. Karlan, and Christopher Schroeder, which provides an excellent account of a progressive understanding of constitutional law.

Alan Dershowitz, Professor, Harvard Law School: The Supreme Court deserves less respect than it gets—especially from lawyers, professors, former law clerks, and the elite media. It is simply another political institution whose members trade votes, make calculating decisions and maximize their own power and interests. There's no evidence that principles play a greater role in judicial than in legislative or executive decisionmaking—especially at the Supreme Court level. But, there is far more hypocrisy in the judicial branch because its power derives largely from the pretense that it is applying neutral principles in a principled manner. (That is why it would have been far more honest for the 2000 election to have been decided by the legislative branch on overtly partisan grounds than by the judiciary on hypocritically principled grounds.) Most books by law professors about the Supreme Court are far too deferential. The books I recommend are exposé books like Woodward and Armstrong's *The Brethren* and those that follow in its tradition by relying on inside sources, leaks, and unauthorized disclosures. And by the way, there is no Santa Claus!

Conrad Harper, retired partner, Simpson, Thacher and Bartlett LLP: The biographical essays in *Mr. Justice*, edited by Allison Dunham and Phillip B. Kurland, offer insight into several key Justices. Justices are not paragons, but real people facing difficult issues that implicate their life experiences. Justice Stevens's essay on Justice Rutledge, for whom he clerked, reveals a good deal about what Rutledge and Stevens regarded as important to judging.

What is the best novel about justice?

Jonathan Franzen, Author, *Freedom: The Tragedy of Pudd'nhead Wilson* is the most underappreciated of Mark Twain's novels and one of the best books ever written about American slavery. It's about an Antebellum, small-town, Missouri lawyer who dabbles in the new science of fingerprinting; it's also, deftly, comically, about justice in every sense of the word.

Alice Walker, Author, *Overcoming Speechlessness*: Victor Hugo's *Les Misérables*. In the character of Jean Valjean, *Les Misérables* shows that what society narrowly considers criminal behavior is often caused by impoverishment, hunger, and desperation to which society has made insufficient address. I too believe that most "criminal" behavior has desperation, and the kinds may be varied, at its root. A truly just society would mean no one who is starving, or seeing those around her starving, would be punished for stealing bread.

Tom Wolfe, Author, *I Am Charlotte Simmons: A Novel*: I can think of many good novels in which justice triumphs and many in which it crashes and burns. But as for how justice lives, I don't know how you can top *Bleak House*. Justice lives not in this world but in a play world. In *Homo Ludens*, the law is Huizinga's favorite example of . . . Man Playing. Not for nothing, he says, is a court of law called a court. It is by no means a case of mere linguistic coincidence. Justice, he says, is not a court of law's concern. The game is. Is there or has there ever been a prosecutor who got up in front of a jury thinking about justice? Has there ever been a civil lawyer who cared so much about justice that he would stand up in court and utter a word that wasn't paid for and put in his mouth? Of course not, says Huizinga. *Homo Ludens!* And there you have the story—and the message—of *Bleak House*. How would Dickens know? His first job was recording court testimony verbatim for newspapers.

Elizabeth Alexander, Professor at Yale, Poet, and Author, *Miss Crandall's School for Young Ladies and Little Misses of Color*: Alice Walker's *Meridian*. This is a novel that shows us that the beloved quest for justice that characterized the Civil Rights Movement was not without its challenges and conundrums.

Elizabeth Wurtzel, Lawyer and Author, *Prozac Nation*: The best novel about justice I've ever read is also my favorite book: *The Executioner's Song*, by Norman Mailer. But I'm not sure it's a novel exactly. ■

Bathtub Conversions

The Strange Alchemy of Life and Law by *Albie Sachs*

Reviewed by *Dahlia Lithwick*

Former South African Supreme Court justice Albie Sachs doesn't downplay the need for reason and logic. But he's adamant: these can't take you all the way to the truth, and, anyone adjudicating matters of human dignity needs to see humans – and not just the law – as deserving of dignity.

America's interest in the question of whether or not our Constitution is "evolving" strikes me as off-base. Constitutional "evolution?" It's a metaphor that's outlived its usefulness—since the Constitution is neither static nor evolving. It's a thing. What should matter far more to us is whether the actual living breathing jurists who interpret that Constitution are evolving, or at least open to the possibility.

After his confirmation hearings, Clarence Thomas is said to have bragged, "I am not evolving," and it's become rather clear from his tenure on the bench that he has no plans to evolve anytime soon. It's an intriguing image: the immutable jurist, whose constitutional views are so fixed and sure that they change very little over the decades. Like a lifetime warranty. Other justices, from William Brennan to Earl Warren to Harry Blackmun, famously drifted leftward over their careers. Some, like Felix Frankfurter and Byron White became more conservative. And some, like sitting Justice John Paul Stevens, claim to have drifted nowhere while the court slid rightward all around him. But one of the great pleasures of reading Justice Albie Sachs' memoir, *The Strange Alchemy of Life and Law*, is that he describes not just evolving, changing, and rethinking over his time on the bench, but does so in a way that is both joyful and surprising.

Sachs spent time as a young man in solitary detention, nearly died in a car bombing, helped write the South African Constitution, and then was appointed by Nelson Mandela to serve on its constitutional court. You might think he'd seen it all and knows it all, but his book unfolds in a series of revelations about the law and justice. Often these revelations take place in his bathtub. Occasionally they occur in conversation at a restaurant. But what links this book together is a taxonomy of Sachs's "aha" moments, at which the judge learns something new about the law by listening to someone else.

And while great legal thinkers stride in and out of the pages—from Ronald Dworkin to William Brennan to Antonin Scalia—Sachs takes care to tell us

This review originally appeared in the inaugural issue of Just Books.

about the lessons he's learned from his law clerks, from homeless litigants, from a pack of political science professors in Toronto, and from a group of representatives from Christian Lawyers for Africa.

Sachs explains that “every word I write is a lie,” not because it isn't true, but because the magisterial certainty of the final legal opinion masks the extent to which his own thoughts and ideas on writing were tumbled around like socks in a drier. What emerges throughout the book and the legal opinions he has excerpted is a man who can forgive the captain of the South African Defense Force who took the photos and prepared the dossier for the men who planted a bomb in his car. Sachs is a man who is sufficiently open to hearing the other side of the story that he can forgive, and move forward. He openly admits that cases have made him cry and that he's shed some tears in the writing of his opinions as well. But the book leaves an overwhelming impression of a man who is turned out to face and soak in the world, willing and even eager to understand what he doesn't yet know. The very idea of a weepy, mutable, porous judge is the sort of thing we like to send up in America; a judge with twice the empathy and half the rigor. But what Judge Sachs explores here is those places at which pure dispassionate analysis fails; the moments when a judge can either look inside himself for the right answers, or look out to the world around him. Sachs doesn't downplay the need for reason and logic. But he's adamant that they can't take you all the way to the truth, and that anyone adjudicating matters of human dignity needs to see humans—and not just the law—as deserving of dignity. In the end it's not so much his jurisprudence that's evolving. It's his sense of the scope of the world around him.

We are so fearful of judges “evolving” toward some ideological viewpoint that we discount the need for a judiciary that evolves to inhabit the world as it is.

We are so terrified by the prospect of un-cabined judicial authority that we forget to be horrified at judicial authority operating in total isolation. We are so fearful of judges “evolving” toward some ideological viewpoint that we discount the need for a judiciary that evolves to inhabit the world as it is. The current debate over the judiciary treats this kind of immutable judicial certainty as a form of “modesty.” What Judge Sachs shows us is that true judicial modesty means knowing how much you don't know, and taking your lessons whenever they present themselves, particularly when you're up to your chin in bubbles. ■

An Essential Understanding of FDR

Jeff Shesol

Having worked close to a President, a former White House speechwriter for Bill Clinton describes why he came to write about FDR's widely-known but little understood attempt to pack the Supreme Court in 1936. What led a man with almost preternatural political instincts to make the biggest blunder of his life?

Supreme Power began, as many books do, as a nagging question.

The Court-packing fight is one of those historical events that gets mentioned frequently and yet, despite its significance, is never really explained. For all the continuing fascination with FDR—for all the books on his early years, his illness, his domestic life, and his leadership through depression and war—his conflict with the Court has received scant attention, even in ambitious, full-scale biographies. The Court fight is usually reduced to a neat, pat parable of presidential overreach, of second-term hubris.

That portrayal, for me, raised more questions than it answered. Is it really enough just to say that Roosevelt was feeling arrogant after his landslide reelection in 1936 and lost his head, deciding to strike back at a Court that had been overturning the New Deal? I didn't think so; but when I began this project five years ago, I was at a loss to explain how Franklin Roosevelt, described at the time as “the greatest politician ever to be placed within a human skin,” did something as apparently radical and self-destructive as proposing to pack the Court. What drove FDR to make the biggest political miscalculation of his life? That was the mystery that drew me in.

There were other enduring questions at the heart of the story. Most significantly, what led the Court to change course—to make the “switch in time that saved nine”—in the middle of the fight and start upholding the New Deal? Was the Court coerced into endorsing FDR's programs? Did Justice Owen Roberts—the deciding vote—wilt in the heat generated by the Court plan? Or was his evolution self-directed, as some historians suggest? And finally, what led Congress to reject the Court-packing plan and defy FDR—after four years in which Democrats had gone along with virtually everything he had proposed?

Answering these questions, I came to believe, is essential to understanding FDR and his times. In the years before World War II, Roosevelt's battle with the Court's conservative justices was the defining conflict of his political life. He and the so-called “Four Horsemen” were the chief combatants in the greatest constitutional crisis since Reconstruction. The nation

This essay originally appeared in the inaugural issue of *Just Books*.

in 1937 was at a crossroads, poised uncomfortably between past and future, and between conflicting notions of the Constitution: one fixed, the other fluid. The Court majority's momentous shift from a last-ditch defense of property rights to an embrace of emergent social and economic rights began in this moment—in the crucible of its conflict with Roosevelt.

The answers also tell us something about our own times.

Of course, I didn't write *Supreme Power* with any knowledge that President Obama, like President Roosevelt, would rebuke the Court in a State of the Union address, or that the centerpiece of Obama's legislative agenda, like Roosevelt's, would face an immediate assault in the nation's courtrooms. But I did write the book in full awareness that the battlefield of FDR's Court fight is still—is always—contested ground.

The questions at the core of Roosevelt's struggle with the Court are always open questions: about the meaning of the Constitution, the limits of presidential and governmental power, and whether democracy can be made to work in times of economic distress. History may not repeat itself, exactly, but it does have a way of echoing itself—sometimes loudly. Today, I think, is one of those times. ■

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