DEMOCRACY & JUSTICE

COLLECTED WRITINGS

BRENNAN CENTER FOR JUSTICE

Volume Five

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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 the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection 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 2011

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 2011. The volume was compiled and edited by Jeanine Plant-Chirlin and Michael Waldman. Erik Opsal and Kimberly Lubrano provided invaluable assistance in producing the volume. For a full version of any material printed herein, complete with footnotes, please contact Jeanine Plant-Chirlin at jeanine.plant-chirlin@nyu.edu.

Introduction from the Executive Director

What kind of democracy do we have? This past year that fundamental question emerged again with new force.

New state laws curbed the franchise for the first time since Jim Crow. Just one year after *Citizens United*, we entered a dystopian world of campaign finance lawlessness. Government in Washington often seemed paralyzed. All this, as the Great Recession continued to hit homeowners and the poor the hardest.

But it was a year, too, where we saw the first stirrings of a response. More Americans are coming to see: if we don't fix our systems, we can't solve our problems.

That's where the Brennan Center at NYU School of Law comes in. Part think tank, part legal advocacy group, we focus on the fundamental systems of democracy and justice. We are independent and nonpartisan. Our studies, lawsuits, and legislative advocacy have a growing impact. *The Boston Globe* called us "indispensable."

This volume offers a taste of our work in 2011. We thank our supporters – individuals, foundations, law firms and businesses – who made it possible. We thank, too, the dozens of pro bono lawyers who worked alongside us.

In 2012, we will continue to fight against unjust laws. But defensive victories will not be enough. As Winston Churchill noted, "Wars are not won by evacuations."

It is not just American politics that seems exhausted. Too often, the ideas by which we govern ourselves seem shopworn. We endlessly debate more government or less government, rather than asking how we can create *better* government. We are constantly asked to make a false choice between constitutional rights and national security, between racial justice and strong criminal laws. To renew America, we need an intellectual renewal as well – a long-term rethinking of policies and jurisprudence to modernize progressive thought and revitalize governance.

The Brennan Center will step up its work as a generator of innovative, nonpartisan new reforms that can restore the rule of law. Please join us over the coming year in our work to advance these core American values of democracy and justice.

Michael Waldman
Executive Director

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A NEW DEMOCRACY MOVEMENT

Maximizing Participation

Michael Waldman

To help revitalize our country, empower small donors and modernize our voter registration system.

This is a dark time for those who worry about big money's outsized role in American politics. Radical Supreme Court rulings, a comatose Federal Election Commission, and-ever more shameless political operatives have obliterated the campaign law edifice that stood shakily for four decades. The 2012 race will be dominated by secret funds, unlimited special interest gifts, and massive independent expenditures. Expect corruption not seen since Watergate.

Will all this stir a backlash? Perhaps. I am more skeptical than many that the current mood of disquiet will translate into a reform moment. What can we do to tip toward positive change?

Yes, we need to organize — lobby better in D.C., rabble rouse better in the countryside. And assuredly we must mount a long-term legal drive to overturn *Citizens United.* But these things are not enough. Let's face it: Campaign finance reformers have not engaged in serious rethinking in decades. We need a revitalization of policy goals as well. A compelling reform agenda is critical to persuading cynical citizens that something can actually change the status quo.

The next generation of reforms must build on the hopeful trends of recent years. The small-donor revolution most evident in the 2008 Obama campaign is real, if incomplete. Social media have begun to transform campaigning while lessening costs. A new democracy movement, I believe, should pursue two key reforms that share a premise of maximizing participation.

First, we must finally and fully embrace a model of public funding focused on boosting the power of small donors. For example, New York City's system provides multiple matching funds for small contributions. A contribution of $100 becomes $700 (real money, even in Tribeca). Candidates fuse their fundraising and organizing strategies.

Imagine the impact of such a small-donor match on a presidential campaign, especially given the rise of Internet fundraising. We should explore other new ways to augment small-donor giving — for example, refundable tax credits for small gifts. These plans could work without the limits on spending that have proved constitutionally controversial and hard to enforce.

A compelling reform agenda is critical to persuading cynical citizens that something can actually change the status quo.

Such an approach does not end all private fundraising. (Indeed, it recognizes that some giving is a token of enthusiasm by real live voters.) It does not purport to stop spending by wealthy candidates or independent groups. It does, however,

This article originally appeared in the January 2012 issue of *The American Prospect.*

create an alternative platform on which to build a different kind of politics without addiction to special interest funding.

The second key pro-participation reform is to ensure that every eligible citizen can vote. This year, state legislatures across the country abruptly enacted harsh new laws restricting voting rights. The Brennan Center, in our authoritative study, concluded that at least 5 million eligible citizens could find it much harder to vote in 2012. That's more than the popular-vote margin in two of the last three presidential elections. Hardest hit: minority, poor, young, and elderly voters.

Small-donor public funding and voter registration modernization offer a vista of a participatory democracy where the voices of ordinary citizens are most influential.

Voting rights groups are pushing back and will succeed in blunting or blocking some of these measures, but most will stay in place. Dispiriting defensive fights cannot be our entire future. To quote Winston Churchill, "Wars are not won by evacuations." We have proposed the Voter Registration Modernization plan, which moves toward universal registration. If the government assured that all eligible citizens were automatically registered, as Canada and Britain do, that shift would add 65 million voters to the rolls, permanently. It costs less and curbs the potential for fraud, too. Frustratingly, the Democrats did nothing to advance this when they had control of both congressional chambers and the White House. Fortunately, 17 states over the past few years moved to implement major parts of the plan anyway, often without partisan rancor.

We need to fight for both of these things — small-donor public funding, voter-registration modernization — together. They offer a vista of a participatory democracy where the voices of ordinary citizens are most influential. Linking the issues offers a chance to break through the walls that often divide activists who focus on one or the other topic. I have sat through far too many earnest conclaves where campaign finance reformers puzzle over how to bring racial and ethnic diversity to their coalition. Meanwhile, an energized, passionate, and increasingly angry movement — with deep roots in communities and in our history — is mobilizing to protect the right to vote.

As we design the next wave of reform, let's heed the words of the great progressive New York governor Al Smith, who declared, "All the ills of democracy can be cured by more democracy." ■

VOTING RIGHTS

In 2011 and 2012, the Brennan Center stepped forward as a strong national force opposing anti-voter laws. Rolling Stone *called us "a leading voting rights group." Elizabeth Drew in* The New York Review of Books *praised our "comprehensive work in the field of protecting citizens' rights."*

- *Our research brought wide publicity to the assault on voting rights.*

- *We lead the challenge to Florida's onerous new registration law. Representing the League of Women Voters, Rock the Vote and Florida PIRG, we filed suit in Federal court in December.*

- *We guide national litigation strategy in the fight against harsh voter ID laws. We developed empirical evidence to counter claims of fraud put forward by Kansas, New Mexico and Colorado Secretaries of State. We successfully pushed the Department of Justice to deny preclearance under the Voting Rights Act of South Carolina's restrictive voter ID law.*

- *Our attorneys testified repeatedly before Congress and state legislatures.*

- *Attorney General Eric Holder, in a major speech at the LBJ Library in Austin, Texas, endorsed the Voter Registration Modernization plan first proposed by the Center.*

- *In the run-up to the 2012 election, we plan to focus on preventing voter intimidation – pressing state officials to block illegal "ballot security" operations.*

New Voting Laws Could Affect Five Million

Wendy Weiser and Lawrence Norden

The swift and coordinated effort to curb access to the polls was unprecedented, highly partisan — and may alter the political terrain in 2012.

Over the past century, our nation expanded the franchise and knocked down myriad barriers to full electoral participation. In 2011, however, that momentum abruptly shifted.

State governments across the country enacted an array of new laws making it harder to register or to vote. Some states require voters to show government-issued photo identification, often of a type that as many as 1 in 10 voters do not have. Other states have cut back on early voting, a hugely popular innovation used by millions of Americans. Two states reversed earlier reforms and once again disenfranchised millions who have past criminal convictions but who are now taxpaying members of the community. Still others made it much more difficult for citizens to register to vote, a prerequisite for voting.

These new restrictions fall most heavily on the young, the elderly, minorities, and the poor.

These new restrictions fall most heavily on young, minority, and low-income voters, as well as on voters with disabilities. This wave of changes may sharply tilt the political terrain for the 2012 election.

Based on the Brennan Center's analysis of the 19 laws and two executive actions that passed in 14 states, it is clear that:

- These new laws could make it significantly harder for more than 5 million eligible voters to cast ballots in 2012.
- The states that have already cut back on voting rights will provide 171 electoral votes in 2012 — 63 percent of the 270 needed to win the presidency.
- Of the 12 likely battleground states, as assessed by an August *Los Angeles Times* analysis of Gallup polling, five have already cut back on voting rights (and may pass additional restrictive legislation), and two more are currently considering new restrictions.

Excerpted from *Voting Law Changes in 2012*, October 2011. The report was the first comprehensive examination of these laws and received wide coverage, including the lead story in *The New York Times*.

States have changed their laws so rapidly that no single analysis has assessed the overall impact of such moves. Although it is too early to quantify how the changes will impact voter turnout, they will be a hindrance to many voters at a time when the United States continues to turn out less than two-thirds of its eligible citizens in presidential elections and less than half in midterm elections.

This study is the first comprehensive roundup of all state legislative action thus far in 2011 on voting rights, focusing on new laws as well as state legislation that has not yet passed or that failed. This snapshot may soon be incomplete: the second halves of some state legislative sessions have begun.

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The extent to which states have made voting more difficult is unprecedented in the last several decades, and comes after a dramatic shift in political power following the 2010 election.

The extent to which states have made voting more difficult is unprecedented in the last several decades, and comes after a dramatic shift in political power following the 2010 election. The battles over these laws were — and, in states where they are not yet over, continue to be — extremely partisan and among the most contentious in this year's legislative session. Proponents of the laws have offered several reasons for their passage: to prevent fraud, to ease administrative burden, to save money. Opponents have focused on the fact that the new laws will make it much more difficult for eligible citizens to vote and to ensure that their votes are counted. In particular, they have pointed out that many of these laws will disproportionately impact low-income and minority citizens, renters, and students — eligible voters who already face the biggest hurdles to voting.

This report provides the first comprehensive overview of the state legislative action on voting rights so far in 2011. It summarizes the legislation introduced and passed this legislative session, provides political and legal context, and details the contentious political battles surrounding these bills.

Overall, legislators introduced and passed the following measures:

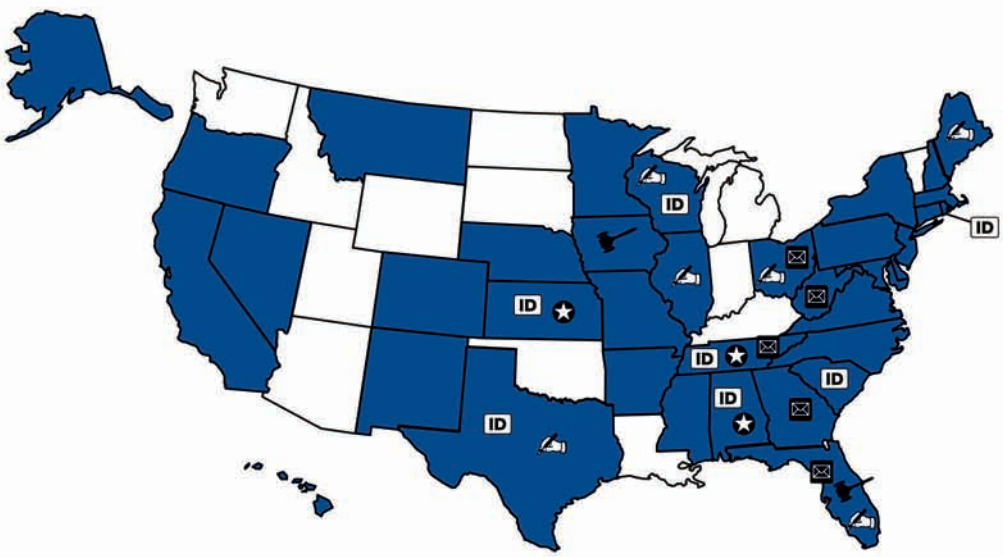
- **Photo ID laws.** At least 34 states introduced legislation that would require voters to show photo identification in order to vote. Photo ID bills were signed into law in seven states: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin. By contrast, before the 2011 legislative session, only two states had ever imposed strict photo ID requirements. The number of states with laws requiring voters to show government-issued photo identification has quadrupled in 2011. To put this into context, 11 percent of American citizens do not possess a government-issued photo ID; that is more than 21 million citizens.

- **Proof of citizenship laws.** At least 12 states introduced legislation that would require proof of citizenship, such as a birth certificate, to register or vote. Proof of citizenship laws passed in Alabama, Kansas, and Tennessee. Previously, only two states had passed proof of citizenship laws, and only one had put such a requirement in effect. The number of states with such a requirement has more than doubled.

- **Making voter registration harder.** At least 13 states introduced bills to end highly-popular Election Day and same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities. Maine passed a law eliminating Election Day registration, and Ohio ended its weeklong period of same-day voter registration. Florida, Illinois, and Texas passed laws restricting voter registration drives, and Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote.

- **Reducing early and absentee days.** At least nine states introduced bills to reduce their early voting periods, and four tried to reduce absentee voting opportunities. Florida, Georgia, Ohio, Tennessee, and West Virginia succeeded in enacting bills reducing early voting.

- **Making it harder to restore voting rights.** Two states — Florida and Iowa — reversed prior executive actions that made it easier for citizens with past felony convictions to restore their voting rights, affecting hundreds of thousands of voters. In effect, both states now permanently disenfranchise most citizens with past felony convictions. ■



Legislation introduced

ID **Photo ID requirements passed**

Proof of citizenship passed

Restrictions on voter registration passed

Restrictions on early/absentee voting passed

Executive action making it harder to restore voting rights

As of November 2, 2011

The Myth of Widespread Voter Fraud

Lawrence Norden and Keesha Gaskins

Those who urge curbs insist they are needed to stamp out fraud. But a voter is more likely to be struck by lightning than to commit in-person fraud. Where misconduct does exist, the new restrictions wouldn't make a dent.

The Brennan Center has paid particular attention in recent years to claims of voter fraud. We have collected allegations of fraud cited by state and federal courts, commissions, political parties, state and local election officials, authors, journalists, and bloggers. We have analyzed these allegations at length, to distinguish those which are supported from those which have been debunked; furthermore, we have created and published a methodology for investigating future claims, to separate the legitimate from the mistaken or overblown.

In 2007, we published a monograph reflecting our analysis, entitled *The Truth About Voter Fraud*, which compiled for the first time the recurring methodological flaws behind the allegations of widespread voter fraud that are frequently cited but often unsupported. Allegations concerning the incidence of or potential for voter fraud have been cited as justification for various restrictions on the exercise of the franchise, specifically photo ID laws. There has been much assertion concerning the appropriate degree of concern regarding such fraud, but relatively little attention paid to the facts.

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Recent Cases Studies

More recent allegations of voter fraud fit the pattern of relying upon allegations that seem particularly egregious on the surface. But when closely examined, they contain little evidence of voter fraud, and utterly no evidence of impersonation fraud that would be solved by enactment of photo ID laws.

New Mexico

In an attempt to prove voter fraud is a serious problem in New Mexico, Secretary of State Dianna Duran turned over 64,000 cases to the state police for investigation of whether voter fraud was committed. In June 2011, Secretary Duran turned over a list of names equal to approximately 5 percent

Excerpted from written testimony submitted on September 8, 2011 to a U.S. Senate Judiciary subcommittee hearing: "New State Voting Laws: Barriers to the Ballot?"

of New Mexico's registered voters to the New Mexico State Police for voter fraud investigation. Secretary Duran took this ill-advised action during the consideration of a proposed photo ID law by the New Mexico legislature.

To identify the names, Secretary Duran stated that her office used names and birth dates to affect the matches between the voter registration lists and the lists of foreign nationals. She further stated that 117 registrants from the voter registration list had social security numbers that did not match their name. It is important to note that New Mexico has more than 900,000 registered voters, most of whom fill out their voter registration card by hand, from which the data must be entered into a centralized data system.

Ultimately, there is no indication that Secretary Duran's analysis included any evaluation or follow-up to determine if any or all of the alleged incidents of voter fraud were the result of data entry errors, unreadable voter registration forms or some other accidental source for the confusion. When interviewed, Secretary Duran's office admitted that the 64,000 names turned over for investigation could not be considered for evidence of voter fraud and may have simply been a result of administrative errors.

In addition, in reviewing the hundreds of thousands of names on the list of registered voters and the hundreds of thousands of names on the foreign national license holders lists in New Mexico over an eight-year period, one should expect to find people on both lists with matching names and birth dates. Consequently, any conclusion of fraud, based solely upon name and birth date matches in a population of hundreds of thousands of people should be viewed with suspicion. Once again, there is no evidence that any of the types of voter fraud alleged here could be prevented by the introduction of photo ID laws.

Like many of the other common allegations of potential voter fraud, the Colorado Secretary of State's report is insufficient to support any real claims.

Colorado

In a report issued on March 8, 2011, Colorado Secretary of State Scott Gessler's office identified 11,805 non-citizens allegedly illegally registered to vote in the state, of whom 4,947 allegedly cast a ballot in the 2010 elections. Secretary Gessler's office, based upon the report, was "nearly certain" that 106 American immigrants were improperly registered to vote in Colorado. The report's conclusion that there are more than 11,805 improperly registered voters and of those 4,000 people improperly voted in the 2010 elections are called into question by the qualifying statements and equivocal recommendations contained in the report.

Secretary Gessler's report admits that inconclusive voter registration data does not prove that all 11,805 persons it identified were registered improperly. It concludes that even where there are improper registrations, they could have been due to unintentional registration, clerical, or other administrative failure without any intention of the registrants to vote or commit voter fraud. The report is utterly silent on how it arrived at the conclusion that more than 4,000 of the "improper registrants" voted in the 2010 election. There is simply a barely-supported, conclusory statement that "it is likely" that many of the 4,214 registrants in question were not citizens when they

cast their vote in 2010. Compare the 106 registered voters that the report alleges are "virtually certain" that they are not citizens, with no attempt to suggest that any of those 106 persons actually voted in 2010 or intended to commit fraud.

Most important, the analysis itself was flawed. The study used a non-citizen resident list dating from 2006 to identify more than 4,900 non-citizens who allegedly voted in 2010. While his process removed duplicates created when a person used two different non-citizen sources of identification to apply for or renew their driver's license or identification card, there is no indication that Gessler's process removed people from the list once they had become citizens. The Secretary did not cross-check those names against the names of more than 30,000 Americans. who became citizens in Colorado between 2006 and 2009 before making unsupported allegations that 4,900 non-citizens voted in the 2010 election in Colorado. Like many of the other common allegations of potential voter fraud, Secretary Gessler's report is insufficient to support any real claim of voter fraud. Moreover, it is worth noting that because Secretary Gessler's methodology was to compare non-citizen lists with motor vehicle license or state identification card lists, each one of the allegedly "illegal" voters had photo ID to prove their identity.

Kansas

A May 23, 2011 letter to the *Wall Street Journal,* Kansas Secretary of State Kris Kobach used 221 incidents of reported voter fraud in the 13-year period between 1997 and 2010 to allege that voter fraud is a concern in Kansas. This allegation of voter fraud relies upon data about "reported" events and "allegations" of problems with no reference to actual prosecutions, arrests, or actual findings of voter malfeasance. A review of the 221 incidents of reported "voter fraud" that he cites revealed that the categories of violations included: electioneering too close to a polling location, failure to deliver voter registration cards, improper ballot challenges, registration cards containing improper zip codes, non-citizen registration (no allegation of non-citizen voting), intimidation of poll workers, double-voting, and voter impersonation. Of the seven convictions arising out of the incidents of "voter fraud," there were two for electioneering and the remainder for double-voting between states or counties. None of the seven convictions based upon the 221 allegations over 13 years would have been prevented by the introduction of photo ID laws.

Maine

Recently, student voters in Maine have been targeted for criminal investigation based on their student status. In July 2011, Maine Republican Party Chairman Charlie Webster claimed that a list of 206 University of Maine students who both paid out-of-state tuition and voted in Maine elections was evidence of potential voter fraud. He turned this list over to the newly-elected Maine secretary of state, who immediately announced that his office would add the student list to an inquiry about voter fraud and called upon the attorney general to assist in a criminal investigation.

But under Maine law, as in other states, the residency rules for tuition are very different from those for voting; many students meet the legal voting residency requirements while still being ineligible for in-state tuition. Maine students are eligible to vote in local elections so long as they meet state voting residency requirements, which require an individual to affirm that his or her residence "is that place where the person has established a fixed and principal home to which the person, whenever temporarily absent, intends to return." As long as a student considers a campus address to be a fixed residence and has no immediate intention to leave, he or she may lawfully register to vote at school. The receipt of in-state tuition, on the other hand, is governed by a completely different and more restrictive set of rules. The University of Maine System's residency guidelines require a student to have lived in Maine for a full year to be considered for in-state tuition, among other requirements. It is worth noting that this rule, if applied as voting residency requirements, would be plainly unconstitutional.

A student paying out-of-state tuition who voted in a Maine election is not evidence of voter fraud. Like many "anecdotal" claims of voter fraud, this is an example of alleging fraud where no illegal conduct exists. The practice of using a population that may be particularly vulnerable to charges of voter fraud and alleging illegal conduct to raise the suspicions of citizens and politicians is particularly abhorrent. Once again, there are no allegations here that would be prevented by the introduction of a photo ID law. ■

How Far from Access to the Vote?

Sundeep Iyer

Who gets hit hardest by new voting laws? Proponents assert that eligible voters can easily obtain the necessary paperwork. But the facts and a map tell a different story. In Texas, more than 1 million minority voters who lack a driver's license will have to travel more than 10 miles to get needed ID. That's not exactly a Freedom Ride.

On May 27, 2011, Texas Governor Rick Perry signed into law Senate Bill 14, which requires that voters show photo identification at the polls in order to cast a ballot. Only the following forms of ID are acceptable for purposes of voting:

- Texas driver's license;
- Personal identification card issued by the Texas Department of Public Safety and featuring the voter's photograph;
- Election identification certificate (a new form of state photo identification created by the legislation);
- U.S. military identification card featuring the voter's photograph;
- U.S. citizenship certificate featuring the voter's photograph;
- U.S. passport; or
- Concealed handgun permit issued by the Texas Department of Public Safety.

To obtain an election identification certificate, personal identification card, or driver's license, individuals must travel to a Texas Department of Public Safety (DPS) office. Texas DPS runs the state's Driver License Offices (DLOs). If the forms of identification mentioned above are obtainable at a DLO location, then assessing whether minorities must travel longer distances to reach their nearest DLO location is relevant to understanding the effect of Texas' voter ID law. My analysis shows that Latino voters in Texas must travel farther than white voters to reach their nearest DLO.

Texas DLO locations are available on the DPS website; I use that information to construct a shapefile (viewable in ArcGIS) with all active DLO locations. Then, using Census 2010 population data by block group, I determine how many Texans live in Census block groups that are in their entirety more than 10 miles away from their nearest DLO location.

The analysis reveals that nearly 1 million African-American and Latino voting-age citizens would have to travel more than 10 miles in order to reach the closest DLO to their home. In particular, Latino citizens are more likely to have to travel this distance in order to reach their nearest DLO: Latinos constitute 35.2 percent of the citizen voting-age population more than 10 miles from the nearest DLO, but just 33.2 percent of the citizen voting-age population in the rest of the state.

Published on Brennancenter.org on September 13, 2011.

The disparity is even greater when assessing the number of Texas citizens who must travel 20 miles or more to the nearest DLO. The citizen voting-age population living more than 20 miles from the nearest DLO is 60.7 percent Latino. The citizen voting-age population in the rest of the state? Just 32.7 percent Latino. Latinos are dramatically overrepresented in areas of Texas that are far from DLO locations: the relative concentration of voting-age Latino citizens in these areas is 85.6 percent greater than in the rest of Texas, while the relative concentration of voting-age white citizens is 34.3 percent less than in the rest of Texas.

These facts undermine the accessibility and effectiveness of Texas' "free" election identification certificate. Indeed, voting-eligible Latino citizens face the added burden of traveling farther than others to obtain the identification deemed acceptable by Texas Senate Bill 14. ■

MONEY IN POLITICS

'Moneyball' and Super PACs?

Adam Skaggs

Citizens United saw no risk of corruption from "independent" political committees. The result: Candidates now routinely raise funds for Super PACs formed by close associates, which can take unlimited cash from corporations.

Political analysts are about to parse the latest presidential fundraising figures filed with the Federal Election Commission.

Will former Massachusetts Gov. Mitt Romney approach or surpass Texas Gov. Rick Perry's $17 million total? Will Herman Cain's recent successes translate into a spike in campaign contributions? Can anyone compete with President Barack Obama's $70 million total? The talking heads are chomping at the bit to start comparing totals.

But like the executives and big-league scouts in "Moneyball" who misread the baseball market by focusing on outdated statistics, the analysts breaking down the latest FEC reports are looking at the wrong numbers.

Traditional baseball scouts looked at old-fashioned stats like batting average and home runs. But these numbers don't accurately predict how many runs a team will score. "Moneyball" showed there are other numbers — "sabermetrics" — that more accurately predict success.

The same is true in our current political environment. Candidate fundraising, of course, tells us something about how successful campaigns are likely to be — but it's a comparatively smaller piece of the puzzle than in past elections.

The new campaign finance numbers that are changing the political playing field are coming from independent groups — not the campaigns. You can't accurately predict which candidates will succeed in 2012 if you don't account for these stats.

Independent spending has soared since the Supreme Court's *Citizens United* decision in 2010 opened the door for corporations and labor unions to spend treasury funds on independent electioneering.

In the 2010 elections, spending by noncandidate groups increased more than 425 percent compared with the last midterm election before *Citizens United.* Nearly half that money — about $135 million — was spent by groups that didn't reveal any information about their donors.

Spending is always higher in presidential election years. If outside spending increased at the same rate in this presidential race, we'd see close to $1.3 billion in noncandidate spending in 2012. That would more than dwarf Barack Obama's record-shattering $750 million total in 2008.

If 2010's exponential increase in outside spending weren't enough to suggest that 2012 will be different, there's a "hot new thing" that promises to change the rules of the game dramatically: the candidate Super PAC. These groups, closely affiliated with specific candidates, exist only to elect those candidates. Just about everybody now making a serious run for the presidency has one.

This op-ed originally appeared in *Politico* on October 13, 2011.

Super PACs dedicated to electing a specific candidate obliterate the notion of independence, making a mockery of campaign contribution limits.

The groups are possible because of a lesser-known ruling in *Citizens United*. Much ink was spilled about the Supreme Court greenlighting corporate electioneering. Less attention focused on the court's declaration that independent election spending can never lead to corruption or the appearance of corruption.

For decades, fighting corruption justified limiting the size of political campaign contributions. But after *Citizens United,* courts reasoned that if independent expenditures, by definition, cannot corrupt, then there is no justification for limiting contributions to groups that define themselves as "independent."

"Moneyball" showed there are other numbers that more accurately predict success. The new campaign finance numbers that are changing the political playing field are coming from independent groups — not the campaigns.

Voilà: the candidate Super PAC. As long as a Super PAC says it is independent of a campaign, and doesn't formally coordinate with the candidate, then it doesn't have to abide by those pesky contribution limits that stop candidates from raising funds in million-dollar checks.

Super PACs have created a supersize loophole in federal contribution limits. Federal law caps donations to a candidate at $2,500. But with candidate Super PACs, deep-pocketed donors can blow past that $2,500 with hardly a pause. You can write the candidate of your choice a $2,500 check — then mail the candidate Super PAC a check for $250,000. Or more.

This isn't just a theoretical possibility. It's how campaign financing works in the 2012 election. A recent analysis by Democracy 21, The Campaign Legal Center, and the Center for Responsive Politics found that in the second quarter, more than 50 donors gave the maximum legal amount to Romney's campaign — and then wrote additional checks to Restore Our Future, the "independent" Super PAC dedicated to electing Romney president.

Their donations totaled $6.4 million — and came in chunks as large as $1 million.

Presidential candidates aren't the only ones in the Super PAC game. On Thursday, congressional Republicans cheered the new Congressional Leadership Fund, set up by leading Republicans to spend millions to expand their majority in the House. The Democrats have their own variation, House Majority PAC, because they, too, know Super PAC money is what counts in 2012.

There's one more wrinkle to the 2012 shadow campaign: Super PAC fundraising totals for July through December don't have to be disclosed until Jan. 31, 2012. With several states rushing to reschedule their primaries before Feb. 1, that means voters in early primary states may be subjected to millions of dollars in Super PAC ads before they have any idea who is funding the ad blitz.

Sabermetrics, "Moneyball" showed, aren't secret. The numbers were there all along — but nobody knew what to look for. Once general managers figured out which statistics mattered, running the numbers was a breeze.

In the 2012 election, on the other hand, everyone knows that the independent spending totals will have a major effect on the outcome. It's just that, under our current campaign finance and disclosure system, we won't see the numbers that matter until after the game is won. ■

Public Financing at Stake

For three decades, public campaign funding was considered constitutionally sacrosanct. But in 2011, the U.S. Supreme Court heard Arizona Free Enterprise Club v. Bennett. *Originally, the Barry Goldwater Institute had asked federal courts to declare public funding a violation of the First Amendment. The Brennan Center, together with pro bono partner Munger, Tolles & Olson LLP, defended Arizona's statute before the Court. In its 5-4 ruling, the Court struck down the state's "trigger" provisions, which gave candidates extra public funds if they faced a free-spending opponent. But the justices unanimously reaffirmed the constitutionality of public funding — averting a devastating setback. This is an excerpt from the Brennan Center's brief.*

The triggered matching funds provision of Arizona's Citizens Clean Elections Act is carefully tailored to combat political corruption, enhance political speech, and increase electoral competition in a fiscally responsible way. By assuring publicly funded candidates that they can run viable campaigns even in competitive races, matching funds encourage participation in Arizona's public funding system. *See Buckley v. Valeo*, (1976) (holding that voluntary public funding of elections "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process"). While candidates who accept public funding agree voluntarily to limit their spending, Arizona's law places no limit on the amount that any privately financed candidate or independent committee may spend. Since the law took effect in 1998, spending by both privately financed candidates and independent committees has risen, electoral competition has increased, and the state has remained free of the corruption scandals that spurred the voters to enact the Clean Elections Act.

Petitioners assert that the Arizona law is subject to strict scrutiny, the standard this Court has applied to laws that directly limit political speech, coerce or compel speech, or discriminate among similarly situated speakers. But a more deferential standard applies to laws, such as this one, that do not directly regulate speech and instead primarily promote First Amendment values, even if those laws may incidentally burden some persons' speech. Thus, for example, in upholding mandatory disclosure of political contributions and expenditures, the Court in *Buckley* established that regulations that further First Amendment values but which may incidentally burden political speech

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Excerpted from the brief on behalf of the Clean Elections Institute, a respondent in the case, filed by Bradley S. Phillips and other attorneys from Munger, Tolles & Olson LLP and by Monica Youn, Mark Ladov, Mimi Marziani, and Elizabeth Kennedy of the Brennan Center. Citations omitted.

are constitutional if they are substantially related to a sufficiently important government interest. This Court reaffirmed that holding in *Citizens United v. Federal Election Comm'n, (*2010). Here, the evidence shows that triggered matching funds further the compelling purposes of public funding that this Court recognized in *Buckley*: combating real and apparent corruption and enhancing public discussion and participation in the electoral process, the very foundation of our democracy. The judgment of the Court of Appeals, upholding Arizona's law, should therefore be affirmed.

In urging reversal, Petitioners rely principally on this Court's decision in *Davis v. Federal Election Comm'n* (2008). But *Davis* involved an entirely different constitutional question from that presented by Arizona's triggered matching funds provision. Voluntary public funding was not involved, and the Court held the federal law at issue was subject to strict scrutiny because it imposed "discriminatory contribution limits" on two privately financed candidates in the same race. No such discriminatory limits exist here. Because Arizona allows candidates to choose voluntarily between two different regulatory regimes — a choice this Court has repeatedly held is permissible under the First Amendment — privately financed and publicly financed candidates are not similarly situated. Moreover, the law at issue in *Davis* could not be justified by the government's interest in combating corruption, while Arizona's triggered matching funds are important to the state's effort to remedy Arizona's history of actual and apparent *quid pro quo* corruption without wasting public funds.

If the triggered matching funds provision in Arizona's voluntary public financing law were invalidated, the result would be less (not more) political speech and electoral competition, and the state's compelling interests in combating corruption and enhancing political participation would be undermined. ■

Public Officials Plead For Reform

Seventeen friend-of-the-court briefs urged support for public funding. An especially powerful submission, authored by Charles Fried, Solicitor General under President Reagan, and attorney Cliff Sloan, argued on behalf of former Republican and Democratic officeholders.

Amici are former elected officials from both political parties who have extensive experience with the realities of electoral politics. **Bruce Babbitt** is a former Governor of Arizona, a former Secretary of the Interior, and a former candidate for President of the United States. **Bill Bradley** is a former United States Senator from New Jersey and a former candidate for President of the United States. **Amory Houghton** is a former United States Representative from New York. **Nancy Landon Kassebaum** is a former United States Senator from Kansas.

Bob Kerrey is a former Governor of Nebraska, a former United States Senator from Nebraska, and a former candidate for President of the United States. **Madeleine Kunin** is a former Governor of Vermont, a former Deputy Secretary of Education, and a former Ambassador to Switzerland. **Connie Morella** is a former United States Representative from Maryland and a former Ambassador to the Organization for Economic Cooperation and Development. **Sam Nunn** is a former United States Senator from Georgia. **John Edward Porter** is a former United States Representative from Illinois. **Larry Pressler** is a former United States Senator from South Dakota and a former United States Representative from South Dakota. **Warren Rudman** is a former United States Senator from New Hampshire. **Alan Simpson** is a former United States Senator from Wyoming. **Christie Todd Whitman** is a former Governor of New Jersey and a former Administrator of the Environmental Protection Agency. **Timothy Wirth** is a former United States Senator from Colorado and a former Undersecretary of State for Global Affairs.

"Brief of Amici Curiae Former Elected Officials in Support of Respondents," filed by Charles Fried and Clifford M. Sloan, Bradley A. Klein, Geoffrey M. Wyatt, Cory C. Black of Skadden, Arps, Slate, Meagher & Flom LLP with Americans for Campaign Reform. Citations omitted. Other briefs in support of the Brennan Center's position were submitted by the United States government, 13 former state Supreme Court chief and associate justices, top political scientists, business leaders through the Committee for Economic Development, and the states of Iowa, Connecticut, Maryland, New Mexico, and Vermont. The amicus briefs were coordinated by the Campaign Legal Center.

Consideration of this case should proceed from recognition of a simple point: The law at issue in this case is not, in the words of the First Amendment, a law "abridging the freedom of speech." Rather, it adds voices to the political forum and thereby expands speech. It is Petitioners — in complaining that these additional voices are a burden on their message — who in reality are seeking to restrict speech.

If there is one fixed star in the constitutional firmament, it is that arguments seeking to compel a reduction in speech face an extraordinary hurdle. This Court's decision in *Citizens United v. FEC* (2010) has been celebrated and criticized as enabling corporate speech in the political arena, but its clear message is that arguments for shutting down speech are constitutionally suspect. Absent the gravest justification, demands to limit or eliminate speech have no constitutional force.

Petitioners attempt to portray Arizona's law as a restriction on speech, when in fact it is their position that would have a restrictive effect on political discourse. They challenge a regime that silences no one, prohibits no speech, and only enables additional speech. To make their counterintuitive point that Arizona's law is nonetheless constitutionally defective, Petitioners must argue that, because the Arizona law enables more speech, it somehow has impermissibly interfered with their ability to speak as much as they want on any subject they choose. This objection depends on a premise that this Court in many ways and contexts has firmly rejected. Petitioners' argument depends on the premise that the speech of others who disagree with them somehow interferes with, silences, swamps, or unfairly competes with their speech. But, except where a speaker quite literally shouts down another, this Court has always rejected the notion that more speech somehow interferes with, silences, swamps, or unfairly competes with speech it opposes. It is up to the listener to decide to whom he wants to attend, to decide when he has heard enough from one speaker, to decide when one speaker is so insistent, verbose, or annoying that he no longer chooses to listen to him. That is not a choice for government to make, or for courts to compel.

If there is one fixed star in the constitutional firmament, it is that arguments seeking to compel a reduction in speech face an extraordinary hurdle.

Never has this "drown out" form of argument been more eloquently rejected than by Judge Easterbook, whose opinion in *American Booksellers Ass'n, Inc. v. Hudnut* (7th Cir. 1985) was affirmed by this Court in 1986. In that case, a municipality championed a thesis, urged by Professor Catharine MacKinnon, that certain speech demeaning to women so deterred, so discouraged them from speaking that the offensive speech — though not obscene — could be prohibited in the name of free speech itself. Judge Easterbrook rejected that argument. Such screening, he said, must be left to the listeners alone, and the danger that they may be overwhelmed by too many messages or messages too strident or crafty is a danger that government has no power to address by prohibition. Yet Petitioners' claim that Arizona's scheme deters, burdens, or threatens to drown them out depends on that rejected premise.

This fundamental principle of First Amendment law — that speech is not burdened by more speech — is illustrated by cases as diverse as *Rust v. Sullivan* (1991) and *Johanns v. Livestock Marketing Ass'n* (2005). In quite different

contexts, the Court has turned aside claims that more speech — there the government's own speech — somehow interfered with speech it neither sought to regulate nor prohibit. In *Rust*, the Court pointed to the absurdity of barring the government from promoting democracy without granting equal time to proponents of fascism. In *Johanns*, the Court ruled it entirely permissible for the government to spend government money to promote beef consumption, even though such promotion may be thought to compete with the business of pork or chicken producers, who may believe that they must increase their own promotional budgets to rebut the government's message. In such cases, we are brought back to the fundamental premise of First Amendment jurisprudence, explicated in *Citizens United*, that listeners must be left to make their own judgments among the myriad signals that reach them — whoever the speaker, whatever its funding.

More speech may answer speech but it does not silence it.

The permissibility of the Arizona law follows a fortiori from the teaching of cases like *Rust* or *Johanns* or *Citizens United*. In contrast to government speech cases, Arizona does not pick from among candidates because of their message — as the government favored prenatal care (in *Rust*) or beef consumption (in *Johanns*). Instead, Arizona extends public financing to any candidate who meets certain seven qualifications and agrees to forego fundraising from private sources. Thus, if the government violates no one's First Amendment rights, does not silence, suppress, or deter anyone's speech by speaking a contrary message in its own voice, so most assuredly it burdens no speech when it makes funds available to all comers on a viewpoint neutral basis. More speech may answer speech but it does not silence it. What effect speech has on its audience the First Amendment leaves up to the audience.

In *Citizens United*, this Court sought to promote robust protections for freedom of speech in the public square. The Arizona law at issue here serves exactly the same purpose and is entirely consistent with Citizens United.

Petitioners' contrary arguments must fail for two reasons. First, Arizona's Citizen's Clean Elections Act expands rather than restricts speech. Following this Court's landmark decision in *Buckley v. Valeo* (1976), various states enacted laws providing for public financing of political campaigns as an appropriate measure to promote public political discourse. In response to a long and well-documented history of political corruption, Arizona has done the same. The matching funds provision is a permissible effort to ensure that the public financing option is viable.

Arizona's law is in harmony with this Court's long line of cases approving governmental promotion of speech. As this Court made clear in *Rust*, a government may promote certain speech, and does not violate the First Amendment by placing conditions on its funding. Consistent with that principle, the Court later held in *National Endowment for the Arts v. Finley* (1998), that the mere fact that the government might subsidize some speakers and not others does not violate the rights of those who do not receive such funding. These cases, and many others, draw a clear distinction between government restriction and government promotion of speech. Arizona's law clearly promotes speech — and it does so without reference to content or

viewpoint, unlike the case in *Rust* and *Finley*. If those who saw themselves as competitors had no free speech claim in those cases, all the more they have none where the government's funding scheme is by contrast completely viewpoint neutral.

Second, none of the theories invoked by petitioners turns the promotion of speech at issue in this case into a burden on other speakers. Petitioners maintain that *Davis v. FEC* (2008) compels invalidation of the Arizona law. But *Davis* concerned a different kind of law, one that imposed asymmetrical campaign contribution limits on candidates. The result of this disparate treatment was that opponents of self-financed candidates could raise three times the money of their opponents from individual donors; it was this "discriminatory" feature of the law that made it an impermissible "penalty" on speech. Arizona's law does no such thing. It finances, rather than limits, campaign speech, and it thus promotes, rather than burdens, First Amendment values.

Petitioners, relying on this Court's decisions in *Pacific Gas & Electric Co. v. Public Utilities Commission* (1986), and *Miami Herald Publishing Co. v. Tornillo* (1974), contend that Arizona impermissibly burdens their speech by forcing them to subsidize speech by their competitors. But these precedents are entirely inapposite. Petitioners are not, as were PG&E and the Miami Herald, forced to subsidize unwanted messages by lending their own facilities to transmit messages offensive to them. Nor is there the slightest risk — as there was in those cases — that an audience might attribute opposing points of view to the supposedly burdened speaker.

Arizona's law finances, rather than limits, campaign speech, and it thus promotes, rather than burdens, First Amendment values.

Petitioners argue that Arizona's law "chills" their speech because candidates will self-censor to avoid triggering funding of their opponents. But this Court's "chilling" cases have traditionally been concerned that the threat of government regulation would suppress particular points of view — not that a speaker should be shielded from speech. Here, the "risk" from speaking is more speech — not censorship. Just as there is no "heckler's veto" of the speech of another, so too there should be no "speaker's veto" of the speech of another.

Because the Arizona law permissibly expands speech and thereby furthers First Amendment values, Petitioners' request that this Court invalidate the law is unavailing. ■

Secret Funds Flood the Courts

Adam Skaggs, Maria da Silva, Linda Casey, and Charles Hall

Judicial campaigns are now awash in special interest spending. Justice is at stake.

On Election Day 2010, for the first time in a generation, three state Supreme Court justices were swept out of office in a retention election when voters expressed anger over a single controversial decision on same-sex marriage. The special-interest campaign — which poured nearly 1 million dollars into Iowa to unseat the justices — was the logical culmination of a decade of rising efforts to inject more partisan politics into our courts of law.

Outside money continued its hostile takeover of judicial elections. More than ever, a small number of super spenders played a dominant role in influencing who sits on state supreme courts. Much of this influence was exercised secretly.

In its full context, the most recent election cycle poses some of the gravest threats yet to fair and impartial justice in America.

But Election Day was only the beginning. Campaign leaders in Iowa issued a blunt warning to judges around the country that they could be next. For the next half year, legislatures across the country unleashed a ferocious round of attacks against impartial justice. More judges were threatened with impeachment than at any time in memory. Merit selection, an appointment system that has historically kept special-interest money out of high court selection in two dozen states, faced unprecedented assault. Public financing for court elections, one of the signature reforms to protect elected courts in the last decade, was repealed in one state and faced severe funding threats in two others.

The story of the 2009-10 elections, and their aftermath in state legislatures in 2011, reveals a coalescing national campaign that seeks to intimidate America's state judges into becoming accountable to money and ideologies instead of the constitution and the law. In its full context, the most recent election cycle poses some of the gravest threats yet to fair and impartial justice in America.

Excerpted from *The New Politics of Judicial Elections*, published by the Brennan Center, The National Institute on Money in State Politics, and the Justice at Stake Campaign, October 2011.

A total of $38.4 million was spent on state high court elections in 2009-10, slightly less than the last non-presidential election cycle, in 2005-6. However, $16.8 million was spent on television advertising — making 2009-10 the costliest non-presidential election cycle for TV spending in judicial elections. Outside groups, which have no accountability to the candidates, continued their attempts to take over state high court elections, pouring in nearly 30 percent of all money spent — far higher than four years earlier. Two states, Arkansas and Iowa, set fundraising or spending records in 2010, following a decade in which 20 of 22 states with competitive supreme court elections shattered previous fundraising marks. Non-candidate groups poured in nearly 30 percent of all money spent in 2009-10 — far higher than four years earlier.

Laced among these numbers were several worrying trends:

- In many states, small groups of "super spenders" maintained a dominant role, seeking to sway judicial elections with mostly secret money. Of the top 10 super spenders nationally, there was only one newcomer, the National Organization for Marriage. Unlike in 2007-08, when the biggest groups on the left and right established a rough parity, business and conservative groups were the top spenders in 2009-10.

- Spending also spiked on judicial retention elections, which — with a handful of notable exceptions — had been extremely resistant to special-interest encroachment before 2010. Retention elections accounted for 12 percent of all election spending — compared with just 1 percent for the entire previous decade.

- Costly television advertising remained all but essential to win a state supreme court election, while TV ads by non-candidate groups often resorted to rank character assassination against sitting judges. Even in states that lacked competitive races, such as Ohio and Alabama, candidates and groups poured millions of dollars into costly ad campaigns.

- Across the country, the 2010 judicial and legislative elections ignited an unprecedented post-election attack on state courts. This included challenges to merit selection systems for choosing judges, a campaign to roll back public financing, and threats to impeach judges for unpopular decisions. ■

The Broken FEC

Adam Skaggs

Non-candidate spending poses a growing danger. One reason: The agency charged with enforcing the laws was frozen. It's time to start from scratch and eliminate the FEC.

The Tea Party and Occupy Wall Street are as far apart on the political spectrum as possible, but both cry foul at the capture of government by special interests. Left and right alike agree that elected officials shouldn't finance their campaigns with contributions from the industries they regulate.

But even stanching the flow of favor-seeking dollars to our representatives won't address the potential corruption that flows from soft money spent by supposedly "independent" groups. To safeguard our democracy, we need strong rules that will bring transparency and accountability to this outside spending — and an oversight agency that can, and will, enforce them.

The Federal Election Commission isn't up to the task. It has refused time and again to enforce the campaign finance laws its commissioners are sworn to uphold. It should be replaced.

The dangers of outside money are growing. Non-candidate political spending rose significantly in the last election cycle, and it's poised to shatter historic records this time around. In 2010, during the first election after the Supreme Court's ruling in the *Citizens United v. Federal Election Commission* case paved the way for unlimited spending by corporations and unions, outside spending increased more than 400 percent compared with the prior midterm election. Almost half came from groups that didn't disclose their donors. If spending increases at the same rate in 2012, we'll see more than 1 billion dollars' worth of political spending by groups that aren't accountable to the public.

Voters can't make informed choices in the political marketplace if they don't know which people, companies, or interest groups are trying to influence their votes. Accordingly, federal law requires these spenders to report donors who contributed more than $200 for the purpose of furthering the group's electioneering.

But the FEC has opened up a loophole in the disclosure law big enough to drive a truck through.

Under the FEC's rules, groups don't have to disclose their donors unless the donor specifically earmarks the donation for a particular advertisement. It doesn't take a particularly sophisticated contributor to game the system — just write your check and hand it over with a wink and a nod instead of an express agreement, and your name stays secret. Under the FEC's rules, money talks — it just doesn't leave its name. Inadequate disclosure is only one problem with the agency. The latest FEC episode looks like pure farce, but it could have tragic consequences for our democracy.

Among other results of *Citizens United*, and another federal court case concerning the group SpeechNow.org, was the birth of a new entity that can take unlimited contributions: the Super PAC. Contribution limits exist — and have been

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repeatedly upheld — because they curb corruption. *Citizens United* declared that independent political spending — undertaken without coordinating or consulting with candidates — cannot corrupt candidates.

Therefore, the FEC concluded in a 2010 advisory opinion, that if a PAC declares that it is fully independent and does not contribute to candidates, it need not abide by contribution limits. Thus was born the Super PAC. Under the FEC's opinion, wholly independent Super PACs can legally receive unlimited contributions — from corporations, unions, and trade associations, among others.

But, on the way to the 2012 election, a funny thing happened with that "wholly independent" requirement.

First, political operatives came up with the "candidate Super PAC" — an entity that is independent in name only, and exists for the sole purpose of electing a particular candidate. All the leading candidates have one, and they have effectively obliterated contribution limits. You're limited to contributing $2,500 to your preferred candidate? No problem: Just write one check for $2,500 and another to the Super PAC working to elect your candidate. And make that second check as big as you want!

Now, the Super PACs want to take it even further. Under the campaign finance laws, expenditures that outside groups coordinate with candidates count as in-kind contributions. This makes sense: If a candidate wants to put up a billboard and asks a supporter to pay for it, the supporter's "independent" check paying for the billboard is just as valuable to the candidate as a cash contribution. This coordinated spending must be reported as a contribution (and must comply with any applicable contribution limits).

Contribution limits don't apply to Super PACs, however, because they have agreed never to contribute to candidates. And to avoid those limits, they also can't coordinate their spending with candidates. But Karl Rove, who engineered one of the first Super PACs, thinks he has figured out a way around that pesky prohibition. He asked the FEC to rule that the agency's definition of a "coordinated communication" doesn't capture advertisements that his Super PAC wants to produce, even though the ads will be "fully coordinated" with candidates, in that the candidates consult on the script and appear on camera.

Uncoordinated, fully coordinated advertisements? Only in Wonderland.

Or at the FEC. In considering Rove's request, the FEC has proposed four potential resolutions — and only one of the four concludes that the "fully coordinated" advertisements are indeed "coordinated." The fact that the FEC might give the proposal a thumbs-up reveals just how ineffective and out of touch the agency is. If the FEC allows Super PACs that take unlimited contributions to coordinate directly with candidates, contribution limits would be utterly meaningless.

A decade ago, a blue-ribbon, bipartisan task force convened by the reform group Democracy 21 proposed replacing the FEC with a new agency that would enforce the law instead of subverting it. The agency would be headed by a single administrator instead of the current model, with six commissioners who routinely deadlock along partisan lines and prevent meaningful action. Violations would be adjudicated by neutral administrative law judges, not political appointees. The proposal made sense then, and it makes sense now.

Replacing the FEC may be a heavy lift, and it may seem that current officeholders benefit from loosely enforced campaign finance laws and have little incentive to change the game. But the center of gravity in politics is shifting from candidates to outside interest groups; once in office, officials are only going to experience more pressure from the shadowy groups that helped put them in office.

At a time when congressional approval ratings are in the single digits and our elections are awash in dark money, establishing a credible agency to enforce the campaign laws will increase faith in our system of government by ensuring that our elections aren't sold to the highest bidder. Our democracy is at stake. ■

Pressure Points For Accountability

Congress won't pass reform. Courts are skeptical. Long term constitutional change takes years. How to push for accountability now in the political system? At a conference in April, corporate law experts, shareholders, academics, activists, and regulators assessed ways to seek transparency one year after Citizens United.

Shareholder Protection

Changing corporate law to give shareholders a right to vote on corporate political spending.

Robert Jackson, Associate Professor of Law, Columbia Law School

What *Citizens United* says is that corporations are entitled to spend corporate funds on political speech or, if you prefer, limitations on this kind of spending will be afoul of the First Amendment. What *Citizens United* doesn't say is how corporations decide whether or not to use this power, and how it will be used if they do.

We have a large body of law in corporate law that tells us generally how corporations make decisions. In general this body of law uses what we call the "Business Judgment Rule," which says that directors and executives get to decide how corporations are run. And this is a good rule for decisions that are made on a day-to-day business basis of the corporation. Why? Because in general, we think that directors and executives, the insiders of the corporation, have superior information to shareholders and it's a good rule to let them make their decisions more or less not subject to oversight by other entities.

But there are many important exceptions to this rule, recognized both by the Delaware courts and by the Congress, over the years where we don't allow directors and executives to make these kinds of decisions without some oversight and participation by other constituents. So for example, corporate law gives shareholders the right to vote on certain fundamental transactions, like mergers and acquisitions. The law also requires that independent

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Excerpted from "Accountability After *Citizens United*," a Brennan Center symposium held on April 29, 2011. Other symposium participants included FEC Chair Cynthia Bauerly, the Committee for Economic Development's Charlie Kolb, Harvard Law's John Coates, Perkins Coie's Marc Elias, and the NAACP LDF's Dale Ho.

directors oversee some decisions, like executive pay decisions for example, where the interests of directors and shareholders are not perfectly aligned. And the law also requires special disclosure with some decisions. Corporate officials, directors and executives are allowed to make some decisions but they have to tell shareholders in very express, detailed terms exactly what they've done and those tend to be situations like, for example, transactions where directors have a personal conflict. These have to be disclosed to shareholders in many cases.

So really we have two sets of corporate law rules for deciding who decides what a corporation does. One set, the Business Judgment Rule generally applies to day-to-day business decisions. Another set, the kind of exception rules I've described, apply to other kinds of decisions where the interests of directors and executives are not perfectly aligned with those of shareholders. And the question I'd like to focus on today is: What kind of decision is the decision to spend corporate money on politics? And I think it's clear that this is the kind of special decision to which special rules should apply. And I'll give you a number of reasons why I think that's true.

In general, we think that directors and executives have superior information to shareholders, and it's a good decision to let them make their decisions without oversight. But there are many exceptions to this rule.

First, there are at least some political spending situations where directors' and executives' interest will not be the same as those of shareholders.... Another reason why the interests might not be aligned in the way you'd expect is that these decisions are actually of considerable financial significance.... But even if that weren't true, the thing I want you to focus on would be that they have special expressive significance, that shareholders might care about these decisions in a way they don't care about other day-to-day business decisions. And for this reason we think that they're special, different for the ordinary business decisions that we usually in corporate law give deference to directors and executives on.

So...we could use a number of special rules to help align the decisions that corporations make on political spending with the interests of shareholders. The first is that shareholders should be given a right to vote on corporate political spending.... I'd want to change corporate law to allow shareholders to vote on by laws that would bind the corporation as to who can receive money that's being spent in politics. So these are the kinds of rules I would offer up for shareholder voting, but in addition to that I'd want to give oversight for these decisions within the corporation to independent directors.

Shareholders Won't Save Our Democracy

Regulating corporate political spending could result in a public policy problem.

William T. Allen, Director, Center for Law and Business and professor, NYU School of Law and Stern School of Business; former Chancellor, Court of Chancery, State of Delaware

The problem is what constitutes political speech. Lobbying is actually very important for businesses to be effective.

I'm more skeptical than probably anyone in the room that there's a problem, so I'll be a discordant note, I suppose, in the conversation today. The title for this panel is: Can Shareholders Save Our Democracy? If our democracy is in trouble, shareholders are not the place to go to save it.

Modern security markets turn over with very great rapidity, the stocks are owned internationally, they're owned by hedge funds, by large institutions. These are not the institutions that if there is a problem with the democracy that we can reliably depend upon.... The notion that this is a serious agency problem however is really I think a silly way to change law to try to imagine that there's a CEO who is going to leave his CEO job and become a congressman and therefore say, well, he could be spending.... I need a lot more in the way of data to change law based upon this notion that this is an agency problem.

I don't disagree that we could have a special rule for political speech, the problem is what constitutes political speech. If the rule goes to making expenditures directly or indirectly in favor of a particular campaign, then I don't have a problem with it. My problem with changing the law is [that] lobbying Congress to change the law or lobbying a legislature could be regarded as political by somebody and lobbying is actually very important.... It's very important for business firms to be effective. If a new regulation on clean air is going to come out, and it's going to raise the cost of production a great deal, it's the responsibility of the firm to be there to inform the process at least about the effects this is going to have and maybe to share the technological information it has about different ways to regulate. So we need to have the producers in our economy sharing information with the regulators. And if we make it more difficult or impede in any way that lobbying process we're creating a public policy problem for ourselves. I know K Street is not a very popular thing in the American imagination and not with me either. But the fact is that lobbying is an important vital public function and if in our regulation of political speech we somehow get to regulate or impede company's lobbying activities, I think we've done ourselves a disservice. ■

Did Marge Have a Bake Sale, Or Did Montgomery Burns Write a Check?

Ciara Torres-Spelliscy

Citizens United *transformed state elections too. Here, the Brennan Center urged Oregon to require disclosure of political spending.*

Many of the financial disclosure laws that govern our elections are woefully out of date. They are based on the quaint notion that candidates will be the primary or the only spender in an election. But if the 2010 election cycle showed us anything, it's that outside spenders are ready to pay big bucks to influence elections. The problem, from a voter's vantage point, is it's often hard to tell who exactly is trying to sway the vote. It could be grassroots neighbors pooling funds to support a candidate or it could be your neighborhood mega-corporation trying to sell you a candidate like it does Twinkies.

Oregon's Legislature is currently considering a bill — House Bill 2894 — that would fix this problem through improved on-ad disclaimers. This move comes after outside groups like the Republican Governors Association and the Democratic Governors Association spent millions in Oregon in 2010 without revealing the source of their funds. This may seem like a small change, but it will give voters a better sense of what group is behind what ad. This matters to everyday citizens trying to figure out whom to vote for in an election.

Not every voter, for instance, is likely to pore through campaign disclosure filings to find out who is funding each and every race on the November ballot. Instead, many busy citizens rely on mental shortcuts to place the candidates into a sensible framework. One of these shortcuts is seeing who is supporting or opposing a given candidate. If a candidate is getting praise from an industry the voter distrusts, the voter may distrust the candidate. It works the other way as well. If voters trust a company because of its good labor practices or environmental record, they may be quite interested in the candidate it supports. But when it's unclear who is praising the candidate, as is often the case, the voter is deprived of a useful democratic cue.

Think of it this way. If we were in "The Simpsons," the question of what money is behind a political ad could be as simple as whether Marge Simpson held a bake sale or whether billionaire Monty Burns signed a corporate check. Both ads could be attributed to a group with a name like "Springfield for a Better Tomorrow." Depending on your political inclinations, you might question a political message from a bunch of cupcake-peddling housewives or you might be skeptical of an ad brought to you by the owner of a nuclear power plant. Bottom line: As a voter, you should know the true source supporting or attacking a candidate, so you're in a better position to make an informed choice at the ballot.

The U.S. Supreme Court recognizes that states have an interest in requiring transparency around electoral spending to help inform the electorate. The court has repeated this mantra for 35 years, and it said it again in the *Citizens United* case in 2010. Disclosure and disclaimers were endorsed by both conservative and liberal justices by a margin of 8-1. Disclosing the source of money in politics is on rock-solid

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constitutional ground and both Republicans and Democrats can embrace this approach.

So what's to be done? Many states, including Oregon, are currently in the midst of their long legislative sessions that occur during odd (non-election) years. Legislators should take a look at their laws to see whether their state's reporting requirements match up with the way money is actually spent. At a minimum, states need disclosure for independent expenditures. These are ads funded independently of a candidate that explicitly say vote for or vote against a candidate.

If we were in "The Simpsons," the question of what money is behind a political ad could be as simple as whether Marge Simpson held a bake sale or whether billionaire Monty Burns signed a corporate check. Both ads could be attributed to a group with a name like "Springfield for a Better Tomorrow."

But as the Brennan Center for Justice noted in its recent report, *Transparent Elections After Citizens United,* states can go further than this. They should also have disclosure of electioneering communications — ads that criticize or praise a candidate on election eve without mentioning the word "vote."

Finally, states need to strengthen disclaimers within political ads to name the top funders of the ad. This is the change that Oregon is currently considering. This would put Oregon in the vanguard along with Connecticut and Washington state, which already have enhanced disclaimers on political ads. And Oregon could follow in the footsteps of Maryland, which, on April 11, adopted robust transparency rules including disclosure directly to shareholders.

The Oregon legislation would require political ads to list its top sponsors. So instead of listing the nonspecific "Springfield for a Better Tomorrow," the ad would also say brought to you by "Springfield Nuclear Power Plant" or "Marge Simpson, concerned citizen." Then voters would have the information they need to judge the content of the ad. This would be a big step forward in bringing transparency to Oregon's elections. ■

Public Financing to Clean Up Albany

Mark Ladov and Lawrence Norden

At the start of 2012, at the urging of the Brennan Center and others, Governor Andrew Cuomo renewed his pledge to advance comprehensive campaign finance reform — including public financing.

Government corruption keeps making headlines. In late June, former Illinois Gov. Rod Blagojevich was convicted on corruption charges, and reports indicate Rep. John Mica (R-Fla.) funneled a billion-dollar project to major campaign contributors.

Such news makes the Supreme Court's 5-4 decision striking down part of Arizona's public financing law particularly troubling. As Justice Elena Kagan explained eloquently in dissent, Arizona voters enacted the law to fight corruption and waste, and to ensure more political competition and speech.

Fortunately for New Yorkers, the Empire State still has plenty of weapons to fight corruption in government. The just-passed landmark ethics bill was a first step. But to get rid of the worst abuses in Albany, we also need comprehensive campaign finance reform, including public financing.

The Supreme Court has made clear that New York cannot adopt the same system as Arizona. But we can pass what is known as a voluntary "small donor public financing system," where participating candidates get public funds to match privately-collected donations. New York City implemented such a program after a city-wide bribery scandal and the suicide of former Queens Borough President Donald Manes in the mid-1980s. The city has been at the forefront of public financing ever since.

New York City's most notable innovation is its use of multiple matching funds to encourage small-donor outreach.

Under current rules, the city gives participating candidates a $6-to-$1 match in public financing for the first $175 raised from New York City voters. That means a $175 donation to a city council candidate is worth as much as a $1,225 contribution from a special-interest lobbyist. This encourages candidates to seek help from average citizens — and allows candidates with grassroots support to run viable campaigns, even without the backing of big money.

This pioneering experiment has been a resounding success. The program has enjoyed robust participation by serious, credible candidates. It has promoted voter choice by increasing diversity and competition in city elections. It has dramatically expanded the number of New Yorkers who contribute to campaigns as small donors — 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 small donors grew by 40 percent. And it is a powerful weapon against the corrupting influence of special interest money; research suggests that large donors, unions, and political action committees exert less influence on publicly financed candidates who depend heavily on small donors.

New York City's model remains fully constitutional, even after last week's Supreme Court rul-

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ing. The narrow issue before the court was the constitutionality of Arizona's "triggered funds," awarded to a candidate who faced high-spending opposition. By contrast, New York City's small-donor incentives provide public funding based on a candidate's own fundraising. This avoids the constitutional problems raised in the Arizona case by ensuring a candidate's public financing rises or falls based on his or her own success at campaigning.

New York City's model remains fully constitutional, even after a recent Supreme Court ruling.

Now's the time to expand public financing statewide. Gov. Andrew M. Cuomo's ethics package establishes for the first time that financial disclosure, independent oversight, and reform are possible in Albany. But cleaning up Albany requires a comprehensive campaign finance reform program — including public financing.

Comptroller Thomas DiNapoli made the first move by proposing public financing for state comptroller races. Passed by the Assembly in June, this proposal offers a critical reform that could help prevent another influence-peddling scandal like the one that landed former Comptroller Alan Hevesi in prison. But the legislation never came to a vote in the state Senate.

Just as public financing put a major dent in scandal in New York City, it can help us clean up Albany next. New Yorkers should urge Cuomo and the Senate to make it a priority next year. Public financing will help us create a model for reform that the rest of the nation can follow. ■

BROKEN GOVERNMENT

iPhone Public Distrusts Dial-Up Government

Michael Waldman

Our leaders will never earn the public's trust until they make a much more compelling case for their vision of the role of government — and one that is more effective, not just bigger.

Americans have argued over government's role since the days when politicians wore powdered wigs. Lately this great debate seemed more like a monologue. Conservatives denounce government with zest. But on this most basic of questions, President Barack Obama and the Democrats have been silent.

That began to change with Obama's State of the Union last week, which sketched an appealing picture of government as an engine of economic innovation. He must do more to set out his vision, and persuade the public to go along.

We have always been ambivalent about what Thomas Paine called "a necessary evil." But throughout the 20th century, liberals, if nothing else, stood for the idea that a strong government could be a force for good.

In his landmark 1932 Commonwealth Club speech, Franklin D. Roosevelt explained, "New conditions impose new requirements upon government" — signaling a sharp expansion of Washington's role, through the Depression, World War II, and the Cold War. Americans embraced this change from our traditionally distant central government.

Modern conservatism was born, in large measure, to repudiate that view. The tone was set in the first minutes of Ronald Reagan's term, when he declared in his inaugural address, "government is not the solution to our problem, government is the problem."

Threat to Freedom

These assaults bit because they came at a time when government seemed unable to meet basic tests, from curbing crime to managing its own finances. It drew from many strands — southern whites resentful of civil rights laws, business people chafing at environmental rules — but all cast strong central government as a threat to freedom.

Through the years, there have been hiccups and hesitations. George W. Bush neither ran nor governed as a foe of big government. But by the 2010 election, the Republican Party made a consistent, confident public argument. As Representative Paul Ryan of Wisconsin said in his televised response to Obama's State of the Union speech, "We are at a moment, where if government's growth is left unchecked and unchallenged, America's best century will be considered our past century."

All this even though government in the U.S. still is much smaller than elsewhere. The federal government accounts for about a quarter of the economy. (That doesn't count state and local levels.) In many other democracies, the public sector can account for as much as half of spending.

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Shift Against Government

Nonetheless, the public largely buys the Republican critique. Numerous polls show a sharp shift against government.

Democrats take refuge in the famous study in 1967 by political scientists Hadley Cantril and Lloyd Free, who found that Americans loathe big government yet crave its benefits. We are "operationally liberal" but "ideologically conservative." So liberal politicians pound on specific programs. Here are some pharmaceuticals, seniors; there are some loans, students; let's hope it adds up to majority. As for whether these goodies cohere into a vision of what government does, well, Democrats long have hoped nobody notices.

Obama tries hard to avoid the issue of government's size and role. He used his inaugural address to chide "childish" politics, instead of spelling out an explicit political vision. When he had the public's undivided attention, he never delivered an Oval Office address to explain the stimulus. (It was Richard Nixon, not Obama, who declared, "I am now Keynesian.")

Democrat Strategy

He talked about government's role occasionally, such as in last year's University of Michigan commencement address — but rarely in more high-profile settings. Absent an overarching vision, the Democrats were reduced to pelting their midterm foes with nit-picky attack ads that were easily deflected.

Perhaps electoral losses forced a reassessment. This year, State of the Union listeners could discern a defense of government's proper role. Obama didn't merely envision a market that creates and distributes wealth, with government stretching a safety net to catch those who fall. Rather, government can help build the conditions for prosperity, as it did from canals in the 1800s to the Internet in the 1990s. As has been noted, this was an approach that echoed Henry Clay and Abraham Lincoln. Obama cannily made budget cutting seem old-fashioned, even defeatist in the struggle for international economic gain.

But he must do much more. The next test will come in May, when Congress has to authorize an increase in the debt ceiling. The Republicans in Congress will try to force cuts. Obama must go beyond tagging individual programs to make the larger point about government's role.

Obama's Pledge

But Obama's address hinted at something even more basic: Democrats must show they seek a more effective government, not a bigger one. Last week, Obama pledged a plan to reorganize overlapping agencies.

That's nice. But fiddling with organization charts can be a placebo instead of actually taking action. Mock Al Gore's reinventing government drive in the 1990s at your peril: It recognized that government had far to go to adopt basic corporate customer-service principles. Citizens who live in an iPhone economy will never trust a dial-up government.

Over coming months, Democrats must show they can grapple with the big questions. What is government's function? What's the ideal divide between the public sector and a robust private economy? When we want a social good — say, clean air — is the best approach command-and-control regulation, economic incentives, direct spending? How can we tap social media to modernize the public sector?

Until Democrats can argue for their vision of the role of government with self-confident gusto, they will never earn the trust of the public, nor should they. ■

How Government Dysfunction Produces Economic Inequality

Jacob Hacker

Globalization and technology are typically cited as the reasons behind our nation's vast economic inequality. The Yale political scientist offers a different rationale to explain the decline of the middle class: money in politics and broken government.

I think Americans are disillusioned about their sense of political power in part because there has been a real pulling away of democracy from the broad middle class. The backdrop for this exploration, if you will, is the startling trends of the last generation, which we describe with this phrase "winner take all." We tend to think of economic inequality in terms of the falling away of the bottom. But really the story of the last generation that is becoming increasingly clear is the pulling away at the top. The very richest of Americans have gotten vastly richer, while most Americans have moved ahead only modestly.

And I think that when we look at public commentary and discussion about this, at least until recently, there was this sense that this was inevitable — a natural result of broad trends, changes in our economy from technology, increasing technological sophistication and globalization — that make it more or less inevitable that there is going to be this pulling away of one section of society from another. Certainly, those who have done so well in this economy have often credited their success to these big shifts in the economy and their innovative ability to take advantage of them.

There was an interview with Sandy Weill, the former head of Citigroup, a few years ago in which he said, "You can look at this last 25 years and say it's been an incredibly unique period of time. We didn't wait for somebody else to build what we built." And in a real sense, Sandy Weill is right. He didn't wait for somebody else to build what he built. If you went to his office a few years ago you would have seen a plaque on his wall, about 4 feet wide; it was wood, had a glass image on it. The image was of Sandy Weill; and below it said, "Shatterer of Glass-Steagall" — because Sandy Weill was the leading voice challenging the Depression-era law that separated commercial and investment banks. Now, the Glass-Steagall repeal, as lots of commentators have noted, was not the precipitating cause of our financial crisis, but it

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Excerpted from Jacob Hacker's remarks at the Brennan Center on April 15, 2011. Hacker is the Stanley B. Resor Professor of Political Science at Yale University and the author of "Winner-Take-All Politics: How Washington Made the Rich Richer—And Turned Its Back on the Middle Class," written with Paul Pierson.

was the capstone to a string of deregulatory moves that were pushed quite aggressively by the financial industry and people like Sandy Weill. And after the greatest financial crisis since the Great Depression, it's a lot harder to see those actions as simply the result of inevitable global economic forces on the one hand, or the reflection of the innate ability of these titans of finance to innovate and produce economic gains for our society.

The debate over whether financialization in our economy causes greater inequality is a little bit moot after it caused the worst economic downturn we've experienced in our lifetime. With unemployment still at around 9 percent, we know that the cost of that financialization has been really broad based. That's just one illustration of a larger story that we tell in *Winner-Take-All Politics.* The way I like to put it is that we have a puzzle wrapped inside a riddle wrapped inside a mystery. So the puzzle is why you are seeing this very sharp pulling away of the rich and I'll say a little more about the character of that in a moment.

How did this happen in the world's oldest representative democracy?

The riddle, if you will, is why this is really occurred because of, not in spite of, various very substantial changes in our public policies over the last generation. And if public policy is deeply implicated in what has happened, that leaves the great mystery of how. How did this happen in the world's oldest representative democracy, in a country that is founded on the idea of responsiveness to the broad middle, of the distribution of income and power, founded on the ideal that all men are created equal? And so I want to walk us through those three interlocking questions, starting with the question of what's happened to our economy.

The Rise of Economic Inequality

There is one figure in the book that nicely summarizes the full story of what's happened over the last generation and it's this one. And this is based on data that the Congressional Budget Office has put together. It includes all sources of income and federal government taxes. It also includes private benefits provided by employers in the health insurance and retirement pension area. So it's really trying to take into account the broadest measure of income that we can look at from the late 1970s until 2007, that's the last year available. In 1979, the top 1 percent had an average income of around $400,000 and the middle fifth had an average income of around $40,000. But if you fast forward to 2007, what you see is a dramatic pulling away. So the top 1 percent has seen its income increase to around $1.4 million dollars on average, whereas the middle fifth has seen its income increase to around $50,000 on average, which works out to a 25 percent increase for the middle fifth and a 281 percent increase for the top 1 percent.

And that's a very stark illustration of how concentrated economic growth has been over these years. If you take all of the gains in income as measured by this after tax, after benefit measure, about 40 percent of them went to the richest one percent over this 1979 to 2007 period. If you look at the most recent period since the 2000s, more than half went to the top 1 percent. And really, while this top 1 percent has done well, if you look within the

top 1 percent the picture is very similar to this. It's really the top one-tenth of 1 percent or 100th of 1 percent that has seen the biggest gains, so that the richest one-tenth of 1 percent has seen its share of national income more than quadruple since the 1970s, so those 1-in-1000 households were making in 2007 about 1-in-80 pre-taxed dollars in our economy; and wealth, as you probably know, is even more concentrated.

The top one-tenth of 1 percent is a useful group to mention because we actually know, thanks to recent research, a lot more about who is in that top one-tenth of 1 percent. Yes, it includes super stars in the media, art, celebrities, sports. But the bulk of that group, 60 percent, is executives, about 40 percent in total is non-financial executives and about 20 percent is financial executives. So when you talk about the richest of the rich, you're talking about people who are the working rich who are making money through executive compensation and through financial transaction.

How Did We Get Here?

The next question: If that's the pattern of inequality, why did this happen? As I said, it's common to say this is really due to large scale shifts in our economy. There's a revealing quote from former Treasury Secretary Hank Paulson back in 2006 when he was forced to confront the reality that inequality was rising. He said, "The fact is economic inequality is simply an economic reality and it is not fair or useful to blame any political party for it." Now you can forgive him since we know which political party he thought was being blamed. But I think this is a very common view that this really has very little to do with public policy and politics. After all, how can we explain the massive amount that folks at the top are taking in even before government taxes and benefits are accounted for? And I think the mistake here again is really to assume that inequality is just about the pulling apart of the rungs from the income ladder, and not to focus as much on this question about what happens at the very, very top, because when you look within the top 1 percent you reach three pretty strong conclusions. All of which point to a fairly fundamental role for public policy.

The first is that the broad changes in our taxes and transfers have not led to a broad pulling apart of American society, say, between the bottom third and the top third. But it has led to very specific decline in taxation on the very richest. And this comes from the work of Thomas Piketty and Emmanuel Saez. So what Piketty and Saez looked at is effective tax rates…what people are actually paying as a share of their income. And if you look over the last generation you can see that there has been a fairly substantial decline in the effective tax rate on the richest 1 percent. It's gone from around 50 percent to around 30 percent. That's pretty remarkable if you think about it, given the trend we're talking about. …We've also cut federal taxes on the top 1 percent. However, it's really within the top 1 percent that you start to see the substantial decline in tax rates. In a way, what we can say is that our tax code used to be progressive all the way up the income ladder. Now it's really not progressive at the very top.

Warren Buffett recently said he thinks he's paying a lower tax rate than his assistants. And these numbers suggest why and the most egregious example of this is the carried interest provision that allows hedge fund managers to pay a 15 percent capital gain base rate on a large chunk of their multimillion dollar incomes. So what we've seen is not a worsening of the distribution broadly, but really a very concentrated series of economic smart bombs, if you will, for the very richest: they shower payloads of cash on to their carefully selected recipients.

The Role of Government in Shaping Inequality

Even so, this alone is not going to explain why we see pre-tax incomes explode for those at the top. And I think there's a real strong source of skepticism about the idea that policy mattered. It's really this idea that, well, how can you understand what has happened with pre-tax incomes as a result of public policy? In the

book we argue that there really are two fundamental mistakes that people make when they dismiss the role of government shaping pre-tax income. The first is to think of markets as pre-political and pre-governmental. After watching Republicans go after unions in recent years, but especially recent months, or watching what happened due to the deregulation of financial markets, it's pretty hard to dismiss the idea that the basic rules that govern the market have a big influence on the relative power of market actors and the ability of some people to accrue large fortunes. In a sense, the financial deregulation story is a perfect illustration of the way you can remake markets through public policy in a fashion that can really create fundamental disparity, fundamental changes in the distribution of economic rewards. And this was not inadvertent, it was not accidental, those who are pushing for these deregulatory changes were doing so and investing in politics because they saw really strong reasons for doing so in terms of the changes on their bottom line. That's pretty obvious, and I'll tell you more about that kind of investment in a moment.

The financial deregulation story is a perfect illustration of the way you can remake markets through public policy in a fashion that can really create fundamental disparity.

The other side of this that's a little less obvious is we don't want to just look at market making in terms of active government policy, but also what government fails to do. So, there have been fundamental shifts in our economy — in particular, very dramatic shifts in what is often called financial innovation and the technologies in the financial sector. And government largely failed to police these changes in ways that also allowed those at the top to reap large rewards. And again, this was not inadvertent. In the book we talk about two key examples.

One is industrial relations. American unions entered the 1970s facing a much more hostile set of policies than unions in any other country. One of the reasons for that was that they were not protected against the threats to unionization that occurred due to the ability of corporations to move their operations to other parts of the United States. They also were not protected against the shifts that were taking place as production was moving from manufacturing to services. They needed, in other words, a reboot of industrial relations law and many unions, despite this common view that they had their head in the sand, recognized this. In 1978 they sought a huge revamp of industrial relations law and many people expected it was going to happen.

In the book we talk about 1978 as the great turning point when a lot of the forces that mobilized to push for these policy shifts that I have been talking about really saw the opportunity to remake American policy and politics in ways that would favor their interest. So in 1978, under President Carter, with Democratic majorities, there ended up being an unprecedented political battle over labor law reform that featured a filibuster on the Senate floor. Filibusters were extremely uncommon on civil rights issues back in the 1970s. And who was leading that charge? One of the people was this very young fresh-faced senator from Utah named Orrin Hatch. They did a real filibuster; they shut down the Senate for the entire summer of 1978. And in the end, they won. And it was a huge rout for labor, which had really saw this as the opportunity to revamp industrial relations law.

Within a few years, of course, corporations were taking advantage of it, but this is well before PATCO — the air traffic controllers strike — well before the early 1980s appointments by Reagan on the National Labor Relations Board. This was in the late 1970s and it was the failure to make changes to the framework that was crucial, not the passage of new laws.

These did not become prominent issues because they were shut down by politicians who are quite responsive to the industry interested in question. But my favorite quote regarding this is from Phil Gramm. Former SEC chair Arthur Levitt comes up to him at one point on the accounting front and says we really need new rules and Gramm looks at him and says, somewhat presciently it turns out, "Unless the waters are crimson with the blood of investors, I don't want you engaging in any regulatory flights of fancy." Well a few years later, the waters were crimson, but Phil Gramm was gone. It was too late, the damage was done, the trillions have been lost. But people recognized this, people in positions of power as well, but they didn't act.

Government's Failure to Respond

This of course leads to the fundamental question, why didn't they act? And I've already hinted at the answer, but I want to try to provide a broader picture here, what happened politically over this period? Why was 1978 a turning point and not, say, 1968 or 1964? Why were the forces that were pushing against updating the social contract or financial regulations successful?

If the middle class was unmade through policy changes that elevated the super rich, then the problem is about restoring a well-functioning, responsive democracy.

So in the book, we talk about this in a way that I think is unfamiliar to commentators who really want to look for grand conspiracy theories....It's about how the mobilization of business in the 1970s and 80s, occurring alongside the decline of a lot of traditional organizations that once represented middle-class Americans, from unions to civic groups, changed the Washington ecosystem so that everyone, Democrats as well as Republicans, had to adapt. Much of this is about decentralized responses to new political and economic realities. And what is consistent is these new incentives are pushing in a direction that is reinforcing the advantages of those who are mobilizing during this period and seeking favorable public policy.

One way to understand this is that the big part of the story is not about massive policy breakthroughs, but about stalemate — about the increasing incapacity of our government to respond to the major economic changes that were taking place.

Obviously part of that story is the filibuster. I mentioned that that was pretty unusual and it was. Historically, the filibuster was actually a fairly rare event up until you see the sort of spike here with the civil rights struggles, but really it's the last generation that's seen the most dramatic increase in cloture motions to end filibusters. Just to give you the numbers here: In the 40 years before 1970 there were fewer than 40 cloture votes in total. In the 40 years after 1970 there have been 800 cloture votes, and more than 200 in the last few years. This is a quasi-Constitutional change; it's one that the Founders would have viewed with a great deal of ambivalence if not outright hostility.

…I don't want to overstate the filibuster, it's not the only factor here, but it's revealing of this story I want to tell. It's not just big changes in tax and transfer programs; it's also changes in markets and some of those changes are occurring because of the failure of government to act in a much more polarized and stalemated political environment.

But why is the pressure coming so consistently from those who are benefiting from these economic shifts and policy changes? Here we have to pay attention to money in politics, but not just campaign money. In fact, corporations spend vastly more on lobbying than they do on campaign spending, and that's true despite, of course, the outpouring of money in politics. So it's really worth keeping in mind that a big part of the story is the concerted efforts of organized economic interests to try to reshape policy over the long term. This is beyond the electoral fights. It's a long-term engagement in policy

Just recently I had this argument vindicated by a real authority on it: David Koch. He said our main interest is not participating in campaigns. Our main interest is in policy. And if you think about that, about what it takes to make policy over the long term, voters are disadvantaged unless they have organizational representation. Unless they can be made aware of the complex features of policy and engaged over the long term, they're always going to be at a very substantial disadvantage to those who are organized and intense and engaged across multiple branches and levels of government for the long term. What we talk about in the book is how that organization occurred within the business community and financial sector in the 1970s and 1980s and has been sustained even as many of the organized representatives of the broader public have lost ground.

The Need for Political Reform

So the common story that we hear every day now is that we face this massive shift in the economic environment that has led to these new competitive pressures; the middle class is inevitably going to fall behind; inequality is the reflection of the sort of large impersonal forces beyond their control.

Our story is much more a political one. The middle class was built was in the mid-20th century, and was unmade through these policy changes that helped elevate the super rich. If that's the case then our problem is, in some ways, more tractable. It's the problem of restoring a well-functioning, responsive democracy. Walter Lippmann, in the early 20th century, when faced with this quandary, described it as basically how democracy has to pull itself up by its own bootstraps; that is, the only way we can fix winner-take-all politics is to work through our broken political system. But it's a much more inspiring vision than one that says, look we just have to get used to these high levels of inequality, levels of inequality that are approaching those of Third World nations because it's the nature of modern American capitalism.

So, far more than economic policy reforms, we need to have political reforms. We need to have an effort to try to create and recreate the kind of middle class democracy of the mid-20th century where Americans of modest means who didn't have much economic capital had a great deal of political capital. And that's the really fundamental challenge. It's a challenge that Franklin Roosevelt and Theodore Roosevelt recognized. And you can go back and look at the debates of the early 20th century, the Progressive Era up to the New Deal. It's striking how often politicians really articulated this as the fundamental problem; and its striking how infrequently it gets discussed in these terms today. TR said the supreme political task today is to drive the special interests out of our political lives. FDR said that political equality is new to us in the face of economic inequality. He said a lot of other things that would make today's bankers — who seemed pretty upset when they get called fat cats — go home crying. And so we've lost that kind of broad egalitarian populist tradition of discourse and I think if these numbers tell us anything, it is that we need to reclaim it. ■

Missed Opportunity To Reform Filibusters

Mimi Marziani and Diana Lee

In recent years, senators staged more filibusters than in the rest of the country's history put together. The Senate had a chance to change the rules to allow more up-or-down votes on key priorities. More than half the Senate urged reform. Instead, leaders flinched.

With the start of a new congressional session in January 2011, the time was ripe for the Senate to reform its archaic procedural rules and curb obstruction — to do something about rampant filibuster abuse.

There had been much talk about comprehensive rules reform, but Senate leadership is now considering only a limited set of changes — namely, abolishing secret holds and streamlining the nominee confirmation process. It has apparently missed its opportunity for real reform.

To be sure, these changes represent steps — albeit baby ones — in the right direction. But they do not come close to addressing the root causes of Senate dysfunction. Here's why:

First, these proposals would not be implemented through an official rules change. Instead, they rely on a "gentleman's agreement," an informal handshake between the parties.

This is already suspect. If the Senate were actually comprised of gentlemen and gentlewomen committed to institutional comity, it wouldn't be riddled with gridlock in the first place.

In fact, secret holds are already banned. The 2007 Honest Leadership and Open Government Act requires senators to publicly disclose their holds within five days. Most senators, however, routinely dodge this rule with a tag-team-hold technique. By passing off an anonymous hold to a cooperating senator (think relay runners) just before the five-day limit expires, a few senators can maintain a secret hold indefinitely — without technically violating the rules.

The current proposal to ban secret holds would change nothing. It is not a meaningful fix because it lacks any enforcement mechanism.

Similarly, reducing the number of executive appointments that need to be confirmed by the Senate also skirts the underlying issues. This move may lessen the logjam somewhat. But there will still be dozens, even hundreds, of nominees in limbo, while essential executive positions remain unfilled.

Senators are still likely to place indefinite, anonymous holds on uncontroversial executive nominations to extract concessions on unrelated issues. Despite Chief Justice John Roberts' public rebuke of the Senate for partisan game-playing that has created "judicial vacancies in critically overworked districts," the current reform proposal would not address the judicial nomination crisis at all.

The current proposal thus contains minor fixes that ignore the core problem: The Senate's procedural rules incentivize the wrong things. Under the current system, obstruction, partisan maneuvering, and strategic gamesmanship predominate. There is little genuine debate on the critical issues facing our country.

This op-ed was originally published in *Politico* on January 27, 2011.

Too often, individual senators can wield the extraordinary power to singlehandedly block legislation or nominations, to gain leverage on their pet projects — with no negative consequences. Legislating takes a back seat to obstruction.

There were several effective solutions introduced earlier this month that would make a significant difference in the way the Senate operates. The most important proposal is also the simplest: Make filibustering senators filibuster.

Too often, individual senators can wield the extraordinary power to singlehandedly block legislation or nominations, to gain leverage on their pet projects — with no negative consequences. Legislating takes a back seat to obstruction.

This fix — known as the "Mr. Smith Goes to Washington" proposal — would force objecting senators to actually debate to sustain a filibuster. As the rules now stand, a senator need not be physically present. Instead, the majority party must produce 60 votes to break obstruction and move forward to a substantive vote.

Changing the rules so that a filibustering senator must take the floor shifts the burden of maintaining a filibuster to the obstructer — making filibusters more difficult to maintain.

Even better, Mr. Smith-style filibusters require real debate. Obstructionists would have to explain their reasons for blocking legislation or nominations that have majority support — and let the American people approve or disapprove of their decision.

Another important proposal would limit the number of opportunities to filibuster a measure. Allowing only one bite at the apple, so to speak. Now, any senator seeking delay gets as many as six opportunities to filibuster a single measure — giving obstructionists the power to effectively kill legislation with a million cuts.

In fact, most of today's filibusters don't occur while a bill or nominee is actually being debated on the Senate floor. Instead, the matter is often derailed during the motion to proceed to the Senate floor — therefore preventing public debate entirely.

The American people should not have to settle for baby steps by agreeing to a watered-down compromise. There is too much work to do in 2011 — like stimulating the economy, fighting the continued threat of terrorism, and addressing pressing environmental concerns — for the Senate to remain crippled by its own procedural rules. ■

Super Committee, Puny Accountability

Mimi Marziani

Congress grew paralyzed throughout the year. Most distressing, a faction in the House provoked a crisis over the debt ceiling. The resulting compromise created a "super committee" to craft a deficit plan. The panel eventually failed, but it set a worrisome precedent: Congress could only grapple with large problems by evading the normal legislative process.

Behind the recent crises averted, another lurks. In the compromise to raise the debt ceiling, Congress struck a strange deal. It created a super committee — a bipartisan group of 12 lawmakers from both chambers — that must devise a major deficit-reduction plan by Thanksgiving.

This committee's choices will set our country's course for years to come. It will affect various voters, issues and industries — for better and for worse.

Not surprisingly, special interests have already started to circle. There's little doubt that when all the committee's members are named in the next two weeks, the lobbyists will pounce. Interest groups across the political spectrum are likely to shower those members with political cash to curry favors.

Given the stakes, the super committee's dealings must be as transparent as possible. All potentially corrupting outside influences — campaign contributors, ties to business corporations, relationships with political groups — must be made public.

To start, as many have urged, all campaign contributions to the supers should be disclosed in real time. Sen. David Vitter (R-La.) has proposed a sensible bill that would impose a 48-hour reporting deadline on donations of $1,000 or more. This should be passed without delay.

But disclosing direct campaign contributions is just the start: The supers should also disclose any involvement in soliciting funds for outside groups now busy building up war chests for the 2012 elections — including Super PACS, 527s, and 501(c)(4) or (c)(6) groups.

All potentially corrupting outside influences — campaign contributors, ties to business corporations, relationships with political groups — must be made public.

Given the outsize but stealth role these organizations play in today's elections, they are an easy vehicle for shielding tit-for-tat arrangements. Indeed, without this transparency, special interests could funnel political dollars through a friendly third-party group, with no disclosure obligations, rather than making direct donations that would inevitably see the light of day.

Voters also have a right to know who is lobbying for special treatment. Thus, committee members should report every meeting they have during the deliberation period — including all meetings between their office staff and outside visitors. These reports should have the names of everyone involved, the organizations represented, and the topic of discussion.

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The best way to make this information accessible, as the Project on Government Oversight has proposed, would be through an official super committee website (the super site?). This site could also host information about the supers (including their full financial disclosures), the committee's staff, the committee's schedule, and — as they start to form — the committee's proposals.

To be sure, the members will need the freedom to negotiate with each other behind closed doors — in today's radically polarized political environment that may be the only way to achieve real compromise.

But requiring robust transparency for committee dealings is necessary to force accountability upon a body with unprecedented powers — and discourage deals that favor narrow interest groups over the broader public.

It could also provide an unexpected silver lining to an unpopular debt deal. Congress has not been able to update campaign finance laws since the Supreme Court's 2010 decision in *Citizens United,* which lifted restrictions on political spending by unions and corporations. As a result, millions of dollars were spent to influence the 2010 election without public disclosure — leaving voters largely in the dark. Once a reform that enjoyed near-unanimous support, disclosure has recently spurred bitter fights, resulting in stalemate.

With so much on the line, this deliberation process must be fair, thoughtful, principled, and fully transparent. There should thus be widespread bipartisan support for Vitter's proposal — as well as for disclosure of solicitation and lobbying contacts. But Congress shouldn't stop there.

Bipartisan endorsement of transparency in the super committee context should be the first step toward requiring disclosure of all campaign spending. That would be truly super. ■

Broken Senate, Broken Courts

Adam Skaggs and Maria da Silva

The crisis of Congressional inaction has spread to the courts, where few new judges have been confirmed.

Washington is mired in partisan gridlock, with the White House and Congress divided even on issues with broad public support. But hyper partisan politics does more than just stop the legislative and executive branches from getting anything done. It also cripples the federal judiciary, one of the bedrocks of our democracy.

The latest egregious example came last week, when Republican senators filibustered the nomination of the eminently qualified Caitlin Halligan to the D.C. Circuit Court of Appeals. In blocking the nomination from going to the full Senate — where Halligan would have been confirmed by majority vote — Republicans ensured that a long-vacant seat would remain unfilled — and that the nation's second most important court remained understaffed.

This is a problem across the federal bench: There are 80 vacancies on federal courts, including 29 in districts that have been deemed judicial emergencies. And while there are highly-qualified, experienced Americans waiting to fill those seats, shameful partisan tactics in the Senate have prevented confirmation votes on the nominees.

The slow pace of nominations in the Obama administration's initial months in office certainly left much to be desired, and didn't help the judicial crisis: By November of his first year in office, Obama had nominated only 26 judges — compared to the 64 nominations President Bush made in the same time frame.

Shameful partisan tactics in the Senate have prevented confirmation votes on the nominees.

But the administration has picked up the pace, and the lion's share of blame for the current judicial logjam falls on the Senate. The president alone can't staff the federal judiciary. Under the Constitution, no nominee can take a permanent seat on the bench without Senate confirmation. And this Senate has failed to act on countless highly-qualified individuals nominated by the president.

Because of those open seats, sitting judges are swamped by extra cases that should be handled by the judges slated to fill the vacancies. That means frustrating delays for the parties that depend on federal courts to resolve their cases.

Federal judges in Arizona are juggling a criminal caseload that has more than doubled in the past two years, while political gamesmanship in Washington kept Arizona's bench short-staffed. Because of dilatory Senate tactics, veterans who risked the ultimate sacrifice defending our freedoms have had to wait several years to receive a final ruling

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on their eligibility for benefits from an overtaxed U.S. Court of Appeals for Veterans Claims. These examples, and countless others across the nation, have occurred because under Senate rules, a single senator can indefinitely hold a nomination from proceeding to an up-or-down vote.

A 2010 report from the Brennan Center for Justice illustrated how, over the last decade, Senate procedures have increasingly been used to prevent crucial decision-making — not to promote deliberation and debate, as the rules are designed to do. Nominees for crucial posts throughout the executive branch have been stalled by the Republicans' cavalier use of the filibuster, but among the most damaging results of these tactics has been their impact on the federal bench.

During Obama's first two years in office, only 62 of his 105 nominations were confirmed — the smallest percentage of judicial confirmations over the first two years of any presidency in American history. It's not that the Senate has rejected his nominees as unqualified or inexperienced; the majority of individuals nominated by President Obama have ultimately been confirmed with little or no opposition during the floor vote.

Take, for example, Judges John Gibney, James Bredar, Catherine Eagles, and Kimberly Mueller. The Senate Judiciary Committee voted unanimously to approve their appointments to district courts in Virginia, Maryland, North Carolina, and California, respectively. But before they could take up the important work of hearing cases, these uncontroversial nominees spent more than eight months in confirmation purgatory, captive to obstructionist senators using arcane procedural tactics to deny them up-or-down votes. All four were finally confirmed — by the unanimous consent of the full Senate.

Democrats aren't blameless, of course. Under the last Republican president, they, too, used the threat of a filibuster as a strategic tool of obstruction. But a 2005 deal struck by a bipartisan group of senators — the so-called Gang of 14 — defused the last confirmation crisis. The agreement, which allowed a vote on any nominee except in the most "extraordinary circumstances," recognized that holding qualified judicial candidates hostage doesn't serve either party — or the country.

Unfortunately, in this hyper partisan political moment, bipartisan common ground looks like a relic from the distant past. Led by Mitch McConnell, GOP senators walked away from the Gang of 14's common-sense compromise. The resulting non-vote on Caitlin Halligan underscores just how dysfunctional our institutions of government have become.

The filibuster's damage isn't limited to grinding the legislative business of Congress to a halt. In Halligan's case, the Senate's archaic rules let an obstructionist party deny the nation the service of a highly-qualified jurist. Partisan politics is imposing a tremendous burden on the ability of the federal courts to handle soaring caseloads.

In considering action on the 21 still-pending judicial nominees, patriotic senators would do well to realize how the Senate's inaction is compromising the judiciary's constitutionally necessary ability to protect our liberties. Senate obstructionism is slowing the work of the courts to a crawl. Senators who delay justice, deny justice. ■

A Civic Literacy Report Card

Eric Lane and Meg Barnette

New Yorkers agree: Citizens must be equipped with basic civics knowledge to engage meaningfully in our democracy. Yet a Brennan Center-commissioned survey reveals that many Empire State voters need a refresher course on the basics.

In the State of the Union address, President Obama called for "our generation's Sputnik moment." Before 43 million viewers, he rallied Americans to meet the new challenges of the global economy, particularly those posed by China's and India's growing economic power. The productivity of American workers is unmatchable, he argued, but their deficiency in science and math puts the nation at a severe disadvantage against the global economic competition. To overcome this, the president pledged government resources, including the training of 100,000 new science and math teachers.

Of course all of this is positive. We urgently need a public commitment to science and math education of the sort that propelled us to our space race victory, putting men on the moon along the way. But with this economic focus, the president did not confront an equally urgent educational need central to our democracy, one that is at the very heart of why Americans are falling behind: civic literacy. As former Harvard University President Derek Bok observed in 2002, "Civic education in the public schools has been almost totally eclipsed by a preoccupation with preparing the workforce of a global economy." As multiple national studies and our findings in this report all demonstrate, few Americans have the requisite knowledge to engage in a democratic policy discussion. Few know anything about the three branches of government, their functions, or how an idea becomes a law. And even fewer would know how to effect the changes recommended by the president, or those called for in this report.

The findings of this report are based on a telephone survey conducted in the summer of 2010 of just over 1,000 registered New York voters, conducted by Princeton Survey Research Associates for the Brennan Center for Justice. We polled a diverse sample of New Yorkers on their attitudes toward civic literacy and its necessity, and we tested their familiarity with prominent elected officials, governmental and legislative processes, and the U.S. Constitution itself. Against the backdrop of previous studies, our evidence shows that New Yorkers, like most Americans, know very little about their Constitution and their government.

Excerpted from *A Report Card on New York's Civic Literacy,* April 2011.

Without civic literacy we cannot maintain a vigorous democracy. And our civic illiteracy will only get worse if we limit our race to the top to only math and science.

Core Findings

- Most New Yorkers believe that the U.S. Constitution is very important to the success of American government.
- Most New Yorkers believe that, for American government to work, citizens must be knowledgeable about the U.S. Constitution.
- Few New Yorkers consider themselves very familiar with the Constitution. More say they are somewhat familiar.
- In fact, few New Yorkers know even a little about the Constitution. For example, less than one-third know that creating a stronger federal government was one of its goals. Only 42 percent of New Yorkers know basic information about the three branches of government. And 60 percent of New Yorkers wrongly believe that the president has the power to declare war.

Core Recommendations

- Raise the alarm — a sense of urgency and a renewed public understanding of the importance of civic literacy are critical to overcoming inertia and beginning to find solutions.
- Renew civic literacy education in our schools.
- Engage the public with a campaign to reintroduce civic literacy to all age cohorts, not just students.
- Form a state commission with broad membership across many sectors to build a strategic plan and to foster innovative ideas to drive forward the renewal of civic literacy education.

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Meaningful democracy requires civic literacy. American democracy can only be sustained by a civically educated populace. Democratic procedures "do not work automatically," writes scholar and president of the University of Pennsylvania Amy Gutmann. The system depends upon Americans possessing "the skills and virtues that support proceduralism, constitutionalism, and deliberation." If Americans do not understand the Constitution and the institutions and processes through which we are governed, we cannot rationally evaluate important legislation and the efforts of our elected officials, nor can we preserve the national unity necessary to meaningfully confront the multiple problems we face today. Rather, every act of government will be measured only by its individual value or cost, without concern for its larger impact. More and more we will "want what we want, and [will be] convinced that the system that is stopping us is wrong, flawed, broken or outmoded."

This is one of the important findings of scholars Michael Delli Carpini and Scott Keeter in their 1996 study, "What Americans Know About Politics and Why It Matters." Civic literacy provides meaningful understanding and support for a number of constitutional values, including compromise and tolerance, and promotes meaningful political participation. Also, "a better-informed citizenry places important limitations on the ability of public officials, interest groups, and other elites to manipulate public opinion and act in ways contrary to the public interest."

What's more, civic literacy helps create community. A common civic literacy would enable Americans to form a sense of connection with those of different views, experiences, and ideologies beyond the bond of a group affinity. We may want different outcomes for different reasons, but if we understand and agree on how we might go about implementing change in our society, we would find ourselves standing together upon a priceless common ground. This point needs re-emphasis. The goal of civic literacy is not the advocacy of particular policy views. Rather, it is to provide a background and a context for a richer and more vigorous public deliberation with the goal of trying to shape a consensus over the problems we confront and approaches to resolving them.

Few Americans are engaged in their democracy. How can this be surprising, when few Americans understand the process of government? Few understand, borrowing a definition from the National Conference of State Legislatures (NCSL), "what it means to participate in self-governance, engaging in that self-governance, having the knowledge to do it well, and appreciating the complexities of the process, and understanding how it works." Many national surveys have shown this to be the case, and the results of our New York survey further underscore this point. A 2002 NCSL study found, "Young people do not understand the ideals of citizenship; they are disengaged from the political process; they lack the knowledge necessary for effective self-government; and their appreciation and their support of American democracy is limited." A 1988 report observed significant drops in civic knowledge since 1976; another in 2002 found "that the nation's citizenry is woefully undereducated about the fundamentals of our American Democracy." According to the 2006 National Report Card on Civics prepared by the United States Department of Education, "About one in four students, or 24 percent, scored at or above the Proficient level, meaning they demonstrated at least competency over challenging subject matter."

Electoral turnout, even including the upward blip in 2008, confirms this. This year, voter turnout for the gubernatorial race in New York was only 30.5 percent, one of the lowest among states where the governor's office was up for grabs, and even though control of Congress was at stake, it fell off from there. Nationally, the 2010 turnout was a dismal 37.8 percent. Not only are citizens failing to vote, we have numerous indications that they are dropping out of the political system — feeling frustrated, alienated, or marginalized, rather than invested, responsible, and engaged. A 2002 report by the Carnegie Corporation and the Center for Information and Research on Civic Learning and Engagement (CIRCLE) concluded, "In recent decades…increasing numbers of Americans have disengaged from civic and political institutions…and political and electoral activities such as voting and being informed about public issues." This abandonment of political life leaves our future in the hands of angry factions of all extremes. "Politics is more polarized than ever. The two parties have drifted further to the extremes. The center is drained and depressed." Our polity is broken.

Civic illiteracy puts American democracy at risk. "How," asks Justice Sandra Day O'Connor, "are we going to have a knowledgeable, participatory population if we don't teach every generation about what our system of government is?" Her former colleague, retired Justice David Souter, uses even starker language as he warns the republic "can be lost, it is being lost, it is lost, if it is not understood." The historian Sean Wilentz, in his impressive history of American democracy from 2005, emphasizes this point:

> Democracy is never a gift bestowed by benevolent, farseeing rulers who seek to reinforce their own legitimacy. It must always be fought for, by political coalitions that cut across distinctions of wealth, power, and interest. It succeeds and survives only when it is rooted in the lives and expectations of its citizens and continually reinvigorated in each generation. Democratic successes are never irreversible.

From the framers onward, civic education has been viewed as the sine qua non for maintaining the American Republic. "[A] well-instructed people alone can be permanently a free people," noted James Madison, the father of the Constitution. According to his fellow convention delegate James Wilson, "Law and liberty cannot rationally become the objects of our love, unless they first become the objects of our knowledge." George Washington provided clear detail of what such knowledge should entail:

> Teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of Society; to discriminate the spirit of Liberty from that of licentiousness—cherishing the first, avoiding the last; and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the Laws.

Madison, Wilson, and Washington echoed the views of the entire founding generation who, according to historian Gordon Wood, believed, "Monarchies could exist with a corrupt and ignorant people, but republics could not."

Along with a complicated form of government, civic literacy was seen as key to thwarting what the Framers saw as a major threat to democracy: the determination of ambitious people to aggregate power and a corresponding tendency of most others to let them. "Without learning, men become savages or barbarians, and where learning is confined to a few people, we always find monarchy, aristocracy, and slavery," wrote the revolutionary and constitutional leader Benjamin Rush. This warning has been renewed over recent generations, as various authoritarian regimes have suppressed the civic education of their citizens to maintain their power. This is what President Dwight Eisenhower called the "gift" that authoritarian governments give to their people: "freedom from the necessity of informing themselves and making up their own minds concerning…tremendous complex and difficult questions."

Civic literacy makes us Americans. America is a country of enormous diversity, a patchwork nation. And this diversity has demarked it since its founding. What has made us all Americans is our commitment to the Constitution, its principles and values, and our collective ethic of working hard to find solutions to national problems, always at a cost to some of our own social, regional, local, or personal interests. President George W. Bush stated: "America has never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests and teach us what it means to be citizens. Every child must be taught these principles." Among these ideals, all of which flow from the Constitution, are freedom, participation, representation, compromise, respect for the process and its outcomes, fairness, and justice. ■

LIBERTY AND NATIONAL SECURITY

Counterterrorism's New Frontier: Intelligence Collection and Law Enforcement

Since the terrorist attacks of September 11, 2001, law enforcement is increasingly charged with a new mandate: prevent terrorism before it happens through intelligence collection. These counterterror efforts raise a host of questions. How do we safeguard core constitutional protections in the new regime? How do we ensure proper oversight of local law enforcement and the federal government? How do we effectively engage the very communities whose cooperation is vital in the fight? Last spring we gathered top law enforcement officials, intelligence professionals, community leaders, and academics to grapple with some of these questions. Excerpts from the conversation follow.

THE OBAMA ADMINISTRATION
The National Response

We now face an ever-evolving terror threat. In order to keep us safe, a senior advisor to the President argues, we must use all available tools to stop it in its tracks.

Hon. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism

Nearly 10 years after the September 11th terrorist attacks, the United States remains at war with al-Qaida and its adherents. Because of the relentless pressure to which we've subjected it, the senior al-Qaida leadership is increasingly hunkered down in its safe haven in Pakistan's tribal regions. Still, it retains the intent and capability to attack the U.S. homeland, as well as our allies abroad.

Despite having its ideology rejected by the overwhelming majority of Muslims, and being at its weakest point since 2001, the threat from al-Qaida is diversifying. Groups and individuals have sprung up in places like Pakistan, Yemen, and North Africa and seek to commit violent acts to further al-Qaida's murderous agenda. We have also seen this problem begin to manifest itself here at home. A very small but increasing number of individuals here in the United States have become captivated by these violent causes, seeking

"Intelligence Collection and Law Enforcement: New Roles, New Challenges" was held at The Atlantic Philanthropies on March 18, 2011. Other symposium participants included Frederick A.O. (Fritz) Schwarz, Jr., University of Chicago Law School's Aziz Huq, Kara Dansky of the U.S. Department of Justice, and former U.S. Attorney Chuck Rosenberg.

to commit violent acts here at home, their plots disrupted in Washington D.C., Oregon, and Maryland during the past year alone.

Others have traveled abroad to join the ranks of international terrorist groups and work to further their cause. What has changed significantly over the past 10 years, the threat from al-Qaida and its adherents represent the pre-eminent counterterrorism challenge we face today. And protecting the American people from this threat remains our highest national security priority. Some suggest that this is largely a military and intelligence challenge with a military and intelligence solution. Our military and intelligence professionals and the unique capabilities they offer are an essential part of our counterterrorism efforts.

We reorganized our intelligence, law enforcement, and counterterrorism communities to enable them to function more effectively as a whole.

But to argue that they are the only solution, or that we should place limitations on other tools and capabilities, is a misunderstanding of the complexity of the problem we face. Confronting this complex and constantly evolving threat does not lend itself to simple, straightforward solutions. No single tool alone is enough to protect the American people against this threat. We need to use all of these tools together, and that is what the Obama administration is doing.

So our counterterrorism efforts are guided by several core principles. First, our highest priority is and always will be the safety and security of the American people. The United States government has no greater responsibility. Second, we will use every lawfully available tool at our disposal to keep the American people safe — military, intelligence, homeland security, law enforcement, diplomacy, and financial at all levels of the government working seamlessly. Third, even as we are unyielding in the pursuit of those who would do us harm, we will remain true to our values and ideals that have always defined us as a nation.

Only by adhering to our values are we able to rally individuals, communities, and entire nations to the cause of protecting the world against the threat posed by al-Qaida. Fourth, we will be pragmatic, not ideological, making decisions not on the basis of preconceived notions of which tool is perceived to be stronger, but based on the evidence of what works. What will keep Americans safe? Fifth, we must retain the necessary flexibility to address each threat in a way that best serves our national security interests. When confronting the diverse and evolving threat from al-Qaida and its adherents, different circumstances will call for different tools.

Just like when we have to face the threat posed by all types of terrorist organizations, we must apply the appropriate tools. Guided by these principles, the administration has worked hard over the past two years to establish a counterterrorism framework that is effective and sustainable. This includes the two tools you have gathered here today to discuss — law enforcement and intelligence. The intersection of these two has at times become a subject of intense debate.

But to draw the conclusion that the use of law enforcement tools prior to 9/11 somehow hindered our efforts to protect the American people and that we should therefore abandon the use of law enforcement in this conflict, would be a mistake. In the aftermath of 9/11, the challenges we had to overcome to effectively confront the terrorist threat to this country proved to be much more complicated than ever before. As a result, much of what we have seen over the past 10 years has been an evolution to find flexible and effective ways to leverage all of our capabilities to confront an evolving threat, including law enforcement and our intelligence capabilities.

Law enforcement and intelligence are not mutually exclusive. In fact, they can and must reinforce one another. Intelligence is absolutely critical to identifying and disrupting terrorist networks. It empowers law enforcement, informing their operations and enabling them to identify and disrupt plots before they are carried out. And intelligence often plays a critical role as evidence at criminal trials. Law enforcement is equally indispensable. Through aggressive investigations, we have been able to identify members of terrorist networks and detect their plots. The tools available to law enforcement allow us to swiftly disrupt the plots we uncover and incapacitate dangerous individuals through successful prosecution and conviction.

Law enforcement also has a well proven track record of gathering vital intelligence through interrogation. When faced with a fair but heavy hand of American justice, terrorists have offered up valuable intelligence about al-Qaida and other terrorist groups. Our challenge, therefore, has been to carefully integrate intelligence and law enforcement, consistent with our values and rule of law, to ensure that they complement and reinforce each other. After 9/11, our law enforcement and intelligence communities had to adapt, gain new tools and authorities, restructure and change their cultures and operations.

We've updated and improved our criminal code to better empower law enforcement to disrupt plots before they take innocent lives. We eliminated the so-called "wall" to allow intelligence and law enforcement personnel to work together, a critical step toward better integration of our law enforcement and intelligence tools, and to break down those stovepipes that Congressman Thompson addressed. The USA Patriot Act and amendments to the Foreign Intelligence Surveillance Act, or the FISA Act, provided our counterterrorism community with enhanced investigative authorities. We reorganized our intelligence, law enforcement, and counterterrorism communities to enable them to function more effectively as a whole.

The Federal Bureau of Investigation has been further integrated into the intelligence community and continues its transformation into an intelligence-driven organization. Each of these steps has transformed law enforcement into a more effective counterterrorism tool — one that can be used pre-emptively, before an attack is attempted, before a bomb goes off. And because they remain bound by our laws and Constitution, there will always be checks on the use of these law enforcement tools to ensure they remain consistent with our laws and with our values.

As a result, today we are in a better position to protect the American people. That does not mean that our work is done. When it comes to detention and interrogation and prosecution of suspected terrorists, our record is clear. Spanning two consecutive administrations, we have successfully leveraged our criminal justice system to protect the American people against the threat from al-Qaida and other terrorist organizations and individuals.

According to its own figures, the Bush administration used federal courts to prosecute suspected terrorists, including those apprehended overseas, on hundreds of occasions, including Zacharias Moussaoui, Richard Reid, Ahmed Omar, Abo Ali, Aafia Siddiqui, Oussama Kassir, and many others. Today, this impressive record of arrest and prosecution of terrorist suspects in federal court is unfortunately frequently forgotten, which has prompted a debate over how best to handle, prosecute, and punish those accused of trying to attack our country.

That debate has at times been conflated with another important and consequential debate that we are engaged in with respect to the future of Guantánamo. And nowhere does the intersection of law enforcement and intelligence, not to mention our Constitution and our values, come together as starkly as it does in Guantánamo. Before 2009, few counterterrorism proposals garnered as much support on both sides of the political aisle — from Colin Powell to President Bush and John McCain — as the proposal to close Guantánamo did.

This administration for the first time consolidated all information about the detainees held there, and the departments and agencies identified the most appropriate disposition for each individual and recommended that we bring several individuals to justice for their crimes. The administration remains committed to the closure of Guantánamo, to do what is in the national security interests of this country. We have continued to move forward with key elements of our plan, including restarting military commissions and providing those who will continue to be held a thorough process of periodic review to ensure their detention is necessary and is justified.

The debate over the use of federal courts to prosecute terrorists has at times been conflated with another important and consequential debate: closing Guantánamo.

But support for closing Guantánamo has inexplicably waned. And some in Congress have sought to impose unprecedented restrictions on the president's discretion to transfer and prosecute the individuals held there. Some have argued that all of these cases should be tried in military commissions and have sought to bar the executive branch from prosecuting any Guantánamo detainees in our Article III courts. Where we believe a military commission is appropriate, we will move forward.

However, where the evidence suggests our federal courts are more likely to produce a result that is consistent with our national security, we will push Congress to repeal these restrictions so that we can take the steps necessary to bring those individuals to justice. Repeal of these unprecedented encroachments on executive authority is critical so that we can make informed decisions about where to bring terrorists to justice, transfer those it is no longer in our interest to detain, and achieve an essential national security objective — the closure of the detention center at Guantánamo Bay.

Even as the number of U.S. citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are up to the job, providing all the flexibility and authority we need to counter the threat they pose.

Even as we deal responsibly with those that are in our custody, we face the challenge of dealing with those we capture or arrest in the future. When arresting terrorist suspects, we must balance at least four critical national security objectives. First, disrupt the terrorist-related activity of the individual, including ongoing plots to kill innocent people. Second, gather any intelligence the individual may have that could enable us to identify and disrupt additional plots against the United States and our allies. Third, protect the intelligence including the sources and methods it comes from that allowed us to identify or disrupt the individual as well as his/her activities.

And finally, where the individual poses an enduring threat, as is often the case in terrorism investigations, provide for the sustainable incapacitation of that individual. There can at times be tension between these objectives, so our core principles and values must guide our every step. When confronted with the question of where to bring someone to justice, we cannot base our decisions on preconceived notions about which system is stronger or more effective in the abstract. The factual and legal complexities of each case and relative strength and weaknesses of each system must guide our decisions to ensure success, otherwise dangerous terrorists could be set free, intelligence lost, and lives put at risk.

Terrorists arrested inside the United States will, as always, be processed exclusively through our criminal justice system. And let me say that again. Terrorists arrested inside the United States will be processed exclusively through our criminal justice system, as they should be. The alternative would be inconsistent with our values and our adherence to the rule of law. Our military does not patrol our streets or enforce our laws in this country — nor should it. Every single suspected terrorist taken into custody on American soil, before and after the September 11th attacks, has first been taken into custody by law enforcement.

Our criminal justice system provides all of the authority and flexibility we need to effectively combat terrorist threats within our borders. In the aftermath of 9/11, two individuals taken into custody by law enforcement were later transferred to military custody. And after extensive litigation and significant cost, both were transferred back to law enforcement custody and prosecuted. Similarly, when it comes to U.S. citizens involved in terrorist related activity — whether they are apprehended overseas or here at home — we will process them exclusively through our criminal justice system.

There is bipartisan agreement that U.S. citizens should not be tried by military commission. Since 2001, two U.S. citizens were held in military custody. And after years of controversy and extensive litigation, one was released and the other was prosecuted in federal court. Even as the number of U.S. citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are up to the job, providing all the flexibility and authority we need to counter the threat they pose.

Our legal authority to use military commissions to prosecute terrorism suspects is not limited to Guantánamo. And we will not limit it to Guantánamo as a policy matter. We will reserve the right, where appropriate, to prosecute individuals we capture in the future, abroad, in reformed military commissions. Our federal courts are unrivaled when it comes to incapacitating dangerous terrorists. Since 2001, the Department of Justice has convicted hundreds of individuals in terrorism-related cases. In many of those cases, the individuals have received lengthy prison sentences and have provided significant and valuable intelligence.

Law enforcement, including our federal courts, has been an indispensable part of our strategy to protect the American people, essential to efforts to disrupt, dismantle, and defeat al-Qaida and its adherents. Where this option best protects the full range of U.S. security interests and the safety of the American people, we will not hesitate to use it. This is not a radical idea. As former Attorney General John Ashcroft said, "Our priority should of preventing future terrorist attacks." As he explained, "To automatically allocate people from one system to another without understanding what best achieves that priority would be less than optimal."

Now some argue that military commissions are inherently more effective and therefore more appropriate for trying suspected terrorists, yet our federal courts are time tested, have resulted in far more detentions and convictions, and have produced much longer sentences on average than military commissions. In choosing between our federal courts and military commissions, in any given case, the administration will remain focused on producing the right result. Because of bipartisan efforts to ensure that military commissions provide all of the core protections that are necessary to ensure a fair trial, there are remarkable similarities between commissions and our federal courts.

Law enforcement, including our federal courts, has been an indispensable part of our strategy to protect the American people, essential to efforts to disrupt, dismantle, and defeat al-Qaida and its adherents.

The reformed military commission system includes the attributes Americans believe are necessary to ensure a fair trial: presumption of innocence, proof beyond a reasonable doubt, an impartial decision maker, the right to counsel including the right to choose your counsel — government provided representation for those who cannot afford to pay — a right to be present during court proceedings, a right to exculpatory evidence, and a right to present evidence, compel witnesses, and compel favorable witness testimony.

In 2009, Congress agreed to replace the original untested system for protecting classified information in military commission proceedings. They did so by largely codifying the rules that have proven extremely effective in our federal courts, a testament to the strength of our federal courts and protecting intelligence, and comfort that our commissions will do the same going forward. Now in some cases, there are advantages to military commissions. There is greater flexibility to admit hearsay evidence. Confessions can be introduced in military commissions even if Miranda warnings were not issued, but they have to be reliable and, except in limited circumstances, voluntary.

Others, such as former Assistant Attorney General for National Security David Kris have spoken eloquently about the relative merits of both systems, the advantages of our federal courts often go underappreciated. Our federal courts have a significantly broader scope. A substantially longer list of offenses can be leveraged to prosecute terrorists, regardless of the terrorist organization they belong to. Federal courts provide clarity and predictability. Decades of experiences prosecuting terrorists in this system allow us to predict with a greater degree of certainty the admissibility of evidence or the likely outcome.

Federal courts provide a greater degree of finality as well. The results of successful prosecutions are more sustainable because of the validity of the offenses and the system as a whole are less susceptible to legal challenge. Finally, federal courts facilitate cooperation with our partners in bringing terrorists to justice. Some of our most important allies will not hand over terrorists or the evidence needed to convict them unless we commit to only using it in our federal courts.

Because of the reforms passed by Congress, we succeeded in bringing the military commission system in line with the rule of law and with our values. Today, both systems, the federal courts and the military commissions, can be used to disrupt terrorist plots and activities, to gather intelligence, and to incapacitate them through prosecution. But we must let the facts and circumstances of each case determine which tool we use. That is the only way to ensure we achieve the results that best serves the safety and security of the American people.

THE ROLE OF CONGRESS

A Broader Look at the "Homegrown" Threat

Just weeks after Peter King's controversial hearing on the "radicalization" of American Muslims, a colleague urges us to focus instead on violent behavior — not race, ethnicity, or religion.

Rep. Bennie Thompson (D-Miss.)

Radicalization recruitment and violent extremism is an issue that my colleagues and I in Congress have dealt with for several years. The ideology of what actually drives an individual of any race or ethnicity to commit violent acts are very complex issues that both the legislative and executive branches are still grappling to comprehend. I'm sure many of you followed the committee's hearing on radicalization and the American Muslim community. As you know, I wholeheartedly disagreed with the premise of the hearing and requested Chairman King to broaden the hearing scope.

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As ranking member and former chairman of the Committee on Homeland Security, I take threats to our nation's safety and security very seriously. I firmly believe that an inquiry into extreme ideology and violent action should be a broad-based examination. I agree that homegrown terrorism and the jihadist threat deserves continuing attention, however, narrowly focusing our attention on a particular religious or ethnic group lacks clarity and common sense. Today's terrorists do not share a particular ethnic, educational, or socioeconomic background.

Recently, when state law enforcement agencies were asked to identify terrorist groups in their states, Muslim extremists ranked 11th on a list of 18. Further, according to a study conducted by the Institute for Homeland Security Solutions, only 40 out of 86 terrorist cases examined from 1999-2009 had links to al-Qaida. According to the Southern Poverty Law Center, in 2010 the number of active hate groups in the United States topped 1,000 for the first time, and the anti-government movement expanded dramatically for the second straight year.

I agree that homegrown terrorism and the jihadist threat deserves continuing attention. But narrowly focusing our attention on a particular religious or ethnic group lacks clarity and common sense.

This study indicated that several factors, including resentment over the change in racial demographics of the country, frustration over the lagging economy, and the mainstreaming of conspiracy theories contributed to the rise in the anti-government movement. Law enforcement agencies identified Neo-Nazis, environmental extremists, and anti-tax groups as more prevalent and dangerous than Muslim terrorist organizations. The sophisticated explosive device found recently along a parade route in Washington on Martin Luther King Day, an act of domestic terrorism clearly motivated by racist ideology, should prove that other groups are just as willing and able to carry out horrific attacks on Americans.

In addition, terrorist groups are not the only threat. According to the Department of Homeland Security, lone wolves and small terrorist cells may be the single most dangerous threat we face. Attacks are just as likely to come from lone wolf extremists like James Wenneker von Brunn, the Holocaust Memorial Museum shooter, Jared Lee Loughner, who is charged with a tragedy in Tucson, Arizona, as they are from Muslim extremist groups. And what do we do? And what do von Brunn and Loughner have in common with Muslim extremists like Nidal Hasan, the Fort Hood shooter, and Colleen LaRose, also known as Jihad Jane?

All allegedly espoused radical views on the Internet through extremist websites, chat rooms, and popular websites. This starkly illustrates what should be common sense. The most effective means of identifying terrorists is through their behavior, not ethnicity, race, or religion. While knowing these facts put us at an advantage, just being aware is not enough. The nation's law enforcement resources have already stretched thin — understand this. We must ensure that we are using these resources to yield the best results.

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Lastly, I think we have to understand that whatever we do here has ramifications internationally. So if we start showing that we are picking on any particular group in America just because of who they are, then clearly there are other people in other parts of the world that will take advantage of that. So when we say on our committee — some of the conventional thought is that we are to profile all Muslims. We can't do that. Or if someone says we have too many mosques in America — we can't promote that school of thought because both schools of thought create opportunities for bad people to do mischief other places.

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Our Constitution is a sacred document. The First Amendment talks about individual thought and speech being protected. But under the Fourth Amendment, Americans also enjoy significant privacy rights. I don't think Big Brother should be peeping in our bedrooms just because it's Big Brother, or any other thing. There are ways that we can get intelligence without infringing on the rights of people. And I'm one of those individuals who promote it. I've encouraged our president to appoint the Privacy, Oversights, and Civil Liberties Board. I've been promoting that for two years now. We still don't have the board appointed.

We sent another letter this week saying we have to do it. This is easy. Congress said do it — do it. But we haven't gotten there yet. So I will wait on my next opportunity to share it with the president.

LAW ENFORCEMENT

Notes from the Front Lines: What It Means to Keep Us Safe

When the top priority is to prevent acts of terror — and save lives — civil liberties concerns are under pressure.

Philip Mudd, Former Deputy Director, FBI, National Security Branch

I testified — one of the only times I returned to the government in the past seven years — on the Fort Hood event. This was an individual who operated alone and then, probably until that morning or maybe a few days earlier, made a decision in his mind, which I can't access with the Internet, with a phone, or with anything else, to commit an act of murder.

What did we have on him? He communicated with a bad guy. He had a weapon. And he thought about killing people. What did the investigation say seven years after the Intelligence Reform Act? I'm not speculating among lawyers. I'm telling you what the legislature of the United States said and what they dragged me up as a U.S. citizen, now private, to talk about.

They said the top priority of the Federal Security Organization and the FBI is preventing, and the FBI did not prevent this. And they are not yet

intelligence driven. So if you want to talk about it, and I heard a phrase earlier about whether adding intelligence increases our ability to prevent, we did not have an option. It's what the law says. I am not a lawyer. But I'm a servant of the U.S. government in the executive branch who responds to the will of the people. So you have an individual, and I cannot predicate that individual on core al-Qaida, and you have a law that says if you wait until something happens, we're going to put your ass in a sling.

We don't care about gang violence. We don't care about drug violence. If one dude who seems to be a terrorist kills people when there are 15,000 murders in this country every year, you're coming up to testify.

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So think about three or four examples, and I'll close in a second on some homework. I mentioned one, Hasan. He had a weapon, U.S. military guy, that makes it even harder, and he communicated, and I use that word advisedly, with the terrorists.

An act of terror results in a congressional investigation because we failed to be preventive.

A week earlier, if we had gone up on that guy, and he hired a lawyer, what would that lawyer have said? By the way, remember, he's an academic doing research. He would have said he's doing research. He has the constitutional right both to talk to people and have a weapon. The day he committed an act of terror — I don't think it was an act of terror actually, I think it was just murder — that results in a congressional investigation, because we failed to be preventive. In the space of minutes, we went from a civil liberties violation to a major national security catastrophe because we weren't preventive.

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So my first question is what do you do about Hasan before it happens?

I guess you could call that behavioral profiling. By the way, I dispute religious. I never heard of religious profiling in the Bureau. I never heard anybody say let's go after somebody because he's Muslim.... Four and a half years, every morning threat briefs, three attorneys general, one FBI director, five days a week, I never saw it.

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Hasan is a technical issue. Is it okay to surveil the Internet to look for people who are communicating and speaking — a First Amendment right — with a terrorist? You want to pay for that? And if he's got a weapon, do you want to put a human source on him? Is it okay if you have reporting showing that a recently emigrated community, that is Somalis in Minneapolis emigrating after 1991-1992 are involved in fundraising to say it's a fair question for a preventive organization to assume that if there's that much fundraising, there is also recruiting? Do you put a human source in that community? Yes or no?

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So [it's a matter of] when the law says be preventive, and when you're not, even as a private citizen, you're going to testify for why you missed somebody talking to a terrorist over the Internet. When the law says that and when the threat shows you that the problem has metastasized, what will you do?

What Evidence-Based Data Collection Looks Like

A local model targeting crime — not communities — that comports with our core constitutional values.

Leroy Baca, Sheriff, Los Angeles County, California

My points are relative to the intelligence matters that this nation is involved in and my local department is involved in and how I see this subject matter....We can't accomplish the goals of safety for all unless we fully understand the relationship with the community that we're serving and the diverse communities there in Los Angeles.

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In Los Angeles, we collect data. We are involved with the FBI and the joint terrorism task forces, and the LAPD, and the Sheriff's Department have deputy sheriffs who are federalized. They work in the federal system. They're managed by the federal authorities. But at the next level, we deal with a joint regional intelligence center that [former Los Angeles Police] Chief Bratton and I put up, and it's basically dealing with the non-secret, non-classified open source forms of information.

Largely all the criminal activity that is going on in Los Angeles County is shared across policing jurisdictions, and our theory is that the more we share our traditional, non-terrorist related criminal activity in a platform sharing fashion, then the idea that terrorism is a crime is going to continually permeate our investigative culture. And so we are a criminal-based intelligence gathering as opposed to any other aspect of the definition of intelligence.

So we collect data only related to criminal activities of individuals, organizations, and groups. The LA County Intelligence System, the joint regional intelligence center that we operate, has guidelines that strictly prohibit the collection of data regarding political, religious, or social views, associations or activities except as it relates to criminal activity. Now we — the Sheriff's Department and the regional intelligence center that we operate — rely on federal intelligence collection standards.

In other words, the federal law for direction on collection, analysis, storage, and dissemination, retention of intelligence products is what we follow.

Regarding oversight, the Sheriff's Department on its own volition has its intelligence system examined by the Institute for Intergovernmental Research, more commonly known as IIR. IIR is the federal contract training group for this federal law. There were no compliance issues identified by this group when it came to our joint regional intelligence center.

We have our own guidelines reviewed by this organization, as I said. Now in the context of the confidential materials and how they're maintained, it is in a secure environment, free of intrusion. It obviously has to be kept in a manner where, you know, it just doesn't get all blown out in all public matters. The Sheriff's Department, however, is still committed to transparency and how it does its job and that's why I'm explaining to you right now how we're doing it.

Every effort is made to ensure that collection, analysis, storage, and dissemination of information meets legal requirements and community approval as well. And the sources of our collection that are our focus are the criminal activities of gangs, organized crime, outlawed motorcycle gangs, narcotics groups, and terrorist groups. The information that we collect is shared with federal investigators in either task forces — the joint terrorism task force the FBI runs, or the joint regional intelligence center that locals run.

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We've had very few instances where communities have felt the impact of intelligence gathering. Since each LASD [Los Angeles Sheriff's Department] case has the criminal nexus to it and therefore if you stay within the guidelines, you're not shotgunning societies or groups of people as a general strategy.

Every effort is made to ensure that collection, analysis, storage, and dissemination of information meets legal requirements and community approval as well.

The civil liberties aspect of this is that we have a statutory mandate to locate and arrest and incarcerate criminal offenders. That's our focus but it's all probable-cause based. There has to be evidence. There has to be a degree of substance there that allows us to do that, and the First Amendment issues are examined only when it's possible that there's an infringement on the rights of others and violation of law.

What's interesting is that we in law enforcement have to recognize who we are, and that because we collect information on a criminal nexus that it should be for that purpose and only that purpose, and so all the elements of our core values are predicated on the Constitution, the Bill of Rights, civil rights, and human rights, and the culture in the Sheriff's Department is one that honors those…It's constitutionally driven. It also is human rights driven.

THE COMMUNITY PERSPECTIVE

Side Effects of Preventive Law Enforcement

For some American Muslims, seemingly lawful surveillance and interrogation tactics are intimidating — and have a chilling effect on their religious and political activities.

Nura Maznavi, Muslim Advocates

Today, almost 10 years after the tragic events of 9/11, there is an incredible amount of fear and apprehension within the American Muslim community. This fear is threefold. First, there is a fear of possible retaliation by federal agents if individuals in the community speak out against surveillance abuses. There's also a fear of backlash from the American public as we see an increase of anti-Muslim sentiment sweep this country. And finally, there is a fear of exercising constitutionally protected rights — going to the mosque, donating to religious charities, welcoming new Muslims into the community, and speaking your mind about politics, religion, or foreign policy.

We regularly hear from American Muslims who are questioned because of political or religious postings on Facebook or involvement in their local mosque.

So how did we as a nation get to the point where Americans are nervous about openly practicing their faith or speaking freely about political or religious affairs, because they just might be monitored by federal agents who could misinterpret their actions or speech?

In late 2008, the Attorney General (AG) Guidelines and the FBI's guidance implementing the AG guidelines were significantly revised and loosened to allow for the types of surveillance tactics that our country has not seen since the surveillance abuses of the '50s and '60s — the monitoring of American's religious and political activities and the infiltration of houses of worship by federal agents or informants with no evidence of criminality.

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I want to highlight a few stories that we've received at Muslim Advocates....

We've heard a story about a community leader who was active in his local mosque and regularly in contact with the FBI as part of their community outreach. One day, the tenor of these meetings changed and agents started asking him about the political and religious beliefs of other congregants, their views on the war in Iraq, their opinion about the Palestinian-Israeli conflict. When he refused, saying that he thought sharing such information was inappropriate, they threatened him by suggesting that they would tamper with his mother-in-law's adjustment status, commenting, "It would be a shame if her paperwork were somehow misplaced."

We also regularly hear from American Muslims who are approached by authorities in their homes and offices because of political or religious postings on Facebook or involvement in their local mosque. The net impact

of these tactics is a chill on the free speech practice and association of American Muslims. It is not only eroding the rights of these Americans, but it is eroding the trust between many members of the community and law enforcement — and between community members and their organizations.

As if this invasive questioning wasn't troubling enough, this type of questioning is practiced by more than just the FBI. It is also regularly practiced at airports and border crossings, by customs and border protection agents targeting Americans coming home after overseas travel. Muslims, and those perceived to be, both citizens and noncitizens, are being detained, searched, and interrogated about First Amendment protected activities at the border.

Sometimes these searches and interrogations are accompanied by intimidation and harassment with individuals pulled out of their cars and handcuffed in front of their families, or individuals searched and questioned by federal agents with their guns drawn. Border agents interrogate travelers with questions like: "How many times a day do you pray? What mosque do you attend? What religious charities do you donate to? How many gods do you believe in? What are your views on American foreign policy?"

An American citizen, who traveled on business in India and Pakistan to visit his ailing mother, was detained by federal agents at the airport and searched and interrogated for more than three hours.

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We do not yet know the precise extent through which the Department of Homeland Security allows for this type of First Amendment questioning as a policy matter, although we do know that federal agents have wide latitude and discretion at the border.

In 2009, Customs and Border Protection issued a directive that allows for the search of electronic devices, including computers, cell phones, and digital cameras without reasonable suspicion. We know that information collected during these interrogations and searches are shared with other federal agencies....

But I'll end my remarks with one story that best encapsulates the extent of this questioning and the impact that it's having on the lives of ordinary law-abiding American Muslims. It's a story of an American citizen who traveled to India on business and stopped in Pakistan to visit his ailing mother. Upon returning home to the U.S., he was detained by agents at the airport and searched and interrogated for more than three hours. He was asked about donations he had made to his place of worship in the U.S. The agent went so far as to tell him that he shouldn't have made the donations.

Agents also asked him about why he chose to enroll his children in an Islamic school and questioned him about the identities of individuals whose pictures he had in his wallet. His computer was seized and copied, and his cell phone was confiscated and mailed back to him one month later, broken and unusable. The search and interrogation did not stop there. A few weeks after his trip, FBI agents visited him in his home. They

interrogated him at length about information he had supplied to agents at the border.

I tell this story not because it's the most outrageous one that we've heard, but because of a follow-up conversation I had with this man that exemplifies the chill that this type of questioning is having on law abiding Americans. He said to me: "I took a business trip and visited my sick mother. And because of that, I am treated like a criminal. I was questioned about my faith and family when I was coming home to my country, and then again in my own home. I have a trip scheduled to go to Mecca for the pilgrimage. I am nervous about my trip back and my family doesn't want me to go because they're worried about what will happen to me at the airport when I come home. We don't want any more trouble. Should I cancel my pilgrimage?"

On the Limits of First Amendment Law

A better way to curb abuse: reforming the Attorney General Guidelines.

Geoffrey Stone, Professor, University of Chicago Law School

So there's a cleric who is giving speeches that are seen as radical in his mosque and the government wants to enter the mosque for the purpose of listening to those speeches and seeing who's in the audience, and making a list of the people in the audience to make sure that they can track them and find out if they're potentially dangerous.... The question is: "Is it unconstitutional for the government to do this?"

The mere fact of being chilled — in and of itself — the courts have said does not give standing.

Well, the first obstacle we face under the law in this context is that the courts have been very reluctant to allow anyone to have standing, to challenge this type of activity, if the only harm they can demonstrate is that they are chilled. That is: the mere fact of being chilled — in and of itself — the courts have said does not give standing. Otherwise, virtually anyone could sue for almost anything they don't like in the realm of speech. And that would just be too open ended.

So even if one concedes that what's happening is what I just described, it would be very difficult under existing law for anyone to actually sue to challenge the constitutionality of that infiltration, even if we assumed it was a violation of the First Amendment, because they wouldn't have standing to do so.

So now let's assume that someone does have standing. Let's assume that an individual is arrested because of subsequent events and the evidence being offered against him is that he heard that speech to show his own radicalization. The question is, now that he has standing, would it be unconstitutional for the government to engage in this investigation? And

there's no law on this question. There's no definitive precedent, or even close to definitive precedent, on this issue.

The problem with trying to make a doctrine on this issue is that the number of situations in which this type of problem arises are limitless. It's the police monitoring a demonstration. Are they there because they want to see who's at the demonstration or because they're trying to keep the peace? And you can again spin out endless examples of situations where there's a mixed motive problem. And so the difficulties, if you're going to rely on the First Amendment to solve this problem, you've got a very difficult road to travel.

The problem with trying to make a doctrine on this issue is that the number of situations in which this type of problem arises are limitless.

And with the current Supreme Court, it's a road that isn't going to go very far. So I think more work needs to be done on this question as a matter of principle as to whether, in fact, a coherent theory can be articulated that would persuasively say that yes this is a workable doctrine that says that government investigation of activity that is religious or expressive can be unconstitutional, even where the government is doing it for the purposes of law enforcement.

All of that suggests that much more attention fruitfully should be paid to other constraints on government than bringing First Amendment lawsuits. And here I think the question of the FBI guidelines and the Department of Justice guidelines become much more important. Even though the First Amendment doesn't prohibit something, that doesn't mean that the government can't exercise restraint and can't place restrictions on its own behavior because those behaviors are problematic, whether or not they're technically in violation of the First Amendment.

This is exactly what happened with the Levi guidelines put in place by Attorney General Edward Levi under Gerald Ford, which was after COINTELPRO (Counter Intelligence Program) and the Church Committee hearings. Levi put in place guidelines that said federal agents may not investigate religious or political organizations unless there is at least a specific and articulate reason to believe that illegal conduct is afoot. And that's been watered down in the years since then, but I think that's ultimately a much more fruitful way to go, particularly with this administration. And putting pressure on them to adopt those sorts of rules, at least from the federal government's standpoint, would be useful. ■

An Evidence-Based Approach to the "Homegrown" Threat

Faiza Patel

In the drive to prevent violent acts, some law enforcement agencies — most notably the FBI and the NYPD — have relied on reductionist, stereotypical views of how a person becomes a terrorist. Yet the theories are inconsistent with extensive expert research on the subject.

In recent years, Americans have grown increasingly concerned about the threat of "homegrown" terrorist attacks. Most notably, the near-detonation of a car bomb in Times Square in 2010 raised alarms that the next phase in terrorism would be directed by Americans, at Americans, in America. Government at all levels has stepped up efforts to prevent such violence.

As part of this drive, government officials have sought to understand "radicalization," which they define as the process by which American citizens and residents turn to violence, using Islam as an ideological or religious justification. They hope that by understanding radicalization, they can identify homegrown terrorists before they strike. Combating radicalization is now a specific goal of the national security policy articulated by President Barack Obama. In Congress, the new chair of the House Homeland Security Committee has launched hearings on the subject.

Officials and experts divide sharply on the extent of the threat posed by homegrown terrorism. The Intelligence Community has traditionally judged the threat to be limited. Local law enforcement agencies and the Federal Bureau of Investigation (FBI), on the other hand, have suggested it is more widespread. The consensus within government, however, is that the homegrown threat demands attention. Myriad federal and state agencies have devoted extensive resources to studying radicalization and designing a response.

Radicalization is complex. Yet a thinly-sourced, reductionist view of how people become terrorists has gained unwarranted legitimacy in some counterterrorism circles. This view corresponds with — and seems to legitimize — "counter radicalization" measures that rely heavily on non-threat-based intelligence collection, a tactic that may be ineffective or even counterproductive. Only by analyzing what we know about radicalization and the government's response to it can we be sure that these reactions are grounded in fact rather than stereotypes and truly advance our efforts to combat terrorism.

Excerpted from *Rethinking Radicalization*, March 2011.

The Department of Homeland Security (DHS) and the National Counterterrorism Center (NCTC) are the federal government's lead agencies to combat radicalization. These expert agencies have made public statements that recognize the complexity of the radicalization process. But they have not expressly repudiated theories suggesting that it is possible to detect radicalization long before people take concrete steps toward violence. Nor have they proposed a unified set of responses that take account of the difficulty of combating radicalization without impinging on the Constitution.

Domestic law enforcement agencies, including the FBI and state and local police departments, have stepped into the breach. They have developed simplistic theories of how American Muslims become radicalized. These theories suggest, contrary to empirical social science studies, that the path to terrorism has a fixed trajectory and that each step of the process has specific, identifiable markers. They imply that by closely monitoring the communities deemed susceptible to radicalization, law enforcement officials can spot nascent terrorists and prevent future attacks. Since the markers of radicalization they identify are inextricably linked to Muslim religious behavior, these theories justify broad monitoring of American Muslim communities, including in their places of worship. Indeed, the theories are characterized by the view that there is a sort of "religious conveyor belt" that leads from grievance or personal crisis to religiosity to the adoption of radical beliefs to terrorism, with each step along that continuum identifiable to law enforcement officials who know how to recognize the signs.

Although the "religious conveyor belt" theory has not been adopted by the Intelligence Community, its influence is evident. In addition to the FBI and state and local law enforcement agencies, the Senate Committee on Homeland Security and Governmental Affairs has embraced the theory. Moreover, the broad intelligence gathering in and about American Muslim communities that the theory supports is becoming increasingly evident. To be sure, it is hard to untangle intelligence gathering driven by fear of radicalization from the overall post-9/11 expansion of intelligence operations. But radicalization concerns seem to be directly connected to the expansion of certain aspects of the FBI's domestic intelligence mandate and the way in which it is carried out. For example, changes to the FBI's mandate implemented by former Attorney General Michael Mukasey, and the FBI's internal rules, encourage the Bureau to gather information about social, religious, and political patterns. There are reports that the FBI has used this authority to collect, with no predicate in suspicious activity or behavior, information about whether "radicalization" is occurring in American Muslim communities.

It is simply not possible to identify "markers" of radicalization (as opposed to actual connections to terrorist networks or plots) that allow early identification of would-be terrorists.

More generally, the accepted understanding of how someone becomes a terrorist influences the selection of investigative techniques. For example, the assumed link between religiosity and terrorism encourages intrusion into mosques, traditionally considered off-limits to the government absent a specific connection to suspected criminal or terrorist activity. Reports have emerged that the FBI has infiltrated mosques simply to learn about what was being said by the imam leading prayers and by those attending.

This emphasis on intelligence collection about radicalization, much of which involves First Amendment-protected speech and activities, has undermined another much-touted prong of the government's strategy — the attempt to engage American Muslim communities in the fight against terrorism. Many American Muslims believe their communities are treated as inherently suspicious by the government. As a result, while American Muslim communities have been invaluable partners in the government's counterterrorism efforts, some American Muslims are becoming more guarded in their relations with law enforcement agencies. The obvious tension between the government's various responses to radicalization is increasingly noted, but remains unaddressed: Can a community simultaneously be treated as suspect and also be expected to function as a partner?

To be sure, intelligence collection often is vital to fighting terrorism. But the blunderbuss intelligence collection response to radicalization poses real questions. Is our understanding of radicalization so complete that we can detect incipient terrorists and stop them before they take overt steps toward violence? Is the "religious conveyor belt" theory, and the hallmarks of radicalization it identifies, supported by empirical evidence or does this theory simply reflect religious stereotypes? Is broad intelligence collection about American Muslims the appropriate response to the threat posed by radicalization? Or is targeted intelligence collection and normal police work a better response? How do we grapple with the fact that an expansive approach to intelligence gathering results in the monitoring of protected First Amendment activity and may well chill American Muslims' free speech, association, and free exercise rights? Does the emphasis on collecting intelligence about radicalization alienate the very communities whose help is so clearly needed in the fight against terrorism and perhaps even affect American Muslims' generally positive view of their place in American society? In sum, given our understanding of radicalization, is our response rational — or, in any event, sufficiently tailored?

This report explores how the unsubstantiated "religious conveyor belt" theory has influenced our response to radicalization among American Muslims and the consequences that have ensued. Since much of the government's response to radicalization is driven by perceptions of the risk of homegrown terrorist attacks, the report begins by demonstrating the differences of opinion between the Intelligence Community and law enforcement agencies regarding this threat.

The next section reviews studies by psychologists, social scientists, the security services of the United Kingdom, and security experts, all of which point to a widespread consensus that radicalization is a multi-faceted and fluid process. It is simply not possible to identify "markers" of radicalization (as opposed to actual connections to terrorist networks or plots) that allow early identification of would-be terrorists. This section also observes that empirical studies largely debunk the claim that religiosity is linked to a propensity for terrorism.

The report's third section turns to our own government's efforts to understand radicalization. It shows that, despite the apparent understanding of the lead agencies on radicalization (i.e., DHS and NCTC) of the state of research on the subject, the "religious conveyor belt" model has never been repudiated. It further demonstrates that the FBI, along with many state and local law enforcement agencies, have followed the lead of the New York City Police Department (NYPD) in affirmatively embracing the "religious conveyer belt" model.

The fourth section of the report examines the interplay between the "religious conveyor belt" model and counterterrorism policy. It argues that this model reinforces intelligence gathering that focuses on religious beliefs and behavior. American Muslims are understandably alienated by this approach (and reluctant to provide information about protected religious practices). This has led to a growing wariness in their relationships with law enforcement agencies and undermined outreach efforts that the government holds up as ways to curtail radicalization and fight terrorism.

Finally, the report sets out recommendations for developing and strengthening institutional mechanisms to ensure that our response to radicalization takes account of the investigative needs of law enforcement agencies, as well as the ways in which the current approach to intelligence collection affects American Muslim communities. It also calls for an accounting of the First Amendment and ethnic/religious profiling implications of current anti-radicalization tactics. ■

America's Unnecessary Secrets : A Proposal for Reform

Elizabeth Goitein and J. William Leonard

Many national security experts agree: far too much information is classified. Indeed, excessive secrecy jeopardizes safety, costs billions, and corrodes democratic decision making. As the President considered reform in 2011, the Center stepped forward with a proposal to restore accountability.

The danger of excessive government secrecy is a lesson we should have learned over the last decade. Although the proper classification of information is vital to keeping the nation safe, "overclassification," as the 9/11 Commission found, jeopardizes national security by inhibiting information sharing within the federal government and with state and local agencies.

Overclassification also corrodes the democratic process by leaving the public and even Congress to debate the issues of the day without full information — as happened, for example, in the lead-up to the Iraq war. And it forces the government to waste billions of dollars on security measures to protect information that doesn't need protecting.

Unfortunately, overclassification continues to be rampant. In fiscal year 2010, officials made 77 million decisions to classify information. Even the most security-minded government officials — including Donald H. Rumsfeld, the former defense secretary, and Porter J. Goss, the former director of national intelligence — have said that far too much information is classified. Defense Department and National Security Council experts have estimated that anywhere from 50 percent to 90 percent of classified documents could safely be made public.

Why is there so much overclassification? Because there are so many incentives, unrelated to national security, to classify. Classifying documents indiscriminately is easier than giving each decision careful time and thought. Officials fear sanctions for mistakenly releasing sensitive information. It is easier to get things done in government when there are fewer people involved. Information is a key weapon in turf wars between agencies, and hoarding information increases officials' sense of importance. Finally, officials who are involved in government misconduct have a powerful incentive to hide the evidence.

Defense Department and National Security Council experts have estimated that anywhere from 50 to 90 percent of classified documents could safely be made public.

By contrast, while officials face harsh sanctions for failing to protect sensitive information, they are rarely, if ever, penalized for classifying documents improperly. In the ordinary course of business, classifiers are not required to justify their decisions, and no one reviews their judgments. In short, there is no accountability.

This op-ed originally appeared online at *The New York Times,* November 7, 2011, based on ideas from Goitein's policy proposal, *Reducing Overclassification Through Accountability,* October 2011. J. William Leonard was the director of the Information Security Oversight Office from 2002 to 2007, under former President George W. Bush.

President Obama has taken some steps to try to reduce overclassification. In a December 2009 executive order, he directed officials not to classify information if they had significant doubts about whether it needed such protection. He also declared that no information could be classified indefinitely and increased the training requirements for officials who classify documents. These were important first steps, but they are unlikely to solve the problem because they do not address the skewed system of incentives.

The president has announced his intention to undertake a "more fundamental transformation" of the classification system, and his advisory committee on classification is currently drafting recommendations for a new executive order. To be effective, that order must rebalance the existing incentives by introducing accountability. As a recent Brennan Center report concluded, a well-designed accountability mechanism would include three elements.

First, classifiers should be required to explain their decisions. E-mail and word processing programs on classified computer systems generally include drop-down menus that allow officials to classify documents. These programs should include prompts that request basic information about the classification decision, including the national security harm that could result from disclosure.

Second, agencies should audit officials' classification decisions. There are too many classifiers (approximately 4 million) to permit yearly audits of all of them, but agencies could conduct "spot audits," selecting classifiers at random and reviewing samples of their decisions. The agencies' inspectors general, whose offices operate with relative independence, should conduct the reviews. They could use the classifiers' explanations as their starting point, but they should have access to any agency information they deem necessary to evaluate those explanations.

Finally, audits should be coupled with consequences. A classifier who performed poorly on an audit should be subject to repeat audits every six months. A continuing pattern of improper classification should trigger mandatory escalating consequences, beginning with remedial training, proceeding to a note in the classifier's personnel file, and culminating in revocation of the official's classification authority.

By holding classifiers accountable for their decisions, the president could make great strides toward solving a problem that imperils national security, weakens our democracy, and needlessly saps the treasury. And 10 years after terrorists threatened to shake our commitment to our values, the United States would show the world that an open government and an informed public are among this nation's greatest sources of strength. ■

Curbing Needless Secrecy

Hon. Christopher Shays and J. William Leonard

Two government officials — with firsthand knowledge of the deeply troubling implications of overclassification — reflect on the urgent need for oversight and accountability.

Hon. Christopher Shays, former Representative, (R-Conn.)

Less classification would mean better security. It would mean lower cost. It would mean a more informed government, and a more informed people within that government.

I had a hearing on this. I co-chaired in the Government Oversight Committee, a wonderful committee that oversaw Defense, the State Department, USAID, and Veteran's Affairs. So we could reach out beyond just a particular department. And we had a number of hearings on classification and overclassification.

If I were President of the United States I would say to Congress: Your job is to do oversight — to find the good and the bad, and make sure it comes to light.

We ended the hearing with a question to the participants, and one of the participants was from the Department of Defense (DOD). I said, "How much do we over classify?" And she said, "50 percent." And then I asked the outside groups, "How much do you think we over classify?" And they said "90 percent." So we're somewhere in between 50 and 90 because you can be assured that the DOD was underestimating what we over classified.

And I was stunned. I was really surprised when I learned that "for official use only" was a made-up non-category having no legal binding. Everything I saw in government had "for official use only" practically. And so I was almost thinking facetiously that whenever we print government paper we should just put at the bottom: "for official use only."

And "for official use only" is there totally and completely to protect someone who may feel that if this gets out they might get criticized, or it may not, it may look foolish. I mean I had a difficult time having the Congressional

These remarks were given on October 5, 2011 at The National Press Club for a conversation on *Reducing Overclassification Through Accountability.* Other participants included *New York Times* national security reporter Scott Shane, Elizabeth Goitein, and Dr. Jennifer Sims, an advisor to President Obama's Public Interest Declassification Board.

Research Service (CRS) reports given to the public. Members of Congress asked for these reports; they're fabulous.

And we tried an experiment. At my urging, there were 14 members of us that we could have anything from CRS made available to the public by going through our website, and that was after a year it was discontinued, but what a tragedy. The American people, if you tell them the truth, they'll have you do the right thing almost all the time.

So let me just end by saying that I really believe if I were President of the United States, I would go to Congress — and since I'm never running I can say this without looking like I am. I would go and I would say to Congress: "Your job is to do oversight. Your job is to find the good that we're doing and the bad we're doing and make sure it comes to light." Because I've come to the conclusion that by the eighth year, they're clueless because they don't know what's happening underneath them.

Roosevelt tried to get around that by simply calling, not the Secretary, but calling someone way down and saying, "What the hell's going on here?" And learning from that person. So I'll end with that.

J. William Leonard, former Director of the Information Security Oversight Office (2002-2007), under former President George W. Bush

There's two quick points I would like to make. First: I thought it very appropriate in a panel discussing overclassification to sit up here and to disclose to you some very highly classified information. Basically what I would like to inform you of is that the CIA conducts secret drone attacks around the globe. And if you were to Google that phrase you would get about 3.5 million hits, to include most recently the article written by Scott this morning in *The New York Times.*

If you go back for the last 10 years in terms of the flawed policy decisions, many of these decisions occurred in large part because they were done in secret.

This is not only an example of the abuse of the classification system, but I think it highlights how deleterious this is for our national interest. Because basically what this means is that whereas the targets of those drone attacks absolutely, positively know that they occur. That their neighbors absolutely know that they occur. That the innocent family members who lose loved ones know it occurs. That the governments where these occur absolutely know that it occurs.

What is the only consequence is that our senior public officials refuse to discuss this, or to debate this in public, in the public forum, and to engage the American people in a discussion. And there is nothing, nothing that is more profound that a nation can do, that a government can do than to unleash the violence of war, the brutality of war in the name of its citizens.

And the fact that any government would hide behind classification, and avoid a public discussion — whether you agree with it or disagree with it, whether you think it's fruitful or unfruitful is immaterial. The fact that we

would unleash such brutality and refuse to have a public debate over the merits of that, the implications of that and the consequences of that, I think is unconscionable.

And if you go back for the last 10 years in terms of the flawed policy decisions that have been made, I think it can be pointed out safely that many of these decisions occurred in large part because they were done in secret.

I'll just give one example. Several years ago this nation came to the point of the greatest constitutional crisis since Watergate, with respect to take your pick, whether it was NSA's warrantless wiretapping program, or the terrorist surveillance program.

But that was a program that was over-compartmentalized and shrouded in so much secrecy that only a single lawyer in the entire Department of Justice was able to have access to the particulars of that program. Not even the general counsel of the National Security Agency (NSA), or the IG of the NSA had access to the legal underpinnings of that program as it was originally crafted, although they obviously knew the operational aspects of it, the information that would be of most interest to any adversaries or enemies.

And as a result of this over-shrouding of secrecy we resulted in an illegal program. And that's not my opinion. That's the opinion of the attorney general of the United States at the time, John Ashcroft, that the program was crafted in such a way that it violated the Foreign Intelligence Surveillance Act.

Not only that, but this nation came within hours of having the attorney general, the deputy attorney general, the director of the FBI, and a host of other senior officials resign in protest over this illegal activity — with the president not having a clue that this was happening; all because of classification.

It's an example of how classification almost guaranteed — classification always guarantees — a sub-optimal outcome because by the very act of classification you avoid the give and take, the consideration of alternatives, and things along those lines.

So classification should be used with restraint. It should be used where appropriate, but especially where the stakes are most high. And there cannot be an instance any greater than the unleashing of the brutality of war in the name of people. That's when transparency should be most apparent. That's when the shrouding of secrecy should be least....

And quickly the second point I want to make is, I had the opportunity to, as many of you know, to serve as an expert defense consultant and potential witness in the Thomas Drake case. That's a situation where Thomas Drake was accused of having unauthorized possession of classified documents in his basement in his home.

I had the opportunity to review that evidence. I had the opportunity to review a specific email that the government declared was classified that they found in his basement. Subsequently, the government themselves declassified that email, recognizing from my prospective that they wouldn't be able in a court of law to convince 12 ordinary Americans that somehow some way the information in this email, if it was disclosed, would cause damage to national security.

But yet they said — they continued to take the position that it was properly classified at the time it was found in his basement, and it was properly classified at the time he was indicted. And that was the basis of one felony indictment under the Espionage Act that Mr. Drake was charged with.

In all my years of experience I have seen many equally egregious examples of the misapplication of classification as I did in this one particular email, but I have never seen a more deliberate example because this was not just somebody producing a document for their boss, and slapping a classifications statement on it. This was a document that for three and a half years went through multiple reviews within the national security agencies, within the Department of Justice. Each and every time somebody made the determination yes, yes, yes, we're going to assign classification to this.

It served as the basis for a felony indictment. It served as the basis to attempt to deny an American of his freedom for decades at a time, but yet it was again, one of the most egregious examples of non-sensitive information bearing classification markings that I have ever encountered.

The whole thrust of the Brennan Center report is the need to restore and instill accountability in the system. I had filed a formal complaint with my former office inquiring as to whether or not the responsible officials at both the NSA and the DOJ have in fact, or will in fact, be subject to sanctions in accordance with the executive order, which says that it doesn't matter whether it's an unauthorized disclosure or improper assignment of classification. They're both egregious examples of violations of the ordinance, and should be subject to similar sanctions.

And I made it perfectly clear from my perspective this is a classic case, although people routinely are held to account for unauthorized disclosures, be them government officials, military service members, defense contractors. I am not aware of anyone ever being held accountable for the overclassification of information.

And from my perspective this case is so egregious that if individuals are not held accountable in this particular case, then that provision might as well be taken out of the executive order because it will have proven itself entirely effect less. ■

Unlocking America's Secrets

Barton Gellman

The Pulitzer Prize-winning author justifies wading into classified territory — not to act as an arbiter of national security secrets, but to hold our leaders accountable.

I spend much of my professional life in pursuit of secrets. I'm looking for secrets that are about us, and about our country, and in some ultimate sense, belong to us. Which is not to say: every single one of them ought to be disclosed. I do believe there's a balance to be had.

The starting point is that since a lot of my work is on national security, foreign policy and national defense, I can take for granted that a huge amount of what I want to know and a huge amount of what's relevant to the story is going to be classified. When I know that something is classified or suspect it, I consider that a yellow light. I take it seriously. But it's not a red light; it doesn't automatically govern. I draw lines. And when I'm writing for a publication in a newspaper or a magazine, my editors also draw lines. We insist on drawing those ourselves.

Now some people wonder "who elected me?" What gives me the right to decide what secrets to disclose? My answer is that I claim no special authority. I don't think that there's any special status that attaches to a journalist for this purpose that doesn't also apply to any citizen blogger. My reasons for thinking this enterprise is socially valuable and justified has to do with what national security secrecy is, which is a conflict of core values. It's the value of self-government and self-defense. If we don't know what our government's doing, we can't hold it accountable. If we do know, then our enemies also know. That can be dangerous and that is our predicament. Wartime heightens the case for secrecy in some obvious ways because the value of security is at its peak.

Although secrecy can also be harmful to the cause of security, I want to stipulate for the purposes of this argument that there are harms of disclosure and there are values of secrecy for security. On the other hand, secrecy is never more damaging to self-government than in wartime, because making war is the very paradigm of a high stakes political choice. Having thought a lot about this, I've concluded that no individual and no institution can be

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Barton Gellman is the two-time Pulitzer Prize-winning author of "Angler: The Cheney Vice Presidency," which was named *New York Times* Best Book of 2008. He joined the Center as a fellow in September 2011. These remarks were excerpted from a talk Gellman gave at the Center in October 2011.

trusted to draw the line, that is safe to be trusted with the authority as the final authority for drawing that line when the two interests collide. And that includes the people with classified stamps. I think that newspapers, journalists, authors can't appoint themselves to be the arbiters of national security, but political leaders can't be allowed to decide for us what we need to know about their performance. ■

A Broader Perspective on WikiLeaks

Frederick A.O. Schwarz, Jr.

The U.S. already classifies too much information. The danger is that, with WikiLeaks, it will try to hide more.

Whenever a new mode of distributing information becomes common, the powerful react by resisting erosion of their control over information. After the printing press was invented in the West, monarchs and popes all sought to use licensing, or absolute bans, to dam up the increased flow of information. Similarly, the apartheid state in South Africa banned television out of fear that its images would arouse disaffection.

The furor surrounding WikiLeaks is the newest example of how changes in information technology challenge the use of secrecy by authority. Whereas in 1969 Daniel Ellsberg needed six weeks to sift through and photocopy the 7,000 pages that came to be known as the Pentagon Papers, today, the Internet allows individuals to distribute massive amounts of information almost instantly. But in the long run, governments will no more be able to prevent the erosion of their control of information by the Internet than monarchs and popes could collar the printing press. The true danger of the WikiLeaks furor is that they will try.

Of course, WikiLeaks does reveal some problems that governments probably should address. There is no reason why a private serving in the army should have access to the State Department's diplomatic cables, nor why his huge volume of downloading should not have been instantly recognized.

But the widened access came as a reaction to the 9/11 Commission's conclusions that there is far too much secrecy in America, and that instinctive turf protection by government agencies (such as the CIA and FBI) helped cause 9/11. WikiLeaks was the product of the government's overexuberance to share information without carefully constructing a system for balancing transparency with legitimate secrecy. A better method for sharing intelligence data was needed. It still is.

But the main danger WikiLeaks poses for the nation is that it will provoke a score of "the sky is falling" scenarios to justify derailing the sensible 9/11 Commission recommendations by excessively tightening rules for classification and secrecy and increasing penalties on disclosure or publication of official information. We are told, for instance, that other nations will now be afraid to negotiate or work with us on matters of diplomacy and national security. We have heard this siren song before: It was the Nixon administration's exhortation to the U.S. Supreme Court against publication of the Pentagon Papers — which proved illusory. That refrain was echoed in the 1970s, when the Senate's Church Committee, for which I was chief counsel, reported questionable CIA activities and we were incorrectly warned that other nations would no longer share secrets with us. The facts proved otherwise.

This op-ed was originally published by *The National Law Journal* on March 7, 2011.

Likewise, the sky has not fallen because of the leaks, and effective American diplomacy has not ended. If we allow WikiLeaks to become the rallying cry for those who wish once more to clamp down on governmental information in the guise of "national security," the American people will suffer.

Unfortunately, the Obama administration is already taking steps in that direction by searching for legal justification for prosecuting the organization's founder and operators. In doing so, the government is actually causing the damage that WikiLeaks did not — "wide condemnation" of American officials and politicians in international news media and, as one newspaper in Germany put it, the raising of Julian Assange to "martyr status." Only once removed from the question of Assange's legal culpability is whether the mainstream press is legally culpable for telling the American people what WikiLeaks already made public. Legislators and legal scholars are already plowing that ground. If they find that they cannot reach WikiLeaks through current laws, the problem of too much secrecy will be lost in the hype over how to prosecute those people who divulge secrets in the future.

The fact is that we already classify and hide too much information and intelligence. The 9/11 Commission, various other government commissions since the 1950s, and recently Defense secretaries Donald Rumsfeld and Robert Gates have all argued that the sheer abundance of unnecessarily secret information in the executive bureaucracy is a hindrance, not a helpful precaution. As WikiLeaks demonstrates, that secrecy is costlier and more challenging than ever in the Internet age, and is largely a losing battle. The government attention and resources diverted for the sake of preserving massive amounts of secrecy should instead be used to better protect and utilize our truly legitimate and crucial secrets. ■

Strength, Security, and Shared Responsibility

Hon. Janet Napolitano, Secretary, U.S. Department of Homeland Security

As a nation, how do we prevent terrorist attacks a decade after 9/11?

If you look at the Department of Homeland Security, as it was created by the Congress after the attacks of 9/11, its responsibilities range from counterterrorism to securing our borders, meaning air, land and sea, to immigration enforcement, a very non-controversial area, to cyber security, which is a fast growing area, more and more important each day, to disaster response and recovery. Whatever the source of the disaster is — a terrorist attack, another man-caused disaster, or indeed Mother Nature.

So, for example, right now we are responding to federally-declared disasters in 28 different states, a remarkable and unfortunately record setting spring for tornados and flooding across our country. So we have a vast range of responsibilities but the priority for the Department was, is, and will remain the counter terrorism issue. How do we protect the people of the United States from being the victim of an attack again? And how do we do that in a way that respects and embraces our own rights and liberties, values that undergird our country and that we are sworn to as attorneys, and as members of the Cabinet, that we are sworn to uphold.

So I want to talk to you about that facet of our work, the counterterrorism facet. And I want to speak with you in that vein as a member of the Cabinet, not as a student or faculty member, but somebody who is dealing with these issues on a daily basis. Because I believe that right now is an opportune time, an opportune time to discuss the ongoing threats that our nation still faces because right now we are between two major events. One of course is the killing of Osama Bin Laden and the other is the upcoming 10-year anniversary of 9/11. What we learned from the Osama Bin Laden operation confirms what I think many in this hall knew or suspected for a long time. And that is that al-Qaida and its affiliates remain determined to target the West, particularly the United States both here and through our interests abroad.

And so as we move forward over the coming months to commemorate what happened on 9/11 and share again the remarkable stories of the men and women who perished in the attacks here and at the Pentagon and in

Secretary Napolitano delivered this Brennan Center-sponsored lecture at the NYU School of Law on June 7, 2011.

Pennsylvania. As we detail the progress the country has indeed made over the past years, we have to also recommit ourselves to the notion that unfortunately the world that we inhabit is a world, an environment where terrorists exist and where they continue to focus upon the West and on the United States.

Now, where are we now in relation to where we stood say on 9/11 or shortly before? I am confident in saying that our country is stronger than we were a decade ago. We have indeed bounced back from the worst attacks ever on our soil. And we have made significant progress in many fronts needed to protect ourselves. I think as well that our nation is smarter about the threats that we face and how best to deal with them. We have used this knowledge to make ourselves more resilient and not just to terrorist attacks but to threats and disasters of all kinds. And by resilience I want to pause here a moment. By resilience what I mean is the capacity to bounce back quickly after a crisis, like we saw at Ground Zero and at the New York Stock Exchange, which reopened just four trading days after the attack.

Now with investments that have been made in capacity building across our country, working with first responders, working with state and local authorities, we have seen remarkable abilities at the state and local level to show resilience from right now Mother Nature. So when you think about what's going on in Alabama, in Mississippi, in Missouri, the ability to bounce back from those storms has been enhanced in part by the efforts we actually invested in to fight terrorism, or to come back from terrorism, but that in fact allow us to respond better, more quickly, more effectively to a disaster, whatever the source.

The Department of Homeland Security (DHS) is part of the largest reorganization of the federal government that has taken place in our nation's history. We have reoriented the agencies not just within DHS, but also within the Department of Justice and the FBI toward the prevention of terrorist acts.

But let me go back to my major point which is that the threats of terrorism are still here. They're not going away. They're real and they are rapidly evolving. They demand our vigilance and they demand our willingness to learn and to adapt. So perhaps at no other time in our recent history this point between when the attacks of 9/11 occurred and when we will commemorate the 10th anniversary is the time to say that we have to rethink how we deal with terrorism and understand that one of the evolutions we have made is to say that counterterrorism is not just a governmental function, it's not just a federal governmental function. It involves states, it involves local law enforcement, it involves first responders, it involves the private sector, it involves individual citizens, and it involves a sense of shared responsibility that we as a country are all in this together. And that while different parts of us leverage different types of strengthens and abilities, the plain fact of the matter is that everyone has a stake in the safety of our people.

So as we move forward we look back on the last 10 years and note as was noted in the introduction, that I now lead the third largest department of the federal government. It is part of the largest reorganization of the federal government that has taken place in our nation's history that we have reoriented not just the agencies within DHS, but also within the department of Justice and also the FBI toward the prevention of terrorist acts. And that we have invested tremendous energy and resources in our country to assimilate the knowledge we have gained, and to use it, and this is a key point, to use what we have learned and to share it to inform and empower a

broader, more inclusive range of people and institutions to become a part of the homeland security architecture of our country. So as we move forward, that architecture, that sense of shared responsibility is a guiding philosophy of how we proceed.

So let me turn to the nature of the threats that we are currently facing. Because the terrorist threat confronting the United States right now has evolved significantly over what it was 10 years ago. Today, in addition to the direct threats we continue to face from al-Qaida or Core al-Qaida as it's known, we also face growing threats from other foreign-based terrorist groups inspired by al-Qaida or al-Qaida-like ideology. They may not have few operational connections to al-Qaida but they certainly are inspired by al-Qaida.

We have no interest in policing beliefs, or in profiling of any sort based on factors like religion or ethnicity. Not only are those practices illegal, they're also ineffective.

And indeed we face a threat environment where violent extremism is neither restrained by international borders nor limited to any single ideology. One of the most striking evolutions we have seen recently — and indeed we've seen this accelerate even during my two and a half years as the Secretary — is that plots to attack the United States increasingly involve U.S. persons, United States persons, American citizens. Based on the latest intelligence and law enforcement actions we now operate on the assumption that individuals prepared to carry out terrorist attacks may be in the United States now and can carry out acts of violence with little or no warning.

So we have been dealing with an increasingly diffuse source of terrorism and an increasingly smaller, if it were, smaller methodology of attack. What do I mean by that? The big plot, the big conspiracies that involve years, and years, and years to develop, to get people in the country, to train them in flight schools, to be able to weaponize commercial air carriers, those kinds of plots are not the kinds of plots we see now. What we see now are more diffuse, smaller, and quicker to happen. They can involve a single person and of course as we know it is very, very difficult to if not impossible to stop a single person if there is no one with whom that person is communicating, sharing information, plans, or thoughts. Because there is nothing at that point to interrupt until something actually occurs.

And so as we move forward we believe that the increasingly savvy use of the Internet, mainstream and social media, and information technology by groups like al-Qaida or al-Qaida-related groups to inspire those who either live abroad or actually live in our county now has added an additional layer of complexity to the problem of terrorism that existed prior to 9/11. And we should be very clear that now there is no single portrait of a would-be terrorist. Research and experience has shown that an individual or group's ethnic, religious, or cultural background does not explain why a small number of individuals choose to take their radical beliefs down a violent path.

So we have no interest in policing beliefs, or in profiling of any sort based on factors like religion or ethnicity. Why? Because not only are those practices illegal, they're also ineffective. That's why we need to be instead working with a broad range of partners to gain a better understanding of the behaviors, the tactics, the techniques, the other indicators that could point to anticipated

terrorist activity and the best ways to mitigate or prevent that activity from being successful.

So if you think about the nature of the evolving threat, what has changed, what we need to be focused on in our efforts to prevent something from being successful, that bears with it then some implications. The fact that new kinds of threats can come from any direction and with little warning upends much of our thinking about terrorism prevention. And that thinking then has changed not just from a decade ago but from a few years ago. It doesn't mean that we still don't need a strong military or top notch intelligence operation, the very kind that was used to kill Bin Laden. ■

THE COURTS

The Crumbling Infrastructure of Justice

Adam Skaggs and Maria da Silva

In tough economic times, state courts face a sharp rise in foreclosure cases, consumer debt proceedings, and domestic violence disputes. But with recent budget shortfalls, they are forced to cut back — with devastating consequences.

Denouncing a proposal to cut $150 million out of a courts budget that has already absorbed a $200-million reduction, California's chief justice, Tani Cantil-Sakauye, recently warned that the "devastating and crippling" cuts would "threaten access to justice for all."

California's not alone. Last month, 350 court employees in New York were laid off to offset $170 million in cuts to the state judiciary's budget. Remarkably, 65 dismissed part-time judges continued to work as volunteers to ensure that the courts' indispensable work wouldn't grind to a halt.

It is inexcusable, not to mention unsustainable, when an institution vital to our democracy must depend on former employees to work as volunteers — or simply lock the courthouse door.

But this is happening nationwide. According to the National Center for State Courts, 32 states experienced judicial budget reductions in fiscal year 2010 and 28 others saw reductions in fiscal year 2011. These cuts will continue, and in some cases accelerate, in fiscal year 2012. Strapped for cash, courts have reduced hours of operation, fired staff, frozen salaries and hiring, increased filing fees, diverted resources from civil trials — which in some cases suspended jury trials — and, in the worst cases, closed courts entirely.

Iowa's court system today is operating with a smaller workforce than it had in 1987 — even though, in the same period, the total number of cases in Iowa courts has doubled.

Unless officials in Jefferson County, Ala., secure additional resources, security officer layoffs will force the closing of or the limiting of public access to all but one of five courthouses by July 15. Judge Scott Vowell, the presiding judge in Jefferson County, says the courts are "essentially shutting down because they will be too dangerous to operate" without adequate security. Vowell explained that the courts hoped to stay open by using volunteer off-duty police, but because of inadequate resources to coordinate off-duty officers, even that emergency option was off the table.

These cuts are coming at precisely the time when courts desperately need more, not fewer, resources. State courts confront elevated numbers of foreclosure filings, consumer debt proceedings, and domestic violence cases — all of which rise in tough economic times.

Unlike other government agencies, courts cannot simply cut some services; they have a constitutional duty to resolve criminal and civil cases. And because about 90 percent of court budgets go to personnel costs, cutting staff is the only way for courts to absorb reductions. Eliminating judicial employees means that some citizens looking to the courts for justice will walk away empty-handed.

Op-ed originally appeared in *The Los Angeles Times* on July 8, 2011.

The long-term implications are particularly alarming. A study of the economic impact of court cuts in Los Angeles County concluded that from 2010 to 2013, the county and state would suffer estimated losses of more than $30 billion from a combination of lost jobs, lost payroll taxes from laid-off court and legal service personnel, a decline in legal services revenues, and uncertainty among litigants. The study said cuts aimed at short-term savings will have negative and "long-term structural consequences for the Los Angeles and California economies."

In Georgia, a similar study came to much the same conclusion. In Florida, business leaders are warning that the court funding crisis is still threatening the state's economy, even after Florida's courts were rescued at the eleventh hour when Gov. Rick Scott authorized emergency loan funds to prevent widespread court blackout days.

"Failing to fund our courts is like failing to repair our bridges," said David Udell, executive director of the National Center for Access to Justice. "Disaster becomes inevitable — just a matter of time."

When policymakers debate budget proposals, they must provide courts with resources sufficient to preserve the ability to deliver justice.

Of course, court administrators must actively pursue cost-saving practices. But courts are the foundation for the rule of law on which the well-being of our democracy depends. As a result, when policymakers debate budget proposals, they must provide courts with resources sufficient to preserve the ability to deliver justice.

"Justice for all" cannot be a bargaining chip traded away during tough economic times. ■

Facing Foreclosure Alone

Nabanita Pal

In 2009, a Brennan Center study showed that 6-in-10 families facing foreclosure lacked a lawyer. Despite impressive pro bono efforts to meet the need, two years later most families still face the loss of a home on their own.

Introduction

In 2009, the Brennan Center for Justice published *Foreclosures: A Crisis in Legal Representation*, one of the first reports to look at the way the burgeoning foreclosure crisis was affecting our justice system and, in particular, those who could not afford counsel to represent their interests. As we wrote then, the foreclosure crisis is also a legal crisis. It has brought hundreds of thousands of Americans into contact with the court system with complicated legal situations that require assistance.

Yet that help has been in short supply for those who cannot afford a private attorney. At the same time as this vast new set of legal needs has arisen, the civil legal aid system has contracted. The federally funded Legal Services Corporation (LSC), which distributes funds to legal aid programs around the country to assist low-income Americans, has struggled with budget cuts. LSC's funding is currently $404.2 million. This amount reflects a cut from $420 million in fiscal 2010, which already was far below LSC's 1995 appropriation of $574 million, when adjusted for inflation. These funding cuts occur at a time when a record 60.4 million Americans are eligible for free legal assistance, the largest number in LSC's history. After federal LSC grants, Interest on Lawyer Trust Account (IOLTA) programs — which pool interest from lawyers' trust accounts — are the largest source of revenue for civil legal aid programs across the country. In 2008, IOLTA funding totaled $284 million. But IOLTA revenue has plummeted due to declining interest rates. In 2009, income dropped 57 percent to $124.7 million.

Against this backdrop, foreclosures continue to overwhelm communities across the country. In 2010, nearly 2.9 million homes received foreclosure filings, a number that translates to 1 in 45 homes, or 2.23 percent of all homes in the United States. The Federal Reserve estimates that there will be 2.25 million foreclosure filings in 2011 and 2 million more in 2012.

The federal government's primary response to the crisis has been the Home Affordable Modification Program (HAMP), a foreclosure prevention

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program under the Department of Treasury's Troubled Asset Relief Program (TARP). HAMP provides financial incentives for mortgage servicers to modify loans for struggling homeowners as an alternative to foreclosure. However, HAMP has failed to keep pace with rising foreclosures and reached only a small fraction of at-risk homeowners. At its inception in 2009, HAMP was expected to help 3 to 4 million homeowners permanently lower their monthly payments and avoid foreclosure. As of June 2011, however, the program had only obtained permanent modifications for 657,044 loans. Accounts of lost paperwork, unnecessary delays, and outright denial of modifications for no apparent reason are widespread. This is largely due to the fact that the program has inadequate enforcement mechanisms and oversight, according to TARP's Special Inspector General, Neil Barofsky. Lender participation in the program is also voluntary.

As the federal response has faltered, states have struggled with the fallout. Thousands of foreclosures continue to flood state courts across the country. For example, foreclosure filings in Florida jumped from 73,878 in 2006 to 368,710 in 2008. In Ohio, 85,843 cases were filed in 2010, up from 63,996 in 2005. Already operating under reduced budgets, courts' ability to do justice to the backlog of cases in their civil docket has been further hampered by the fact that the majority of defendants in foreclosure do not have a lawyer.

The lack of representation for homeowners has created fertile ground for widespread abuse of the legal process.

Many states and jurisdictions have responded by creating foreclosure mediation programs. Since 2008, these programs — also called diversion or settlement conferences — have arisen in 30 states with both judicial and non-judicial foreclosure. Mediation programs provide an alternative forum outside of a court proceeding for homeowners to meet with lender representatives and renegotiate their loan terms, with the goal of preventing foreclosure. Another goal of mediation is to divert the backlog of foreclosure cases from courts.

While their popularity has grown, mediation programs still do not reach many homeowners. In hard-hit states and jurisdictions, only a small fraction of homeowners with foreclosure cases in court participate in mediation. For example, in Cook County, Illinois, there were approximately 43,000 residential foreclosures pending in 2010. Between June 2010 and May 2011, only 627 cases completed mediation, despite the significantly larger volume of homeowners who originally contacted the program's central hotline. Many of the homeowners who were unable to participate in the mediation program were ineligible because they had not yet received a foreclosure notice, were tenants in foreclosed properties, or had insufficient income to qualify for a modification. Not all mediation programs have the same requirements or enforcement mechanisms to ensure that servicers agree to and stand by their loan modification. Furthermore, programs vary in their accessibility; some are mandatory for all homeowners in foreclosure, while others are voluntary.

Loan modification and mediation programs offer hope for struggling homeowners. But the unfortunate reality for many is that they cannot fully

avail themselves of these solutions without skilled legal assistance. As we describe below, that assistance is in short supply. And the widespread lack of representation for homeowners has created fertile ground for widespread abuse of the legal process.

I. Homeowners Are Overwhelmingly Unrepresented In Foreclosure Proceedings And In Mediation

Many court systems do not track whether homeowners are represented. The few courts that do collect legal representation information reveal that the majority of defendants in foreclosure do not have any counsel on record for their case.

- In New York, court officials reported that defendants in 70 percent of foreclosure cases closed in 2009 had no attorney on record for the case. The court cautions that this number includes people for whom no representation information is available.

- In New Jersey, defendants in 92.9 percent of cases in 2010 had no attorneys on record.

Although a handful of mediation programs are tracking homeowner representation, the numbers are less likely to reflect the underlying situation in court since mediation is often optional and reaches only a proportion of cases. In some places, attorneys may formally "appear" as counselor of record for the mediation process but not in the underlying legal case. In addition, attorneys are sometimes permitted to appear on record as representing a homeowner for one particular session of mediation but not for the entire process. On the other hand, because the numbers reflect formal appearances they do not necessarily capture the fact that a homeowner may have received advice or counseling through a volunteer pro bono initiative or from a legal aid program. Nonetheless, the numbers of represented homeowners in mediation are strikingly low, as the examples from various states and jurisdictions below demonstrate.

Philadelphia

In more than 95 percent of cases that completed mediation in Philadelphia's nationally recognized Residential Mortgage Foreclosure Diversion Program between September 2008 and May 2011, homeowners did not register a formal appearance by an attorney. Program evaluators caution that this figure underestimates the total number of people receiving legal assistance because a significant number may have received some legal assistance that was more limited than formal representation in mediation.

Connecticut

Defendants in **74.1 percent** of cases in the state's foreclosure mediation program did not have legal representation in 2010.

Florida

Homeowners in **56.6 percent** of cases that completed settlement conferences in six judicial districts between 2009 and 2011 did not have legal representation.

Franklin County, Ohio (Columbus)
Homeowners in **87 percent** of cases scheduled for mediation did not have legal representation in 2009 and 2010. In some cases, mediation lasts for more than one session. An attorney appears on record as representing a homeowner even if they attend only one session out of the entire course of mediation.

Indiana
Only **56 borrowers** appeared with a pro bono attorney out of the 908 cases for which settlement conferences were held in a pilot program in 13 counties in 2010. An attorney appears on record as representing a homeowner even if they attend only one conference out of the entire course of mediation.

Maine
Homeowners in **61 percent** of cases that completed mediation in a statewide program in 2010 did not have legal representation.

Cook County, Illinois' mediation program stands out as a model for guaranteeing free legal representation to every eligible homeowner for the entire course of their mediation. Funded with a $3.5 million appropriation from the County Board, the program has made community outreach and legal assistance central components of its design. However, although volunteer canvassers contact a significant number of homeowners to educate them about the program, proportionally far fewer homeowners ultimately enter mediation.

II. The Pervasive Lack Of Legal Assistance Leads To A Lopsided Process Without Adequate Controls

Our justice system is adversarial. It assumes a process in which parties are represented by counsel on both sides who aggressively press their respective cases. But when homeowners facing foreclosure do not have legal representation, that model fails and the process becomes fertile ground for abuse.

As New York's Executive Deputy Attorney General Martin Mack has testified, "[T]he lack of individual representation in foreclosure actions is one reason we have seen systemic abuses of the legal system by lenders and debt collectors." Moreover, the abuses continue to go unchecked because homeowners do not have lawyers: "For every abusive case uncovered, there are dozens upon dozens of homeowners and, sad to say, former homeowners who have been steamrolled because they did not have adequate representation."

Government oversight agencies, judges, and attorneys general have issued harsh criticism of the practices of lenders and foreclosure law firms. First, as the widely publicized "robo-signing" scandal revealed, many foreclosure actions are brought on the basis of affidavits and other legal papers that assert facts that the lender may not have properly established. Amid the frenzy to repackage mortgages into securitized assets that could be sold to investors, many mortgages were bought and sold multiple times. However, the paperwork surrounding those sales is often faulty. As a result, it is not always clear that the party who claims to own a homeowner's loan really does; in legal parlance, this means that the lender may lack "standing" to bring the foreclosure. But without a lawyer, a homeowner may not be able to bring the inadequate record of ownership to light.

As one New York judge observed:

> It was only because this was one of the rare foreclosure cases where the defendant was represented by counsel that the fact that the Plaintiff did not own the note came to light. The Court can only speculate in how many other cases plaintiffs with no interest in mortgages wrongfully foreclose on them and collect proceeds to which they are not entitled.

Another judge in Florida noted that the sheer volume of foreclosures has been presented as an excuse for inadequate filings:

> At oral argument, the bank's attorney tried to justify this improper filing due to the vast volume of foreclosure cases in the judicial system. While this court is well aware of the volume of these cases, that circumstance is not a matter that relieves the bank and its attorneys of their obligation to file pleadings that are adequately supported by a reasonable investigation prior to suit. If anything, the volume of these cases and the obvious detrimental effect that such volume has upon the legal system should be a factor requiring attorneys who file the actions to engage in a higher degree of professionalism.

Second, even when homeowners are able to meet with lenders in face to face mediations or settlement conferences, these negotiations are stymied. As documented errors and abuses in the HAMP modification process show, homeowners need effective advocates at their side pressing for results from lenders. Judges have commented on the gap that exists between the vast majority of homeowners who do not have lawyers and the banks and servicers who always do:

> [T]he court notes the inherent inequity in the settlement process in the foreclosure part. Indeed, all plaintiffs are represented by counsel, and the homeowners are mostly self-represented and largely unaware of their legal rights including possible defenses to the action.

Lenders have also acknowledged the ways in which representation improves the mediation process. One bank representative, Michael Helfer, the general counsel of Citigroup, testified in a New York hearing:

> We believe there is an important role for lawyers to assist borrowers in avoiding foreclosure in New York, especially in the context of the mandatory mediation programs that have been instituted in New York…lawyers can help facilitate communication and guide borrowers through the process to work out solutions more quickly and without the need for repeated sessions.

Helfer noted that Citigroup's lawyers often have to reschedule mediation sessions because unrepresented homeowners are unaware of the documents they need or the procedure for modifying loans. Lawyers for homeowners not only benefit homeowners, they also ensure the entire mediation process works effectively, Helfer explained "[I]f we could get lawyers, to a greater extent, to be involved in this mediation or settlement conference process…collectively, the system would work a lot better."

III. When Homeowners Are Represented, Their Assistance Can Make The Difference Between Losing And Saving A Home

In contrast, when homeowners are represented, their attorneys can make a significant difference in their individual cases and in the process more broadly. In *Foreclosures: A Crisis in Legal Representation*, we identified several ways in which lawyers assist homeowners:

- Raising claims that protect homeowners from lenders and servicers who broke the law;
- Helping homeowners renegotiate their loans;
- Helping ensure that the legal process is followed properly;
- Helping homeowners obtain protection of the bankruptcy law;
- Helping tenants when a landlord's property is foreclosed; and
- Giving those affected by foreclosure a voice in policy reform.

In the two years since that report, the foreclosure landscape has evolved. Lawyers for homeowners continue to intervene in important ways, several of which we describe below.

A. Protecting Against "Rescue" Scams

Amid widespread foreclosure, a second wave of scams has crept up on vulnerable households. Companies promising to reverse mortgages, repair credit, or provide legal assistance to defend foreclosure actions convince homeowners to invest their dwindling resources in fraudulent schemes. Attorneys general across the country have initiated investigations and sued mortgage rescue companies. Skilled legal assistance is often the only hope for undoing the damage done by these mortgage rescue scams. Take, for example, the case of Israel and Christine Muniz of Cook County, Illinois, who are featured in *Fighting Foreclosure: Why Legal Assistance Matters*. Mr. Muniz, a former Marine and active member of the Illinois National Guard, worked for a trucking company in between his deployments to Afghanistan. During the recession, Mr. Muniz's hours were reduced and the Munizes fell behind on their monthly mortgage payments. They feared foreclosure after speaking with a bank representative. A mortgage "rescue" company contacted the Munizes, promising to refinance their mortgage and repair their credit. Through a series of negotiations and meetings, Christine signed paperwork to approve what was presented to her as a refinance of her mortgage. What Christine signed, in fact, was paperwork authorizing the sale of their property, which transferred the title to the mortgage "rescue" company.

Christine took her case to the Legal Assistance Foundation of Metropolitan Chicago (LAF). LAF sued the "rescue" company, eventually settling the case once it became clear that the Munizes could not recover their home. With the settlement funds, a veterans' home loan, and money they had saved in an escrow account with LAF, the Munizes had the down payment for a new home. This "graceful" exit was possible only because LAF took on complex litigation that forced the "rescue" company to pay up — at least in part — for their scam. Yet other homeowners who have inadvertently lost their homes or drained their financial resources over similar scams often do not have the benefits of legal representation.

B. Negotiating Loan Modifications

For many homeowners, the best hope of saving a house is negotiating a loan modification to reduce monthly mortgage payments. But the federal HAMP program and other loan modification programs

have been notoriously difficult to navigate. As the Troubled Asset Relief Program Special Inspector General has documented in quarterly reports to Congress, mortgage servicer violations are rampant in the administration of loan modifications through HAMP. For example, one homeowner made payments on time for 13 months during her trial period and was promised a loan modification would be made permanent, only to discover the servicer had "decided not to go forward" with it. Another borrower reported that he was denied a permanent modification for failing to sign papers he had never received in the first place.

Although there have been no empirical studies measuring the difference legal representation makes in determining the outcome of a foreclosure case, a 2010 study by the Urban Institute evaluating a loan counseling program shows that skilled assistance makes a significant difference. The Urban Institute found that homeowners in the counseling program were 1.7 times more likely to avoid foreclosure than those who were not. Homeowners with a counselor also secured better results in negotiating a loan modification with their lender. The study found that, on average, housing counseling clients lowered their monthly payments by $267 more than those who did not have a counselor.

Lawyers representing homeowners are able to spot legal defenses to the foreclosure and use those defenses as leverage to negotiate a refinancing of the mortgage.

The Urban Institute study also examined the effects of the level of counselor involvement in a client's case. Homeowners who received more extensive assistance secured larger payment reductions in their loan modifications than a homeowner who met only once with their counselor and had no follow up meeting. Homeowners who received the highest level of assistance lowered their monthly payments by an average of $335 while those who received the lowest level of assistance lowered their monthly payment by an average of $214. While we cannot extrapolate this finding to the impact of legal assistance, it does suggest that the extent of assistance plays a role in influencing the outcome, especially given the complexity of some foreclosure cases.

In addition to assisting in negotiations, lawyers representing homeowners are able to spot legal defenses to the foreclosure and use those defenses as leverage to negotiate a refinancing of the mortgage. Several examples from *Fighting Foreclosure: Why Legal Assistance Matters* illustrate this point. Eighty-year-old Louise Golden of Prince George's County, Maryland has lived in her home for 28 years. In 2007, Mrs. Golden and her ailing husband, Stanley needed home repairs. A broker who visited their home convinced the Golden's that the best way to finance their repairs was by signing a fixed-rate mortgage. The Golden's went ahead with the refinance package. When Mr. Golden passed away shortly thereafter, Mrs. Golden saw her monthly payments jump from 2 percent to nearly 8 percent — contrary to what she had been told. Relying solely on her Social Security income, Mrs. Golden could not make the payments and received a foreclosure notice. She took her case to the Maryland Legal Aid Bureau where an attorney negotiated on her behalf in mediation. Mrs. Golden's attorney convinced the lender to lower her monthly payments, arguing that if they did not arrive at a resolution in mediation, she could raise valid consumer protection claims in court.

Charles Guider provides another example of the way in which legal representation can save a home. Mr. Guider's parents bought a house in the 1960s, joining other first-time African-American homeowners in Chicago. After refinancing their mortgage, Mr. Guider and his family fell behind on the payments and received a foreclosure notice in 2008. Mr. Guider requested a loan modification with his lender, but they refused to communicate with Mr. Guider because his late mother's name was on the loan. LAF took on Mr. Guider's case and found problems with the lender's disclosure of finance charges. Mr. Guider and his attorneys also pointed to the fact that the original plaintiff who had brought the foreclosure action against Mr. Guider had not proven to be the trustee of the mortgage. This defense is a difficult one to raise without legal representation, but it is extremely relevant in light of the thousands of mortgages that have been bundled and securitized with minimal tracking by banks and servicers. In negotiations, Mr. Guider and his attorneys ultimately secured a permanent loan modification under HAMP in exchange for dismissing other claims. Mr. Guider was able to save his family home, but LAF remained vigilant throughout his case, checking servicer errors during the loan modification process.

C. Ensuring The Legal Process is Followed

In states where foreclosure is under the purview of the courts, lawyers for homeowners play a critical role in making sure that the legal process is followed properly. One lawyer's volunteer work on a Maine case that made national headlines provides a compelling illustration of how homeowner representation is critical for uncovering problems in the foreclosure process. Like so many homeowners across the country, Nicole Bradbury received a foreclosure notice after losing her job and falling behind on her mortgage. Ms. Bradbury had been paying the mortgage on her house for seven years. It was a modest home unlike the trailer she had lived in before. Unable to afford a private attorney, Ms. Bradbury contacted Pine Tree Legal Assistance (PTLA), an organization that provides free legal representation to low-income people in Maine. PTLA was able to connect Ms. Bradbury with a volunteer lawyer, Thomas Cox. Mr. Cox's intervention in Ms. Bradbury's foreclosure case brought into sharp focus a convoluted legal process in which lawyers for homeowners play a very important role.

Buried in Ms. Bradbury's paperwork, Mr. Cox discovered a discrepancy. The mortgage servicer's documents had been signed by an employee whose title indicated that his knowledge of Ms. Bradbury's case was probably limited. Mr. Cox deposed the employee, where he admitted to signing off on thousands of affidavits purporting that the servicer had a right to foreclose on homeowners — without ever reviewing the cases. Following the deposition, it soon became clear that this practice of "robo-signing" documents was not unique to that particular servicer. Four years into the foreclosure crisis, the country was hit with a historic scandal that brought into question the validity of thousands of foreclosures.

In the following months, major banks temporarily froze foreclosure actions in 23 states as their operations came under scrutiny from attorney general offices and the national media. The rate of filings slowed temporarily in late 2010 after Ms. Bradbury's case in Maine helped expose the widespread practice of rubber-stamping legal documents. By November 2010, there were 21 percent fewer foreclosures filings than in October, and 14 percent less than in November 2009. But this was only a temporary lull in activity.

Not surprisingly, legal aid programs representing homeowners in foreclosure are often the first to identify errors made by servicers' attorneys. Because these civil legal services providers handle a high volume of cases, they are able to identify trends that cut across individual cases and reflect systemic problems in the way that foreclosures are handled by lenders and the courts. For example, a recent study by MFY Legal Services, Inc., a legal aid organization in New York City, also identified troubling trends for a set of foreclosure cases filed by four foreclosure law firms in the state. The study found that these firms

delayed filing paperwork that is required to move a case from the initial complaint to the settlement conference phase, which is mandatory in New York. As a result, the cases remained in limbo, and fees and interest against the homeowner continued to accrue. Moreover, because this paperwork triggers the phase in the case at which referrals to housing counselors occur, homeowners were not gaining access to that assistance nor were they being connected to legal assistance. Examining case files in November 2010, MFY found that approximately 82 percent of the same cases had not moved onto settlement conferences in June 2011 because the law firms had failed to file the necessary paperwork. These are just some of the systemic problems that have been brought to light by the presence of skilled counsel on the side of homeowners.

Conclusion

With no clear end in sight for the foreclosure crisis, policymakers and advocates continue to debate many worthy interventions to address the problem. Expanded legal assistance needs to be part of the solution, too. Preventing further cuts to LSC, the backbone of our nation's civil legal aid system, is a critical first priority. LSC-funded programs provide a significant amount of the homeowner representation that is occurring, but they cannot hope to meet the need for assistance under current funding conditions. These programs also serve as hubs for the many foreclosure volunteer and pro bono initiatives that courts and bar associations have launched. Efforts at the state and local level also play an important role in foreclosure prevention. Legal services providers and housing counseling agencies depend on dedicated state and local funding to bolster their programs and reach more homeowners. Foreclosure is not only an incredibly complex process, it is also lopsided. For homeowners facing foreclosure, having a skilled advocate at their side can make all the difference. ■

Criminal Justice Debt

Rebekah Diller

Cash-strapped states increasingly impose fees on criminal defendants to help fill state coffers. But for many who can't pay, the fees pile up, pulling them back to prison.

As states struggle to close persistent budget gaps, they are casting about for ways to raise revenue. One of the more penny-wise, pound-foolish schemes is to levy more fees on a group least able to pay: people involved in the criminal justice system. Just this year, Arizona instituted a $25 background check fee for any family member who wants to visit an inmate in state prison, a move made despite significant evidence that involvement with family is key for preventing recidivism.

Arizona is not alone. *In Criminal Justice Debt: A Barrier to Reentry,* a report published last year by the Brennan Center for Justice, we surveyed recent fee practices in 15 states and found a disturbing uptick in both the dollar amount and the number of fees imposed on criminal defendants. These fees kick in at almost all stages throughout the process: Fees may be charged for one's public defender and prosecution, for court costs upon conviction, each day in jail or prison, and for each month of parole or probation supervision.

These fees may seem small in isolation — $25 here, $50 there — but as "The Unintended Sentence of Criminal Justice Debt" demonstrates, they can have harmful and lasting consequences. The amounts add up quickly, often totaling hundreds or thousands of dollars. Collections efforts take an added toll, generating additional fees and interest, often leading to driver's license suspensions and wrecked credit histories. At its worst, inability to pay criminal fees paves the path back to prison by prompting violations of parole or probation, arrests for failure to appear at fee-related hearings, or other new offenses.

As the human costs mount, there is scant information about the repercussions of imposing these financial costs. Jurisdictions have looked at only one side of the ledger — the amount of money they expect to generate — without thinking through what happens when significant numbers of individuals cannot pay.

It is time to rethink the problem. First, states should exempt up front those who lack the means to pay. This is not only the just thing to do, it's the smart thing. Jurisdictions would then stop spending scarce resources to chase down debt that is, in many cases, simply not payable.

Second, as "The Unintended Sentence" suggests, evidence-based analysis and programming are desperately needed. For individuals who cannot pay debts such as restitution and fines that are part of their sentence, credit for well-designed community service and other programming could offer a way out of the vicious debt cycle. The rigorous study associated with a demonstration project can help other jurisdictions reform their criminal debt practices, too. ■

This post originally appeared on the *Vera Institute of Justice* blog.

RACIAL JUSTICE

Ending Prison-Based Gerrymandering

In 2010, we drafted a law to end New York's practice of counting prisoners where they were housed — but could not vote. This distorted political representation, hurting minority communities. We led a civil rights coalition to defend the law in court. In December 2011, a New York State Supreme Court judge upheld the statute.

This case is about upholding New York legislation that ensures fair representation. Part XX of Chapter 57 of the Laws of 2010, duly passed by the Legislature and signed by the Governor on August 12, 2010, rectifies the longstanding injustice of prison-based gerrymandering, a practice that violated both basic common law principles and New York constitutional principles holding that incarcerated persons remain residents and domiciliaries of the districts where they last lived prior to incarceration.

Incarcerated persons remain walled off within the districts in which they are physically imprisoned, yet they retain deep ties and contacts with their home communities to which they almost invariably return when their voting rights are restored upon the completion of their sentence. Nonetheless, prison-based gerrymandering relies upon the fiction of using the temporary and involuntary presence of incarcerated persons in the districts with prisons to boost those districts' population numbers when conducting redistricting. This setup resulted in an unjust inflation of the political influence of districts with prisons and the weakening of votes cast in all districts without large prisons.

A stark example is seen in Senate District 45, represented by State Senator Betty Little, the lead plaintiff in this case. Her current Senate District includes 12 state prison facilities. She represents 285,442 non-incarcerated constituents, while State Senator Roy J. McDonald in neighboring Senate District 43, where no prison is located, represents 302,261 non-incarcerated constituents. The political representation and voting strength of Senator Little's district is highly inflated by counting in thousands of prison inmates who have no ties to the local community and are not Senator Little's constituents in any credible sense of the word. Meanwhile, the voting strength of Senator McDonald's district is diminished in comparison.

Excerpted from the Memorandum in Support of Intervenors-Defedendants' Motion for Summary Judgment, filed by the Brennan Center, Center for Law and Social Justice at Medgar Evers College, CUNY, Demos, LatinoJustice PRLDEF, NAACP Legal Defense and Educational Fund, Inc., New York Civil Liberties Union Foundation, Prison Policy Initiative, and Sidney Rosdeitcher, on August 18, 2011. Citations omitted.

Malapportionment along these lines has been all-too-common: following the 2000 Census, seven state Senate districts lacked sufficient non-incarcerated populations to meet the requirements of population equality applicable to state legislative districts.

Overall, prison-based gerrymandering in New York disproportionally reduced the representation of Latino and African-American communities which had high numbers of incarcerated persons removed for redistricting purposes, but to which these incarcerated persons continued to have ties and in most cases would soon return as potential voters.

Part XX corrects this longstanding injustice and restores equal representation to those districts whose voting strength and representation were severely diminished under the former policy. Under the new law, the Department of Corrections and Community Services is responsible for providing home address information for everyone incarcerated in state prison on Census Day to New York State's Legislative Task Force on Demographic Research and Reapportionment (LATFOR). LATFOR is then responsible for allocating and geocoding the data for those incarcerated individuals to their home communities for redistricting purposes. The new policy helps ensure that all New Yorkers have equal representation in our state and local governments, and that every community has a proportionate ability to draw attention to the issues and problems that affect them, to propose solutions to these problems, and to have a fair hearing before the legislature and local governing bodies, without regard to whether that community happens to be located near a state prison. ■

Remembering "I Have a Dream"

Clarence B. Jones

Dr. Martin Luther King, Jr.'s speechwriter and lawyer recalls "the lightning in a bottle" of the day the "dream" came alive.

I wasn't in touch with him in the morning. I had just learned somebody called me and said Dr. King's speech is mimeographed and put into a press kit. Harry Belafonte had asked me to coordinate a so-called celebrity delegation coming to the March on Washington shared by, of all people, Charlton Heston. So I had to go meet Charlton Heston and Marlon Brando and all these people. Leading them, and they all say, "This is a great day isn't it." Mr. Charlton and I are thinking yes it is.

It's not until I am up on the platform — Dr. King, it was an extraordinary moment. At four o'clock in the afternoon, a beautiful day, just fantastic. The speaker before Dr. King's speech is introduced is read by Joachim Prinz, who was then president of the American Jewish Congress. He gave a very profound, but short speech. He said, in effect: "I remember being a rabbi in Hitler's Germany and remember many tragic things of those times. What I remember is that hate, intolerance, and bigotry are not the worst things. The worst thing that I remember was the silence of the good people." Very powerful.

And after that Randolph gets up and he says ladies and gentlemen, brothers and sisters, the moment that we've all been waiting for. Now I want to introduce to you the indisputable moral leader of our country the Reverend Martin Luther King, Jr.

The place has more than 250,000 people. It was like they all set off firecrackers at the same time. Unbelievable. Martin gets up, speaks from the text on American history. As I'm listening, for the first time I recognize that for about the first seven to eight paragraphs of the opening speech are the words that I gave him to consider using. He used them, didn't change a word, comma, period, spoke them exactly as I wrote them. Then he added his own additional language for about four or five paragraphs.

He's reading this text. He's reading this at the podium. He's over here and [this woman] turns to him and shouts to him, interrupts him. "Tell them about the dream Martin. Tell them about the dream." And he pauses. I look

Excerpted from remarks Jones gave at the Center in the spring of 2011.

at him and take the text. He moves it off to the side and grabs the podium. I turn to the person standing next to me. This is all happening in real time. And I say: "Look at these people. They don't know it, but they're about ready to go to church." Because I can tell by Dr. King's body language, that where he stood implacably reading the text, that his body language has changed to this preacher mode.

That's when he started speaking, I have a dream. That was totally spontaneous, totally extemporaneous. If you listen to the speech, I say that Martin King had a much more prophetic confidence in America than America had in itself. Because the speech where he uses I have a dream is all in the future tense. "I believe that one day.... I believe that one day my poor children will be judged by the content of their character and not by the color of their skin. I believe that one day the great, great grandsons of slaves and the great, great grandsons of slave owners will sit down at the table of brotherhood...." All in the future tense — paragraphs that you read, all in the future tense. The most extraordinary thing I had ever seen. They only way I can tell you is to describe it to you and what I knew. I can remember what I knew.

What is most significant about Martin Luther's appearance at the March on Washington is this: We caught lightning in a bottle, because the right man spoke the right words to the right people at the right time. No part of this formula should be undervalued. Though one or two components could gel together, the culmination is not likely to be replicated ever again. ■

Supreme Court Ruling Won't Fix Michigan's Indigent Defense

Thomas Giovanni and Laura K. Abel

Equal justice under the law in Michigan? Not until the state steps up to provide the constitutionally-required level of representation for people facing criminal charges.

On Halloween, the Supreme Court will hear oral argument in a case illustrating how people and society suffer when indigent defense systems are chronically underfunded. In the case, *Lafler v. Cooper,* the Court will decide whether the Constitution is violated when an attorney's advice to reject a plea bargain is based on a laughably poor legal error. However the Court decides, though, the decision will not address the underlying problems that made these errors entirely foreseeable.

In *Lafler,* Anthony Cooper brings a federal habeas challenge to a Michigan state court conviction. Mr. Cooper was accused of shooting a woman several times in her legs as she was running away. The most serious charge he faced was assault with intent to murder, with the maximum potential sentence being life in prison. The prosecution made a pre-trial offer: plead guilty to assault with intent to murder and take a prison sentence of approximately four to seven years.

Mr. Cooper's court-appointed attorney advised him to reject this plea offer, advising Mr. Cooper that because the victim had been shot below the waist, the prosecution could not establish his intent to kill. This advice was egregiously incorrect. Nonetheless, Mr. Cooper followed it and went to trial, where he was convicted on all charges and received a sentence of 15 to 30 years. By listening to his attorney's incorrect advice, Mr. Cooper's sentence was approximately four times longer than it would have been under the prosecution's original plea offer.

This outcome was unfair and unnecessary. But given the state of Michigan's indigent defense system, it is unsurprising. Michigan lacks many of the basic requirements of a functioning indigent defense system. Each county is required to run its own indigent defense system, without any statewide oversight. In many counties, including Wayne County, where Mr. Cooper's trial occurred, there are attorneys who are assigned cases without being screened for competence, and are not provided with training or supervision. With this lack of support and oversight, it is inevitable that some attorneys will give bad advice.
These problems are well known.

The issues were aired publicly in the course of a multi-year class action lawsuit that eventually reached the Michigan Supreme Court. And they have been widely covered in the media.

In the face of all of this evidence, Michigan's government has repeatedly failed to act. In a 2009 decision, the Michigan Supreme Court eschewed responsibility, saying that only the legislature could remedy the constitutional problems. The legislature has not done so. And just last month, Michigan's governor established yet another commission to write yet another report on the problem.

Both of the lower federal courts that have addressed Mr. Cooper's habeas petition have upheld it. The Supreme Court should do the same. But until Michigan makes a serious attempt to provide the constitutionally required level of repre-

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sentation to people facing criminal charges, we will see many more cases involving egregious attorney errors. In a nation founded on the principle of equal justice under law, that is simply unacceptable. ■

BUILDING A NEW JURISPRUDENCE

The Roberts Court's Free Speech Double Standard

Monica Youn

Conventional wisdom holds that Chief Justice John Roberts' Supreme Court is exceptionally pro-free speech. Yet a look at the data tells a much different story.

That the conservative majority of the Roberts Court are champions of free speech is a trope that simply refuses to die. *The New York Times* summed up the Court's most recent term by describing free speech as a "signature project" of Chief Justice Roberts, and numerous commentators have chimed in, contributing to the common misperception that the Roberts Court is "the most free speech Court in American history." Efforts to debunk this myth, by Erwin Chemerinsky, David Cole, and Nadine Strossen, among others, have seemingly failed to make much of a dent in the popular wisdom.

Ben Sachs' forthcoming *Columbia Law Review* article, "Unions, Corporations, and Political Opt-Out Rights after *Citizens United*," serves as a useful corrective, and, indeed, is one of the absolutely essential pieces of scholarship that I've seen in the wake of the decision. But before getting into the article in more depth, let's look at some basic numbers for background.

In its first five years, from 2006 until 2011, the Roberts Court granted certiorari in 29 cases in which a free speech violation was claimed (including the speech, press, assembly, and association guarantees). In these cases, the Court held that a free speech violation existed in 10 of the cases, and that no free speech violation had been demonstrated in 19 of these cases. Thus, simply looking at the numbers, the Roberts Court has supported a free speech claim in 34.48 percent of argued cases. By way of comparison, as Lee Epstein and Jeffrey A. Segal have shown, from 1953 to 2004, the Supreme Court supported claims of deprivation of First Amendment liberties in 53.95 percent of argued cases. Thus, at the most basic quantitative level, the Roberts Court seems to be not especially protective of free speech rights.

Disaggregated, these numbers become more dramatic. Out of the 10 cases where the Roberts Court has supported a free speech claim, six of those are cases in which the Court struck down campaign finance reform laws

This article originally appeared online at the American Constitution Society on November 29, 2011. At the start of the Court's term in early January 2012, *The New York Times*, in an article about the study by Adam Liptak, confirmed Youn's findings. Youn is the first Brennan Center Constitutional Fellow at NYU School of Law.

(counting *WRTL* twice, per Epstein and Segal's protocol). These numbers bear out Chemerinsky's argument that "what really animates [the Roberts Court's] decisions is a hostility to campaign finance laws much more than a commitment to expanding speech."

Out of the four non-campaign finance cases in which the Roberts Court has supported a free speech claim, three — the animal cruelty videos case, the funeral picketing case, and the violent video games case — were what I will call free speech "slam-dunks" — that is, cases that were decided by an 8-1 or 7-2 majority, and in which (contrary to the usual Supreme Court's certiorari practices) there was no split among circuit courts, and the Court affirmed the lower court decision. These free speech slam-dunks, with their colorful facts, were among the Roberts Court's cases that have attracted the most press attention, but they are hardly indicative of a conservative majority with an expansive view of First Amendment freedoms. The remaining case in which the Roberts Court was willing to uphold a non-campaign finance related free speech claim was *Sorrell v. IMS Health Inc.*, a relatively low-profile commercial speech case in which a 6-3 majority of the Court struck down a state "prescription confidentiality" law, which barred sale or disclosure of doctors' prescription practices to pharmaceutical marketers. An interesting case, and one which warrants more attention than it has received so far, but not really a banner-worthy free speech decision. At the same time, the conservative majority has shown itself willing to disregard free speech claims by, inter alia, government employee whistleblowers, humanitarian aid organizations, and, most pertinently for today's purposes, unions. Thus, it seems that the most that can be said of the conservative majority's free speech record is that "[t]he Roberts court strongly protects speech that it likes, while allowing regulation of speech it disfavors," as Adam Winkler has put it.

Out of the 10 cases where the Roberts Court has supported a free speech claim, six of those are cases in which the Court struck down campaign finance reform laws.

Sachs' article illuminates a piece of this picture that has been largely overlooked by First Amendment commentators — the Court's asymmetrical treatment of corporations and unions. To put it in simplistic terms, if you think of corporate and union general treasuries as two big piles of money, *Citizens United* held that both corporations and unions could *spend* freely on campaigns from their respective piles, but left in place existing restrictions regarding the *amassing* of such funds for political purposes that apply to unions, but not to corporations. Specifically, under current law and settled constitutional doctrine, employees have a right to opt out of funding union political activities, but shareholders enjoy no similar right to opt out of corporate political spending. Indeed, the Roberts Court has twice reaffirmed this opt-out right — rejecting public sector unions' First Amendment challenges to state laws requiring affirmative authorization from non-members for political spending and upholding a ban on voluntary payroll deductions for union dues — and has granted certiorari in a third union dues case set for this term.

The Court has primarily justified this asymmetry by reasoning that in the union context, employees are "compelled" or "coerced" to fund union political speech, while investing in a corporation is a fully voluntary act.

Sachs persuasively undermines this distinction, observing that:

> The argument that the union and corporate contexts can be distinguished on compulsion grounds reduces to a claim that the costs of being shut out of the stock market are acceptable, but the costs of being shut out of jobs covered by a union security agreement are not. Given the very real costs involved in both contexts, however, this conclusion is not an obvious one.

Especially with regard to public employee pension plans, where, as Sachs argues, public employees may be required to assent to corporate political speech as a condition of employment, the justification for the asymmetrical treatment completely dissolves. According to Sachs, state action doctrine and the associational speech jurisprudence similarly offer no sustainable rationale for this asymmetry.

As Sachs points out, prior to *Citizens United*, both unions and corporations could make independent expenditures only with PAC funds — those that stemmed from "knowing free-choice donations." But while the *Citizens United* majority struck down the PAC requirement for both corporations and unions, "the opt-out rights that unions must grant employees mean that, with respect to political spending, the union general treasury still resembles a PAC."

> Federal law continues to impose on unions a requirement that they fund their political expenditures only with funds voluntarily and knowingly donated for political purposes. Labor law, that is, continues to impose on unions a funding requirement that *Citizens United* has removed from corporations.

If one takes seriously Justice Kennedy's claim that political speech may not be restricted based on the identity of the speaker, the asymmetrical treatment of corporate and union political spending is highly constitutionally problematic.

The corporate/union political speech asymmetry may be viewed as one manifestation of a fault line that, as I have previously argued, underlies *Buckley*'s contribution/expenditures distinction and much of the convoluted campaign finance case law — an unresolved argument regarding the source of First Amendment value in political spending. Does such value derive from a particular spender's voluntary decision to dedicate a particular expenditure to an expressive purpose — a.k.a., a "knowing free-choice donation"? Or should we, instead, assess such value from the point of view of the marketplace, and hold that free speech values are transgressed whenever a given restriction may lessen the amount of money that can be used for communicative purposes? One could muster strong arguments in support of either theory — but how can the supposedly "source-blind" Roberts Court continue to justify the application of one theory to corporations and a separate theory to unions? Far from imposing coherence in an area of doctrinal confusion, the *Citizens United* decision continues to raise more First Amendment questions than it answers. ■

Money, Politics, and the Constitution

Edited by Monica Youn

To respond to Citizens United, *top constitutional scholars launched a jurisprudential movement to rethink the role of money in politics. The goal: to build a new approach that will allow democratic self-government to survive. What follows are excerpts from our book, published with The Century Foundation: "Money, Politics, and the Constitution: Beyond* Citizens United."

First Amendment Fundamentals

Start with first principles: what is the real role of the First Amendment in governing campaign law?

Robert Post, Dean, Yale Law School

My own view is that the First Amendment protects speech in order to facilitate democracy. Democracy is a form of government in which the people govern themselves. Fundamental to democracy is the warranted belief that persons are free to participate in the formation of public opinion and that government is accountable to public opinion. I shall use the term *public discourse* to describe those communicative processes deemed essential to the free formation of public opinion. First Amendment coverage should be triggered whenever state regulations threaten adversely to impact forms of communication that are essential to public discourse, and First Amendment doctrine should be formulated to protect essential processes of democratic legitimation.

This account of First Amendment values rather well explains the actual scope of First Amendment coverage and protection. First Amendment coverage tends to be triggered by government efforts to regulate the public sphere, within which public opinion is formed. And First Amendment protection is formulated so as to block efforts to regulate public discourse in ways that are viewpoint discriminatory. The reason for this kind of First Amendment protection is that viewpoint discriminatory regulation excludes persons from participating in the formation of public opinion on the basis of their ideas, and hence refuses to extend to such persons the democratic legitimation of public discourse. The prohibition against viewpoint discrimination does not reflect an equality among ideas, as the theory of the marketplace of ideas would suggest, but instead an equality among persons with regard to their right to make government democratically responsive.

Excerpted from "Money, Politics, and the Constitution: Beyond *Citizens United*."

Campaign finance regulation plainly seeks to constrain efforts to form public opinion and thus should trigger First Amendment coverage. But whether it should survive constitutional scrutiny is quite a different question. The question of First Amendment protection should turn on an assessment of the justification for campaign finance regulation in light of its impact on public discourse. There are a number of plausible justifications for campaign finance regulation that are consistent with standard First Amendment analysis.

Public discourse is protected because democratic legitimation consists in making government accountable to public opinion. But public debate also serves the purpose of enabling public decision-making. Once a democracy has reached a decision about what to do, it must effectively implement its will. If we decide to create a social security system or a health care administration, we must also create government institutions that are authorized and empowered to realize these ambitions. The social structure of such institutions will be quite different from public discourse.

Campaign finance regulation plainly seeks to constrain efforts to form public opinion and thus should trigger First Amendment coverage.

Public discourse is a social structure in which a democracy seeks to determine the content of its own ends. Public discourse therefore cannot be subordinated to any particular end, since any such end might be altered after sufficient discussion. Government organizations, by contrast, exist to achieve particular ends that have already been decided within public discourse. Government organizations must therefore be authorized to regulate speech as necessary to achieve their predetermined ends. Otherwise, the very function of public discourse will be frustrated.

It follows that government organizations cannot be structured so as to perennially keep options open for deliberation. Government organizations must be structured so as to accomplish the ends for which they have been established. School systems must be empowered to educate students, court systems to dispense justice, and so on. As a consequence First Amendment doctrine protecting speech within the managerial domain of organizations is very differently structured than First Amendment doctrine protecting speech within public discourse. Schools are authorized to regulate speech as is necessary to educate students; courts to regulate the speech of attorneys, witnesses, and jurors as is necessary in order to attain the ends of justice; and so on.

This insight poses a constitutional puzzle with regard to campaign finance regulation. On the one hand, campaign communications are quintessential efforts to shape public opinion in circumstances when public opinion truly matters. On the other hand, elections are themselves government institutions designed for the particular purpose of ensuring that government remains accountable to public opinion. Campaign finance regulation can thus be conceptualized either as an effort to suppress public discourse, in which case it should face a heavy presumption of unconstitutionality, or as an effort to secure the effectiveness of elections, in which case First Amendment scrutiny should turn on whether particular campaign regulations are necessary for elections successfully to accomplish the purposes for which they have been established. Although in neither case would campaign finance regulations

lie beyond the scope of First Amendment coverage, the appropriate form of First Amendment protection would very much depend on how we have decided to conceive the constitutional status of elections.

In many countries, elections are conceived as managerial domains. Even in the United States there are many ways in which we already regard elections as purposive institutions. For example, we prohibit people from saying, "I offer you 20 dollars in exchange for your vote," or from soliciting for votes on election day within 100 feet of the entrance to a polling place. These rules regulate speech during elections without raising fatal First Amendment concerns; they are regarded as necessary for elections to succeed in their assigned task, which is essential to democracy.

To regard campaign finance regulation as restricting public discourse is effectively to constitutionally prevent public control of campaigns. If we wish to reconcile campaign finance regulation with existing First Amendment doctrine and values, we shall need instead to conceptualize such regulations as efforts to preserve the institutional purposes of elections. This reconceptualization of campaign finance regulations would require us to ask whether particular government rules are necessary for the successful functioning of elections. This perspective is not logically required, and we are required to adopt it by nothing apart from the growing fear that our elections are increasingly failing to fulfill their democratic task, and that as a consequence the successful legitimation of our constitutional government may be slipping from our grasp.

Under the First Amendment, Elections Are Different

One approach says that elections are special — and that regulating spending can boost democracy and enhance speech.

Richard H. Pildes, NYU School of Law

The strongest legal argument, in my view, for justifying regulations of election financing, such as electioneering paid for out of a corporation's or union's general treasury funds, is the view that elections should be considered a distinct sphere of political activity. Elections are distinct from the more general arena of democratic debate, both because elections serve a specific set of purposes and because those purposes can, arguably, be undermined or corrupted by actions such as the willingness of candidates or officeholders to trade their votes on issues for campaign contributions or spending. Given this risk of corruption of the political judgment of officeholders, regulations of the electoral sphere — including how elections are financed — might be constitutionally permissible that would not otherwise be permissible outside the sphere of elections. This is the form of argument that must be accepted to justify measures such as ceilings on campaign contributions, disclosure of campaign spending, and limits on the role of corporate and union electioneering.

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The position is one that Frederick Schauer and I have labeled "electoral exceptionalism." According to electoral exceptionalism, elections should be constitutionally understood as (relatively) bounded domains of communicative activity. Because of the defined scope of this activity, it would be possible to prescribe or apply First Amendment principles to electoral processes that do not necessarily apply through the full reach of the First Amendment. If electoral exceptionalism prevails, courts evaluating restrictions on speech that are part of the process of nominating and electing candidates would employ a different standard from what we might otherwise characterize as the normal, or baseline, degree of First Amendment scrutiny.

What Schauer and I call electoral exceptionalism surfaced in public debate and in First Amendment literature in the 1990s. Typically, it has been the foundation for an argument against *Buckley v. Valeo*. This contra-*Buckley* argument asserts that, even though the principle that one may spend personal money to promote a cause is good First Amendment law in general, it does not apply when one is not advocating particular ideas or issues but instead seeking to elect a candidate to public office. Operationally, therefore, the most common version of electoral exceptionalism would permit restrictions on communicative activity in the context of elections that would not be permitted in other contexts.

Those with a penchant for oversimplification might say that electoral exceptionalism is an argument for weaker First Amendment protection in the context of elections. I describe this as an oversimplification, however, because in the context of arguments that campaign finance regulation would increase voter and candidate participation, decrease the influence of money compared to other sources of influence, or enhance voter confidence in democratic institutions, it is hardly clear that the values underlying the First Amendment would be more supportive of speaker (or candidate) immunity than they are of speaker (or candidate) participation. It is not self-evident that the values of democratic deliberation, collective self-determination, guarding against the abuse of power, searching for truth, and even self-expression are better served by treating government intervention as the unqualified enemy than by allowing the state a limited role in fostering the proliferation of voices in the public sphere, or of increasing the importance of message and effort by decreasing the importance of wealth. Although it is plainly true that a negative conception of the First Amendment generally, and freedom of speech in particular, have held sway over the past several decades, both in the literature and in the case law, it may still be too early in the First Amendment day to assume that the possibility of a positive conception of the First Amendment, and thus of a positive but limited role for the state, have no claim to recognition as the legitimate carrier of the free speech banner.

Moreover, although the position we label electoral exceptionalism would ordinarily be associated with greater state intervention, and thus with what some commentators might characterize as weaker First Amendment protection with respect to elections, electoral exceptionalism could logically support the opposite result. Critics of campaign finance regulation might argue that state restrictions on communicative activity in the electoral process are especially risky, largely because the self-interest of potential governmental regulators would be greatest in precisely this sphere. Consequently, this argument would continue, permissible restrictions in other or more "normal" contexts should be impermissible in the electoral context; if anything, the First Amendment ought to be even more absolute in this domain precisely because of its special characteristics.

In sum, concluding that elections constitute a distinct domain for First Amendment purposes does not dictate what we would do within that domain.

Rethinking Political Corruption

According to the Supreme Court, campaign finance laws are permissible if their purpose is to combat corruption. The NYU Law professor argues that the Justices have adopted a crimped concept of corruption. How can we move beyond merely banning bribery to a broader, more realistic view of what is corrupt?

Samuel Issacharoff, NYU School of Law

Any system of privately financed campaigns invites strategic use of money to influence public officials. So far, the debates at the Supreme Court have asked only whether the candidates are corrupted through illicit quid pro quo arrangements, or per the dissents, whether electoral outcomes are distorted as a result of concentrated corporate and private wealth. The case law has set off on a multi-decade search for a workable definition of just what is corrupt as opposed to benign when aspiring public officials solicit money to further their ambitions.

An alternative take on the problem of corruption of the political process would suggest that both of these definitions miss the mark. Each is concerned with the improper influences on the selection of candidates for office. While the influence of the well-heeled may be a concern, and while the prospect of out-and-out corruption is a serious issue, there is an alternative concern, perhaps the more serious problem, that looks not to inputs into who holds office, but to the outputs in terms of the policies that result from an elected class looking to future support in order to retain the perquisites of office. On this view, the underlying problem is not so much what happens in the electoral arena but what incentives are offered to officeholders *while in office*. While the question of holding office remains key, the focus shifts to how the electoral process drives the discharge of public duties. Specifically, the

While the influence of the well-heeled may be a concern... and the problem of corruption a serious issue...there is a more serious problem... that looks to outputs in terms of policies that result from an elected class looking for future support in order to retain the perquisites of office.

inquiry on officeholding asks whether the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, who in turn may be mobilized to keep compliant public officials in office.

The outputs account of corruption is concerned with the subversion of the classic account of the role of government as a provider of public goods, such as security, environmental protection, foreign relations — matters from which private initiative cannot realize gains and that in turn require public coordination. It is precisely this benevolent use of public authority to overcome the collective action barriers to the production of public goods that is increasingly subject to challenge. The public choice accounts of recent political economy claim instead that the existence of public power is an occasion for motivated special interests to seek to capture the power of government not to create public goods, but to realize private gains through subversion of state authority.

This strategy — identified in the political science literature as *clientelism* — defies easy categorization as corruption under current campaign finance law precisely because the concern is what happens in office, rather than during the election campaign. At its simplest, clientelism is a patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods. The concept differs in emphasis from quid pro quo corruption. The traditional account of corruption assumes that the harm is the private benefit obtained by the politician. While the concept of quid pro quo corruption is ample enough to include almost any benefit obtained, the focus of clientelism is not the enrichment of an individual politician, but continued office-holding on the condition that "party politicians distribute public jobs or special favors in exchange for electoral support." For all democracies, there are aspects of clientelism in any responsiveness to constituent interests. A pathology ensues when political decisions are made to allow important sectional supporters "to gain privileged access to public resources" for profit. Weak political parties and candidates with difficulty holding a programmatic electoral base begin to rely on patron-client networks to retain their positions. "As it becomes increasingly costly to connect with groups of voters, candidates prefer to organize smaller subsets of the electorate and target them with larger transfers."

The pathology of clientelism then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups. Private gain may abound in large-scale government enterprise that is non-transparent to the public and that resists either monitoring or accountability. The extreme form is the earmark, which does not even require formal identification of its existence.

Unfortunately, any attempt to act on the danger of clientelism runs into the inescapable problem that government is a blur of the high-minded and the petty, and that it is often difficult to distinguish between rewards to constituents and matters of policy and principle. The American recognition of

the risk of legislation in the private interest dates at least to *The Federalist No. 10,* in which Madison identified as a central problem of republican governance the ability to resist "a number of citizens… who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The Framers appear to have conceptualized corruption as a derogation of the public trust more than as the narrow opportunity for surreptitious gain. But the distinction between public and private regarding legislation is difficult, and efforts to try to review legislation on the basis of its public-regarding character have largely failed. The debate over whether political initiative is dominated by public or private purposes proves to be too great an invitation to reargue the politics of legislation that any particular group finds objectionable.

Despite the difficulty in drawing clear substantive lines, there are concerns that our political process introduces pathways for private motivations to capture the use of governmental processes — and that these may not be pathways but rather avenues, boulevards, perhaps express lanes. Clientelist pressures erode public institutions with incentives to increase the size, complexity, and non-transparency of governmental decisionmaking, with the corresponding impetus simply to increase the relative size of the public sector, often beyond the limits of what the national economy can tolerate. Political accountability through a robust and competitive political system may check some pressures toward the excessive rewarding of private constituencies through public authority. But, if unchecked, clientelism breeds the perception of "systemic corruption, which cripples institutional trust and public confidence in the political system" — a parallel to the Court's concern in *Buckley* over the detrimental effects of the appearance of quid pro quo corruption.

No doubt money is at the root of the problem, but the problem is not limited to the wealthy or the corporations or even the institutional actors such as public sector unions or Indian tribes. Like the overbroad prohibition on corporate independent expenditures that proved problematic in *Citizens United,* simply trying to root out money in undifferentiated fashion miscasts the problem of the compromise of public authority. More closely hewn, the issue is not money as such but the potential private capture of the powers of the state. The Supreme Court acknowledged this concern a year prior in *Caperton v. A. T. Massey Coal Co.,* in which the Court ruled unconstitutional a state judge sitting in judgment on a case involving a major campaign supporter. *Caperton* suggests a concern for the ability to use privileged positions in the democratic process to gain control over the exercise of governmental authority. Under this view, the problem is not the ability to deploy exceptional resources in election campaigns, but the incentives operating on governmental officials to bend their official functions to accommodate discrete constituencies.

The problem is not the ability to deploy exceptional resources in election campaigns, but the incentives operating on governmental officials to bend their official functions to accommodate discrete constituencies.

The risk of private-regarding legislation is heightened when groups are able to bypass the normal process of interest group bargaining in favor of securing benefits for groups with special holds on government. Ordinary democratic politics may be a messy and imprecise construct, but the contrast is to groups that have dual mechanisms of influence over political outcomes — that is,

claims both within and outside of the political process. For example, several decades ago Professors Harry H. Wellington and Ralph K. Winter found public sector unions to possess such double claims of interest, thus exercising "a disproportionate share of effective power in the process of decision."

If we look beyond campaign finance, there has been some recognition of clientelist-style double claims on the political process, particularly with regard to government contractors. Beginning with a 1940 amendment to the Hatch Act, all federal government contractors were prohibited from "mak[ing] any contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use," during the period of contract negotiation or performance. That prohibition does not turn on the form of organization as a corporation, a partnership, or an individual contractor — indeed, the Tillman Act has prohibited corporate contributions to candidates for federal office since 1907 — but rather on the same idea that contractors engage the decision making processes of elected officials in dual fashion. While this provision has never been in the Supreme Court, parallel provisions of the Hatch Act have been twice upheld against constitutional challenge.

The prohibition on contractor contributions in federal elections continues in force and was basically integrated into the 1974 election reforms of the Federal Election Campaign Act (FECA), though somewhat weakened by expressly allowing contractors to make contributions to political activities through political action committees. In its current form, federal election law not only prohibits federal contractors from making contributions for any purpose related to a federal election, but also makes it illegal for anyone to "knowingly solicit" such contributions. Whatever their limitations, the restrictions on contractor contributions attempt to insulate politics from the demands of those who would use public power for private aims. As with the arguments advanced by Wellington and Winter in the context of public employee strikes, the basic intuition is that claims on the decisions of political officeholders should be played out in the political process, and that legal means must be sought to shut down the mechanisms that induce politicians to contort the outputs of the political process for the gain of the few at the expense of the many.

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While *Citizens United* gave new vitality to the fundamental *Buckley* divide between contributions and expenditures, it did not exhaust the possible range of concerns occasioned by how money is utilized. When abstracted from the broader rhetoric on the role of corporations, the majority opinion in *Citizens United* is actually less sweeping than might appear. The Court is concerned only with the inputs to the electoral process, not the outputs of the ensuing legislative process. Thus, in overturning *Austin*, Justice Kennedy concluded that *Buckley* categorically prohibited regulations aimed at "equalizing the relative ability of individuals and groups to influence the *outcome* of elections." Similarly, Justice Kennedy distinguishes *Caperton* as distinctly about post-election conduct, not campaign speech: "*Caperton's*

holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."

A tightly drawn prohibition that is premised on the effects of "pay-to-play" on public policy could survive as a constitutional first step, and might even be welcomed by the subjects of the regulation as a protection against being shaken down for campaign expenditures by public officials, in much the same way that the prohibition on federal employee contributions was designed to avoid coerced solicitations of money. Likewise, the protections offered by the Hatch Act amendments may be broadened by prohibiting contractors from engaging in expenditures through political action committees (PACs), political groups operating under Section 527 of the tax code, or bundling efforts without running afoul of the underlying rationale in *Citizens United*. Admittedly, these are partial steps. Such measures would be only a partial inroad into the accompanying world of lobbying and the sector of the economy that does not face incumbent state officials as contracting parties but as subjects of regulation. Nonetheless, such approaches do offer alternative insights into the problem of money, not so much in terms of election outcomes but in terms of public policy. Whether an incumbent Congress would welcome such legislation is another matter.

The Framers' War On Corruption

The drafters of the Constitution cared deeply about combating corruption. In fact, it was a guiding principle for the design of our institutions. To be true to the framers' original intent, courts must allow laws to combat systematic corruption — including strong campaign finance regulations.

Zephyr Teachout, Fordham Law School

A key feature of Justice Kennedy's decision in *Citizens United* was that *Austin* was an outlier case in the law defining the scope of corruption. He describes the cases as pre-*Austin* and post-*Austin*, and emphasizes the singularity of the opinion. He describes *Austin* as uniquely giving weight to the governmental interest in prohibiting aggregated wealth from unduly influencing politics. I have argued elsewhere that corruption is a fundamental constitutional concern that is given far too little deference by the modern Supreme Court. Corruption was the Founders' paramount concern when drafting the Constitution. By the terms of the debate in Philadelphia, and by the terms the Founders used to describe the purpose in creating the Constitution, limiting corruption was the most important goal of the convention. Corruption is not only a serious concern, it is a constitutional concern. The Constitution was drafted with the purpose of limiting corruption in the new republic; it was the paramount concern that drove hundreds of drafting decisions in the summer the Constitution was written. It was, according to various accounts by Founders as diverse as James Madison, Alexander Hamilton, George Washington, and Benjamin Franklin, the driving motivation behind the Constitution's final form. Moreover, their understanding of corruption was not cash-for-votes, but conduct that used public channels for private gain.

Justice Kennedy concluded that improper influence is not corruption, and that the appearance of influence would not lead to perceptions of corruption. This view is in direct conflict with decades of 19th century precedent.

I argued that the judicial branch ought to recognize an "anti-corruption" principle, akin to federalism or the separation of powers, that would guide constitutional decision making. My previous argument ended when the Constitutional Convention ended. However, if one extends the historical inquiry to the 19th century, at least some courts understood corruption far more broadly than Justice Kennedy. Corruption, under this line of cases, referred to personal failures that posed structural threats to democracy, often caused by inappropriate dependencies.

There are hundreds of examples of courts throughout the 19th century assuming a broader definition of corruption, one that encompasses undue influence. High contingent fees were described as "bribes," because "the use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector." Courts refused to enforce contracts that would "tend[] to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty." "The law in its wisdom we think has a tendency to close the door of temptation by refusing to recognize contracts which in any way hamper the faithful discharge of the trust which the railroad company owes to the people in the location of public conveniences."

Justice Kennedy concluded that improper influence is not corruption, and that the appearance of influence would not lead to perceptions of corruption; this view is in direct conflict with decades of 19th century precedent, as well as *Austin*. In refusing to enforce a contract in 1920, the Nevada Supreme Court explicitly held that a contract need not be illegal, and the actors involved need not have a corrupt motive, if the overall effect of similar contracts would be to allow people to "assum[e] a position where selfish motives may impel them to sacrifice the public good to private benefit." Kennedy concludes that only direct "quid pro quo" is corrupt, whereas these courts routinely concluded that quid pro quo was not required in each instance, but the court recognized the "corrupting tendencies of such contracts." They recognized that the definition was not pat or simple, but that the lack of simplicity did not relieve courts of the responsibility of trying to define it.

Courts thus had little difficulty in talking about corruption in a way that included almost any effort to use money to put private interests before public interests in what they perceived to be fundamentally public-facing decisions.

If one peels back history and looks at cases from the 19th century, *Austin* feels more mainstream, and *Buckley*'s quid pro quo reference (along with *Citizens United*), looks more like an outlier.

Citizens United and Equality Forgotten

Has the Supreme Court turned its back on political equality?

Mark C. Alexander, Seton Hall University Law School

Starting with the landmark 1976 *Buckley v. Valeo* decision, the U.S. Supreme Court has analyzed efforts to regulate money in politics under a First Amendment framework. Spending has been equated with speech in the political world, and the individual right to speak — and to spend money to do so — has enjoyed the utmost constitutional protection. That tradition has carried over the past 30 plus years, including and through last term's *Citizens United v. Federal Election Commission* decision, in which the Court struck down restrictions on corporate political spending. While the Court is right to exalt First Amendment values — central to our nation's governmental and political systems — its analysis has paid scant attention to broader, collective concerns about equality.

As this chapter explores in full, there is a serious democratic tension when one constitutional value (speech) gets promoted over another (equality). In our modern fundraising machinery, as candidates and elected officials raise money from a small set of elite donors, they are disproportionately responsive to the few, not to the many, and not to their constituents. When this occurs, elected officials cannot do their jobs as well, the few have concentrated power, the many have diluted power, and political equality is trampled. In this context, individual free speech interests effectively trump equality interests. And, as equality is forgotten, the American people and our political and governmental systems suffer.

Dejudicializing Campaign Finance Law

We take for granted that our campaign laws will be rewritten by judges. It wasn't always that way.

Richard Briffault, Columbia Law School

The U.S. Supreme Court dominates American campaign finance law. *Citizens United v. Federal Election Commission* dramatically illustrates this basic truth, but *Citizens United* is nothing new. The Court has been the pre-eminent force in shaping and constraining our campaign finance laws since *Buckley v. Valeo* in 1976, and the Court's role as arbiter of what rules may or may not be enforced only continues to grow. The president of the United States can wag his finger at the Court during the State of the Union Address and denounce its *Citizens United* ruling to the justices' faces on national television, but even he does not propose to overturn any element of their decision. Instead, the president calls only for new laws in those areas where the Court indicated some regulation is permissible. According to public opinion polls, as much as 80 percent of the population opposes the

Court's holding that corporations and unions have an unlimited right to spend money in elections. But the public is, in practice, powerless to have the law changed.

The Court should step back and be more deferential to the decisions of the elected representatives or of the people themselves.

The central features of American campaign finance law — its rules, its goals, and its scope — are the product of the Court's actions and opinions. To be sure, our campaign finance laws have been adopted by our elected representatives in Congress or state and local legislatures, or by the people acting through state or local voter initiatives. But the Court consistently — and, particularly during the time of the Roberts Court, aggressively — has had the last word in deciding which laws may be allowed to take effect.

Court determination of campaign finance law might not be a bad thing if the Court's campaign finance jurisprudence were (i) stable and coherent, (ii) clearly determined by the text and values of the Constitution, or (iii) functionally necessary to protect democratic self-government. Unfortunately, our Court-determined campaign finance law is none of these things. The Court's campaign finance jurisprudence is a mess, marked by doctrinal zigzags, anomalous distinctions, unworkable rules, and illogical results. The law governing corporate spending may be the poster child for the instability of campaign finance law — and the complexity such instability has bred — but it is far from unique. The Court has careened back and forth on the definition of the scope of campaign-related speech, and on the nature of the "corruption" necessary to justify campaign finance regulation. Moreover, the centerpiece of the Court's approach to campaign finance law — the contribution/expenditure distinction — has been difficult to apply and has given rise to some of the worst features of our current campaign finance system. From an internal perspective, after almost 35 years, the Court has failed to develop a consistent and workable body of doctrine.

Nor is the Court's jurisprudence clearly required by the text, values, or structure of the Constitution. The Constitution does not speak to campaign financing, or at least it does not speak clearly or univocally. The Constitution brings multiple concerns to bear in addressing campaign financing — including the right to vote, freedom of speech and association, equality, and self-government. These values can come into conflict — and typically they do — in the making of campaign finance policy. The Constitution provides no standard for resolving those conflicts. The Court has no greater legitimacy than the other branches of government in weighing and balancing the political values that go into campaign finance law. Moreover, it surely has much less expertise than the other branches of government in understanding how campaign finance works in practice and how legal rules can shape, or distort, the flow of money in elections.

Finally, there is no good functional argument for the judicialization of campaign finance regulation. In theory, there is some danger that elected

officials will misuse campaign finance law to entrench themselves in office. But there is actually little evidence that campaign finance regulation has been used to favor incumbents — or that it favors incumbents more than an absence of regulation. Judicialization of campaign finance law is no more functionally necessary than it is constitutionally required.

Campaign finance law ought to be, to a considerable degree, dejudicialized — not deconstitutionalized, but dejudicialized. Campaign finance law inevitably is shaped by and reflective of constitutional values, and like election law more generally it is constitutive of our polity. But the Court has failed to develop a coherent and workable doctrine, fully reflective of the relevant constitutional norms, that justifies the aggressive and constraining role it has assumed. The Court should step back and be more deferential to the decisions of elected representatives or of the people themselves. This does not mean judicial abandonment of the field. The Court still needs to police against laws that would discriminate against minorities and political outsiders or that would entrench incumbent officeholders or parties. That is the path taken by the courts in Canada, and by the European Court of Human Rights, of marking the outer limits of legislative regulation but not imposing tight prescriptions on political choices. But short of these extreme cases, the Court should let the democratic process play the leading role in determining how democratic elections ought to be financed. ■

Judging: When To Hold, When To Fold

Hon. Diane P. Wood

In the annual Brennan Center Jorde Symposium, delivered at Berkeley Law School, Judge Diane P. Wood, of the United States Court of Appeals for the Seventh Circuit, outlined the reasons that judges write separately from colleagues. She notes that at times, a careful concurrence or a powerful dissent can wield greater influence than quiet assent to a majority opinion.

In *The History of the World Part I,* King Louis XVI (played by Mel Brooks) reflects several times that "It's good to be the king." What the king wants, he gets; he has only to say the word. I sometimes think that this is what it is like to be a district court judge, solo in the courtroom, mistress of all she surveys. True, the Court of Appeals is lurking around somewhere in the background, but let's be realistic: only about 15 percent of cases are appealed, and the district court is affirmed in most of them. The judges on the federal courts of appeals, in contrast, like their colleagues on virtually all other appellate courts in the United States, do almost all of their work through multi-member panels. By statute, those panels normally consist of three judges, unless a majority of the judges in regular active service vote to hear the case *en banc.* A Court of Appeals judge thus cannot hope to get anything done without persuading at least one fellow judge to agree with her. At the *en banc* level, or at the Supreme Court, the problem is similar, but more complex. The Seventh Circuit, on which I sit, has 11 active judges when it is at full strength; the Ninth Circuit is authorized for 29 active judges; and the federal Supreme Court of course has nine justices. Given the challenging nature of many of the cases that come before these tribunals, it is no surprise that answers are not obvious and that people of good faith do not always agree on the rationale for a certain outcome, or even on the outcome itself.

I am well aware that I am not the first person to consider the ramifications of these uncontestable truths. My old boss, Justice Harry A. Blackmun, reflected on them when he administered the oath of office to me up in Spider Lake, Wisconsin, many years ago. Here is what he had to say:

> Even though you will sit primarily with two other judges, as you sit in groups of three on the federal appellate bench, your vote will essentially be yours, and not theirs. There will be moments

Seventh Circuit Judge Diane P. Wood delivered the fall Thomas M. Jorde Symposium, held on October 25, 2011, at the University of California Berkeley Boalt Hall School of Law. The remarks will appear in 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.

> of a feeling of reward and satisfaction, and moments with a feeling of disappointment, and certainly moments of loneliness, despite the fact that you have a multiple judge court. Because that vote is yours, and only you can make it. Don't let it discourage you.

In essence, Justice Blackmun was describing the "hold 'em" strategy (with apologies to Kenny Rogers and his Gambler). Federal judges are surrounded with robust protections for independence — tenure during "good behavior" and salary protection, to name the most prominent of them — and with that independence comes the obligation to vote in every case according to one's best judgment. If that vote does not coincide with the votes of the other members of the panel or court, then the judge will sometimes believe that the only defensible option is to stand firm and, if necessary, to dissent.

As the Gambler suggests, however, "holding 'em" is not always the right strategy — not in poker, and not in courts. Sometimes, as the song suggests, the best thing to do is to acquiesce in the others' views and save the disagreement for another day. That is what I'm calling the "fold 'em" option. Holding and folding do not, however, exhaust the options for a judge, even if they may for a card player. An appellate judge often has an opportunity (to push the card metaphor about as far as it will go) to reshuffle the deck: The case that seemed to be about constitutional rights might be recast as one about how to present a complaint under Federal Rule of Civil Procedure 12(b)(6); the case that looked like an environmental showdown might instead be about which litigants have standing to sue under Article III of the Constitution; the case that initially presented a question about the rights of trespassers might be transformed into one about judicial federalism. The "shuffle" cases are the ones that may call for an opinion concurring in the judgment.

When to hold, when to fold, and when to shuffle are questions that many — including, notably, Justice Brennan — have addressed. Most of the attention has been devoted to the particular problem of dissent in the United States Supreme Court. Some of the observations made about the Court will apply with equal force to all courts of last resort as well as to intermediate appellate courts. But (as in the rest of life) one size does not really fit all — at least not very comfortably. Because I sit on one of those intermediate appellate courts and have had an opportunity to observe its practices for more than 16 years, my ultimate focus in today's lecture will be on separate opinions at that level. From a certain perspective, the decisions of the courts of appeals are almost as final as those of the Supreme Court — in the Seventh Circuit, for instance, 3,364 cases were terminated over the 12-month period ending June 30, 2010; the Supreme Court reviewed *five* cases from the Seventh Circuit during October Term 2010. That sounds as if decisions from the courts of appeals enjoy considerable finality. But there is a world of difference between "almost final" and "absolutely final," and that distinction has a profound effect on the considerations that impel judges on intermediate and final courts to write separately.

•••

Let us return at this point to the fundamental question: What should a judge do when she disagrees with her colleagues on the bench? Should the potential dissenter always "fold"? Should the potential dissenter adamantly refuse to meet others halfway? Perhaps there is no singular answer to these questions, based on assumed criteria like a judge's aversion to the extra work that a separate opinion entails, or her desire to get along with her colleagues, or the purity of her intentions. Chief Justice Roberts is not wrong, however, to worry about the effect on the legal system of an excessive amount of separate writing, especially when the court of last resort is unable to muster a single coherent, binding ruling. One wonders if the large number of separate opinions, especially at the Supreme Court, has come about in part because the courts, like so many other institutions in our society, have lost the knack of compromise. Might there be lessons from history to be learned, when one examines how the Court finally surmounted earlier deep splits, such as those in the fields of obscenity and the Establishment Clause?

Perhaps there should be a norm under which every judge or justice should stop and consider under what ground a contemplated separate opinion can be justified. Just as the courts of appeals require advocates to include a section in their brief addressing the standard of review, maybe concurring and dissenting opinions ought to touch briefly on both the normative and instrumental purpose the writer hopes to achieve — an address to a higher court, a plea to the legislature or an agency, a call for a constitutional amendment or the overruling of a constitutional case, or even just a simple plea to get the facts and process right. These are all worthy goals. If separate writing were suppressed — unlikely though that is at this late date in our history — it seems likely that we would lose more than we would gain. This is particularly true for separate writing at the court of appeals level; it is entirely possible that there is too little dissenting and concurring by the circuit judges, while there may be too much of a good thing in the courts of last resort.

Conflicts within the circuits are one proxy for the kind of case that is worth the Court's attention. But so too are well-reasoned separate opinions within one court.

If the balance is indeed out of whack, then we need to ask why. The culprit that comes most immediately to mind is the size and nature of the docket at each of the levels we have been considering. Although the numbers of petitions for *certiorari* at the Supreme Court hovers around 8,000 per year, the justices hand down decisions on the merits in only about 1 percent of those cases. Spreading 80-some cases among nine justices yields a manageable workload, even factoring in the decision to write separately from time to time. Each justice would need to file a separate opinion two-thirds of the time to reach the mean number of majority opinions that each circuit judge writes.

It is worth noting that the courts of appeals for many years now have been slipping quietly toward a system that could be described as *certiorari*-lite, under which only the most challenging cases receive plenary treatment through oral argument. Circuits groaning under the weight of heavy caseloads and unfilled judgeships ration oral argument time tightly, and their publication policies are even more parsimonious. Even in the Seventh Circuit, which has the highest percentage of oral argument in the country, only 49.5 percent of the appeals were terminated after oral hearing. At the low end, in the Fourth Circuit only 12.8 percent of appeals were concluded after oral argument. This may be undermining the nominally mandatory nature of the intermediate level's jurisdiction. True, litigants still get an answer from the circuit courts, but deferential standards of review and abbreviated procedures have taken a toll on that part of the appellate process.

As a systemic matter, this is cause for concern, if one believes in the theory that the circuit judges are sending signals to the Supreme Court through the cases in which they write separately. It is just as difficult for the justices to weed through 8,000-odd filings in depth as it is for the courts of appeals to cope with large caseloads. Conflicts in the circuits, as Supreme Court Rule 10 recognizes, are one proxy for the kind of case that is worth the Court's attention, but so too are well-reasoned separate opinions within one court. In the final analysis, therefore, we can return to the Gambler,

or, if you prefer, to Justice Blackmun. While there are times when acquiescing to one's colleagues is the correct thing to do, there are just as surely situations in which expressing a different view is called for. The trick is to know which to do at what times. Awareness of what we are actually doing, and to what end, will help judges use their prerogative to write separately in a more intelligent way. Even more importantly, it will help all who are affected by the decisions judges make to understand the dynamics of judicial decisionmaking and how our quasi-common-law system continues to evolve. ■

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