

The CLOUGH JOURNAL of CONSTITUTIONAL DEMOCRACY

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The **CLOUGH JOURNAL**
of **CONSTITUTIONAL DEMOCRACY**

The mission of the Clough Journal of Constitutional Democracy is to provide a forum for interdisciplinary reflection on the promise and problems of constitutional democracy both domestically and internationally.

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LETTER FROM THE EDITOR

This second issue of The Clough Journal of Constitutional Democracy comes at a time when our world is rife with change. With the recent revolutions in Egypt, Libya, Tunisia, as well as protests in Algeria, Jordan, Oman, and Yemen, the “Arab Spring” is well underway. There could be no better time to bring to light a frank and open discussion of constitutional democracy as many of these nations are in the midst of struggles to throw off dictatorial regimes and set about creating their own versions of constitutional democracy.

With this in mind, consider the second issue of the Clough Journal of Constitutional Democracy. These pages contain articles that focus on varying aspects of constitutional democracy in nations all around the globe. From a discussion of the factors that led to the revolution in Egypt, to an article on free trade agreements in South America, to a discussion of social benefits in the European Union, this issue contains discussion of some of the most pertinent aspects of constitutional democracy of our day.

The division of the journal into four sections serves to guide the reader towards stories of particular interest. Our domestic democracy section focuses on the major issues of constitutional democracy within our borders in America. The historical democracy section gives insight into the current state of constitutional democracy both domestically and abroad by embarking upon a

thorough investigation of major past issues of constitutional democracy. The comparative and developing democracy sections address the differences in constitutional democracies around the world.

This being our first issue in print, the editorial board has decided to considerably update and improve the layout of the issue. While the look may be different than our first issue, which premiered online last year, the strong content and commitment to seeking out new and interesting viewpoints in the realm of constitutional democracy remains the same. Our first issue, and all subsequent issues, will be found online at www.bc.edu/clubs/clough. Please flip through these pages and read about how constitutional democracy is impacting the lives of so many people throughout the world.

David Kete
Editor-in-Chief

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The Supreme Court and the European Court of Justice

CONSTRUCTIVE TENSION VERSUS
DISPASSIONATE CERTAINTY

By Douglass Hasset

is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"² The partiality of this question was subtle, but present. Peckham presented both legal principles in one question. The position favoring the state's right to intervene was expressed in only fifteen out of the total sixty words; leaving the remaining seventy-five percent of the question to describe the alternative position—the end that Peckham was moving towards in his opinion. A closer look at the expression of each alternative reveals a stark contrast in emphasis behind each position. On the one hand, the court could have convicted *Lochner*, reasoning that the law against a 60-hour workweek was an appropriate exercise of police power or, on the other hand, the court could have ruled in favor of *Lochner*, viewing this law as an arbitrary interference of one's personal liberty to enter into a contract.

Without the dissenting opinion of Justice Holmes, the opposition would have lost much more than a chance at expressing the alternative argument with a sincere tone. Holmes' dissent highlighted legal dimensions that Peckham did not consider. Peckham invested much into his argument that the occupation of a baker does not provide appropriate grounds for the state to intervene in the name of social or economic welfare. Holmes' dissent claimed that it is not the position of the court to make that decision, because neither the Constitution nor its amendments enact a particular economic theory. "[A constitution] is made for people of fundamentally differing views, and the accident of our

finding certain opinion natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."³ Holmes' dissent put forth a strong legal argument—reference to which cannot be found in the majority opinion—as to why the decision should have gone the other way.

Though in 1905, the thinking behind Justice Holmes' dissent was not supported by a majority in *Lochner v. New York* (nor for the next three decades during what would come to be known as the "Lochner Era") it was eventually employed in the case *West Coast Hotel Co. v. Parrish* 1937. In *Parrish*, Chief Justice Hughes argued for the majority opinion that the Constitution allows the state to implement a minimum wage for women. In doing so, Hughes called upon the logic of Holmes' dissent in *Lochner* and validated state economic regulation. Though language from Holmes' dissent was not explicitly referenced in the *Parrish* case, his rationale is largely considered to be the basis for legal thought on economic issues in the post-*Lochner* era.

Justice Blackmun's famous writing in *Calins v. Collins* regarding capital punishment is another example that highlights the power of a dissent. Blackmun illustrated a contradiction in objectives, noting his optimism for a day when the Court "will conclude that the effort to eliminate arbitrariness while preserving fairness 'in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether."⁴ By indicating his hope for an eventual overturn of the court's decision allowing for capital punishment, Justice Blackmun acknowledged judicial system's ability to change over time. Such an acknowledgement is

not considered blasphemous and does not hinder the seriousness with which the Court's decisions should be taken, but it indicates the constructive tension fostered by the Supreme Court

In *Furman v. Georgia*, the problem of inconsistency provided the main impetus for imposing a *de facto* moratorium on the death penalty. Justice Stewart argued that a penalty as unique as capital punishment could not be effective when “so wantonly and so freakishly imposed.”⁵ Four years later, *Gregg v. Georgia* marked the first of many cases to come that overturned *Furman's de facto* moratorium on capital punishment by providing a structure to be used when considering the death penalty. *Gregg* put forth two guidelines which were designed to yield a fair imposition of the death penalty. The first is that objective criteria would be used in a suspect's evaluation to promote consistency and the second is that the court would consider the dignity and individuality of the defendant through discretionary consideration.⁶ The joint majority opinions of Justices Stewart, Powell and Stevens in *Gregg* seem to put forth an efficient procedure to ensure the fair implementation of the death penalty.

After almost twenty years of observing the employment of the system, Blackmun, in his *Callins v. Collins* dissent, managed to illuminate the inherent inconsistency of the aims sought by majority decisions such as *Gregg*. Citing examples of cases since *Furman*, Blackmun showed the failure of the Court to assuage the various concerns surrounding a fair implementation of the death penalty. His analysis of recent cases led him to conclude that “any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that

the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense.”⁷ While Blackmun's sentiments do not represent the majority they provide a critical and necessary analysis of what many consider to be the failure of capital punishment. Blackmun's writing shows how the dissent can be used to provide constructive criticism, an alternative rationale, and hope for future change.

Just as the writing of a dissenting opinion helps to comprehensively explain the subtle arguments surrounding the law, the absence of dissenting opinions in unanimous decisions reinforces the unequivocal nature of certain legal principles. The final paragraph of the unanimous *Brown v. Board of Education* decision begins, “we conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”⁸ Though non-unanimous majorities often phrase statements using “we,” the word's full meaning can not be realized in these cases. The collective pronoun “we” is most genuinely expressed in unanimous decisions like *Brown* where it refers to all nine positions of the justices. The opportunity of justices to dissent provides for a more incontrovertible tone when the opportunity is not taken. If dissents were not a part of the United States' judicial system there would be no way to differentiate the unequivocal denunciation of segregation in schools seen in *Brown* from the hotly debated and still controversial 5-4 decision of *Bush v. Gore*.

The role of the European Court of Justice in the judicial systems across the European Union differs greatly from that role played by the Supreme Court in the United States. The legal authority of the ECJ lies most commonly

in the form of preliminary rulings. As set forth by Article 267 of the Treaty on the Functioning of the European Union, the ECJ has jurisdiction to answer questions regarding interpretation of treaties, acts, bodies, offices, or agencies of the Union posed by national tribunals if the decision is deemed necessary to enable the national court to give judgment or if the case pending is before a tribunal against whose decision there is no judicial remedy under national law.⁹ While the definition and boundaries of this jurisdiction are the subjects of much case law and scholarly analysis, the purpose of the preliminary ruling can be safely characterized as an impartial and veritable reference. The preliminary reference is intended to “promote legal certainty and unity.”¹⁰ Thus it seems that unlike the United States Supreme Court, the ECJ does not seek to encapsulate the great subjectivity of the law but instead considers itself to be a source of dispassionate certainty.

In *Cassis de Dijon*, the German national court asked the ECJ to rule on the legitimacy of the enforcement of an article that required spirits to have a minimum of thirty-two percent alcohol content as this German rule had prevented the sale of a particular French liqueur within Germany’s market. The ECJ found that such a restriction would constitute a violation of the free-movement of goods between member states in that it would have an effect equivalent to a quantitative restriction on imports. In answering the German Court’s question as to the legitimacy of the minimum alcohol requirement, the ECJ’s response took on the following structure: “the concept of ‘measures having an effect equivalent to quantitative restrictions on imports’ contained in Article 30 of the Treaty is to be understood to mean that...”¹¹ [*emphasis added*]. Though the de-

cision contained refutation of the arguments set forth by the German national court, the decision itself provides only the one understanding respected by the ECJ. The form of the court’s response allows for no qualification or ambiguity.

Yet in 1993 during the Criminal Proceedings against B. Keck and D. Mithouard the interpretation upon which the *Cassis de Dijon* case was decided did require qualification. The proceedings read “...the Court considers it necessary to re-examine and clarify its case law on [Article 30].”¹² In *Keck*, the Court deemed that a state’s prohibition on resale at a loss did *not* constitute an equivalent effect to quantitative restriction. The Court, acknowledged the precedent set by *Cassis de Dijon*—that such obstacles to the free movement of goods did indeed constitute an equivalent effect to quantitative restriction—and then proceeded to rule in contrast to that case law. The ECJ’s response to the question in *Keck* was forced to take on the following form: “by contrast, contrary to what has preciously been decided...”¹³

The contradictory decisions of *Cassis de Dijon* and *Keck*¹⁴ exhibit the difficulty, if not the impossibility, of interpreting the law in absolutely certain terms. The call for a reexamination and clarification of case law came, according to the ECJ, in light of an increasing tendency of traders to appeal to Article 30 as a means of challenging rules that they felt limited their commercial freedom.¹⁵ This, obviously, was not something that the Court could have anticipated fourteen years earlier when *Cassis de Dijon* was decided. Such is the evolution of the law; its nature changes circumstantially. It seems, in this example at least, that the ECJ’s structure of delivering unqualified certainties as decisions eventually proves inhibitive. While the judicial system of the United

States would have allowed for dissenting opinions to mark the subtle ambiguities of the article in question, the ECJ's framework requires that it more explicitly contradict itself if it is to allow for progressive interpretation.

The Charter of Fundamental Rights of the European Union keeps with the aim of the ECJ to deliver dispassionate certainties. Though the Treaty of Lisbon only refers to the charter and does not include the actual text, the principle of adhering to a codified list of fundamental rights, when a member state is implementing European Union law, is noteworthy. It seems overly ambitious and dangerous, given the structure of the ECJ, for the European Union to sign into a treaty a list of fundamental human rights that are to be respected as legally binding. Though The Bill of Rights attached to the United States Constitution may appear similar in title, its use via the judicial system of the Supreme Court renders it principally different. The Bill of Rights was set forth at virtually the same time as the Constitution and was thus in place before the birth of a practicing judicial system. The U.S. court system has since had over two hundred years to expound these founding principles by subjecting them to the incessant legal tension that the U.S. judiciary strives to foster. The Charter of Fundamental Rights, on the other hand, has acquired legitimacy more than fifty years after the judicial system that enforces it was established. The implementation of the Charter of Fundamental Rights, given the ECJ's tradition of voicing the answers to legal questions as categorical certainties, seems to risk compromising the subjectivity of justice to an unprecedented degree.

The structure of the United States judicial system, as observed in Supreme Court cases, al-

lows for a constructive tension. Through the use of the dissent, the judicial opinions handed down from the bench provide a comprehensive expression of the legal decision, its reasoning and its shortcomings. The subjectivity of the law is not allowed such a conducive environment by the framework of the European Court of Justice decisions. The ECJ, instead, decides legal questions as if it is an infallible source of legal reference. The ECJ's tradition of rendering decisions as dispassionate certainties falls short of fostering the subjectivity of the law, which is just where the U.S. Supreme Court's promotion of a constructive tension triumphs. *

ENDNOTES

- 1 *Marbury v. Madison*.
- 2 *Lochner v. New York*. Supreme Court. 1905.
- 3 Ibid.
- 4 *Callins v. Collins*
- 5 *Furman v. Georgia*
- 6 *Gregg v. Georgia*
- 7 *Callins v. Collins*
- 8 *Brown v. Board of Education*
- 9 Coursepack p.80
- 10 Coursepack p.199
- 11 *Cassis de Dijon*.
- 12 *Criminal Proceedings Against: B. Keck and D. Mithouard*.
- 13 Ibid.
- 14 To refer to *Cassis de Dijon* and *Keck* as "contradictory decisions" is not to say that they are absolutely opposed to one another. I understand that there are subtle differences between the two cases, but this essay includes an exploration of the structure of the ECJ system not the particularities of its decisions and so I have left them out of the argument.
- 15 Ibid.

Social Policy and Its Affect on the Integration of the European Union

HOW IT BOTH PUSHES AND PULLS ON THE
LEVEL OF INTEGRATION OF THE VARIOUS
STATES WITHIN THE EU

By James Sasso

The European Union is a community both trying to increase and limit the centralization of power with the European Committee (EC) in Brussels. On the one hand, it has supranational policies and regulations, mainly focused on economic concerns, which supersede the power of the individual member nations that constitute the Union. At the same time, the member states are left to decide upon and regulate social policies, which remain—at least technically—sovereign issues for the EU countries. In theory this system, in which economic policies are controlled by the supranational body while social policies continue to be enacted by the member states, would work wonderfully. The economy would flourish with international cooperation and regulations meant to increase trade, while each nation would be left to decide the politically sensitive issues of social policy where it is often difficult to find a common ground in the multicultural realm of the EU. In essence, the governmental system

of “non-political” management of the economy by the European Union while allowing the extremely political social policy decisions to reside with national governments would enable the individual countries to retain their sovereignty despite surrendering most of the ability to manage themselves economically.

In reality, however, the integration of the European economies has opened up the social borders of the European nations through the basic community principle of “freedom of movement” of goods and services, which permits social policies and services to cross international boundaries as if they were economic commodities. Through decisions made by the European Court of Justice (ECJ) that have extended the “freedom of movement” standard from only economic matters to social policy matters, the individual nations appear to be slowly losing sovereignty to the supranational body of the European Union: they are all forced to recognize a hybrid, convergent social policy that is dictated either by some other EU nation or the EC, which undoubtedly causes conflict between the nations’ individual interests and the supranational concept of the EU. Social policies are still matters of national sovereignty because the EC does not directly mandate the form of the member states’ social system. Nonetheless the European Union claims to enjoy a unique social model in the world and even makes frequent references to a European Social Model (ESM). The rhetoric of the Union, then, seems to indicate a desire for further integration within the community toward a more federalist design with power centralized in the European Committee. Also, like economic policy, social policy has become a force that affects the degree to which the states

become integrated into the Union. It can either pull the countries toward further harmonization and centralized rule in Brussels, or it can push the countries apart as the member states react negatively to their depleting national sovereignty. But in the end, the intermingling of the various social policies within the EU, combined with the EU's own initiative to further converge the social policies of the member states, will indeed advance the integration of the Union and drive countries toward harmonization.

Despite the contemporary social policy influences of the EU, one cannot claim that the initial motive for the creation of the European Union had much to do with controlling the social policies of each member state. Rather, it was created to improve the economic situation of Europe after the devastation caused by WWII. The countries of Europe that participated in the initial 'union' desired to lower trade and commerce barriers among each other as they struggled to crawl out of the economic hole in which they had found themselves at the end of the war. The first treaties, starting at Paris in 1951, were purely economic in nature and were meant to regulate the trade and use of coal and steel. This was followed by the creation of the European Economic Policy in 1957 at Rome and the Euratom agreement concerning economic development in 1957.

This economic development would be achieved through cooperation; the "destruction of borders" between the nations would allow the free movement of goods and services across the borders of the member states, which the founders hoped would encourage trade. However, although the initial motivation for the European Union was decidedly economic, the founders did

not necessarily ignore the realm of social policy. Article 117 of the Treaty of Rome gives credence to the idea that social needs hold importance in the formation of an European Community, at least because social improvement is thought to increase economic output.¹ As such, "a form of harmonization was envisaged in 1957 including social conditions as well as systems and emerging from some sort of market-driven convergence."² This community would arise from economic factors but develop into one with more than just a universal economic policy. At some point, whether due to economic integration or the need to improve economically, the countries would have to come to some sort of 'social policy agreement' to ensure further economic success. Even though the idea of common social policy had been planted, the treaties left the regulation and forming of social policies up to the nation states. This has resulted in a dual government system that requires subordination to the EU economically, but leaves the formation of social policies to the member states, all while hoping that, some day, a common social policy might improve economic conditions.

Still, "precisely what distinguishes the EU as a policy arena is that it rests on a kind of amalgam of those two levels of governance."³ In this split of sovereignty, the EU can already be seen as a "federal system with a constitutionally guaranteed separation of powers between the EU and member states."⁴ Further, "federalism was a powerful normative ideal motivating many of the founders of the European movement," indicating that a level of integration beyond an economic one was, in fact, envisioned for the EU, since federal systems imply by their structure some sort of cohesion between the social policies of the

various members of the Federal State.⁵ If there were little convergence among the social policies, conflict would undoubtedly rise as citizens would seek the best benefits while questioning the differences in services provided by each of the member states. Such a system is unstable and in extreme cases can lead to violence; for example, the American Civil War, which was fought on the premise of varying social policies concerning slavery. As such, it seems apparent that the founders would have desired some sort of social policy convergence in their imagined federal system in order for it to succeed.

Regardless of the level of social policy included or implied within the original treaties of the European Union, the economic policy of ‘freedom of movement’ worked marvelously, kick-starting a huge economic boom within Europe after WWII. Europe began to thrive in an age of prosperity. In this “Golden Age” countries initiated huge expansions of social-security, health, and higher education systems, all of which fundamentally turned most European countries into what are known as “Welfare States,” or cases in which the State provides its citizens with safety-nets in the form of social services in case of times of need.⁶ The ‘welfare state system’ became so ingrained over the years that it turned into “a powerful source of legitimization for national governments.”⁷ Even in the face of hard economic times, nations found it difficult to reverse these welfare regimes, as they had garnered tremendous support among the voters; politicians often became “staunch defenders of the welfare state.”⁸ As sources of ‘pride’ for the national governments, it goes without saying that the states’ individual welfare state systems evolved into politically charged representations

In this “Golden Age” countries initiated huge expansions of social-security, health, and higher education systems, all of which fundamentally turned most European countries into what are known as “Welfare States.”

of national sovereignty, ones countries would resist surrendering to the EU.

The welfare states were allowed to evolve fairly diverse modes of social coverage, which range from complete coverage by the state to ones where coverage levels are driven more or less by the market, since the EU’s former policies had only concerned economics. Typically, political scientists can group the countries into four distinctive categories of welfare-state: Social Democratic, Conservative, Liberal and Mediterranean.⁹ The individual differences among these are not essential here, but what does hold importance is that, despite these categories, a “significant number of welfare states can be considered hybrid states,” or cases in which the state fits into more than one “group of welfare models.”¹⁰ These differences would create no problems in a non-federal system, but the “federality” of the EU forces the integration of these individual member states at the economic level, which results in a conflict between their unique social policies and those of other member nations.

These conflicts between the member states' social policies are certainly barriers to the Europeanization, or integration, of the countries into a more nationalized system. Differences in social policy, however, do not extinguish the possibility of further integration, even though many nations resist surrendering to a supranational body the sovereign ability to establish social plans. Some would argue that social policy would do the opposite, as "the emergence of a European welfare state might not only help in overcoming the numerous social and economic cleavages in Europe, but also strengthen European identity and the legitimacy of EU authorities," given the myriads of cultures and ethnicities in Europe.¹¹ And, in that light, there are certain modes in which social policy acts to harmonize the individual member states, the first of which is through the decisions of the European Court of Justice (ECJ).

The ECJ has made numerous rulings, the most famous of which are *Viking* and *Laval*, which have greatly extended the rights of EU citizens to claim social policies across all national

Essentially, the ECJ has declared that the economically borderless European Union must now have no social policy borders and that the freedom of movement extends to social policy issues.

boundaries in the European Union because the Court ruled the economic 'freedom of movement' standard applies to social services as well.¹² The ECJ has been recognized as the main actor in the realm of European social justice, and "the main task of the ECJ appears to be to compensate for regulatory and political shortcomings at the EU level," in bringing the separate EU countries to a social policy convergence.¹³ The ECJ, a non-political body, is able to make laws that supersede the laws of nations within the EU and therefore have a direct effect on their policies through 'hard law.' It has used this power to effectively mandate that the freedom of movement of goods and services among European countries apply to social policies in addition to the economic policies. They have "made it clear that market freedoms are basically also applicable to those areas of public policy, [such as health-care and employment rights], that most national governments have explicitly excluded from the market."¹⁴

Essentially, the ECJ has declared that the economically borderless European Union must now have no social policy borders and that the freedom of movement extends to social policy issues. An Italian, for example, can go to France for health treatment and still be covered by his national health insurance thanks to his European citizenship. This has forced the integration of social policies within the EU, in which EU citizens now can compare their national policy to other, perhaps better, ones and utilize democratic procedures to demand such services from their home country. At the same time, "national welfare-state frontiers are increasingly becoming legally insignificant for national citizens," because they can transfer themselves to another

EU country to receive the desired services.¹⁵ The ECJ decisions do not go as far as to deny the national member states the right to legislate social policy, but “even though the European health care systems still formerly appear to be national, European integration has steadily reduced the policy margin member states can use effectively when regulating their health care sector.”¹⁶

The open borders of social policy, enacted by the ECJ, have increased the integration of member states towards a more nationalized state without having to be established politically. These social policy decisions of the ECJ almost necessitate that the nations slowly move towards a common social system, as they have dramatically reduced the ability of member states to decide upon one of the cornerstones of national sovereignty: public policy. Each country must now deliver the services of other nations within the Community when claimed by a citizen of that other nation. Again, an Italian can go to France to seek medical care and France must provide it to him, at the level of Italian coverage, regardless of whether France would cover the procedure for its citizens. This lack of a choice in the matter is a lack of sovereignty in the realm of social policy, and the fact that one can now find the same social policies throughout Europe as a result of these ECJ decisions reflects that in this sense social policy has acted as a pull towards greater integration of the EU.

The next manner in which social policy acts as a ‘pull’ factor in the procession towards a more nationalized system comes directly from the European Commission. The Open Method of Coordination (OMC), an initiative created by the EC in the first Lisbon Treaty to help achieve more social integration, is meant to guide, not

force, nation states of the EU into developing similar social policies by providing international guidelines to which countries must respond with a plan of action. There are no penalties for missing these guidelines.¹⁷ The OMC is an example of soft-law which can encourage a country to act, but which cannot provide any definitive legal sanctions for enforcing that act. The hope, though, is countries that meet these guidelines will seem more appealing than those that do not, and therefore, nations will feel encouraged to move toward the common guidelines. The “emphasis [of the OMC’s methods are] on policy learning through information exchange, benchmarking, peer review, deliberation and blaming and shaming,” which act to pull countries towards a more common social goal without stepping on their national sovereignty.¹⁸

This method does not aim “to replace the welfare states of the various EU member states, rather it components them and creates convergence and harmonization in some policy areas by establishing a framework in which they can be formed.”¹⁹ The OMC, a non-political strategy used by the Commission to push countries toward a common social policy, avoids the political trappings that come with any discussion of politically-sensitive issues such as social policy. In fact, “the EU itself can now be said to have a ‘process’ underway [to improve] poverty, social inclusions, pensions and healthcare” across all member states.²⁰ The EU, therefore, directly influences the social policy of member states by setting these guidelines, which they hope countries will meet on their own volition.²¹

Unlike the hard-law of the ECJ decisions, which force the member states to comply with their rulings, soft-law looks to slowly integrate

proposals and guidelines that eventually lead Member States to develop the common social model of the EU on their own. “The OMC [is] meant to improve Member State’s own policy in the dedicated domains [of the EU] and also to achieve some commonality across Member States,” without forcing a confrontation between the EU and member states through the use of hard-law.²² Still, although this move to allow countries to retain sovereignty in the realm of social policy is ‘valiant,’ “the Commission...is fully aware of the fact that once the OMC has proved to be an effective instrument, voluntary participation will turn into moral and finally political obligation,” for the nations of the EU.²³ In the end, whether as soft-law or something more mandatory, the OMC has certainly acted, and continues to act, to further integrate the European Union.

Soft-law is not the only way in which the EU governing body uses social policy as a tool for furthering integration, because the free economic borders of the EU have influenced a system of thought that believes social coherence is necessary for economic improvement. Even more basically than that is the fact that job growth, a single currency, and a common facilitation of economic growth all provide the income to finance public services.²⁴ But past the obvious, an improvement and convergence of social policies would likely improve the economic cooperation of the EU member states as well because it is widely believed that strong social policies lead to strong economies. Therefore, a body looking to improve economically will also look to improve socially in order to enhance its chances of economic development. Even further, “the deepening of EU economic integration in recent decades has increased pressure for a strengthen-

ing of the social dimension of Europe in order to level out the asymmetry of economic and political integration.”²⁵

Such a leveling out of differences would enhance the nations’ ability to survive in a borderless economy signifying that the harmonization of the social policies within Europe would benefit them and “increasing cohesion is most likely to occur where national interests...are at stake.”²⁶

In the EU “the belief [is] that economic growth should be combined with social cohesion and that the state has an active part to play within the provision of welfare.”²⁷ The openness of the economic market almost demands the integration of the social policies because “in the present state of economic integration the aspirations of ‘Social Europe’ can no longer be realized through purely national solutions.”²⁸ The open borders concept allows for the international distribution of social services, which in turn means that all countries must improve their services to a convergence point in order to remain attractive to their citizenry. In a way, this introduces economic competition driven by the citizens’ desires for the best social services possible. Each nation can no longer monopolize the provision of these services because an EU citizen can freely move about the EU. In other words, a citizen is no longer restricted in his choice of social services by his borders, which means that he can choose from services from any country in the Union, bringing his tax revenue and job value with him as he leaves his home country. The economic value connected to improving social services encourages every country to improve their social services in the terms outlined by the EU which acts to pull all countries towards increased integration.

Interestingly enough, the economic effects of pulling to establish a convergent social policy can be something that in fact pushes countries further away from becoming nationalized instead of moving them closer together. Because social policies are rather expensive, the requirements for social initiatives can drive countries away from integration during times of economic crisis because these countries must increase spending to meet the previously established social goals of the EU. The structure of the European social system is “built upon the Scandinavian social democratic model which aims at using...human potential and at including the public authority, as well as the social partners to obtain this objective.”²⁹ This means that the social goals of the EU, to which each member nation is supposed to strive, are the most inclusive and expensive in Europe. This only serves to worsen the integration ability of social policy, because an economic crisis results in a lack of funding for such an expensive policy package. Nations therefore

In instances of economic turmoil social policy can inhibit integration and at times a sense of resentment develops towards the EU initiatives that were designed to improve social policies across the nations.

cut spending, rather than pursuing policies that would add to their economic woes.

In instances of economic turmoil, social policy can inhibit integration and at times a sense of resentment develops toward the EU initiatives that were designed to improve social policies across the nations. Richer countries begin to refute the general idea of the EU because they end up supporting the weaker economies of other countries as part of a common economic community. Indeed, during the present economic crisis, there have been some rumblings in Germany and France about leaving the European Union. These rich countries question the appropriateness of continuing to pay for highly inclusive social policies, let alone striving for more inclusive policies, in the face of economic instability.

Along similar economic lines, the diversity of each nation's economic condition affects the ability of social policy to encourage EU integration. Some countries cannot afford the expensive social policy that the EC desires even during stable economic times. As such, the citizens of countries without certain services will transfer to places with those services to obtain them. Even if these citizens had never lived in their new country and therefore never provided to the tax base, they can obtain the full services of their new home country. These “states with better welfare systems could be threatened by:...worries that... their state will be overrun by people seeking services,” which would imperil the tax fund that supports these services because none of the new “immigrants” would have spent their lives fiscally contributing to the state system.³⁰ Integration driven by combining social policy, therefore, can generate fiscal fears during times of economic problems and high unemployment that make

integration appear less attractive to European countries.

One of the major reasons that countries feel this underlying tension in terms of economics when it comes to the harmonization of social policies is because the countries are individualistic. The lack of international borders for a highly political issue such as social policy threatens the sovereignty of the member states. And certainly it seems as such because, “the EU would be socially integrated if its component societies had lost the geographical and legal boundaries to their social institutions and social practices and functioned instead as a ‘single social area.’”³¹ This signifies that integration could only succeed if there were a single, federal European state, such as the United States. This concept scares nation states who consistently see significant amounts of their sovereign power being transferred from the national to the supranational.³²

Through the “hard-law” of the ECJ decisions, which “destroyed” the international borders of social policy, the EC now can effectively command the member states and force them to adhere to a their particular social policy regardless of the fact that social services continue to be, within the realm of national power. “It stands to reason, [then], that national governments fear the perils of too much competency being shifted to the supranational level” because that robs the nation states of one of their greatest sources of legitimization as governments in the eyes of their constituency.³³ The fear of a loss of individual sovereignty, based on the idea of a forced, borderless social policy arena in the EU, has caused a lot of push back against integration by many nations that do not desire to change their social policies.

One major concern for many of the member states in the EU is that the borderless policies have meant that many of the EU-15, which have fairly inclusive and advanced social policies, now have to deal with an influx of EU citizens coming from the Eastern States that have extremely limited social policies. The Eastern expansion has been a roadblock to the integration of the EU, especially when it comes to social policy. The massive gap between the Eastern and Western European countries in social and economic arenas causes great concern to the Western countries.³⁴ In the West “traditional social policy models...have been in flux and seem to be converging,” while the Eastern States have barely begun to implement social policies.³⁵ This leads to a flood of Eastern citizens into the Western states looking for services for which the West must now pay due to the freedom of movement.. In other words, the widening of the EU directly affects the enthusiasm of European States to integrate, largely because of the high costs of paying for advanced social services for a newly increased population.

At the same time the New Member States are attempting to become part of the European Monetary Union and gain access to the Euro. To do so, however, they must first stabilize their economies and reduce debt, which means that they cannot fund the social services for which the EU asks. As a result, the Western States must provide social services for many Eastern European citizens who simply cannot find those services in their home countries.³⁶ Indeed, “the ‘widening’ of the EU has also meant that the convergence towards an ESM has been complicated by enlargement.”³⁷ In this case common social policies only causes nation states, at least in the West, to

try and slow integration because of the disproportionate costs they pay due to the increased numbers of people coming from the East.

In the end, however, social policy does more to spur integration than to hamper it. At the most basic level, the social policy requirements of the EU have created rights and services that are incredibly popular with, and beneficial for, most of the population. Once a government introduces services it becomes incredibly difficult for the country to even augment these policies, let alone cancel them. In France this year, for example, the government raised the retirement age from 60-62 which caused massive strikes and protests throughout the country.³⁸ People enjoy the social protections of the EU. Now, with the absence of borders between member states, the citizens have access to diverse social services and will not easily allow a reduction of those services. This means, then, that the EU will be further integrated by the converging social policies as they move towards a common European Social Model.

This is not to say that this process is immediate or even fast. In fact, it is quite slow and incremental as “the creation of the ESM has been more evolutionary” and will slowly continue to take shape over the years.³⁹ The effects of a borderless “social state” within the EU are simply too great for it to not pull the Community towards greater integration. The combination of competitive social initiatives, through the OMC, economic factors and ECJ backing has made social policy one of the strongest, if not *the* strongest, force affecting the convergence of the EU; and it is one that increases the harmonization of the countries, not decreases it.

In today’s economic situation, however, it may seem that social policies are slowing the in-

tegration of the EU as countries roll back spending in social areas across the board. Instead of working towards a common social policy model, countries are doing everything in their power to avoid increasing the spending necessitated by the social policy requirements of the EU. Britain’s Prime Minister David Cameron has introduced the “country’s steepest public spending cuts in more than 60 years, reducing costs in government departments by an average of 19 percent, [and] sharply curtailing welfare benefits.”⁴⁰ This happens to be the most extreme example of cuts in the EU, but throughout the economic crisis countries have been forced to make reductions to public spending which generally means social services are threatened to find themselves cut. Still, though, the EC’s “Europe 2020” plan continues to maintain that the EU needs to strive for fiscal consolidation and a green economy while maintaining the welfare state, “The Commission clearly indicates the fields to be tackled as a matter of priority (European Commission, 2010c: 24) ‘Fiscal consolidation and long-term financial sustainability will need to go hand in hand with important structural reforms, in particular of pension, health care, social protection and education systems.’”⁴¹

While this plan might not perfectly solve the problem, nor offer a viable exit strategy to the crisis, it at least stresses the importance of retaining and converging social policies both for the citizens and the economy.⁴² As such, the economic crisis is, in essence, a traffic jam on the highway towards integration. Robust economies are necessary for countries to be able to increase their ability to implement social policies. Countries need to have economic security before focusing on the installation of more inclusive

social policies. Social services may be altered, and when they are, the changes find heavy resistance, but they cannot be ended without serious repercussions for the government from the people. A perfect example of this was the British student protests against the cuts in education funding in November.⁴³ Regardless of the current economic situation, once the economy returns to prosperity social services will return and continue to harmonize through the various methods discussed above.

Finally, even in this time of economic distress there is European rhetoric that the countries have a unique social policy compared to other places in the world such as China and the United States. Below the surface one would not think that this statement entirely accurate because of the myriad of services provided by each country to its citizens. With the implementation of the borderless Europe, however, these differences have seemed to matter little, but they do still exist. The claim of a unique social system in Europe is not a misleading statement. There are common initiatives and social policies involved with the European Social Model. This common idea “does not replace welfare states of the various EU member states, rather it complements them and creates convergence and harmonization in some public policy areas by establishing a framework in which they can be reformed.”⁴⁴ In other words, though the European Union consists of different states with unique social systems, the rhetoric of the EU has a fair amount of truth in it. A single social model will one day exist, more or less, because of the convergent initiatives and guidelines established by the EC.

Social policy increases the integration of the EU. It pulls the countries closer together,

instead of pushing them further apart, because the positive aspects of enjoying common social policies among member states far outweigh the potential negative aspects. The lack of borders as a result of ECJ decisions, the use of the OMC and the economic advantages of a cohesive social policy among the economically connected countries make social policy a very strong pull factor. It brings the European countries closer to a ‘Europeanized’ place, even when one considers the negative integration factors of social policy, such as the loss of national sovereignty and high costs of implementing social policy. Will the EU one day resemble America and become one entity? It is difficult to say, but the EU is already federalist and it continues to increase harmonization through the effects of converging social policy. *

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Baguatar

GLOBALIZATION, ITS CONSEQUENCES, AND
SOLUTIONS FOR THE PERUVIAN AMAZON
NATIVES' PARTICIPATION IN A CONSTITUTIONAL
DEMOCRACY

By Alvaro Zapatel

On 5 June 2009, the Peruvian Government unleashed chaos. After a painful and violent protest, 32 people were killed, among which 23 were policemen and 9 indigenous civilians.¹ This incident became the most shocking problem that President Alan Garcia faced during his administration, which ended with the resignation of Peru's Prime Minister, Yehude Simon. Yet, the Peruvian government had several opportunities to avoid this chaos. Several contentious issues enraged the indigenous people involved and resulted in the confrontation between natives and the government. What was the main cause of this conflict? What could have enraged the natives' communities in such a way that put them against the Peruvian government? The answer lies in the government's attempts to promote an economic and political agenda, the products of globalization, and globalization's effects on a weak democratic regime. The government's arrogance added to the lack of opportunities for the natives to adapt to the

overwhelming conditions set up by neoliberalism, under the auspices of globalization, and created the perfect conditions for a social conflict of drastic magnitudes, leading to the eventual disregard of the natives' basic constitutional rights.

The Amazonian indigenous people have endured a number of mistreatments over time. The constitution of 1920 established some norms that protected communal property, much like the ones the natives have today. In 1992, when Alberto Fujimori executed a *coup d'etat* against himself, in order to dismantle the Peruvian Congress, the Amazon indigenous people saw their living conditions further deteriorate after the continual invasion of their territories for resources. In 1993, Fujimori created a new constitution that revoked the guarantees for the territories' inalienability, as well as some environmental laws protecting them². Since then, the indigenous peoples have been fighting for their property rights within a legal framework that has been setup against them. The government took some measures to formalize indigenous properties, yet these measures were not completely developed. The problems were not exacerbated until President Garcia portrayed the native communities as "relics" that were significant obstacles hindering Peru's development.³ Hence, given the market's importance in the newly-open Peruvian economy, the government had to take all measures possible to facilitate the exploitation of natural resources, such as oil and gas, at the expense of natives and indigenous people.

Ultimately, President Garcia proposed that he would "put the lazy land lots in hands of the *comuneros*⁴ at the disposal of investors that would make them productive."⁵ This was an action that he justified by the constitution of 1993. Right

after this press release, the government formulated a “Free Trade Agreement (FTA)⁶ ‘package’, sponsored by the Congress of the Republic to facilitate the FTA’s implementation between Peru and the United States. Furthermore, “The decrees stipulated in the ‘package’ were not discussed with the communities, and, given the communities’ strong reactions against them; they were systemically hidden from public opinion, even to the Congress of the Republic”.⁷ Between 2007 and 2008, the Peruvian government argued that the decrees, which affected indigenous resources and territories and were released with no consultation to the parties involved, were necessary for a proper implementation of the FTA between Peru and the US, although the decree didn’t explicitly relate to the FTA’s success. In the end, the reiterated explanations coming from the Minister of Foreign Commerce Mercedes Araoz, who continued to argue that the derogation of those decrees would jeopardize the FTA,⁸ enraged the native communities, since they suffered the systemic violation of their basic civil rights. These decrees ran counter to the resolutions and policies on the rights of native communities released by the UN and the ILO.⁹ In the end, the decrees, which broke the natives’ land inalienability and facilitated the private ownership of communal properties by third parties, while excluding the natives from that process, mobilized the Awajun and Wampi natives living in Bagua to advocate for the decrees’ derogation. The AIDSESP¹⁰ became an essential promoter of the social mobilizations against the decrees that were released without consultation. The social mobilizations, called the “Amazon Strike of 2009,”¹¹ resulted in several riots on June 5 that caused the Council of Ministers to use “force to restore the principle

of authority.”¹² Given the shortage of supplies in Bagua, the Peruvian National Police and the Division of Special Operations intervened, engaging in violent clashes with natives that ended with several deaths and a number of wounded people. After the natives’ violent reactions, the government spoke out against the controversial decrees. In addition, the government called for the implementation of consultation procedures that would bring the government and the communities together in negotiations to find the most environmentally and socially sustainable ways to promote foreign direct investment and free trade in the Amazon.

The violence and social unrest that took place in Bagua, or *Baguatar* as some Peruvian journalists referred to the incidents in relation to the main plot of the movie *Avatar*,¹³ was an unavoidable effect of a “clash of civilizations” within Peru.¹⁴ Globalization in the last 30 years has been mainly driven by neoliberal policies intended to open up and develop the world as well as to promote the free market, but it has also had adverse and unexpected effects in a variety of countries. Bagua is just one among many of these examples where governments chose to disregard people’s basic civil and constitutional rights for the advancement of certain economic and social policies. These same policies end up undermining the weak democratic regimes that promoted them. The economics of globalization, in this sense, were promoted as a means through which “the minimal state, deregulation, liberalization, privatization, free enterprise, market society and market morality [would provide] freedom, prosperity and fulfillment.”¹⁵ However, the “seemingly inexorable power of markets breathes new life into neo-classical economic doctrines,

which, among other things, require governments to deregulate their economies and reduce their capacity to intervene in their own economies.”¹⁶ While states lose power when confronted with the power of market forces, given specific conditions stipulated in a FTA or through the race for foreign direct investment (FDI), they still promote increasingly liberal economic policies. In that sense, states still have a say on whether to abide by the conditions stipulated by contracts or to participate in the “race to the bottom.”

Bagua’s case has several similarities with other violent reactions of particular communities against policies of specific supranational or governmental groups. For instance, the Water Wars in Cochabamba, Bolivia had similar symptoms and reactions from native Bolivians against the state-driven policies promoting foreign direct investment. The Bolivian Government believed that “the market [was] the best director and the best way to manage water.”¹⁷ This assertion was similar to Garcia’s assertions on how to use the Amazon’s land. Water, a communal resource, was privatized to maximize its potential profits. Similarly, the Peruvian government promoted policies that alienated the natives from their land, which although not formally owned by them, belonged to them. As a result, the Peruvian Government intended to exploit the Amazon’s land for natural resources, leaving the natives out of the agreement. In the end, “[the market] leaves out the poor”¹⁸ and marginalized people who otherwise should have been included in the negotiations, decisions, and agreements, when discussing resource use. In both Bolivia and Peru, there were significant social mobilizations driven by community associations that gathered the natives around a common objective: to boycott the

policies that were affecting their economic and social life in the ultimate sense. In Peru, AID-ESEP became the main mobilizer, while in Bolivia, the *Coordinadora de Agua y Vida*¹⁹ channeled the energy of the converging social forces that gathered against the privatization of water. In the end, both associations successfully mobilized natives and people outside the communities in order to create awareness of the issues at stake. Both organizations can be seen as main actors in the politics behind the conflict, assuming the identity as representatives of a wider “‘anti-globalization’ movement.”²⁰

What happened in Bagua and Cochabamba, then, was a clash between traditional and neoliberal concepts of trade and property. This clash took place within the current realm of globalization, which challenged the constitutional guarantees for both the natives and the people belonging to the armed forces. In fact, as of 2007, 58.5% of Peru’s economy was informal²¹. Informality, in this case, is both a condition and an activity. While informal to the government’s eyes, these activities and situations take place within an institutionalized framework that provides organization to the informality. Hernando de Soto argues that “[these] informal settlements have always had democratic organizations, with a basic, clear-cut organizational structure.”²² Consequently, the natives from Bagua, as well as the ones from Cochabamba, had a particular organization despite their informality. Their organization was not synchronized with the established political and economic structure, but was independent. Nonetheless, the rule of law establishes that “*all* entities inside and outside the state that aspire to exercise any kind of authority—from tennis clubs to multinationals and international

organizations—can do so only because ultimately, they have received some kind of entitlement from the state.”²³ In that sense, given that native communities were not officially recognized by the Peruvian government, their actions were considered to be irrelevant to the final decisions made.

The process of formal establishment under a specific rule of law, has a parallel process in the informal, or “para-legal,” establishment that native organizations used to organize themselves. The question is whether the informal establishment of the native organizations granted them the same rights as formally established organizations. The argument that the informal establishment is equal to formal establishment is strengthened by questions of the state’s legitimacy of rule over the Amazonian native peoples and the regions they control. Nonetheless, “ownership cannot be clearly determined because communal rules for acquiring and keeping status as a community member are not duly documented: Rules differ from one community to the next... [and] by giving each community the [implicit] authorization to create its own rules, the State, instead of creating a single law for indigenous peoples of the Amazon, has created some 5,000 sovereign legal systems that are not standardized.”²⁴ Since the natives have been omitted from formal law and mistreated over time, the state’s sovereignty is undermined. This creates a situation of conflict that is resolved with these para-legal systems, which are a peaceful alternative. Consequently, “it is legality that is marginal; extralegality has become the norm.”²⁵ In that way, “the globalization of markets has...seriously affected the state’s capacity to provide other kinds of public good, so that its authority is increas-

ingly being challenged, bypassed, and ignored by its citizens.”²⁶ Hence, when the state intervenes in the para-legal system, which those omitted from the formal legal system built in reaction to their systemic neglect, violence and social unrest rise. This increase in violence can be considered their last resort for the defense of their communal power, sustainability, and rights. The state’s intervention is self-justified by its understanding of economic neoliberal policies, products of the latest wave of globalization, as the best way to promote economic stability and comfort for the nation’s majority. Consequently, critics of globalization would argue that part of the lack of understanding between the legal and para-legal systems is due to the fact that “governments... formulate economic and social policies that will attract foreign investment, rather than meeting the needs of their own citizens.”²⁷ That assertion contradicts the common belief that a free-market and democratization go hand in hand. Globalization, according to this interpretation, could be seen as an economic and political mechanism that undermines social participation and democracy at the lowest level, since it blocks the “creation of new political institutions or new social actors without acknowledging the struggles over power that are involved in these processes.”²⁸

Legitimacy is understood as the “state’s entitlement to sovereign authority...[reinforced through the provision of] various collective goods.”²⁹ The legitimacy of a legal system is challenged by the social conflicts rising from the legal system’s imposition of its formal rule of law over the para-legal system’s already established organization. Globalization, along with its incentives for developing countries to pursue a neoliberal agenda, does not guarantee a successful syn-

chronization of interests between the legal and para-legal systems. Similarly, the government's systemic neglect of natives delegitimizes their power over the natives. In the end, the lack of synchronization of interests between the legal and para-legal systems that grew with globalization reinforces the former system's underestimation of the latter. Consequently, the natives are neglected once again through the refusal to negotiate or consult determined policies—such as the decrees in Peru or the water privatization in Bolivia. Anti-globalization movements rising from these conflicts are the oppressed people's identification of their subjugation as an inevitable effect of the policies promoted by the legal system. These are the same policies that encourage economic and social development through means that undermine political participation. For tribes like the Awajun or Wampí, globalization enhances the “nation state's [likelihood to] become a vehicle for authoritarianism and corruption, rather than the framework for democratic institutions.”³⁰

There is an important group of scholars that “accept the logic of market capitalism, especially free trade, but not the excesses of neo-liberal regulation or abuses of state regulation. It is, in many ways, the global equivalent of Third Way experiments in social liberalism and a new ethic of social responsibility.”³¹ These scholars and economists recognize the failures, asymmetries, and imperfections that exist within strict neoliberal policies or radical state participation in the economy and social life of individuals. Scholars such as Amartya Sen and Hernando de Soto promote a capitalistic alternative that could bring about a friendlier globalization process for the ethnic and social minorities. For example:

“Amartya Sen and others critical of the crushing weight of state planning, bureaucratic deficiency and corporatism in the developing world or in the once socialist states have argued for a dual approach centred around, on the one hand, building capabilities and grass-roots democracy to unlock potential and competitiveness.”³²

In the same way, Hernando de Soto sees the state's formal system in these realities as an inherently exclusive framework, given the variety of limitations and difficulties for those living in para-legal systems. De Soto argues that in countries such as Peru or Bolivia, “it is very nearly as difficult to *stay* legal as it is to *become* legal.”³³ According to de Soto, “the titling system [in the Peruvian Amazon] is not easily accessible to the different jungle communities and the process is extremely long and expensive—requiring an average of 747 working days at a cost of...\$36,095 (USD), which is equivalent to 186 times the average basic wage in Peru.”³⁴ Similarly, although informally owned and administered, “only about 5% [of the Peruvian Amazon natives] have a property title that allows them to control their territory and manage their so-called communal resources efficiently and productively.”³⁵ Consequently, de Soto's conclusion is that

“The native communities prefer being in charge of their own resources and destinies, even if it means forfeiting a sizeable income. What they are adamantly rejecting is being overwhelmed by the overbearing forces of globalization. They refuse to continue being marginalized and having no role in the production model that is being proposed by globalization: they reject feeling inadequate in their own neighborhood. This feeling of powerlessness is what has pushed

these people toward the radical politics that lead to the kind of violent response we saw in Bagua.”³⁶

For this reason, the para-legal systems that already exist in the Peruvian Amazon should be completely recognized by the legal system. If that were the case, the natives could have their civil, social, and ethnic rights, already established through their para-legal system, under the norms and regulations of the legal system. The formal system’s recognition of these para-legal systems through mechanisms of political and economic participation in the decision-making process would enhance the natives’ opportunities for social advancement, as well as strengthen their constitutional rights. Through these mechanisms, deforestation and environmental degradation, endemic problems related to the government’s attempts to promote economic development in the area, would be diminished, since these problems tend to happen “in areas without solid property rights. The absence of [formal] property rights favors the plundering and depletion of resources, along with the degradation of the different ecosystems.”³⁷ Accordingly, de Soto maintained that these mechanisms would create a more equitable economic treatment for the natives under the scope of neoliberal globalization. In that sense, “state-based re-regulation plus democratically negotiated inter-governmentalism, it is believed, can tackle the global inequalities exacerbated by neoliberalism.”³⁸ The state-based re-regulation is understood to be the state’s reform of its limitations and boundaries established against those who live in para-legal systems. As a result, governments would be more open to accept the political and economic intervention of postponed native minorities and re-

duce the likelihood of future conflicts. Therefore, “the argument is about treating contemporary globalization as a new kind of cultural economy performance with new mappings.”³⁹

Since the “imminent” absorption of the para-legal system by the formal legal system may be unfeasible given the aforementioned situation, the state could instead promote “micro-worlds of regulation,”⁴⁰ through which “ongoing territorial relations—in local economic clusters, regional identities or national imaginaries—are now so shot through with trans-territorial presences and absences—from the flows of people and information and goods and images to the effects of interest rates and political decisions elsewhere—that they cannot be grasped as social formations without recognition of their multiple constitutive geographies.”⁴¹ This idea is reinforced by the concept of “regionalism”, which “refers to the general phenomenon as well as the ideology of regionalism, that is, the ruge for a regionalist order, either in a particular geographical area or as a type of world order.”⁴² The regionalist process, together with the micro-worlds of regulation, connects the native communities’ reality to the “processes associated both with globalization and with the specific historical experiences of a particular space. At the same time, the globalization discourse pushes for a reconfiguration along the lines of its own ideal type of socio-economic governance.”⁴³ Consequently, the Awajun and Wampi’s economic and social realities in the Amazon can be interconnected to the state through a system of political and social participation, where they would maintain their communal importance in the decision-making process together with the government. As long as these mechanisms translate into “modern,

solid and lasting institutions,”⁴⁴ *Baguatar* could go from being an event within a chain of economic and social events to a perennial source of protest and unrest for Peru. Yet, Bagua is not *Pandora*⁴⁵, and the Awajun are not the *Na’vi*. The parallel with the movie fails because the Awajun are communities that are eager to participate in the formal economy, as long as their para-legal organizations are respected and adapted to participate in the economic and social globalization processes. In that way, globalization as a whole will neither constitute the “survival of the fittest”⁴⁶ nor a situation of “global pillage,”⁴⁷ but a realm through which government, cultural, and social institutions within a nation-state and among countries can peacefully interact, and embrace both the legal and para-legal systems within a context of respect for the Peruvian citizens’ constitutional rights.

While culture and ethnic identity could be preserved under the aforementioned economic and social participation mechanisms, “people on the ground [could be] manipulating the idea of ‘culture’ as a tool for securing political, economic, and development resources.” Therefore, it could be argued that “multiculturalism” leads to the “commodification of culture, the perpetuation of Western imperialist nostalgia, and the promotion of a neocolonial quest for the authentic Other.”⁴⁸ That interpretation is more skeptical of globalization as a realm through which native communities can take advantage of their cultural and regional power to promote a social and economic development agenda. In the ultimate sense, this position sees regionalism and ethnic participation as another means to perpetuate the already existing omission and inequality of ethnic minorities. Yet, the alternative to this position

is isolationism, given that even through the para-legal structures the ethnic minorities are exposed to various manifestations of social and economic openness—through migration, outside investment, etc.

Bagua’s deaths and turmoil were not in vain. The deaths caused people from various fields to analyze the effects that globalization, in its economic, political, and cultural sense, has on the Amazon ethnic minorities’ reality and how the Peruvian government can find ways to avoid future social unrest. Several scholars assert that globalization, in itself, is not inherently exploitative and abusive to ethnic minorities (such as the Awajun and the Wampí). Yet, governments that are coerced by the conditions for FDI or trade agreements to pursue a policy of globalization tend to dismiss these minorities for the sake of the majority’s benefit. This is a flagrant violation of these minority people’s basic civil and human rights. The perennial omission and neglect of these people only contributes to their further enagement. The state’s non recognition of the natives’ para-legal system and the imposition of the formal system creates an inevitable source of conflict, arising because the neglected natives see their para-legal system as their only collateral, given the state’s absence. On one hand, under that economic policy’s framework, globalization turns into the face of a global authoritarian regime that promotes the developed countries’ neoliberal agenda at the expense of the global poor’s basic rights. On the other hand, scholars such as Sen or de Soto propose a “globalization with human face,” which uses market forces to reconstitute the ethnic minorities’ capital sovereignty over their resources as well as to recognize the native peoples as active participants in the gov-

ernment's decision-making process. Accordingly, the formal rule of law's adaptation to the native's para-legal reality could soften the impact of globalization in the native communities. By recognizing the natives' property, the government would enhance their social and economic opportunities. The natives have a para-legal system in which they engage in economic transactions that are executed within the basic rules of a market economy. Consequently, natives are capable of inserting themselves in the free-market while keeping their own customs, uses, and traditions, and avoiding social and cultural alienation.

The main challenge is to adapt those informal economic transactions to the formal economy's framework through regionalization and micro-worlds of regulation. While there are some voices against these adjustments and synergies between the formal and informal apparatuses of the economy and political systems, this transition seems to be the way to bring social justice and economic dignity to the Peruvian Amazon natives. Ultimately, Bagua is not *Pandora* and Peru's story is not that of *Avatar*'s. However, globalization as we currently experience it is very complex and its impact on the lives of the marginalized is more palpable than ever. Capitalism can still be seen as a tool through which these people can find solutions; through the adaptation of their own systems and realities to the overall global state of politics and the economy. Thus, greater hopes for more equitable laws and the reinforcement of a still weak democracy will encourage the natives' participation in a better social and economic reality. *

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Hindrances of Democracy and Modernity in the Middle East

AN ANALYSIS OF IRAN, EGYPT, AND PALESTINE

By Gregory McGee

The contemporary Middle East is surrounded by economic stagnation and political repression. As the United Nations declared in 2005, the Middle East faces “an acute deficit of freedom and good governance,” where most citizens live in a “black hole...in which nothing moves and from which nothing escapes.”¹ With the widespread dearth of freedom, equality, jobs, education, and overall prosperity in the Middle East, these words sting with undeniable accuracy and truth.

At a conference in Egypt in 2004, government leaders from 18 Muslim majority countries defined democracy in the Alexandria Statement. According to these leaders, democracy requires “...freedom of thought and expression and the right to organize under the umbrella of effective political institutions, with an elected legislature, an independent judiciary, a government that is subject to both constitutional and public accountability, and political parties of different intellectual and ideological orientations.”² Al-

though these leaders produced a promising definition of democracy, most of them have refused to implement these liberal ideals within their respective regimes. Autocracies, monarchies, and dictatorships continue to dominate the Muslim world.

This paper will analyze several characteristics of authoritarian regimes in the Middle East that inherently obstruct democracy and modernity. Citing evidence from the recent histories of Iran, Egypt, and Palestine, it will demonstrate that oppressive regimes and their denial of secularization, their overarching desire for survival and power, and their negligence for their citizens, are biggest obstacles to democracy and modernity. Where pertinent, it will discuss the Resource Curse and the natural emergence of radical Islamist movements in these structures. Ultimately, it will conclude that although much of the Middle East remains trapped in a dire situation, the 2011 Egyptian revolution inspires all to believe in the possibilities of reform and the hope for a democratic future.

The separation of church and state, or secularization, is a necessary precursor for the establishment of democracy and modernity. As political scientist James Wilson agrees, “Separating religion from politics was the key to the development of liberal nations in the West, and it will be the key to the emergence of such states in the Muslim world.”³ The Iranian theocracy that emerged from the 1979 revolution exemplifies an authoritarian regime that prevents secularization and, in turn, deters democratization.

During the revolution, Ruhollah Khomeini united the Iranian people around Islam. He claimed that the country’s economic stagnation was a divine punishment for the government’s

failure to incorporate Islam in its policies and for aligning with the infidels of the West. Khomeini argued that the state needed to follow the Quran and that the leaders needed to be men well versed in Islamic law; in other words, Iran needed to become an Islamic state.⁴ After rallying the citizens to overthrow Shah Pahlavi, Khomeini organized a theocratic government based on his beliefs and named himself Supreme Leader.

Khomeini implemented various measures to synthesize the Iranian legal system with the Islamic faith. First, he removed all of the secular judges appointed by the Shah and granted the positions "...only to individuals with competence in Islamic law."⁵ Second, Khomeini abolished all of the secular laws and replaced them with

The recent history of Egypt exemplifies how Muslim autocracies seek to preserve their power at all costs and, in turn, effectively stifle democratization. For decades, the former Egyptian president, Hosni Mubarak, demonstrated that he would "... stop short of no crime in order to cling to power, and to life, for as long as possible."

strict Islamic laws. Today, Iran still abides by this Sharia Law that is based on 7th century norms and Khomeini's interpretations of the Prophet Muhammad's ancient decrees. Naturally, it is at the expense of prosperity, toleration, and modernity that these "timeworn interpretations of the Quran and sayings of the Prophet"⁶ are applied to modern day circumstances. Third, Khomeini eradicated the Shah's laws that promoted women's rights because he feared that "female emancipation... would disrupt family life."⁷

Regarding Iran's economic structures, Khomeini nationalized banks, insurance companies, and many other vital industries. He justified this government takeover of private sector by asserting that this was the only way to live in accordance with Islamic notions of social justice and the equal distribution of wealth.

Khomeini's de-secularization campaign restructured the political and economic systems in ways that inhibited democracy and modernity. The strict legal codes prevented the people from finding ways to live an Islam oriented life in accordance with the modern and liberal world. Iranians could only live and work within the confines of these centuries old customs. Also, by outlawing the practice of *ijtihad*, or interpretation of Quranic texts, Khomeini further prevented the citizens from embracing modern traditions and notions of equality. The new economic policies hindered free markets and competition, two significant components of modern democracies and economic prosperity.⁸

The Iranian government should deemphasize the relationship between the Islamic faith and the state in order to foster an environment where democracy and modernity can thrive. However, this secularization does not require a

complete separation of church and state, a division that does not even exist in the United States. As Michael Ignatieff notes, “Secularism doesn’t mean crushing religion, it just means creating a neutral space in which arguments between religious and secular people are settled by evidence, not dogma.”⁹ The constraints need to be loosened to the point where the rule of civil law, equality, privatization, the freedom of expression, and other democratic foundations can develop.

To continue, the recent history of Egypt exemplifies how Muslim autocracies seek to preserve their power at all costs and, in turn, effectively stifle democratization. For decades, the former Egyptian president, Hosni Mubarak, demonstrated that he would “...stop short of no crime in order to cling to power, and to life, for as long as possible.”¹⁰ Here, it is valuable to consider Mubarak’s frequent use of political maneuvers and violent tactics that ultimately resulted in the 2011 protests and his forced resignation.

The first way that Hosni Mubarak stifled opposition and maintained his power was through non-violent manipulation of the Egyptian legal system. One example is the state of emergency which Mubarak renewed upon his inauguration in 1981, which curtailed many of the human rights and liberties protected in the 1971 Egyptian Constitution. Increased public outrage with these restrictions forced Mubarak to promise that he would abolish the state of emergency laws if he were reelected in the 2005 presidential elections.¹¹ However, after reelection, he failed to comply with his campaign pledge and he extended the emergency laws for another two years in 2006 and bided his time until 2010 when he again extended the laws for another two years. Moreover, in 2007 Mubarak went so far as to

orchestrate a constitutional amendment to give himself the absolute authority to “...remand civilians to trial in military courts in cases related to terrorism and...to suspend human rights protections in other parts of the constitution...”¹² These clauses in the amendment legalized the aspects of the emergency laws the citizens feared most. Contrary to democratic legitimacy, President Mubarak exploited the amendment process to legally assume authority over anyone he suspected to be a political rival or national threat.

Furthermore, Mubarak often counteracted democratic reforms with specific loopholes to ensure the continued dominance of his National Democratic Party. For example, among the “democratic” reforms in 2005 was a constitutional amendment to subject the presidential candidates to direct election by the people. For opposition parties, this was only a superficial victory. Mubarak used his influence over parliament to immediately pass subsequent legislation that only allowed presidential candidates to run if their parties had at least 5% of seats in both the Shura Council and the People’s Assembly, both houses of Egyptian Parliament. The only coalition that was able to meet this requirement was the Muslim Brotherhood, one of the NDP’s most viable threats, and previous laws prevented it from establishing a legal party, making it impossible for the Brotherhood to participate in elections. Mubarak even constitutionalized the law against the Muslim Brotherhood in 2007. Any reform passed by Mubarak that seemed to be a move towards democratization was countered with loopholes that maintained his superiority over opposition parties and restricted the sovereignty of the people. As Marina Ottaway writes, “The weakness of political parties and

the lack of meaningful competition are among the main impediments to democratization in Egypt...”¹³

Furthermore, Mubarak and the NDP have notoriously staged many fraudulent elections, providing a façade of democracy to appease the public. Late in 2010, the NDP rigged an election for the upper house of Parliament and laid claim to 93% of the seats. As Jay Solomon of the Wall Street Journal notes, this election was “... widely viewed as the most corrupt in the country’s history.”¹⁴

On top of his political manipulations, Mubarak also used physical force to suppress opposition to his regime. The suppression through force was blatant following the 2005 parliamentary elections. Running on an independent platform, the Muslim Brotherhood was able to win a considerable amount of seats, posing a direct threat to the NDP. In response, Mubarak ordered his security forces to arrest leaders and proponents of the Muslim Brotherhood and keep them imprisoned for extended periods of time.¹⁵ These Egyptian internal security forces also tortured political prisoners for information and abused them as punishment. These violent tactics served to intimidate the public and discourage any dissenters from speaking out. As Ottaway also agrees, “The internal security services and armed forces represent distinct challenges to the prospects for democratization in Egypt.”¹⁶

Moreover, Mubarak and the NDP have frequently relied upon “...part-time thugs for hire,”¹⁷ or a group collectively known as the *baltagiya*. Essentially, the party offers to drop charges for men in jail if they beat and sometimes kill opposition candidates and voters, especially during election seasons. Even Mohamed

Rajab, a member of the NDP and the upper house of Parliament, acknowledged the NDP’s practice of bribing these thugs. Although the *baltagiya*, Turkish for “the axe-wielding one,” is not efficiently organized, it has been a powerful weapon of the regime to force opponents into submission.¹⁸ During the recent mass protests that began on January 25, 2011, the *baltagiya* and the police forces led the attacks against the protestors. Throughout the 18 days of protests, over 300 Egyptians were murdered. January 28th, or the “Day of Rage” as the Egyptians refer to it, proved to be one of the most bloody episodes; police and firearm wielding *baltagiya* fired upon protestors, anyone with a camera, and even innocent bystanders seeking refuge in their homes. Not even 13-year-old Hadir Adel could escape the violence as she was shot through a window while hiding with her family. The police ordered hospitals not to treat the wounded and threatened them with retaliation if they did. Hadir Adel was one of the many victims who were turned away from hospitals and died as a result. While the physical repression worked to stifle the crowds in the past, this recent use of “...thug-fueled chaos instead appeared to have undermined Mubarak’s credibility”¹⁹ and led to his downfall.²⁰

The Iranian *Basij*, or “...Ali Khamenei’s [the current Supreme Leader’s] volunteer Islamic militia,”²¹ bears an unnerving similarity to the Egyptian *baltagiya*. Members of the *basij* are notorious for beating and killing protestors in the name of the Supreme Leader. After incumbent president Mahmoud Ahmadinejad suspiciously defeated the popular reformist, Mir Housain Moussavi, in the June 12, 2009 election, members of the *basij* attacked those who contested

Presently, in the wake of the 2011 Egyptian revolution and widespread unrest in the Middle East, the Iranian regime is resorting to violence once again. The basij's attacks helped terminate the opposition in 2009 and the regime is hoping to suppress the tens of thousands of citizens currently protesting publicly.

the controversial results. Many citizens were murdered for voicing their opposition, including the young Neda Agha-Soltan, whose death was captured on video and viewed by millions around the world on YouTube. The government tried to interrupt the organization of protestors by closing Tehran's universities, blocking cell phone signals and text-messaging, and shutting down Facebook and other communication websites,²² yet when these methods failed it quickly resorted to violence and murder. Presently, in the wake of the 2011 Egyptian revolution and widespread unrest in the Middle East, the Iranian regime is resorting to violence once again. The basij's attacks helped terminate the opposition in 2009 and the regime is hoping to suppress the tens of thousands of citizens currently protesting publicly.²³

One last point to consider regarding Middle Eastern regime tactics to maintain survival

includes the dispersion of subsidies. Both the Egyptian and Iranian governments attempt to appease the public by providing them with free necessities such as oil, gas, heat, food, jobs, and so on. Particularly in Egypt, these subsidies have severely inhibited the economy by leading to the development of an enormous black market. Furthermore, when the government offers jobs as a subsidy to every citizen, it fosters an incredibly inefficient system. To keep up with their promise, the government must create new jobs, almost entirely public, and employ multiple people to the same positions. This practice stifles productivity and inhibits the development of the private sector.

These subsidies also shed light on the "Resource Curse." As described by Fareed Zakaria, "...The regimes that get rich through natural resources...[don't] develop, modernize, or gain legitimacy."²⁴ Zakaria mentions the case of Egypt to demonstrate that through gas and oil revenues, money from foreign countries to use the Suez Canal, and general aid from the United States, "it gets a hefty percent of its GDP from unearned income."²⁵ With so much money coming in for natural resources, the Egyptian government's budget does not rely on the citizens working and paying taxes. Robin Wright made an intriguing point when she noted that while Americans recognize the significance of no taxation without representation, they often forget that the opposite also holds true; without taxation, there does not need to be any representation.²⁶ With natural resource revenues, the governments can focus on survival rather than economic productivity and they have the means to appease the public and sustain themselves with inefficient economies.

As the evidence has demonstrated, the

Egyptian and Iranian governments have used all measures at their disposal to maintain their power, while preventing the formation of prosperous free markets and democratic political structures. Here, an analysis of recent Palestinian history will show how Middle Eastern governments' unresponsiveness to their people further restricts democratic reforms.

The main desires of the Palestinian people have consistently included employment, peace, improved living standards, and better lives for their children. The population has been displaced and relocated for over six decades, resulting in populations of 2.4 million in the West Bank, 1.4 million in the Gaza Strip, and approximately five million spread out among twenty-two Arab states and six continents.²⁷ Considering the plight of the Palestinian people, it is likely that they would prefer a quick compromise with Israel, even one involving two states, and this is corroborated by former Palestinian political candidate, Sheikh Nayef: "If negotiations have the potential to serve the interests of the Palestinian people or improve the lot of average Palestinians, yes, there is room for that."²⁸

Nonetheless, the Palestinians' desires for greater prosperity and growth have been repeatedly undermined by their leaders. From 1994 to 2004, the Palestinian Authority was riddled with corruption under Yasser Arafat. He consolidated his power as the sole leader of Palestine, embezzled millions of state funds, and awarded members of Fatah, the Palestine Liberation Organization's most sizeable faction bent on the destruction of Israel, with elite positions in the government and private sector.²⁹ Furthermore, after a mutually beneficial two-state solution as drawn up at the Camp David Summit in 2000,

Arafat inexplicably refused to accept it and left. It is clear that Arafat had his own particular interests in mind rather than those of his suffering citizens. As Palestinian journalist Sufian Taha described, "Arafat became the curse of the Palestinian people."³⁰

Unfortunately for the Palestinians, their situation did not improve with the 2004 death of Arafat and the subsequent decline of Fatah. The election of Hamas leaders in 2006 elections demonstrates the cyclical nature of unruly and unresponsive governments shifting into power, even through seemingly democratic elections. Despite Hamas's radically violent nature during the first intifada from 1987 to 1993, it became increasingly popular among the Pales-

Unfortunately for the Palestinians, their situation did not improve with the 2004 death of Arafat and the subsequent decline of Fatah. The election of Hamas leaders in 2006 elections demonstrates the cyclical nature of unruly and unresponsive governments shifting into power, even through seemingly democratic elections.

tinian citizens. During the 1990's, Hamas spent 90% of its resources on establishing social services, schools, clinics, welfare organizations, and women's groups.³¹ In the words of Robin Wright, "Where the Palestinian Authority failed to deliver, Hamas institutions increasingly did." Palestinians were drawn to Hamas because it provided tangible results and hope for an improved economy, education system, and greater prosperity. As polls demonstrate, support for Hamas is due in large part to the social services it provides for the Palestinian people, not their political agenda concerning Israel.

In 2005 Hamas won a series of city-council elections and in 2006 it won rights to choose the prime minister, appoint a cabinet, and conduct daily governmental operations. After these increases in Hamas' power, a rift emerged between Hamas and the Fatah controlled presidency. As Wright contends, "The rivalry between the two parties only deepened. Both sides violated the spirit of democracy."³² Despite the fact that every single poll proved the Palestinian citizens' preference for peace with Israel through a two state solution, Hamas refused to recognize Israel, renounce violence, or accept past or future peace negotiations. Hamas garnered support from the Palestinians by tending to their needs yet once it achieved power, these needs were quickly sacrificed for Hamas's power hungry and anti-Israeli goals.

Disturbingly, Hamas's rule became eerily similar to that of Yasser Arafat. Foreign aid stopped flowing in because of the outside world's unwillingness to negotiate with the violent and radical government. Hamas was only able to gather half of the funds necessary for the government's payroll and the Palestinian police of-

ficers, medical workers, teachers, and other civil servants were the ones who suffered the consequences. In June 2007, only 18 months since the 2006 elections, the tensions between Hamas and Fatah erupted in Gaza. A costly civil war broke out, which resulted in the deaths of innocent citizens and the destruction of infrastructure. After five days of fighting, Hamas declared victory, claimed control of the presidency, and looted Fatah possessions and properties. In little more than a year, "...the two largest Palestinian parties had destroyed the euphoria of the Arabs' most democratic election ever."³³

In these societies, the citizens that suffer the consequences of the government's actions are naturally drawn to radical Islamic political movements. These fundamentalists enjoy significant advantages over their secular opponents. With occasional government support and the security of mosques, they are able to effectively recruit members and hold meetings. Also, with aid from outside Islamic regimes, the Islamist movements have ample sources of funding at their disposal. Citizens that live in a seemingly hopeless society surrounded by poverty, unequal distributions of wealth, unemployment, and restricted freedoms, gravitate to the radical Islamists. Without well-organized secular parties and political institutions, the fundamentalist groups will continue to define the political landscape of the Middle East. These Islamist movements tend to advocate for strict fundamentalist Islam and commit violent acts; both of which are not conducive to peace, legitimized political structures, or democracy. As Wright describes, the violent Islamist movements, "...have repeatedly proven that they can destroy. But they have yet to provide tangible solutions or viable new models for problems plagu-

ing the region.”³⁴

Authoritarian regimes of the Middle East inhibit democracy and modernity through a rejection of secularization, a focus on regime survival, and an unresponsiveness of citizens’ desires. Nevertheless, despite the oppressive nature of these regimes, there is reason to hope for a brighter future. This hope was realized during the 2011 Egyptian revolution that resulted in the ousting of President Mubarak. The protests that fueled the revolution were led by “...a cadre of educated, tech-savvy youth seeking better economic opportunity and more political freedoms.”³⁵ These brave individuals, including members of groups such as the Revolutionary Youth Alliance, the Muslim Brotherhood, Mohamed ElBaradei, and the Ghad Party, were dissatisfied with Egypt’s economic conditions and Mubarak’s corrupt regime. They organized and encouraged forces through social media, stood up to Mubarak, and refused to surrender despite the regime’s efforts to intimidate and brutalize. On February 11, 2011 Mubarak finally stepped down and handed control to the military. Since taking control the military has dissolved parliament, suspended the constitution, eradicated the state of emergency laws, and promised to conduct elections within six months.³⁶ Although the citizens approve of these measures, they are hesitant to claim victory and remain skeptical of the military’s accountability and its decision to maintain the cabinet, which is full of members who were loyal to the regime. Also, while the military is beginning to meet with opposition leaders, it neglected to consult them before professing its strategy for reform. Nevertheless, despite these challenges and the uncertain future of Egypt, it is a future that the citizens will

be able to write for themselves. The people have demanded transparency in the country’s rocky transition and have promised to persist in these demands until elections are held. This revolution has inspired protests all throughout the Muslim world from Libya to Iran, to Bahrain, to Yemen. The Egyptians have become a beacon of hope to those still living under oppression. One day, these oppressed citizens may be able to proclaim what an elated Egyptian, Abdul-Rahman Ayyash, did: “This is the first time in my life I feel free.”³⁷ *

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US Cultural Hegemony

THE RULING CLASS RULES

By Tyler Creighton

In the famous words of Karl Marx, “the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie.”¹ Although Marx never fully articulated his conception of the modern advanced-capitalist state’s nature, it is clearly not one of a neutral arbiter or the embodiment of the “general will.” In fact, the modern state is inherently biased towards those who benefit most from the capitalist structure and above all else, it caters to the preservation of the capitalist mode of production.

This analysis of the state has, for all intents and purposes, been wholly rejected or ignored by prevailing political ideology in the U.S. After all, the U.S. political system rests upon a series of checks and balances, separation of powers, and free and fair elections, which afford its citizens equal protection under the law and authority of the state. Following the paradigm professed by James Madison and the Federalists, the very existence of these republican principles are designed

to curtail and “control the violence of faction,” in such a way that prevents the promotion of the interests of one group at the expense of the “aggregate interests of the community.”² The modern American understanding of Madison’s claim has become a general belief that “power...is competitive, fragmented, and diffused” and that everyone has some power, but no one person or political body has too much. Following this logic, there is no reasonable way that a bourgeois class could possibly hijack the state so completely that the state would cease to exist as a promoter and protector of the “general will.” Over time, Madison’s narrative of competing factions has solidified itself as a primary component of prevailing U.S. political ideology, one that dismisses the very suggestion that a ruling class in fact controls or even could control the state apparatus.

But how true is Madison’s axiom, and every other democratic axiom upon which it is built? According to its creators, the goal of The Federalist was to garner support for the U.S. Constitution because it outlines a republican government that represents the most ideal means to ensuring a state that embodies the “general will.” However, there are subtle indications that Madison’s own promotion of the republican form of government outlined in the Constitution was secondary to his assumption that any government adopted by the newly independent colonies would be constrained by the existence of capitalism, along with the other political and economic assumptions that accompany it.

Written some sixty years before Marx’s Communist Manifesto, Madison’s Federalist 10 correctly recognized the inherent class struggle present in capitalist society. He did this by asserting that a variety of “interests grow up of ne-

cessity in civilized nations and divide them into different classes,” which at once places them into “the most violent conflicts.”³ When one juxtaposes this claim with Marx’s assertion that “the history of all hitherto existing society is the history of class struggle,” one can see that Marx and Madison’s conceptions of human history under capitalism were not too different.⁴ Like Marx, Madison even acknowledged the obviously uneven nature of this struggle, determining the status of “the landed interest, manufacturing interest, mercantile interest, [and] moneyed interest,” superior to the “many lesser interests.”⁵ But unlike Marx, who openly identified the state as a further instrumental promoter of this unevenness, Madison and other adherents of 18th century enlightened political philosophy attempted to hide the inherently biased nature of the state behind appeals to democratic axioms. Far from idealizing the creation of a neutral state, Madison and the founding fathers envisioned a political system that is in clear favor of a particular class, namely the propertied class or capitalist class.

In outlining his argument concerning competing factions in America, Madison made it clear that any measures to restrict liberty as a means of restricting factions is a “remedy, that [is] worse than the disease,” because liberty is quintessential to life itself.⁶ Contrary to hegemonic teachings, protection of personal liberty by the government is not an end in itself. According to Madison, “The first object of government” is not the protection of a general liberty, but more specifically the protection of differing faculties, “from which the rights of property originate.”⁷ True to his capitalist leanings, Madison wished above all else to construct a government that could ensure the right to acquire greater

amounts of property for men of greater capacities (biological, racial, hereditary, etc...) and a government that would defend the ownership of that property.

While it may seem that in a state constructed in such a way, the class with the greatest capacity to acquire property, and subsequently the greatest amount of property, would be the class most protected by the state, Madison’s argument drew the opposite conclusion. He claimed that given the political framework proposed by the Constitution, no class or interest would be able to muster enough political support to usurp the total power of the state for the promotion of its own interest at the expense of all others. For Madison, in a representative democracy as large as the U.S., pluralism would triumph and the oligarchical realities of the old, established European states would not occur.

Over the course of American history, especially the last 150 years, Madison’s bold claims have been proven false. The fallacy of his argument lay in his unfounded assumption that the republican principles outlined in the Constitution would prevent a minority faction from taking power. In his only line addressing the problematic nature of a minority faction, he wrote, “Relief [from a minority faction] is supplied by the republican principle, which enables the majority to defeat [the minority’s] sinister views by regular vote.”⁸ In short, Madison believed that free, fair, and frequent elections would be sufficient to protect against a minority elite dominating public affairs. The rest of his argument was concerned entirely with the adverse effects of majority factions, a fear then and now known as the “tyranny of the majority.” In an elegant discourse, he produced a convincing ar-

gument for the impossibility or at least improbability of such majority factions converting the state into a tool for the promotion of their own interests. Thus in the Madisonian model, the U.S. political structure protects its citizens both from the few economically empowered individuals, and the economically deprived, but numerous poor. Within this structure, the state can supposedly remain the neutral entity that the Constitution designed it to be.

Madison's argument rests entirely on the legitimacy of free, fair, and frequent elections. If, contrary to Madison's assumption, the electoral process is not a sufficient measure to protect against the rise of a political minority elite strong enough to takeover state power, Madison's lack of concern regarding minority factions becomes much more problematic. If the political elite took over the U.S. political structure, there would be no way of controlling the economic elite. Since Madison and other founding fathers had such a bias towards the preservation of property rights, the U.S. Constitution became a perfect formula for the rise of an economic and political elite capable of using the state to further entrench the capitalist mode of production and preserve its standing at the top of the economic structure, while simultaneously stripping the lower class of its most fundamental political leverage.

Madison's claim that the U.S. electoral process maintains a true capacity to produce effectual change in the state has become a distant reality. Some may claim that the Bush-Clinton dynasty was responsible for the corporate elite's takeover of the American political system, but even that does not go nearly far enough to explain the ineffective nature of the U.S. electoral process. The reason is less due to the similarity in

the particular people elected to office and more due to the sameness in policy pursued once in office. Despite the perceived increase of polarization between the Republican and Democratic parties, the foundation upon which they have developed their respective ideologies is essentially the same. That foundation is the same universal U.S. political ideology already discussed, namely an assumption of capitalism and with it free enterprise, liberty, etc. The two parties may claim to be radically different, but their so-called radical differences are all circumscribed within the framework of capitalism. Both products of cultural hegemonic principles and ideals, neither party pushes for radical structural changes of the economic or political system, but rather trivial adjustments depending upon their supposed constituency at the time. The Democrats may support universal healthcare and the Republicans private health, but both support capitalism above

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all else. Noticing this striking similarity between the two major parties, Arthur Milliband writes:

The assertion of such profound differences [in political parties] is a matter of great importance for the functioning and legitimation of the political system, since it suggests that electors, by voting for one or the main competing parties, are making a choice between fundamental and incompatible alternatives, and that they are therefore, as voters, deciding nothing less than the future of their country...In actual fact however,...the disagreements between those political leaders who have generally been able to gain high office have very seldom been of the fundamental kind these leaders and other people so often suggest.⁹

For empirical proof of this reality, one need only look to the leaders of national economic policy over the past several decades. Take, for example, the last several appointments for the U.S. Secretary of Treasury. Beginning with the Clinton Administration there was Lloyd Bentsen, president of Lincoln Consolidated, Robert Rubin, board member of Goldman Sachs, and Lawrence Summers, current Director of the National Economic Council and instrumental proponent of the Gramm-Leach-Bliley Act¹⁰ and unrestricted OTC derivative trading.¹¹ Under President George W. Bush, there was Paul O'Neill, CEO of Alcoa, John Snow, CEO of CSX Corporation, and finally Henry Paulson, CEO of Goldman Sachs. And now under President Obama, Timothy Geithner, former president of the New York Federal Reserve and apprentice of Summers, directs U.S. economic policy. The same capitalist minded personalities have also coordinated U.S. monetary policy as Chairmen of the Federal Reserve for the last several

There are two important trends to note in these appointments. First, in nearly every case, candidates were previously CEO's in the financial or industrial sectors with annual incomes placing them in the top .05% of the U.S. population.

decades as well. Both President Carter and Reagan appointed Paul Volcker, current Chairman of Obama's Economic Recovery Advisory Board and former vice president of Chase Manhattan Bank. Following Volcker, Reagan, Bush Sr. and Jr., and Clinton all appointed Alan Greenspan, former chairman and president of Townsend-Greenspan Co. Finally, both President Bush and Obama appointed Ben Bernanke, former Chairman of the Council of Economic Advisors for President Bush. There are two important trends to note in these appointments. First, in nearly every case, candidates were previously CEO's in the financial or industrial sectors with annual incomes placing them in the top .05% of the U.S. population. Secondly, Democrats and Republicans alike appoint the same leaders of economic policy. All of this leads to the apparent conclusion that regardless of those brought to power by the electoral process, the same general economic policy, favorable to free enterprise and lenient on business regulation, will be pursued.

This fact is further affirmed by an examina-

tion of the actual policy decisions of the Secretary of the Treasury and the Chairman of the Federal Reserve. For example, one may examine the series of policy strategies chosen by Ben Bernanke and Henry Paulson following the 2008 financial sector collapse. Despite numerous claims by both Bernanke and Paulson that the foundation of the U.S. economy was strong leading up to the 2008 financial crisis, they had finally publically acknowledged the existence of a serious problem by mid-2008. In September 2008, they led a campaign demanding the use of \$700 billion of government money to purchase toxic assets in order to save the very institutions that, operating under minimal regulation, had produced the circumstances that created the economic downslide.¹² In the aftermath of this colossal bailout, Fannie Mae, Freddie Mac and AIG now remain legitimate institutions, despite the (already forgotten) reality that they were completely bankrupt. Furthermore, many other failed financial institutions have since been consolidated under ever-larger commercial and investment banks such as J.P.Morgan, Bank of America, Goldman Sachs, and Barclays. In every case, the CEO's of failing firms came away relatively unscathed despite their companies' dissolution. Concurrently, large swaths of the U.S. population, who also incurred large-scale debts, have been subject to home foreclosure and unemployment. In other words, the economic strategy invoked by the U.S.'s economic advisors did support measures for overall economic recovery, but at the same time shielded the economic elite from the adverse consequences of risky trading, while making the average citizen suffer for his or her own poor investment decisions. Not surprisingly, the top economic advisors also supported

the same general strategy following the savings and loan crises of the 1980's and 1990's.

These facts point to a consistent U.S. economic policy with a clear bias in favor of the economic elite. In light of this fact, it is evident that despite America's electoral system, a minority faction with minority interests is more than capable of directing state policy in favor of its own interests.¹³ What then explains Madison's falsified assurance that no such reality would ever come to fruition under the Constitution?

The founding fathers were propertied men. They represented the very economic minority that Madison assured would not pose problems to the maintenance of the state as a promoter of the "general will." Interestingly enough, they were also the same men who wrote the Constitution, assumed power after its adoption, and made the protection of private property the primary goal of the state. In doing so, they constructed the original U.S. cultural hegemonic block, successfully convincing the U.S. citizenry at large that the political principles, institutions, procedures, and mechanisms embodied in the Constitution represent the best means to achieving equality of opportunity. As the years passed, this original hegemonic block has remained the most effective modern conception of hegemony in preserving the capitalist mode of production, requiring the least reliance on the use of the state's repressive mechanisms.

Antonio Gramsci's conception of hegemony holds that at the most basic level hegemony is the consensual basis of an existing political and economic system within civil society.¹⁴ Within the framework of this definition there is no implication that the consensus of civil society has deemed the existing social order perfect or even

great. Rather, there is a general agreement “that whatever may be wrong with it is remediable without any need for major structural change and that any radical alternative...is bound to be worse.”¹⁵ Absent from these particular conceptions of hegemony is the explicit existence of a dominant class, which by virtue of its privileged position at the top of the economic system, maintains a unique capacity to “disseminate [its] values and ideas throughout society, and thus to persuade the subordinate class to conceive the world in [its] own terms.”¹⁶ In the U.S., cultural hegemony is the full acceptance and belief in the merits of free enterprise, the electoral process, liberty, equality of opportunity, and an array of other democratic principles developed by the founding fathers that are now no longer questioned, but held as truth.

The ability of the capitalist class to use cultural hegemony to direct national economic policy is now greater than ever, as demonstrated by the current debate over extending tax cuts for the wealthy or extending unemployment benefits. For the past year, national unemployment has been hovering around 9-10%. That equates to some 15 million people who, long before their more recent history of unemployment, were entrenched in a vicious cycle of debt as a result of rising prices and stagnate wages. The jobless benefits for some 4 million of these people expired in December 2010.¹⁷ Concurrently there was increasing debate over the expiration or extension of Bush’s 2001 and 2003 tax cuts. Such cuts included high tax breaks for the top 1% in the tax bracket who have a combined household income over \$500,000 and would cost \$120 billion over the next two years, double the amount necessary to fund a year long extension of un-

employment benefits.¹⁸ The fact that such a debate occurred, and the tax cut for the top 1% was re-passed, proves that the hegemonic capacity of the dominant class has gone a long way in convincing a sufficiently large portion of U.S. voters that tax cuts for the wealthy is an economic strategy of equal, if not greater, value than extending unemployment benefits. This phenomenon illustrates the trend among U.S. voters to place their political ideology above their own private interest. With regards to the tax cut versus unemployment benefit debate, it appears that roughly half of the U.S. supported the measure benefiting those in no real need (i.e. the top 1% of income earners) over those in desperate need (i.e. the unemployed). The explanation lies in the effectiveness of the cultural hegemony disseminated by the ruling class. Many Americans, firm believers in the American dream, falsely envision the prospects of themselves climbing the ranks into the top 1% to be higher than the prospects of one day being unemployed. Moreover, these same Americans are adamantly supportive of big business growth and opposed to policies of a perceived socialist nature. Thus, there remains more support for the tax cuts for the wealthy than for the extension of unemployment benefits, even among the middle and lower classes.

The U.S. is like “all advanced capitalist countries [in having] regimes distinguished by political competition on a more-than-one party basis, the right of opposition, regular elections, representative assemblies, civic guarantees and other restrictions on the use of state power.”¹⁹ Nonetheless, all advanced capitalist societies have witnessed the rise of a ruling class, which “owns and controls the means of production and which is able, by virtue of the economic power thus

conferred upon it, to use the state as its instrument for the domination of society.”²⁰ Historical precedent has illustrated that despite the composition of specific political structures and the nature of its institutions, the capitalist class has in every case been able to use state power for its further entrenchment as the dominant class. One must look no further than the U.S. to witness the success of cultural hegemony in convincing the subordinate classes to support public policy that would harm them. This class is persuaded to favor capitalist class interests, an irrelevant electoral process, and other political mechanisms and procedures, rather than truly changing public policy. *

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Clashing Ideals

THE ORIGIN AND EFFECTS OF THE CULTURE
WAR IN AMERICAN POLITICS

By Christopher Fitzpatrick

The political and social development of the modern United States has encompassed a wide variety of historical, religious, and philosophical movements. As the nation struggled to find its place in the post-revolutionary world, it borrowed many concepts from external sources, such as democratic principles from the Greeks and a legal code based on Roman and British systems. The philosophical concepts of religious conservatism and liberalism played a key role in the beginnings of American culture. The remnants of strict Puritan morality clashed with liberal notions of freedom and individual rights. These clashing principles, which have caused social friction and political disagreement since the inception of the government, still assert their effects on the nation today. This interplay between conservatism and liberalism forms the underlying basis for all major conflict in the United States polity, creating a distinct culture war in which the principles of these two main ideologies exert their effect on many political issues.

In this paper, the term “liberalism” is used to refer to its meaning under Locke or Mill rather than its colloquial meaning in current United States political jargon. That being said, liberalism has in many ways been adopted to a greater extent by the Democrats (the “liberals”) than the Republicans, particularly in considering public morality. The Democratic platform’s stance on social issues remains largely permissive and in favor of personal moral supremacy. In contrast, the Republicans’ platform espouses more conservative ethics, which have been a prominent feature of their party politics since the Reagan era. While republican values are neither affiliated with a particular religion nor necessarily involved in religion at all, they are so often in line with Christian moral teaching that to consider the Republican position without considering religion would most certainly be an inadequate analysis.

This clash of principles, this culture war, is no new aspect of the American polity. Whether the disputes were between Protestants and Catholics, slave states and free states, hawks and doves, etc., the United States has long played host to social conflict, even to the point of physical violence. Fortunately today, the culture war is generally fought with words, though the occasional hate crime serves to remind the nation of the strong emotions many Americans harbor on these moral issues. Whereas older states, such as those European nations from which the first settlers came to America, were endowed with a long-standing history of largely static social structures prior to the revolutionary age, the United States had no such “old regime”. As Lindholm and Hall wrote, “Americans were consequently able to create a society with a unique commitment to egalitarianism and social mobility.”²

With this foundation of freedom, new concepts would invariably originate and challenge people's perceptions of morality and acceptability. In light of this fact, the United States' history of clashing principles is not overly surprising. What is surprising instead, is the fact that, despite the various landmark historical changes that the nation underwent, the basic tenets of conservatism and liberalism have continued to exert such a strong effect. Regardless of remarkable technological development, fast-paced globalization, and the decline of mainstream religious observance that would generally lead society toward liberal principles, the conflict with conservatism continues.

The founding documents of the United States reflect this ideological conflict. For example, the Constitution undeniably supports some liberal notions of freedom; however, one would be incorrect to assume that the founding fathers adhered fully to the tenets of liberalism. In fact, they mitigated their liberal principles with elements of religious moral conservatism and non-democratic governance. Despite the liberal tendency to find the good in man and support freedom of the individual, the early American statesmen included safeguards against the common citizen. Hofstadter remarks,

"The men who drew up the Constitution in Philadelphia during the summer of 1787 had a vivid Calvinistic sense of human evil and damnation and believed with Hobbes that men are selfish and contentious. They were men of affairs, merchants, lawyers, planter-businessmen, speculators, investors. Having seen human nature on display in the marketplace, the courtroom, the legislative chamber, and in every secret path and alleyway where wealth and power are courted, they felt they knew it in all its frailty. To them a

human being was an atom of self-interest. They did not believe in man, but they did believe in the power of a good political constitution to control him."³

This attitude of the Constitutional writers found its way into many parts of American political life. While democratic reform has occurred on a wide scale, some of the founders' safeguards remain in place today, such as the oft-contested Electoral College. Overall, the founding fathers introduced only a moderated form of liberalism, diluted by their fear of giving too much liberty to the common man. This anti-liberal sentiment throughout American history finds its root not only in fear of the commoner, but also in examples of unadulterated religiosity. In 1630, Governor John Winthrop of the Massachusetts Bay Colony gave his famous speech, "A Model of Christian Charity." He remarked, "We are a company professing ourselves fellow members of Christ, in which respect only, though we were absent from each other many miles, and had our employments as far distant, yet we ought to account ourselves knit together by this bond of love and live in the exercise of it, if we would have comfort of our being in Christ."⁴ Furthermore, he challenged his people to set a perfect example of Christianity, saying, "We must consider that we shall be as a city upon a hill. The eyes of all people are upon us. So that if we shall deal falsely with our God in this work we have undertaken, and so cause Him to withdraw His present help from us, we shall be made a story and a by-word through the world."⁵ With the earliest colonial settlers having such strong religious convictions, faith and religious morality naturally held power over the development of colonial America, and eventually the United States. Even to this day,

Just as the founders initiated policies with an impure branch of liberalism, their beliefs did not fully reflect time-honored religious conservatism either. Many of the founders rejected Christianity for various forms of deism.

politicians still refer to this moral tradition. President Reagan spoke of “keeping America great by keeping her good.” In a 1983 address to the National Association of Evangelicals in Orlando, Florida (better known as his “Evil Empire” speech), he boldly stated that “There is sin and evil in the world, and we’re enjoined by Scripture and the Lord Jesus to oppose it with all our might.”⁶ This strong, blatantly Christian message illustrates the important role that religious conservatism plays in American politics, even in the face of a culture leaning strongly away from traditional ethics.

On the other hand, just as the founders initiated policies with an impure branch of liberalism, their beliefs did not fully reflect time-honored religious conservatism either. Many of the founders rejected Christianity for various forms of deism. In fact, historians largely agree that George Washington himself believed in a deist divinity. Henriques notes that “he used a remarkable number of names for this force, such as ‘the supreme disposer of all events,’ the ‘Grand

Architect,’ ‘the Almighty ruler of the universe,’ the ‘great governor of the Universe,’ and dozens of others.”⁷ His successor to the presidency, John Adams, also adopted a form of deist belief—as did many of the other early statesmen, suggesting that these men were neither purely religious (in the traditional conservative sense) nor purely liberal. They viewed politics in a similar vein, introducing liberal ideals while maintaining conservative protections. Consequently, the social disharmony in American politics stems not only from varying interpretations of the founding documents and leaders, but also from those documents and people themselves. Their philosophies were hybrids between moral conservatism and liberalism, between a mixed Anglo-Calvinist tradition and one stemming from the godless age of reason. This inner conflict within their thinking, actions, and writing still resonates today in American society, becoming clearer as more divisive arguments grip the media, voters and elected officials.

While some social issues receive more attention than others from the American public, as Lindaman and Haider-Markel argue, “morality as a general issue has consistently been salient” in recent history.⁸ This exemplifies the current culture war—it is very much based in notions of individual morality, not so much war or national allegiance as it has been in the past. The continued polarization of political parties serves to further ingrain these social issues into the American psyche, as candidates seek to respond to the growing divide in American ethical thought. The portrayal of national politics in the news media does little to remedy the effects of this polarization. Increasingly harsh rhetoric from the left and right—fueled by the deep-

seated ideological differences between conservatism and liberalism—spews into televisions, computers, and radios across the country from both elected officials and politically-motivated media networks. As Hunter argues, the social discord that stems from the nation’s ideological differences reflects personal differences among individual citizens, “but these differences are often intensified and aggravated by the way they are presented in public...the media technology that makes public speech possible gives public discourse a life of its own.”⁹ Unfortunately, this life may not be benefitting the American polity. With the modern onset of 24 hour cable news, the explosive progress of information technology, and the globalized world becoming connected in ways never before dreamed possible, one would expect the media to be better informing the voters; however, this does not seem to be the case. In fact, the opposite may be occurring. In the introduction to his book, “Democracy Without Citizens,” Robert Entman notes that “despite any improvement in access to news, Americans do not know more about politics now than they did twenty years ago...According to some observers, the public’s knowledge of facts or reality has actually deteriorated, so that more people are prone to political fantasy and myth transmitted by the very same news media.”¹⁰ With the media presenting its sometimes untrue, often highly-inflammatory version of the news, it is no wonder that the culture war continues with such intensity. The public is receiving increasing levels of ideological disharmony while understanding less of the political reality in which it develops. As a result, their ability to adequately balance notions of liberalism and moral conservatism diminishes greatly.

In a January 2001 issue of the *Economist*, Republican pollster Bill McInturff described the modern United States in terms of “two massive colliding forces. One is rural, Christian, religiously conservative. [The other] is socially tolerant, pro-choice, secular...”¹¹ This comment, though a rather wide generalization, does typify the current socio-political climate. It most certainly reflects the difference between the effects of liberalism and the effects of moral conservatism, and this general thinking can be used to consider some current questions facing society.

Though the American culture war focuses on a wide variety of matters ranging from gun control to drug use, this paper deals with three mainstream issues both for their contemporary significance and their applicability to the discussion of moral conservatism and liberalism: gay rights, abortion, and pornography case law. These issues hold particular importance because they are some of the most hotly debated topics in modern politics, and create such visceral reactions from the public. In short, these three issues are adequate case studies in which to represent the supreme effect of clashing conservative and liberal ideologies because they are most relevant to contemporary Americans.

The issue of gay rights provides what is perhaps one of the most easily discernable examples of the culture war. To many Americans, references in Old Testament books like Deuteronomy and Leviticus suggest that homosexuality or homosexual acts are gravely immoral. This deference to the Bible shows a surprisingly strong lasting effect of the religious, morally-conservative tradition of the country. In some ways, it is shocking that large segments of the American public, a demographic that historically mistrusts

authority, accepts this ancient writing as truth. Other Americans, following the ideals of liberalism, view this matter as one that the government has no business regulating whatsoever.

The government's actions relating to gay rights reflect the public disagreement on the topic. Different courts and administrations have taken vastly different stances on the matter. Perhaps California exemplifies this situation, where gay marriage was legalized, repealed by Proposition 8 of the 2008 elections, and then once again ruled legal by the courts. This flip-flopping serves as prima facie evidence of clashing social ideals. Marriage, however, is not the only question at hand. The recent overturning of the military's "Don't Ask Don't Tell" policy also illustrates the effects of liberalism and conservative morality. The overturning of the policy suggests a move toward liberalism. On the other hand, the fact that this development took so long and was met with so much controversy suggests a strong element of conservatism. A 2005 study undertaken by the Heritage Foundation found that "The South is overrepresented among military recruits. It provided 42.2 percent of 1999 recruits and 41.0 percent of 2003 recruits."¹² Without labeling the many diverse individuals who reside in those states, studies also suggest that the South generally does not support politicians or laws that promote gay rights. For example, not one Southern state issues marriage licenses to homosexual couples, recognizes homosexual marriages from other states, or allows civil unions.¹³ Whether a military made up predominantly of individuals from this region will accept the overturning of "Don't Ask Don't Tell" or continue to be part of the culture war is unclear, but historical precedent suggests that such radical change

will take some time to become fully accepted. Furthermore, that statisticians can generalize moral stances based on geographic location illustrates just how strongly the culture war affects American society.

Liberalism's main objectives of individual rights and freedoms suggest that an individual should be able to choose his or her sexual preferences, along with most everything else. While moral conservatism rendered gay marriage a scorned institution for centuries, liberalism has had the opposite effect. According to a May 2010 Gallup poll, opposition to legalized gay marriage has never been at a lower point, although a slight majority of Americans still oppose it.¹⁴ Additionally, while gay marriage has not achieved wide-ranged legal acceptance, some states offer legal protections and rights packages to homosexual couples in the form of domestic partnerships or civil unions. Gay rights advocacy groups would certainly hope for more progress on this matter, but the development of civil unions and legal protections does suggest the spread of liberalism to some extent. Unfortunately for those

Liberalism's main objectives of individual rights and freedoms suggest that an individual should be able to choose his or her sexual preferences, along with most everything else.

who would like to see an end to the culture war, the almost stalemated contention on gay rights shows that both the Republicans and Democrats—representing moral conservatism on one side, and liberal rights on the other—are far from amicable resolution of this disagreement.

Just like the gay marriage debate, the question of legalized abortion has served as a divider between conservatism and liberalism since the latter half of the 20th century. By applying the liberal tradition in a modern sense, some argue that abortion is a choice pertaining to freedom rather than to the protection of life or some other moral standard. That discussion is better served in other works. For the purposes of this paper, this particularly divisive aspect of cultural disagreement is brought up only to show its effect on American politics and society. The moral ramifications of abortion are simply a topic to which this paper could not do justice.

The vast majority of Americans have an opinion on abortion, and one could easily argue that it is the most divisive topic in modern American politics. Jelen and Wilcox offered one explanation why, stating

“Abortion is a classic “easy” issue...about which citizens can easily form opinions without great technical knowledge. In the 2000 National Election Studies, fully 98 percent of respondents voiced an opinion on abortion. More than one in five indicated that the issue was extremely important, and another 36 percent indicated that it was “very” important. Only 15 percent said that the issue was “not too important” or “not important at all.” Other questions in the survey revealed well formed and intense opinion about parental notification, and “partial birth” abortion.”¹⁵

With so many Americans having both

The American culture war undeniably exists. The war is fought between the Democrats and Republicans to some extent, but it is also waged within the minds of the each individual. Conflicting ideology and polarized party identity have made these concepts blurred to the voters.

knowledge and a well-formed opinion of this vehemently debated topic, it clearly has the power to shape elections, and certainly plays a critical role in defining party identities and fueling the culture war. Understandably, individuals on both sides of the issue react with strong emotions to attacks from the other side. On the one hand, those following the tradition of liberalism hold that to prevent legalized abortion is to deny an essential freedom to women. On the other hand, those following a more traditional conservative moral viewpoint believe that abortion takes the life of a human being. Neither the denial of freedoms nor the destruction of human life can be popularly defended, especially when elected officials' positions are known to the American public largely in the form of brief sound bites or misleading campaign ads. It is clear, however, that no matter which movements defend either side of the issue—evangelical Christians, women's rights

groups, libertarians, or others—their reasoning can be traced back to the basic ideological divide between conservatism and liberalism.

With the national attention turning toward the wars in Iraq and Afghanistan, the issue of pornography case law lost some, but certainly not all, public awareness. Similar to the development of abortion case law, the Supreme Court has been widening the scope of acceptable pornography for some time. Landmark cases like *Stanley v. Georgia* and *Miller v. California* systematically expanded the legality of pornography, first by declaring it legal to possess obscene materials, and then by setting strict standards by which the state could regulate obscenity.^{16 17} The only issues that Republicans and Democrats generally agree upon is limiting distribution to adults and preventing occurrences of child pornography; everything else is left for debate. Once again, clear religious conservatism combats liberalism in this instance. The Judeo-Christian religious tradition finds moral fault with pornography, whereas liberal thinkers believe the choice to access pornographic materials is a liberty that should not be taken away.

Outside of the courtroom, the American public has formulated its own opinion of pornography. For better or worse, obscene material has become a strong presence in modern society, especially since the advent of internet technology, which provides the public with unprecedented private access to this content. In his book *Porn Generation*, Ben Shapiro represented the conservative side of this issue, bemoaning the growing cultural acceptance of pornography. He wrote,

“In a world where all values are equal, where everything is simply a matter of choice, narcissism rules the day. Our culture has bred hollow

young men, obsessed with self-gratification. Young women are told to act like sex objects—and enjoy it. The revisionist historians have effectively labeled obscenity as a right that the Founding Fathers sought to protect. Society told the porn generation that final moral authority rests inside each of us—and in our vanity, we listened.”¹⁸

It goes without saying that Shapiro’s view, which is shared by many conservatives in the United States, reflects the religious morality that makes up one side of the culture war. The *Stanford Encyclopedia of Philosophy* offers a similarly insightful look at the liberal defense of legal pornography, stating that

“Many [liberal thinkers] concede that pornography ... is “low value” speech: speech that contributes little, if anything, of intellectual, artistic, literary or political merit to the moral and social environment. But this does not mean that it should not be protected—quite the opposite. A vital principle is at stake for liberals in the debate over pornography and censorship. The principle is that mentally competent adults must not be prevented from expressing their own convictions, or from indulging their own private tastes, simply on the grounds that, in the opinion of others, those convictions or tastes are mistaken, offensive or unworthy.”¹⁹

Here, one can see why the debate over issues like pornography creates seemingly unending arguments. Those individuals coming from a morally conservative viewpoint claim that society’s ethics are degrading, and liberal thinkers respond by suggesting that the government can neither make moral choices for the people nor infringe on the people’s freedom of expression. The conservatives might then cite the po-

lice powers as providing the government right to protect societal morals, to which the liberals would claim that the government right does not extend so broadly. Where rights and liberties exist is yet another example of the ideologically fueled culture war.

Having now explained the origin of the culture war, there remains an important point to be made. The culture war is difficult to fully comprehend because it is not necessarily fought between diametrically opposed groups of people. While extremists certainly reside on both sides of the issue, most individuals have mixed feelings; they are often torn between the two sides, remaining somewhere in the middle of the debate. In essence, the “two Americas” that make up the culture war are both a division between people and a division within people. Culturally indoctrinated to simultaneously embrace morality, derived from the conservative tradition and civic virtues inherited from the great liberal thinkers, many citizens cannot decide on a balance between rules and freedoms, between traditional values and total liberty. This psychological effect on individuals naturally correlates with a sociologically-driven lack of agreement on moral issues. In some sense, the people are unable to know whether they are a conservative or a liberal—how they balance morality and freedom, because the hybridization of these philosophies has occurred to such a great extent in the United States culture war. Evidence of this phenomenon can be seen even in the confusion of the terms “conservative” and “liberal” in modern politics. The big government supported by the “liberal” Democrats would have been frowned upon by the great liberal thinkers, whereas the “conservative” Republicans’ notion of liberty from such big government seems rather in

tune with the tenets of liberalism. This is due in part to historical changes within the current parties, particularly President Franklin Roosevelt’s New Deal liberalism, but the fact that the terms remain the same despite philosophical changes can only add to the cultural ambiguity regarding moral conservatism and liberalism. Yet, regarding the issues of gay marriage, abortion, and pornography, Republicans generally still adhere to the conservative viewpoint, while Democrats adhere to the liberal viewpoint.

The American culture war undeniably exists. The war is fought between the Democrats and Republicans to some extent, but it is also waged within the minds of the each individual. Conflicting ideology and polarized party identity have made these concepts blurred to the voters, making many political scientists bemoan the continued social friction of this culture war; however, it may not necessarily be a bad thing. In fact, the culture war could be the most prominent symptom of a healthy democracy. The purpose of the American republic is to promote liberty, in which disagreements ought to be encouraged rather than decried. The key to maintaining a healthy society then, is to recognize that despite different points of view on social issues, a nation can still remain united in its shared aspirations. Whether influenced more strongly by conservatism or liberalism, most Americans would likely agree.

In a free and democratic society, there must be a balance between morality and rights and between privacy and intrusion. Unfortunately, this balance is not present in many cases. The government, which has been just as shaken by the culture war as the citizens, does not always act with prudence on matters of social disagreement. Only by adopting a more moderate approach,

coupled with a willingness to think outside the confines of party loyalties, can the nation ever hope to reach an understanding on these confounding social issues. That is not to say that the culture war should be done away with. In fact, it is that contentious attitude that refreshes our democracy and gives meaning to our political discourse. As a society, the United States must put aside its view of “two Americas,” while continuing the culture war; keeping the tension, but doing away with disrespect. The nation must develop a newfound attitude of unity by understanding the citizens’ differences. In simplest terms, the people must live up to the national motto, *e pluribus unum*—out of many, one. *

ENDNOTES

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The Divisiveness of Arizona's SB 1070

By Ricardo Tapia

its potential to spill over the border and affect Americans. As Newsweek's Eve Conan wrote, "It's terrifying to live next door to homes filled with human traffickers, drug smugglers, AK-47s, pit bulls, and desperate laborers stuffed 30 to a room, shoes removed to hinder escape".⁴ Supporters argue that the law is not racially driven; it is simply an attempt to make the lives of Arizonans as safe possible. They reason that if there were harsher immigration laws, the chances of Mexican drug violence spreading to Arizona would be greatly diminished. In addition, they claim the law does not require racial profiling because it enables a police officer to investigate one's immigration status only after the person has been stopped for some other violation. As National Journal's Stuart Taylor II pointed out, the law is principally "driven by frustration with the federal's government's failure to protect Arizona and other border states from seeing their neighborhoods, schools, hospitals, and prisons flooded by illegal immigrants".⁵ Since the federal government has not effectively addressed the issue of illegal immigration, Arizona is simply accepting the challenge of responding to a problem that has long needed resolution. The defenders of the Arizona law, however, fail to realize all the unethical consequences that could result from a law that involves race to a significant degree.

Given the current state of immigration in Arizona, it would be irresponsible for someone to say that SB 1070 does not entail some sort of racial profiling. While a person can be lawfully stopped for committing a potential transgression, the ethical question of whether a policeman should have the right to question the apprehended party's citizenship is far from settled. Although some questioning is necessary

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for proper law enforcement, some questions may violate a person's basic right to privacy. The law states that one can only be asked about her status in the country if there is reasonable suspicion that she is here illegally. But what exactly does reasonable suspicion, apart from ethnicity, entail? A clear and precise answer to this question has not yet been given, but a law such as this inevitably implicates racial ethics. As stated above, statistics would suggest that, reasonable suspicion would logically result in questioning more Hispanics than people of other races. But generalizations based on race should never be made, regardless of their foundations. The matter of who should be reasonably questioned needs to be properly explained before the police can go about enforcing this law. Furthermore, the proponents of the law must also realize that the way a law is written and the way it is enforced are two different things.

One of the main points of contention over SB 1070 is that its advocates believe that the law will function as written, while opponents believe

that it will lead to racial profiling. In theory, the law does not allow law enforcement to discriminate based on race. Jessica Colotl, a Kennesaw University student, pointed out that there always must be a reason to justify intrusive questions by policeman “and the reason may not be the color of your skin.”⁶ Ideally, policemen would be able to question transgressors for lawful reasons other than race. They would be able to distinguish someone who is suspicious from someone who is not based on some exemplary criterion that disregards ethnicity. In practice, this is not the case. No law should allow police to based solely on external features. Not only is the law unethical, but the reasons for its creation also raise many questions.

The Arizona immigration law was, in part, developed as a result of increased concerns regarding lawless illegal immigrants, many of which were exaggerated. Not only were they overstated, but they were the result of a great deal of ignorance. Eve Conan’s aforementioned claim about people being terrified to live in close proximity to illegal immigrants’ homes “filled with human traffickers, drug smugglers, AK-47s” is rife with stereotypes. Clearly, homes such as the one described surpass even the most extreme examples found in the real world and to utter such a statement is simply reckless. People who believe that a scenario such as the one Conan describes is possible are simply not in touch with reality. As Georgia’s Fulton County Commissioner, Emma Darnell, affirmed, “I think that people should be more educated about the subject because the problem is that there are so many generalizations and stereotypes about immigrants.”⁷ Once the general populace realizes that illegal immigration’s biggest threat is not

violence, states like Arizona can begin to create immigration laws that better reflect reality. After all, The New York Times’ Randal C. Archibald observed that in 2009, “homicides and violent crimes decreased” in Phoenix and surrounding Maricopa County.⁸ This suggests that the growing numbers of illegal immigrants are unrelated to crime rates. Without a doubt, there are justifiable concerns that the Mexican drug violence could leak into Arizona, but laws such as SB 1070 remain unjustified. Perhaps this law is simply a response to the federal government’s inability to regulate the border.

Many supporters of the immigration law praise Arizona simply for taking action. Certainly, the federal government’s inability to firmly manage the border has incited Arizonans who are frustrated with the increasing number of ille-

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SB 1070 should be abandoned because any law that even touches on racial prejudice is categorically unethical. The enactment of SB 1070 would set a terrible precedent in American legal history and foster future laws that even further limit the public's right to experience fair, unprejudiced treatment.

gal immigrants entering their community. President Obama characterized the law well when he called it simply misguided.⁹ It is reasonable to sympathize with any group of people who feel their government has not provided satisfactory laws to ensure their safety. Moreover, a state that attempts to solve the problems that the national government has not, should be highly regarded. However, these attempts should not be looked highly upon when they are unethical. Any law that blurs the line between ethics and proper law enforcement should be promptly discarded.

SB 1070 should be abandoned because any law that even touches on racial prejudice is categorically unethical. It can be presumed that, even if the law does not permit it, a situation may arise where it would be advantageous for a police officer to racially profile, for example, a Hispanic who does not speak English, and question his

citizenship. Under SB 1070, an officer could legally do this so long as he does not reveal that racial profiling was the only reason for his questioning. While it may seem like its unlikely that this scenario would occur in our modern time, there is a high probability of this happening. It is logical that any law that would potentially pave the way for racial profiling should be considered unethical. There is no reason why a law that is so ambiguous and imprecise when it comes to terms such as "reasonable suspicion" should be enacted. The enactment of SB 1070 would set a terrible precedent in American legal history and foster future laws that even further limit the public's right to experience fair, unprejudiced treatment.

Arizona's highly divisive SB 1070 is an unethical measure because it permits racial profiling in its enforcement. Under no circumstances should race even remotely come into play in matters of law enforcement. Arizona's motivation for creating such a law can be understood. Still, the law itself is ill-conceived and does not properly address the issue of illegal immigration since it holds the potential for racial prejudices to be exploited. Although there are large concerns with violence committed by illegal immigrants, this cannot justify SB 1070. Many of the reasons for passing the law are based on exaggerated claims and the law is far too broad to be justified by only one reason. The fact remains, laws are not always enforced the way they are written, and SB 1070 is a prime candidate for racial profiling because of the law's uncertain wording. As a result, SB 1070 is unethical because it fails to guarantee the fair treatment of all citizens. *

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Political Theory and the Justification of the American Civil War

By David Kete

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Whenever two nations go to war, each side will present its reasons for entering into war and its justifications for acting on those causes. The American Civil War presents a clear example of the diametric opposition between warring peoples' justifications for fighting each other. This paper will focus on the question of the validation of the Civil War. Both sides of the Civil War justified themselves on three levels. First, each side claimed that its action, either seceding from the Union or preserving it, was in accordance with the Constitution. Next, each side claimed that it was faithful to the political ideals of the founders of the nation. Finally, each side claimed that its goals were in accordance with "natural law", as articulated in John Locke's writings. Natural law predates and is superior to all man-made law, so justification on this level carried the most ideological weight. While both sides used a variety of justifications for their actions, after a close examination it is clear that the Union was jus-

tified in preserving the nation by following the American Constitution, the political philosophy of the American Revolution, and John Locke's idea of natural law, which all built the foundation for the American political system at the time of disunion.

The Confederates claimed that the right to secede from the Union was found in the Constitution. They thought that by exercising this right, they were throwing off the reigns of a tyrant just as the founders of America had done 85 years prior. On the other hand, the Union was also convinced that the founding fathers would recognize its side as both properly interpreting the Constitution and as faithful to the ideals of the American Revolution. The US federal government claimed that the founders created a permanent union of the states in one coherent nation. Therefore, it had to preserve the Union at all costs. Northerners believed that revolution was justified in some cases, such as the American Revolution, but not in the case of Confederate secession.

The first method that the Confederates tried when justifying secession was to frame the debate in terms of the "compact theory." Compact theory is the idea that state governments are prior to, and create the Union. This theory holds that the fundamental bedrock of the national government is the state government. State governments gathered together at the formation of the nation and pledged support for one another, creating a union between themselves for mutual protection. This compact, when agreed upon, was ratified by the states. If the compact theory is the correct model for the federal government, then just as each state chose to ratify the compact and join the union, it could de-ratify the compact and

leave the union. This made the question of secession a question of the legal nature of the Union.

J.L.M. Curry, a legal scholar and former Confederate, wrote a chapter on “the legal justification of the South in secession” in 1899, as part of the 12 volume *Confederate Military History*. He wrote, “the states...emerged from their colonial condition...having achieved separate independence and established a new form of government, a federal union of concurrent majorities.”¹ Curry’s emphasis was on the independence of each state not only from England, but also from each other, at the conclusion of the Revolutionary War. He continued, “the colonies were wholly distinct and separate from all others in political functions, in political rights, and in political duties.”² Curry argued that the Union did not pre-date independence, or even the Constitution, but was created by the states upon their ratification of the Constitution. In this work, Curry demonstrated an adherence to southern compact theory.

The Confederates argued that since the states needed to ratify the Constitution before it was binding law, then the states must be somehow prior to it. Just as states held Constitutional ratifying conventions throughout the 1780’s, so too could they hold Constitutional de-ratifying conventions throughout 1860 and 1861, or at least that is how their reasoning went. Lincoln, however, held a contrary view. He wrote, “The Union is much older than the constitution.”³ He also wrote that the Constitution, far from acting as a compact between states, “formed a more perfect Union”, demonstrating that the Union already existed by the time of the ratification conventions.⁴ In demonstrating that the Union predated the states, Lincoln swiftly destroyed

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the Confederates’ most plausible argument for the precedence of states and thereby showed that the states could not choose to leave the Union on their own volition. The states did not create the Union. In reality, the Union divided its powers, giving some to the states in order to govern more efficiently at the local level.

Lincoln himself inextricably linked not only the Declaration of Independence, but the entire American fight for independence, to the Constitution. In his first inaugural address, he said, “The Union is much older than the Constitution....It matured and continued by the Declaration of independence...and finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was, ‘to form a more perfect Union.’”⁵ By linking the Declaration of Independence and the Constitution, Lincoln was

claiming a continuity of the idea of the Union from the Revolution to the Constitutional ratifying conventions. He showed that the Union had existed prior to the Constitution's ratification.

Southerners took a very different view of the Constitution. From Confederate president Jefferson Davis, all the way down to the freshest commissioned soldier, southerners truly believed in the Constitutional basis for the right of secession. Jefferson Davis, in his farewell speech on the floor of the US Senate, spoke of his strong belief in the right of a state to secede. He wrote, "I have for many years advocated, as an essential attribute of state sovereignty, the right of a state to secede from the Union."⁶ He then continued, "Secession...is to be justified upon the basis that the States are sovereign."⁷ George Edward Pickett, then just a newly commissioned captain, wrote to his wife LaSalle, "I, of course, have always strenuously opposed disunion, not as doubting the right of secession, which was taught in our text-book at West Point, but as gravely questioning its expediency."⁸ This quote is remarkable in that it claimed that secession was taught at West Point, the single largest alma mater of leaders on both sides of the war.

While it may be surprising that an institution run by the federal government taught that the Constitution allowed for its own destruction, it is nonetheless true. In his in-depth history of early West Point, Stephen Ambrose uncovered the fact that William Rawle's book, *A View of the Constitution of the United States*, was used to instruct students at West Point in 1826. Ambrose wrote, "From 1825, when Lee and Jefferson Davis entered the Academy, until 1850, the right of secession was taught at West Point in a text by William Rawle."⁹ Scholars contest the number

of years that the book was used in undergraduate instruction, but they all agree that it was at least taught during the 1825-1826 school year. Even if it were only used for one school year, numerous officers on both sides would have received this instruction. Notably, Robert E. Lee and Jefferson Davis received instruction using this text, but not Ulysses S. Grant (who was too young) or Abraham Lincoln (who did not go to college).

While it may initially shock the reader to hear that West Point taught secession rights, it should be noted how these rights were asserted. Coloney Edgar Dudley, a law professor at West Point during this time, said that Rawlings wrote about this right to secede in "Lockean terms", and only referred to the right of secession as a "general right".¹⁰ Dudley claimed that this right was only asserted because the right of secession was, "the principle on which all our political systems are founded, which is that the people have in all cases the right to determine how they shall be governed."¹¹ From Dudley's assessment, Rawle's work appears to be very compatible with Union interpretations of Locke and the Constitution, in that it asserted the basic right of revolution, but did not necessarily promote secession. Viewed in this light, the right of revolution taught in Rawle's book could have justified something like the American Revolution, but not the secession being called for in the late 1850's and early 1860's.

When one moves past Dudley's analysis of Rawle's work, and turns to *A View of the Constitution* itself, the view appears much less "Lockean" and much more similar to the views of secessionists throughout the Confederacy. Rawle claimed, "the secession of a state from the Union depends on the will of the people of such state", and "the

states may have reasons to complain in respect to certain acts of the general government...and may declare secession in case of their [the negotiations] failure.”¹² From these passages, it is clear that Rawle supported a much looser interpretation of secessionism and right of revolution than the strict “Lockean” interpretation that Dudley believed Rawle held. It is clear that secessionists such as Lee and Davis, along with other Confederate officers educated at West Point, would have been taught that the US Constitution, founded on the political philosophy of John Locke, would have completely justified state secession.

It is easy to see how the Confederate states would latch onto the idea of “the right of revolution” to justify secession, which they viewed as their own revolution. The Confederates believed that the same circumstances that had predicated the American Revolution were present in the 1850’s and heading into the 1860’s, only instead of an oppressive King of England there was the oppressive US federal government, with Lincoln taking the helm. The Confederates felt their fears of egregious constitutional violations would be quickly realized with the election of Lincoln as President. Some even viewed Lincoln’s election *itself* as a constitutional violation.

This viewpoint is reflected in the letters of several southern secession commissioners, those in charge with convincing the southern state legislatures to secede. Alabama’s secession ordinance cited “the election of Abraham Lincoln...by a sectional party, avowedly hostile to the domestic institutions and to the peace and security of the people of the State of Alabama” as the reason for secession.¹³ Here the secession signees agreed that the federal government was depriving the south of its basic rights, just as the

British had done in the eighteenth century. One Mississippi secession commissioner, W.L. Harris, spoke to the Georgia state assembly, saying, “Today our government stands totally revolutionized in its main features and our Constitution broken and overturned.”¹⁴ This quote demonstrates that some southerners literally believed that the election of Lincoln constituted a revolution. If Lincoln’s election were a revolution, then by seceding, the southern states would just be restoring order. Yet, Lincoln captured a majority of the Electoral College and even won the popular vote in a crowded field of four candidates. He had not said one thing about changing the existence of slavery in the south, nor did he have as objectives as president anything else that would harm the southern way of life. Lincoln’s constitutional election was nothing like a revolution, so southerners were not justified in seceding on these grounds.

Nevertheless, many Confederates still held that their position was supported by the Constitution. Charles B. Dew, author of *Apostles of Disunion*, examined Confederate vice president Alexander Stephens’ view of the war. He wrote, “The American Civil War, Stephens concluded, represented a struggle between ‘the friends of Constitutional Liberty’ and ‘the Demon of Centralism, Absolutism, [and] Despotism.’”¹⁵ Jefferson Davis, president of the Confederacy, also claimed the Confederates’ primary motive in seceding was faithfulness to the US Constitution. Dew wrote, “The South had fought for the noblest of principles, Davis concluded: for ‘constitutional government,’ for ‘the supremacy of law,’ and for ‘the natural rights of man.’”¹⁶ John Smith Preston, writing after the defeat of the South, wrote, “The Constitution you fought

for [the Confederate Constitution] embodied every principle of the Constitution of the United States ... It did not omit one essential for liberty and the public welfare.”¹⁷

Those who supported the Union responded to Confederate claims that they were justified by the Constitution. While many Confederates may have been led to believe that secessionist rights were contained in the Constitution, it was the Union men who truly interpreted it as the founders would have intended. The defense of the Union started with the man in charge of leading it through the period of division: Abraham Lincoln. In his first inaugural address, Lincoln addressed an obvious point when he remarked, “It is safe to assert that no government proper ever had a provision in its organic law for its own termination.”¹⁸ Lincoln, like many in the north, knew that no government that allowed small pockets of its citizenry to break apart the nation could exist for long. He continued, “The Union is perpetual, confirmed by the history of the Union itself.”¹⁹ Clearly, there was no provision in the Constitution itself for states to leave the Union.

If the US Constitution did not expressly allow for the dissolution of the Union, then the only justification that the Confederacy could have had to secede would have been an adherence to the drafters’ intent or some sort of higher law. Possible justifications could have included the idea of adherence to the true spirit of the Constitution, the hopes of the founders of the nation, or even the political philosophies (such as that of John Locke) upon which the drafters of the Constitution drew.

The ideological claims of both sides at least partially account for the motivations that caused

each side to fight as hard as it did. Simply put, both sides were utterly convinced that they were justified in prosecuting the war. The kind of resolution required to carry on despite the enormous casualties lay not merely in the conviction that one had the correct interpretation of the Constitution, but also in the absolute certainty that one was following a higher law, a “natural law”. This natural law is the basis of the United States Constitution, but even deeper than that, is the foundation of any just government.

Since the natural law behind the Constitution was just a continuation of the same political ideals of the revolution, the Confederates tried to make the argument that if the American Revolution had been justified, then secession would be justified as well. The Confederates knew that all Americans clearly believed that the American Revolution was justified, so if they could draw enough parallels between the situation in the 1770’s and the 1850’s, they could justify secession. Lincoln and other Unionists who asserted that the Confederate states did not have the right to secede had the burden of showing that the secession of the Confederate states was somehow different than the revolution of Britain’s thirteen American colonies. In doing so, supporters of the Union examined the justification of the American Revolution and the ways in which the state of government was different in 1860 than it was in 1776.

Numerous political writers around the time of the American Revolution used an appeal to higher law. Bernard Bailyn wrote, “In pamphlet after pamphlet, the American writers cited Locke on natural rights.”²⁰ He continued, “Within the framework of enlightenment abstractions and common law precedents... [including] Locke...

brought together in a comprehensive theory of politics...the colonists responded to the new regulations imposed by England.”²¹ Even political writers in England recognized the American quest for independence as a fight based on principles that the English themselves should also hold dear. Matthew Robinson-Morris, a pamphleteer in England, wrote a political pamphlet rife with references to Locke’s political philosophy, which he subscribed to without hesitation. He wrote that because Americans had “subdued the land upon which they lived” and had “organized themselves into governments”, they had a “right to freedom in their governments and security in their persons.”²² He based these rights on “the principles which such men as Mr. Locke... maintained with their pens.”²³

While these writers’ opinions are certainly to be respected, none is such an authority as the words of the Declaration of Independence itself. Within the first sentence, Jefferson cites, “the laws of nature and Nature’s God” as the reason why America must become independent.²⁴ This reference to a higher law, found explicitly in Locke’s work, shows an appeal to something over and above British rule. Locke is again referred to later in the declaration, where it is written that all people have certain “inalienable rights...[including] life, liberty, and the pursuit of happiness.”²⁵ Jefferson and those who supported Revolution did so in spite of the fact that they were the ones violating the written law because they believed that the British were violating a more important law: natural law.

The idea of natural law is an ancient concept, dating back to Aristotle, yet it had a contemporary meaning in the circles of the eighteenth century intellectual elite, which centered on the

philosophy of John Locke. Jefferson and the founders were appealing to this broad history of natural law, but even more so to the explicit definition of natural law found in Locke. This is evidenced by their continued reference to Locke, and his ideas of natural law and revolution, in pamphlets, speeches, and writings in support of revolution.

This is exactly the political philosophy that the founding fathers of America relied on in justifying their split from England. They recognized that no government can be stable if parts of the nation can break away at will; that the strength of a nation lays in its unity. However, they also recognized that if their leader was acting as a tyrant, then he had in effect dissolved the government for them and they had a right to separate themselves and create a new nation. The slogan of the American Revolution, “taxation without representation”, was the embodiment of the feeling that the American colonists had been ruled by a tyrant, and did not have the opportunity to have their interests represented in government.

The participants in the American Revolution believed that King George III had gone to war with them long before the bullets began to fly. The Tea Act, Stamp Act, and Intolerable Acts of 1773-1774 enraged the Colonists. The British government believed that since it had fought hard to defend the Colonies in the Seven Years War, the Colonies themselves should pay for this newfound security. The new, heavier tax burden caused the colonists to call for representation in Britain’s legislative branch. While they were fine with having no voice in Parliament before the increased taxes, the colonists wanted a say now that the decisions of Parliament were affecting their lives in new ways. This led to the rallying

cry “taxation without representation.” When the Colonists were repeatedly denied representation in Parliament, they decided that this meant war. Robinson-Morris captured this idea exactly when he wrote, “We have not far to seek for the cause of the present situation of things between the mother-country and our colonies... these all undoubtedly proceed from our having taxed those colonies without their consent...this is the origin, the spring, and the source.”²⁶

By not giving the Colonists a seat in Parliament and increasing the tax burden, King George had effectively broken the state of governance and entered the state of war with the Colonists. The Colonists, being in the state of war, were free to assemble their own government under their own ideals, as stated in Locke’s political philosophy. The Colonists did just this. They assembled a government, the Second Continental Congress, and declared themselves a free and independent nation on July 4, 1776.

The framers of the constitution were also deeply affected by Locke’s political philosophy. Isaac Kramnick, editor of *The Federalist Papers*, wrote, “the mentors of the framers of the constitution were Locke and Montesquieu.”²⁷ Madison, Hamilton, and Jay were all very familiar with the philosophy of John Locke, and wrote using his exact language when drafting the Constitution. “Madison put in his letter to Washington in straightforward Lockean terms, [that the government should] be an impartial umpire in disputes.”²⁸ Willmoore Kendall, author of *John Locke and the Doctrine of Majority-Rule*, wrote, “Locke was the favorite philosopher of the authors of the American Revolution.”²⁹

John Locke, the political philosopher who most influenced the drafters of the United States

constitution, established the idea that government, even under a monarchy, is formed by the assent of the subjects. In his major political work, *Two Treatises of Government*, he tells the story of how men come together to form governments. Locke wrote, “God having made man such a creature that it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society.”³⁰ He wrote that men enter into society, “not only to preserve property, that is, life, liberty, and estate, against the injuries and attempts of other men; but to judge of and punish breeches of the law in others.”³¹ This society is modeled after the most basic relation between two human beings: the relationship between man and wife. Locke notes, “The power of the husband being so far from that of an absolute monarch, that the wife has, in many cases, a liberty to separate from him.”³² Thus, Locke established the principle of assent to rule and freedom to stop being ruled by a certain government.

By not giving the Colonists a seat in Parliament and increasing the tax burden, King George had effectively broken the state of governance and entered the state of war with the Colonists. The Colonists, being in the state of war, were free to assemble their own government.

In the final chapter of *Two Treatises*, entitled “Dissolution of Government”, Locke describes the situation in which the people, having formerly given the government the power to govern, can decide to retake that power. Locke argues that the inferiors, or the subjects of the rulers, cannot dissolve the government. According to Locke, society can be in one of three states, listed in ascending order of desirability: the state of war, the state of nature, or the state of governance. In the case when a king or leader of a government is governing justly (the state of governance), he cannot be deposed and the people cannot dissolve the government. However, if the leader of the government acts as a tyrant by “exercising power beyond his right”, then he has placed himself at war with the citizens.³³ If he places himself at war, then all citizens are no longer in the state of governance, but the state of war. Since the ruler has already dissolved the government by putting the civilization back in the state of war, the citizens can remove him from power and establish a new government. The idea of natural law found in Locke’s writings stipulates a specific relation between ruler and subjects. The ways in which natural law is written about in the revolutionary time period (1763-1787) are the same as the ways in which Locke wrote about the corresponding rights and responsibilities tied to natural law.

Southerners argued that Lincoln was exactly the type of tyrant that Locke was writing about. The American colonists had called King George III a tyrant in “Lockean” terms, and so too did the Confederates call Lincoln a tyrant. W.L. Harris wrote, “The new administration, which has effected this revolution, only awaits the 4th of March for the inauguration of this new govern-

ment.”³⁴ Harris illustrated the popular view that Lincoln’s election, in and of itself, was an act of tyranny.

The trick for the Union was to show how the situation was any different in 1860 than 1776. This was not incredibly difficult for the Union to do. It just had to point to one group: the 22 Senators and 65 Representatives from the states that would become the Confederacy. The main rallying cry of the American Revolution was “taxation without representation”. The reason why George was a tyrant and not just an unpopular ruler was because he was imposing his will on the people without their consent. Locke’s primary criterion for a just government is that it is formed by the consent of the people. So, if the people had no say in the government, and it was no longer representing their interests, they could leave and set up their own government. In 1860, the states that would become the Confederacy held a total of 87 seats in congress. Obviously, these states were represented in the national legislature, and could voice the interests of the people from those regions. So, to say that the US federal government had become tyrannical would have been completely unjustified. The normal, legal avenues for dissent were still functioning perfectly adequately. Southerners could vote for their senators, congressman, and president. Therefore, the southerners were not justified in secession on the basis of Locke’s political theory or an idea of natural law.

The Confederates tried before, during, and after the Civil War to justify secession any way possible. They attempted to show that the Constitution allowed secession, that the intent of the drafters of the Constitution and the Declaration of Independence would have supported the

right of secession, and even that Locke's political philosophy would have allowed for secession. Despite many attempts by those alive during the Civil War and countless historians, the fact is that none of these justifications is legitimate. Lincoln pointed out that the Constitution has no such provision for the destruction of the Union and that the Union predates the states, so even the theory behind the Constitution supports the permanence of the Union. The American Revolution clearly hinged on a lack of representation for the colonists in government. This fact shows a clear difference between the Civil War and Revolutionary War. A close examination of John Locke's political philosophy also shows that the right of revolution only exists in certain extreme cases, such as a true tyranny. The completely legal and just election of Lincoln in 1860 is a far cry from such a tyranny, and as such, did not justify secession by any means. *

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The Failure of Direct Democracy in California

By Alex Guittard

In October 2009, California Chief Justice Ronald George posed an important question to his audience at the American Academy of Arts and Sciences. “Does the voter Initiative,” asked George, “remain a positive contribution in the form in which it now exists in 21st century California? Or, despite its original objective - to curtail special interests, such as the railroads, that controlled the legislature of California and of some other states - has the voter Initiative now become the tool of the very types of special interests it was intended to control, and an impediment to the effective functioning of a true democratic process?”¹ George’s remarks came only a few months after the state’s last series of constitutional amendments, which both overturned his court’s earlier approval of same-sex marriage and restricted the confinement of barnyard fowl in coops. In the words of Justice George, “Chickens gained valuable rights in California on the same day that gay men and lesbians lost them.”²

This latest constitutional paradox is the

product of California’s dysfunctional direct democracy, specifically the process of the ballot initiative. While more than two-dozen other states also practice the initiative, California, with over 500 constitutional amendments, uses this process more than any other state by far. The facility with which the voters amend the constitution undermines the nature of the representative democracy on which the United States was founded, and contributes directly to the state’s financial paralysis and the increased political influence wielded by special interest groups.

The origins of California’s contemporary problem with direct democracy can be traced to the California Constitution of 1879; a document which stood in stark contrast to the original 1849 state constitution that it replaced. The earlier constitution, which was printed in both English and Spanish, was modeled on those of Iowa and New York and “provided for a limited government that protected individual rights and sought the common welfare.”³

By the late 1870s, however, changing conditions had created a new political environment. The completion of the Transcontinental Railroad in 1869 led to a massive increase in California’s population from 50,000 to 865,000, 8% of whom were Chinese immigrants.⁴ The nationwide economic depression of the 1870s contributed to the rising unpopularity of the railroads, corporations, Chinese immigrant workers, and the contemporary political establishment.⁵ This political shift led to the new constitution, which “provided for regulation of economic life and led the way for the Progressive Era reforms of Governor (and later Senator) Hiram Johnson.”⁶

Despite this movement towards reform, during the period between 1880 and 1911, “the

Southern Pacific Railroad Company was the greatest single influence operating in California politics.”⁷ By employing more labor and owning more land than any other individual or business, Southern Pacific was able to control state politics to a degree that was “rivaled only by those of Tammany.”⁸ However, as Southern Pacific’s power grew, so too did “the first faint indications of the coming storm of revolt” against California’s machine politics.⁹ In 1898, John Randolph Haynes founded the Direct Legislation League to combat what he perceived to be the corruption of Los Angeles through transferring “political power from the bosses to the electorate.”¹⁰ In 1903, Los Angeles became the first city in the United States to amend its charter to include a recall provision.¹¹ In 1907, a group of reformers sympathetic to the policies of President Theodore Roosevelt established the Lincoln-Roosevelt League, which succeeded in passing a bill that abolished the nominating conventions and allowed “candidates to appeal directly to the electorate for their nomination,” preventing Southern Pacific from selecting the candidates for the 1910 gubernatorial election.¹²

The same year, Hiram Johnson, a San Francisco anti-graft prosecutor, took advantage of the grater political openness and was elected the Governor of California. Johnson’s platform called for the implementation of initiative, referendum, and recall (including recalling the judiciary), the direct election of senators, and de-fanging the Southern Pacific.¹³ Johnson framed these efforts as “a fight against the interests and the system, and for true democracy.”¹⁴ This theme was echoed by John Randolph Haynes, who argued that while “bribery of the people’s representatives by special interests is the great demoralizing fac-

tor in our unchecked representative system of government... it is much easier to bribe a few representatives than to bribe the majority of the many electors.”¹⁵ In November 1911, after over a year of deliberation in the state senate, constitutional amendments providing for the initiative, referendum, and recall were approved by the electorate.¹⁶

The 1911 amendments begin with the clause that, “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”¹⁷ This statement was actually originally present in the 1849 constitution,¹⁸ but was removed in the 1879 rewrite and replaced with the clause that “The people have the right to instruct their representatives,” but not specifically to suggest or approve new laws.¹⁹ For the last century, this shift towards a more direct democracy has undermined the principles of representative democracy on which the United States was founded.

James Madison argued specifically against direct democracy in Federalist No. 10, saying, “The instability, injustice, and confusion introduces into the public councils, have, in truth, been the mortal diseases under which popular governments everywhere have perished.”²⁰ Madison continued, “A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it.”²¹ The defining factor of American democracy, therefore, was the potential for perspective and deliberation that is provided by an insulated (but not unresponsive) legislature. Lee Hamilton ac-

curately summed up the Federalist position on direct democracy, “Legislatures are designed to allow representatives to weigh these matters and make difficult decisions about their priorities. Initiatives are not.”²²

Another important unforeseen effect of direct democracy in California is the state’s growing financial paralysis. Here, the problem can be traced to a few ballot initiatives that have collectively eviscerated the state’s fiscal policy. The most significant of these initiatives, Proposition 13, was passed in 1978 and stipulated that tax increases must be approved by two-thirds of both houses of the state legislature and that property taxes cannot be increased by more than 1% of the full value of the property.²³ While this measure has saved California taxpayers more than a half-trillion dollars in property taxes over the last thirty years, it has also significantly increased the budget’s reliance on income and sales taxes.²⁴ According to Justice George, this has placed lawmakers in a “fiscal straightjacket” that restricts their ability to spend to the mercy of “boom or bust” economic cycles.²⁵

This problem is compounded by a 2004 voter initiative, Proposition 58, which requires that the state pass a balanced budget every year.²⁶ This law, when taken with another proposition that stipulates that the budget must be approved by two-thirds of both houses, significantly limits the spending powers of the legislature. Additionally, several ballot initiatives have mandated the state spend certain amounts of the budget on specific programs, such as 1988’s Proposition 98, which reserves about 40% of the state budget for education.²⁷

All three of these factors: Proposition 13’s cap on taxes, Proposition 58’s supermajoritar-

ian requirement for the passage of the budget, and the funding mandates from initiatives like Proposition 98, have “aggravated California’s fiscal incontinence” and hampered the financial independence of the legislature and governor.²⁸ As a result, the state has been forced to cut back on services that don’t enjoy the protections of ballot initiatives, such as aid to needy families and even the judiciary. (Courts are closed one extra day a month to offset their 10% budget reduction in FY09-10.²⁹)

The most ironic consequences of the movement that was designed to break the Southern Pacific’s grip on California politics is the enhancement of special interest groups at the expense of the political parties.³⁰ According to Jackson Putnam, California’s early progressives failed to realize “that they were throwing out the baby with the bath when they sought to destroy the political party.”³¹ Putnam continued, saying that the party has historically acted to moderate between competing special interests and provide a degree of separation between officeholders and lobbyists. The direct democracy amendments of 1911 were specifically intended to weaken the power of parties and strengthen the political power of the electorate. However, by removing the direction and support provided by the party, Johnson et al. directly exposed politicians to increased dependence on lobbyists of special interest groups, transforming the legislature into a “commodity market.”³²

The electorate has also become exposed to direct lobbying and manipulation by interest groups and wealthy donors who seek to use the tools of direct democracy to circumvent the “cumbersome and often time-consuming process of supporting candidates for public office

and then lobbying them to pass legislation” to achieve their goals.³³ Troy Senik noted several recent cases of this development:

In 2006, for example, Los Angeles real-estate heir and environmentalist Steve Bing single-handedly dumped nearly \$50 million into Proposition 87, an initiative to levy \$4 billion in taxes on California oil producers. That same year, actor/director Rob Reiner plowed nearly \$3 million of his own money into a measure that would have raised state income taxes to fund universal pre-school. And in 2008, Orange County tech billionaire Henry Nicholas spent nearly \$5 million bankrolling Proposition 9, a measure that expanded victims’ rights under California criminal law. In the end, both Bing’s and Reiner’s initiatives went down to defeat, while Nicholas’s passed with nearly 54% of the vote. But regardless of their outcomes, these endeavors bear witness to the fact that the referendum system is just as often a means for the powerful to circumvent the system as it is for the people to have their voices heard.³⁴

Just as significant as the actual the role of special interests is the perceived role played by these groups within California’s direct democracy. This phenomenon was especially evident in the 2003 gubernatorial recall. According to Baldassare and Katz, Governor Davis’s political crisis was caused primarily by his failure to address the public’s concerns over his connections to special interest groups. Indeed, several of Davis’s actions, such as continuing his prolific fundraising at a time when the state was facing budget cuts and an energy crisis, exacerbated his problems.³⁵ Tapping into the suspicions of interest groups that reach back to the Southern Pacific era, Schwarzenegger capitalized on the

public perception of Davis and made his promise to “terminate” the special interests a mainstay of his campaign. He even claimed independence from the interests in a way that would have appalled the early Progressives, claiming that, “I am rich enough that I don’t have to take anyone’s money.”³⁶

Direct democracy was brought to California at the early part of the last century to empower the electorate at the expense of machine politics and special interest groups. However, its attempt to curb the defects of party politics by entrusting the people to manage a responsible government has failed. Direct democracy, as it came to be practiced in California, fundamentally reshaped the notion of American democracy by giving rise to exactly the kind of popular “rages” for the kinds of “improper or wicked projects” against which Madison cautioned in 1787 fearing the selfishness of man. Further, the initiative process has led to the passage of several propositions that have severely constrained the fiscal powers of the state government. A government that cannot spend cannot govern. This point is illustrated by the closures of the California courts, which are only the first step towards the rolling back of other vital state services. Finally, and most ironically, the processes of direct democracy have allowed special interest groups to dominate California politics, just as they did in the late nineteenth century; exactly the opposite task for which they had been created. These developments answer the question Justice George posed in the introduction. Direct democracy has become “an impediment to the effective functioning of a true democratic process.”³⁷ *

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The Battle Over Same-Sex Marriage

By Daniel Martinez

P*erry v. Schwarzenegger* is a landmark case in every sense of the word; despite not having reached the nation's highest court, it has already had a widespread effect. For same-sex marriage advocates, the ongoing legal saga surrounding *Perry v. Schwarzenegger* is far from the first battle. However, in recent history, the most notable event can be traced to 2004, when Gavin Newsom, mayor of the perennial liberal bastion San Francisco, drew a line in the sand by issuing marriage licenses to same-sex couples. Although the California Supreme Court voided the marriages that San Francisco allowed, the decision by Newsom began an inevitable journey to courtrooms. *In re Marriage Cases* ended 2 years later in the appellate courts, when a judge ruled the state had a compelling interest in maintaining marriage in its "traditional definition" and abiding to the popular opinion in California. In 2000, California voters had passed Proposition 22 by a 23 point margin, strictly defining marriage as between a man and woman.

2008 was a tumultuous time for both sides in the same-sex marriage fight. In a stunning decision the California Supreme Court, reviewing *In re Marriage Cases*, ruled a ban unconstitutional. Chief Justice Ronald George argued that sexual orientation is a protected class, invoking strict scrutiny under the Equal Protection Clause of the 14th Amendment.

After the decision in *In re Marriage Cases*, the people of California placed a referendum on same-sex marriage on the ballot. The people chose to restrict marriage to a man and a woman through Proposition 8. *Perry v. Schwarzenegger* followed.

The name of the case itself is misleading. After the May 2008 California Supreme Court decision, Governor Arnold Schwarzenegger publicly stated his support for same-sex marriage, despite the overwhelming opposition by members of his Republican party. Attorney General Jerry Brown, charged with upholding state laws, declined to defend the controversial proposition on grounds of violating the 14th amendment. Thus, the defense fell to Dennis Hollingsworth's protectmarriage.com, and they became the Defendant-Interveners.

Notwithstanding the peculiar circumstances surrounding the case, *Perry v. Schwarzenegger* was conducted by Vaughn R. Walker, a Federal District Judge appointed by President George Bush. Walker pressed both parties to argue the potential benefits and risks of same-sex marriage: what effect it would have on children, opposite-sex marriage, and society. The counsels for the plaintiffs were Theodore Olsen and David Boies, who had argued on opposite sides in the unforgettable *Bush v. Gore* decision that decided the 2000 election.

The plaintiffs paraded la crème de la crème of academics, including psychologists and historians, while the defendants could only muster a handful of witnesses, some of whose credentials were put into question. There was also a contemporaneous Supreme Court Case, *Christian Legal Society v. Martinez*, which dealt with a Christian group at a California public law school (fittingly, only a stone's throw from San Francisco City Hall) and their rights to exclude on the basis of sexual orientation. In her opinion, Justice Ginsburg separated behavior from status, and designated sexual orientation an "identifiable class," as Ronald George did two years earlier.

Walker's judgment was sweeping and decisive. With the aid of the plentiful scientific evidence of the plaintiffs, Walker cited the Due Process and the Equal Protection clauses of the 14th Amendment, writing, "sexual orientation discrimination can take the form of sex discrimination."

Walker plainly argued that Proposition 8 prevented an identifiable class, homosexuals, from marrying whomever they chose: a right given unquestioningly to heterosexuals. "Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex. But Proposition 8 also operates to restrict Perry's choice of marital partner because of her sexual orientation; her desire to marry another woman arises only because she is a lesbian."

Walker's 138-page argument focused on positive societal aspects that have come from gay marriage as well as the unwarranted discrimination against homosexuals that have played a fac-

tor in the passing of propositions and legislation regarding same-sex marriage. Furthermore, like Ronald George, Walker found no rational basis for discrimination, not to mention the strict scrutiny requirement for minority groups as laid out in previous Supreme Court rulings. Defendants of Proposition 8 could not overcome the arguments for its unconstitutionality, arising from the fact that it discriminated against the fundamental rights of a class of people.

As was seen in *Perry v. Schwarzenegger*, the legal avenues of opposition to legal marriage are limited and the argument that government has a compelling interest in preserving the traditional conception of marriage is gradually losing strength. The overwhelming scientific evidence cannot be ignored; the blatant discrimination against a class of citizens based on status is indefensible. Opponents argue allowing same-sex marriage will change the meaning of marriage entirely for heterosexual couples. The problem is that the religious identity of marriage and the state definition of marriage have become muddled. Opponents of same-sex marriage fear that changing the state definition of marriage might change the religious one; yet, as the Constitution clearly spells out (in the First Amendment no less), there is a protection for the free exercise of religion. Thus, the religious concept of marriage will not change in the slightest. A marriage in a church or synagogue must be complemented with a marriage according to state guidelines; it is only when the second step is completed that two individuals are legally married. Allowing same-sex marriage will clarify what marriage is: a stable union between two individuals who are committed to each other for life.

At the moment, the plaintiffs are challeng-

ing whether the defendant-interveners even have jurisdiction to defend, as they technically are not the defendants. The case still hangs in the balance. Although advocates for same-sex marriage won the day, there seems to be an inevitability of the case reaching the Supreme Court.

Yet if the case were to reach Washington, it would arrive at the Supreme Court no earlier, I believe, than one year from the time of the Walker decision. It must first navigate through the 9th Circuit Court of Appeals; this process alone could take a year. For advocates, this time might be a blessing, since the Roberts Court's reliable judicial conservatism may be a harbinger of a decision not in favor of same-sex marriage advocates. However, I do not think Boies and Olsen would throw caution to the wind by choosing to bring up the issue when they did if they knew it would fail. Both are extremely experienced litigators who have argued countless cases in front of the Supreme Court. Furthermore, I do not believe the Roberts Court, however conservative it is, will be so eager to prevent same-sex marriage. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Roberts wryly quipped, "The way to end discrimination based on race is to end discrimination based on race." Although race has long been a protected and identified class, would he feel comfortable replacing the word "race" with "sexual orientation?" If one were to follow this logic, the question that must be answered is: What is the difference between race and sexual orientation? If neither can be chosen, why is one a protected class and the other is not? If it reaches the Supreme Court, I believe the decisive factor will be how the Roberts Courts deals with Judge Vaughn Walker's assertion that a strict scrutiny review should apply to homosexuals.

In *Perry v. Schwarzenegger*, the Court can rescue the legal definition of sexual orientation from the Stone Age and rightly designate it as an identifiable class. The fact that a minority group has been the victim of injustice and discrimination can be described as nothing less than a travesty. The purpose of a life-long term on the Supreme Court was to be removed from political, ephemeral sways of opinion; justice and "the good" should be chosen with no fear of repercussion. *Perry* provides the opportunity, in all senses of the phrase, "to form a more perfect Union." *

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