Dædalus

Spring 2013: American Democracy & the Common Good

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Foreword

Leslie C. Berlowitz

The essays in this volume were collected as part of an ongoing American Academy project, *Stewarding America: Civic Institutions and the Public Good*. The project brings together leading scholars and experts to analyze the institutions that are critical for inspiring good citizenship. Institutions such as Congress, the courts, the media, the military, corporations, unions, the nonprofit sector, and the education system are held in public trust. They provide a continuity of law and procedure, of practice and participation, and of information and knowledge from one generation to the next. When they serve the short-term interests of particular individuals or groups, they erode public trust; they erode the faith of citizens in the longest functioning constitutional democracy.

Several of the essays suggest ways for our government, our schools, and our businesses to pursue the "common good." They demonstrate what it would take, personally as well as collectively, to inspire a greater commitment to good citizenship. This volume is intended to promote a much-needed public conversation about how to reclaim a sense of decency in American politics and American life.

We are grateful to Norman Ornstein, of the American Enterprise Institute, for leading this Academy effort; to William Galston, of the Brookings Institution, for coediting this issue of *Dædalus* with Norman; to the S. D. Bechtel, Jr. Foundation for inspiring and supporting our work; and to the distinguished authors in this volume who have contributed their thinking about our nation and its future.

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Introduction

Norman J. Ornstein

What is the common good? The Latin root of "common," *communis*, is the same as the root of "community"; it evokes "shared," "ordinary," and "public" all at the same time. In civic terms, the common good is the shared welfare of ordinary people – ordinary citizens working together for public ends.

Individual citizens have responsibilities to the community, and the community in turn protects, defends, and uplifts its citizens. What enables this exchange of responsibility and cooperation are our civic institutions – those that are part of the fabric of governance and those that are part of civil society.

The essays in this volume focus primarily on contemporary institutions and their relationship to the common good. They were written at a time of considerable stress in the American polity. Some of that stress flows from the anti-institutional, anti-leadership populism that often emerges during times of economic hardship. At the moment, no institution in America is held in high regard by Americans, with the exception of the military (and even the military, in the midst of individual miscreance and allegations of scandal, is in a less secure position). This distrust for institutions and leaders has been amplified by the sharp levels of ideological and partisan polarization that characterize American politics, especially but not exclusively at the national level.

Polarization itself is not new in America, but the divisions with which we now contend have become almost tribal in nature. And a new media dynamic,

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with its own tribal divisions, only accentuates the problems – including a coarsened political and social culture. It seems we are moving further every day from the ideal of a public square, where citizens share a common set of values and facts and can debate and deliberate to find the common good.

How well do our institutions advance, or at least protect, the common good? What are their appropriate roles? Where do institutions fit in historical context? What can be done within or outside the institutions to ameliorate the problems and restore a better balance?

This volume is divided into three parts. The first part focuses on public institutions, beginning with William Galston's look at the Preamble and the Constitution itself. He dissects these founding documents' relationship to the theory and practice of the common good. The section then moves on to examine the larger problem of dysfunctional governance. Tom Mann and I describe the erosion of our political system, which was built around debate and deliberation, divided powers competing with one another, regular order, and avenues to punish and curtail corruption. Jeffrey Rosen and Geoffrey Stone next focus on manifestations of these problems in the American judiciary. Rosen examines the tensions caused by a Court striving for legitimacy in an era of polarized politics – when the Court itself is becoming more overtly polarized on key decisions. Stone takes an even more critical look at the Roberts Court and its key decisions, including *Citizens United*.

A somewhat more sanguine view follows on the military. Andrew Hill, Leonard Wong, and Stephen Gerras write about the continuing high regard Americans feel toward their military, as reverence for the military and its mission has superseded fear of military abuses in the domestic arena. Still, the authors note that the current balance is not guaranteed to last. Kathleen Hall Jamieson then tackles the challenges of civic education – an obvious means of advancing the well-being of our democratic society, and an obvious area of concern in an era of low voter turnout and high rates of civic ignorance.

The final two essays in the section focus on the lifeblood of the American democratic system: political parties, elections, and the campaign finance system. Mickey Edwards canvasses America's political landscape, including primaries that pull lawmakers toward ideological poles, redistricting that distorts incentives and heightens partisan divisions, poisoned discourse, and a disastrous system of campaign financing. He highlights how all these aspects together have elevated partisanship and have diminished prospects for compromise and concern about the common good. Edwards's former colleague in the House of Representatives, Jim Leach, then examines the Supreme Court's *Citizens United* decision on campaign financing, filleting its reasoning and decrying its results.

The second part of the volume considers nonpublic institutions, including corporations, unions, the nonprofit and philanthropic sector, and journalism. Ralph Gomory and Richard Sylla trace the history of the corporation in America and argue that more recent changes in incentives have led corporations to pursue the singular goal of enhancing shareholder value – at the expense of their role as stewards of the common good. Andy Stern, the former head of a major union, then offers a full-throated defense of unions as protectors and enhancers of the public good, even as he acknowledges decreased union membership and instances of corruption and scandal that have challenged labor's image.

Noting that the framers of the Constitution discouraged the intervention of private associations between citizens and their elected governments, Peter Dobkin Hall examines the role of nonprofit organizations and philanthropy throughout American history. He argues that the recent accumulation of philanthropic resources has not been matched by any expansion of our moral imagination to challenge injustice or create great new institutions.

The title of Michael Schudson's essay on journalism is itself instructive: "Reluctant Stewards." Schudson reminds us that journalists are ambivalent about their role in society, and he proposes three general principles for the modern journalistic enterprise: it requires loose oversight; it needs to be decentralized and multiform; and journalists need to acknowledge their unresolved position between norms of "social trustee professionalism" and "expert professionalism."

The final set of essays looks more broadly at the context for our discussion of the "common good," including the larger public culture of argument and the framers' desired culture of compromise to benefit the public good. Revisiting her important 1998 book, *The Argument Culture*, Deborah Tannen focuses on the concept of "agonism" – taking a warlike stance to accomplish something that is not literally a war – and wonders if the more appropriate term for contemporary American civic life would be "combat culture." Amy Gutmann and Dennis Thompson, in turn, amplify the argument they make in their new book, *The Spirit of Compromise*. They distinguish between compromise and finding common ground; the former, requiring negotiation and sacrifice, is more difficult to achieve, yet it remains a linchpin to American democracy.

The volume concludes with essays by Howard Gardner and Kwame Anthony Appiah. Gardner considers our current challenges by reflecting on his longstanding efforts with the GoodWork Project, which nurtures ethical behavior and cultivates a broader sense of the value and reward of acting in the common good. Appiah examines the underpinnings of the democratic spirit, including the obligations of individual citizens; this foundation, he argues, is key to the American experiment.

Each essay analyzes a particular section of our social fabric. Taken together, they provide a strong overview of the entire tapestry. Our civic life may be fraying at the edges, the essayists suggest, but it is possible to reverse the damage and restore our sense of common purpose. Indeed, it is necessary and urgent that we get to the work of doing so.

The Common Good: Theoretical Content, Practical Utility

William A. Galston

Abstract: Despite skepticism about the common good, the idea has both theoretical content and practical utility. It rests on important features of human life, such as inherently social goods, social linkages, and joint occupation of various commons. It reflects the outcome for bargaining for mutual advantage, subject to a fairness test. And it is particularized through a community's adherence to certain goods as objects of joint endeavor. In the context of the United States, these goods are set forth in the Preamble to the Constitution – in general language, subject to political contestation, for a people who have agreed to live together in a united political community. While the Preamble states the ends of the union, the body of the Constitution establishes the institutional means for achieving them. So these institutions are part of the common good as well. These are the enduring commonalities – the elements of a shared good – that ceaseless democratic conflict often obscures but that reemerge in times of crisis and civic ritual.

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Many people who think of themselves as realists rather than cynics dismiss the common good as pious rhetoric. There is no shortage of leaders who have deployed the phrase in just that way. And there is evidence to support this skeptical view. Most societies are divided along lines of class, ethnicity, and religion. Free societies with market economies proliferate what we have come to call *interest groups*, just as James Madison predicted. In the United States, partisan polarization has intensified in recent decades and has become intertwined with dueling ideologies whose views of the proper ends and means of politics clash fundamentally. Nonetheless, the idea of the common good is neither vacuous nor futile. It has real content in theory and real utility in practice.

I begin by examining three kinds of social facts that are easy to overlook because they are so ubiquitous.

Inherently social goods. Some goods are inherently social. Telling a joke to oneself is virtually impossible, because humor requires surprise. It is barely possible to imagine a brain-damaged individual who remembers jokes only in the act of retelling them and forgets them immediately. Such a person might be capable of surprising himself. But the science-fiction character of this example suggests how fanciful it is.

Many games are inherently social goods because the stimulation and satisfaction they evoke require the interplay of two or more independent minds and wills. Playing chess with oneself is possible as a technical matter, but the experience is not the same.

Human life itself has inherently social dimensions. To survive infancy and develop human attributes, we need what has been called the *social womb* – the nurturing aid and companionship of other human beings. Once grown, we seek out the company of others, not only for specific benefits, but often because we feel isolated if we are alone too much or too long. We differ among ourselves, of course. Some of us find solitude unbearable, while others experience ordinary social life as burdensome. But even extreme introverts crave the company of others – on their own terms. So we assemble in parks and malls and bars, often not for specific purposes, but just to be with others. And when we do, we enjoy a kind of good together that we cannot enjoy alone.

Social linkages. In addition to these inherently social activities, there are what I call *social linkages* – aspects of our lives in which the well-being of some people affects the well-being of others. Mental illness is a familiar example: if one family member is afflicted, it disrupts the lives of the others. Martin Luther King, Jr., made much the same claim about segregation: oppression damages the oppressors, not just their victims.

The regime of public health rests on the fact of linkages. Societies mandate vaccinations because so many diseases are infectious. If an unvaccinated child gets sick, the odds are that many of her classmates will as well. Because we agree that health is an important good for each individual, and because we understand that the health of each individual is linked to the health of others, we can say that public health is an element of the common good. So conceived, the common good is anything but a demanding moral ideal. It is rather a matter of enlightened self-interest.

It is always tempting, however, to look for ways around the interest-based logic of the common good – that is, for ways of cutting the links that bind our fate to that of others. Before the development of modern medicine, people of means tried to put geographical distance between their families and the epicenter of epidemics. Those who could decamped for their country homes. Often the disease would follow them, because some of those who fled were already infected.

In our own times, fortunate individuals have used a similar strategy of de-linkage to escape the social version of public health hazards: violent crime. They use their wealth to live in fortified houses or well-patrolled gated communities. When they travel, private armed guards accompany them. In some stratified societies, they use guards and armored cars to protect their children from being kidnapped on the way to school.

These evasive measures are very costly, and not only in material terms. They mean living a life of constant fear, and they entail a considerable loss of liberty. At some point, most societies decide that it is better to address crime collectively – to make the investments in police and courts and prisons that a credible program of criminal justice requires. As the residents of New York and many other U.S. cities discovered during the past few decades, an investment in crime control can pay huge dividends to society as a whole. When people can walk without fear in their neighborhoods, they enjoy more freedom and more security. And besides, businesses move in, the local economy grows, and property values increase. Once we accept that social linkage is an inescapable fact, we can act in ways that benefit society as a whole. Here again, the common good is enlightened self-interest.

The good of the commons. As social beings, we find, create, and congregate in various shared places. Some are constructed physical spaces, such as streets, parks, and public buildings. Others are technology-based and virtual. Still others, such as the air we breathe, are part of the natural environment. Despite these differences, they have a common attribute: how we behave in these places affects everyone's ability to enjoy them over time. If we carelessly leave an unextinguished fire in a campground, the entire facility may go up in flames. If we fail to control emissions from vehicles that use fossil fuels, atmospheric pollutants can increase the incidence of asthma and other ills. So the common good includes the good of the commons.

While these three kinds of social facts – intrinsically social goods, social linkages, and shared places – are aspects of the common good, they hardly exhaust it. As individuated beings, our separate existences generate clashes of interests, and our liberty gives rise to competing conceptions of the good. These familiar differences are themselves social facts, and they challenge all but the most limited understandings of the common good. In the face of difference, the common good is an achievement, not a fact.

The everyday activity of bargaining illuminates some basic features of the achieved common good. The animating reality of this activity is the belief that relative to the status quo, some agreement would leave both parties to the negotiation better off. This dyadic common good exists only potentially; it takes cooperation to make it actual.

On some occasions there is only one possible agreement, a single point of tangency between the most that A is willing to offer and the least that B is willing to accept. In the vast majority of cases, however, there is a zone of overlap between the arrangements that could be acceptable to both. Most bargaining tactics, such as bluffing, are designed to secure for oneself the largest possible share of the benefits of cooperation. So the common good neither implies nor requires comprehensive harmony between the parties: there is almost always competition within the zone of mutually beneficial cooperation.

In actual politics, this competition often takes the form of arguments about allocating the costs of maintaining important communal activities. If we agree that education is vital, whose taxes will make it possible? Does it make sense to rely as heavily as we now do on local communities, principally through property taxes? If we agree that it is important to maintain a certain level of military capabilities, who will participate in the armed forces, how are they to be chosen and compensated, and who will be asked to pay? If we go to war, should there be a "war tax" to which everyone is asked to contribute? The common good requires a balance between the benefits and burdens of social cooperation such that all (or nearly all) citizens believe that the contribution they are called on to make leaves them with a net surplus. If they cease to believe that, they will try to lighten these burdens, either by evading some taxation or, in extreme cases, by leaving the community through exit (for individuals) or secession (for groups).

It turns out that the criterion of mutual advantage is only part of what makes bar-gains mutually acceptable. In a famous two-person experiment, one person is handed ten $1 bills and is asked to divide them into two shares. If the other person agrees to the division, each receives his designated share; if not, neither gets anything. One might imagine that the second party would accept any division, because even a small share leaves him better off. In practice, not so; beyond a certain point of inequality, a sense of unfairness trumps the potential gain from the transaction. The need for mutual consent establishes a kind of bedrock equality between the parties that spills over into, and delimits, the zone of acceptable agreements.

It is always possible that an agreement that meets the tests of fairness and mutual advantage will work to the disadvantage of those not involved in the decision. In many poor communities, for example, gentrification benefits both developers and new incoming residents while pricing current residents out of the market. Rent increases can also make it impossible for long-established "mom and pop" businesses to survive. So third parties will often appeal to a conception of the common good broadened to include them, and they will resort to nonmarket mechanisms, such as street protests and local governments, to make sure their voices are heard.

This raises a question fundamental to the theory and practice of the common good: how are we to define the limits of the community within which the principle of commonality applies? Environmentalists argue for a global definition: the consumption of fossil fuels produces externalities that affect the entire human race. (The long-running international negotiations to produce a global compact on climate change represent an effort – which may fail – to reframe a zero-sum conflict between developed and developing nations as the quest for mutual advantage.)

We cannot rule out the possibility that a workable conception of the global common good will emerge from these discussions. At present, however, the common good is typically predicated on independent political communities, the kinds of entities represented in the United Nations. These communities are not pre-given natural facts, of course; they are in part human artifacts. Often one part of a community will decide that a common good linking it to the rest of the community no longer exists (if it ever did). Successful secessionist movements redraw the boundaries of the communities within which the common good is pursued. And so, in reverse, do successful efforts to integrate independent states into a single overarching political community.

The U.S. Constitution begins with three fateful words: We the people. It could have been (and, as dissidents such as Patrick Henry argued, should have been) "We the *states*." Instead, the Constitution invoked – and to some extent called into being – a united political community with a single *demos*.

There is a precondition of community: the people who form it must want to live together as a unity, and they must think of themselves as sharing a common fate. Communities fail when this condition is not or ceases to be satisfied. In states such as Iraq and Syria, the identities of different ethnic and religious groups contend with – and may trump – their shared identity as members of the same political community. And once-successful communities can break down when disagreements on fundamentals trump their shared history. In Federalist No. 2, John Jay argued that "Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government." Three quarters of a century later, Abraham Lincoln concluded his First Inaugural with a desperate plea to the South: "We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break, our bonds of affection." In the end, of course, the "mystic chords of memory" to which Lincoln appealed proved weaker than did differences of interest and principle, and also the sentiments of anger and fear. The United States barely survived the ensuing ordeal; many communities do not, and their common good dissolves as an effective force.

But in 1787, the dominant reality was Jay's, not Lincoln's. Taking the presumption of one united people as granted, the Preamble went on to sketch the content of the common good the Constitution was created to foster. The words that follow "in order to" specify the key elements of that good: a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty. In principle, all were to share in these goods, and all were to benefit from them. (The gap between this principle and actual practice is one of the central drivers of American history.)

Note that the Preamble defines a distinctive understanding of the common good for a specific society. Unlike some other societies, America's common good does not explicitly include theological doctrines or a canon of the virtues. We are free to argue (and throughout our history many *have* argued) that the common good we seek is unattainable without religion and civic morality. George Washington and Alexis de Tocqueville are hardly alone in seeing just such connections. But as citizens, we are free to disagree, and to draw practical inferences (for example, about the wisdom of public aid to parochial schools) from our divergent views.

Note also that the Preamble defines the common good in highly general terms. We are free – indeed, invited – to argue about what it means to establish justice or to promote the general welfare. And the "liberty" we are pledged to protect and pass on to future generations is among the most contestable terms in the political lexicon. While the Preamble sets the terms of debate about the American common good, it hardly prejudges the outcome of that discussion, and it leaves open the possibility that the prevailing understanding of key terms may change over time. (History suggests that this open-endedness is anything but a defect.)

One final observation about the Preamble: it is limited geographically but not chronologically. While only the individuals associated with a particular place – the United States – fall under the canopy of the Preamble's promise, the founders sought to extend it beyond their own generation, to "our posterity." To remain true to the Constitution, no generation may seize for itself fleeting advantages that risk leaving future generations with diminished shares of the goods that the founding charter places at the heart of our collective enterprise.

If the Preamble states the ends of the union, the body of the Constitution sets forth the institutional means for achieving them. And these institutions are part of the common good as well. They enable not only collective decision-making but also the capacity to implement decisions once they are made. They make possible the peaceful resolution of disputes. They are designed to ward off tyranny, whether of individuals or of groups, and to offer a voice for all. They empower majorities while protecting minorities. And the Constitution provides, as well, for processes of amendment to improve its capacity to promote these ends when changing conditions make such improvements necessary.

The common good, to repeat, is no guarantee of social and political harmony. Our constitutional common good establishes a framework of ends and means about which, and within which, vigorous contestation is inevitable. We disagree, of course, about how different sectors of society are to divide the burden of maintaining a free and well-functioning political community. But the debate can touch on even deeper issues. If the common good encompasses multiple goods, then some of its elements often stand in tension with one another. A fair trial is an element of the common good as we understand it; so is a free press. What should we do when they collide? Even when only one good is at stake, we disagree on what its general specification means in specific cases. The Fourth Amendment protects us from "unreasonable" search and seizure. But how do we draw the line between what's reasonable and what isn't? Reasonable people often disagree about what it means to act reasonably in specific cases.

Controversy over the common good can even raise an issue on which moral philosophers have long been divided: is the good of the community to be determined by aggregating the consequences of different courses of action for all members of the community? For example, while the right to acquire and hold private property is an important element of the common good in the United States, it is not absolute. The Fifth Amendment states that "private property [shall not] be taken for public use without just compensation." We may leave aside the often contentious issue of when compensation is just and focus on the concept of public use. No one doubts that roads, post offices, and military bases fall under this concept. In 2005, however, a five-member majority of the U.S. Supreme Court allowed the city of New London, Connecticut, to take private property to further the community's economic development. If development was designed to boost the community's overall production and wealth, it qualified as a public use that justified the taking of private property. This decision proved enormously controversial, in part because it subjected what many regarded as an individual right to a collective calculation. The good of private property, argued many critics, is not something we can determine simply by adding up the consequences of different patterns of property ownership for all affected individuals.

There is of course a continuum of contestation, from clashes that can trigger civil war to the disputes that characterize everyday political and social life. But even disagreements over public policy – should the federal government guarantee that no citizen must go without health insurance? – can trigger fears that the community's fundamental character is being transformed. The passions and divisions of the moment often lead to myopia, a blurring of the vision that allows us to discern what we share despite our differences. It is the role of statesmanship – always in short supply – to remind us of the enduring commonalities that we are forever in danger of overlooking.

Finding the Common Good in an Era of Dysfunctional Governance

Thomas E. Mann & Norman J. Ornstein

Abstract: The framers designed a constitutional system in which the government would play a vigorous role in securing the liberty and well-being of a large and diverse population. They built a political system around a number of key elements, including debate and deliberation, divided powers competing with one another, regular order in the legislative process, and avenues to limit and punish corruption. America in recent years has struggled to adhere to each of these principles, leading to a crisis of governability and legitimacy. The roots of this problem are twofold. The first is a serious mismatch between our political parties, which have become as polarized and vehemently adversarial as parliamentary parties, and a separation-of-powers governing system that makes it extremely difficult for majorities to act. The second is the asymmetric character of the polarization. The Republican Party has become a radical insurgency – ideologically extreme, scornful of facts and compromise, and dismissive of the legitimacy of its political opposition. Securing the common good in the face of these developments will require structural changes but also an informed and strategically focused citizenry.

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*(*See endnotes for complete contributor biographies.)*

From Federalist No. 1 on, the framers of the American political system showed a deep concern about the role of government as a trustee of the people, grappling with questions about the power, structural stability, and credibility of government. In that first Federalist paper, Alexander Hamilton defended a vigorous role for government: "[It] will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government."[1]

In Federalist No. 46, James Madison wrote, "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."[2] And in Federalist No. 62, Madison, outlining and defending the special role of the Senate, reflected at length on the need for stable government and the danger of mutable policy: "[G]reat injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements."[3]

Stable government, to Madison, included an underlying and enduring legitimacy in the legislative process. This meant both a disciplined government that did not spew out a plethora of unnecessary and careless laws, and a government that did not produce contradictory laws or reversals of laws so frequently that citizens questioned the content and legitimacy of the standing policies affecting their lives. Madison wrote in Federalist No. 62 of mutable policy: "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."[4]

Madison ended Federalist No. 62 with a warning that resonates today: "But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, toward a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability."[5]

The actions and functions of government, a vibrant political process and system, were thus essential for the common good of a society. The framers saw several challenges peculiar to the new American country. It was, as they wrote, an "extended republic," a huge geographic expanse and a society containing dramatically diverse populations, including people living in rural areas so remote that they literally might not see other human beings for months, and others living in urban areas far more densely packed than today's Manhattan. How could the new government build consensus and legitimacy around policies that would affect all citizens, in light of their different interests, lifestyles, and backgrounds? The demands of the American political system differed from those in Britain, a much smaller and far more homogeneous culture and society. Instead of a parliamentary system, the framers carefully constructed a system that would be practicable and desirable for their nation, built around the following elements:

Debate and deliberation. The legislative branch was called Congress – not parliament. This was not simply a different word, but reflective of a different approach to governance. The word *congress* comes from the Latin word *congredi*, meaning to come together; *parliament* comes from the French word *parler*, meaning to talk. In a parliament, the legislators vote on a program devised by the government; the majority members reflexively vote for it, the minority members reflexively vote against. Citizens accept the legitimacy of the actions, even if they do not like them, because within four or five years, they have the opportunity to hold the government accountable at the polls. The minority expresses its power by publicly questioning government actions and intentions during regular periods of "Question Time."

In contrast, the American framers wanted a system in which representatives of citizens from disparate regions would come together and meet face to face, going through extended periods of debate and deliberation across factional and partisan lines. This model would enable the representatives to understand each other's viewpoints and ultimately reach some form of consensus in policy-making. Those who lost out in the deliberative process would be satisfied that they had been given ample time to make their case, adding to the likelihood that they would accept the legitimacy of the decisions made, and communicate that acceptance back to their constituents. Of course, in contrast to a parliament, it was a process that made swift action extremely difficult. But the trade-off was that government power would be constrained and that Americans would be more likely to accept the decisions and implement them fairly and smoothly.

Debate and deliberation could not be limited to governmental actors. For the system to work and be perceived as legitimate, there had to be debate and deliberation among citizens, via local and national "public squares," and in campaigns, where candidates and their partisans could press their cases and voters could weigh the viewpoints and preferences of their alternatives for representation.

Divided powers competing with one another. America's unusual system of the separation of powers did not offer a clean and pure division between the executive, legislative, and judicial branches, nor between the House of Representatives and Senate. Instead, as constitutional scholar Edward Corwin put it, it was an "invitation to struggle" among the branches and chambers. But that invitation to struggle, which anticipated vibrant, assertive, and proud branches, also was infused with *the spirit of compromise*, as eloquently analyzed by Amy Gutmann and Dennis Thompson in this volume and in their recent book on the subject.[6] A political system with separation of powers and separate elections for House, Senate, and president could easily have institutions at loggerheads. The system, and the culture supporting it, required safeguards to enable the government to act when necessary and desirable, without getting caught in stalemate or gridlock.

Regular order. To make the processes work and to foster legitimacy, legislative and executive procedures had to be regularized and followed. This would in turn enable real debate by all lawmakers, opportunity for amendments, openness and reasonable transparency, and some measure of timeliness. Executive actions, including crafting and implementing regulations to carry out policy, would also require elements of transparency, responsiveness to public concerns, and articulated purpose. Similarly, judicial actions would have to allow for fairness, access to legal representation, opportunities for appeal, and a parallel lack of arbitrariness.

Avenues to limit and punish corruption. Public confidence in the actions of government – a sense that the processes and decisions reflect fairness and enhance the common good – demands that the cancer of corruption be avoided or at least constrained. If small groups of special interests or wealthy individuals can skew decisions in their favor, it will breed cynicism and destroy governmental legitimacy. Thus, it is necessary to find ways to constrain the role of money in campaigns, to build transparency around campaign finance and lobbying, to discourage "old boy networks" and revolving doors, to investigate and prosecute bribery, and to impeach and remove government officials who commit high crimes and misdemeanors, which include corrupt behavior.

On all these fronts, there is ample reason to be concerned about the health and function of America's current political institutions. Of course, no political system operates exactly as intended. Politics and policy-making are inherently messy, occurring at the intersection of power, money, and ambition, and leading to temptations and imperfections. We have been immersed in these processes in Washington for more than forty-three years, and we have observed frequent governmental failures, deep tensions, and challenges to the political system – from profound societal divisions over wars like Vietnam to the impeachment proceedings against two presidents. But those challenges were modest compared to what we see today: a level of political dysfunction clearly greater than at any point in our lifetimes.

Fundamentally, the problem stems from a mismatch between America's political parties and its constitutional system. For a variety of reasons, all recounted in our book *It's Even Worse Than It Looks: How the American Constitutional System Collided With the New Politics of Extremism*, the two major political parties in recent decades have become increasingly homogeneous and have moved toward ideological poles.[7] Combined with the phenomenon of the permanent campaign, whereby political actors focus relentlessly on election concerns and not on problem-solving, the parties now behave more like parliamentary parties than traditional, big-tent, and pragmatic American parties.

Parliamentary parties are oppositional and vehemently adversarial, a formula that cannot easily work in the American political system. The parliamentary mindset has been particularly striking in recent years with the Republican Party, which has become, in its legislative incarnation especially, a radical insurgent, dismissive of the legitimacy of its political opposition. Of course, substantial majorities in the House and Senate, along with the presidency, can give a majority party the opportunity to behave like a parliamentary majority. But that phenomenon, which occurred for Democrats in the first two years of the Obama administration, resulted in major policy enactments but not a smoothly functioning political system. It featured neither a widespread sense of legitimacy nor deep public satisfaction.

Why? The processes of debate and deliberation were disrupted first by the Republicans' unprecedented use of the filibuster and the threat of filibuster as purely obstructionist tools. This deluge was designed to use precious floor time without any serious discussion of the reasons behind the filibusters, or any real debate on differences in philosophy or policy. Second, when Democrats were able to pass legislation, it was against the united and acrimonious opposition of the minority. America's political culture does not easily accept the legitimacy of policies enacted by one party over the opposition of the other – much less the continued, bitter unwillingness of the minority party to accept the need to implement the policies after lawful enactment. But this dynamic, which accompanied the economic stimulus package in 2009, the health care reform law of 2010, and the financial regulation bill in 2010, among others, resulted in greater divisions and public cynicism, not less.

The approach of the minority party for the first two years of the Obama administration was antithetical to the ethos of compromise to solve pressing national problems. The American Recovery and Reinvestment Act of 2009, a plan which included $288 billion in tax relief, garnered not one vote from Republicans in the House. The Affordable Care Act, essentially a carbon copy of the Republican alternative to the Clinton administration's health reform plan in 1994, was uniformly opposed by Republican partisans in both houses. A bipartisan plan to create a meaningful, congressionally mandated commission to deal with the nation's debt problem, the Gregg/Conrad plan, was killed on a filibuster in the Senate; once President Obama endorsed the plan, seven original Republican co-sponsors, along with Senate Republican Leader Mitch McConnell, joined the filibuster to kill it. McConnell's widely reported comment that his primary goal was to make Barack Obama a one-term president – a classic case of the permanent campaign trumping problem-solving – typified the political dynamic.

The succeeding midterm election brought a backlash against the status quo – which meant divided government once Republicans captured a majority in the House of Representatives. As a result, the 112th Congress had the least productive set of sessions in our lifetimes, enacting fewer than 250 laws, more than 40 of which were concerned with naming post offices or other commemoratives.[8] The major "accomplishment" of the 112th Congress was the debt limit debacle, which marked the first time the debt limit had been used as a hostage to make other political demands. The result was not just the first ever downgrade in America's credit, but another blow to the public's assessment of its government's capacity to act on behalf of the common good.

The 2012 elections were in most respects a clear expression of public will. President Obama earned reelection with a majority of popular votes, as did Democrats in elections for the House and in the thirty-three contests for the Senate. But in the House, a concentration of Democratic voters in high-density urban areas, contributing to a more efficient allocation of Republican voters across congressional districts, and a successful partisan gerrymander in the redistricting process left Republicans with a majority of seats, and hence control. Despite the election, the dysfunction in the policy process continued in the succeeding lame duck session of Congress, as efforts to resolve America's fiscal problems before a January 1, 2013, deadline were thwarted until after the deadline had passed. House Speaker John Boehner was himself undermined by members of his own party when he tried to devise an alternative to the president's plan. In this case, a substantial share of safe House Republican seats were immune to broader public opinion and to their own Speaker, but were more sensitive to threats from well-financed challenges in their next primaries – from the Club for Growth and other ideological organizations – and to incendiary comments from radio talk show hosts and cable television commentators popular among Republican voters in their districts.

Tribal politics and vehement adversarialism has also led to deterioration of the regular order. In recent years, there have been more and more closed rules in the House, denying opportunities for amendments from the minority, and more uses of a majority tactic in the Senate called "filling the amendment tree," in which the majority leader precludes amendments, usually as a way to forestall or limit the impact of filibusters. There have been more omnibus bills, pooling action across areas because of the increased difficulty in getting legislation enacted; and fewer real conference committees to iron out differences between bills passed by each house of Congress. There have been fewer budget resolutions adopted and appropriations bills passed; fewer authorizations of programs and agencies; and less oversight of executive action. Fewer treaties have gained the two-thirds vote needed for ratification in the Senate, leading to more executive actions. There have been more holds and delays in the Senate in executive nominations. All of these pathologies lead to more acrimony inside Congress and between Congress and the executive, and a diminished sense of confidence by Americans in their political and policy institutions.

At the same time, the administration of elections has been politicized. Partisan legislatures have passed stringent voter ID laws to narrow the vote; several of these laws have been thrown out by courts for targeting or unfairly affecting minorities. In other cases, shortened voting hours and restrictions on early voting, in states such as Florida and Ohio, were also aimed at constraining minority voters. Fortunately, the 2012 election was not close; had it been more like the 2000 election, it is very likely that it would have further reduced public trust in the fundamentals of democratic elections.

The world of money and politics has also taken an alarming turn toward at least the appearance of corruption, of democracy driven by big money and large interests. A combination of factors – the Supreme Court's *Citizens United* decision, an appeals court decision called *SpeechNow*, a Federal Election Commission that is unable or unwilling to enforce campaign finance laws, and an Internal Revenue Service that allows the operation of faux social-welfare organizations set up to influence elections but not required to disclose donors – has given wealthy individuals, corporations, and other entities an overweening influence on elections and on the policy process. If super PACs did not determine the outcome of the presidential election, their impact did expand as one moved down through Senate and House elections and on to state, local, and judicial elections. In states like Kansas, North Carolina, and Arkansas, large donations from a handful of individuals and groups targeted moderate Republicans and replaced them with reactionary conservatives, creating more division and polarization, not to mention politicians beholden to those whose money put them in power.

Organizations such as the American Legislative Exchange Council (ALEC) have used large and often anonymous contributions from corporations and individuals to write laws, including the voter ID laws and laws favoring the corporate sector, that many state legislatures have simply enacted as written, obviating their independent role. And inside Congress, many lawmakers have told us about the intimidating effect that occurs when a lobbyist tells them that if they do not support a bill or amendment, they might face a multimillion dollar independent attack days or weeks before the election, which they will be unable to counter due to a lack of time or fundraising limitations. Such threats can result in the passage of bills or amendments without any money even being spent. By any reasonable standard, this is corruption.

All of this exhibits a level of dysfunction in American political institutions and processes that is dangerous to the fundamental legitimacy of decisions made by policy-makers, not to mention the ability of those policy-makers to act at all. Tribal politics at the national level has metastasized to many states and localities, and has affected the broader public as well. The glue that binds Americans together is in danger of eroding. What can be done about these problems?

There is no easy answer, no panacea. The problems are as much cultural as structural. But if structural change inside and outside Washington cannot solve the problems, it can ameliorate them, and perhaps also begin to change the culture.

One strategy for structural change is to accept the emergence of parliamentary-style polarized parties and try to adapt our political institutions to operate more effectively in that context. This is easier said than done. Eliminating or constraining the Senate filibuster would give unified party governments a better shot at putting their campaign promises into law.[9] But separate elections for the presidency and Congress, as well as the midterm congressional elections, often conspire to produce divided party government, which has become more a basis of parliamentary opposition and obstruction than consensus-building and compromise. Shifting more power to the presidency, which is already under way, may produce more timely and coherent policies but at a considerable cost to deliberation, representation, and democratic accountability. A president is, of course, elected by the entire nation. Especially on national security issues, Americans are willing to tolerate and even embrace many unilateral presidential actions; think Grenada and Abbottabad. But America's political culture has ingrained in the public a sense that legitimate policies more often call for some form of broad leadership consensus and institutional buy-in. A series of unilateral actions by the president would not necessarily result in public acceptance of the decisions as being made for the common good. The same can be said for other forms of delegation, from Congress to fed-like independent agencies, or boards that encourage more expert and evidence-based decision-making that is at least somewhat removed from the clash of polarized parties. Each of these ideas has some limited promise, but none can be the basis of constructively reconciling a fundamental mismatch between parliamentary-like political parties and the American constitutional system.

Another approach emphasizes trying to bring the warring parties together: by reaching for consensus through increased social interaction (the House experiment with civility retreats); encouragement of or pressure on politicians to come together to make a deal (Fix the Debt); the mobilization of centrists in the citizenry to create political space for more collegial and collaborative policy-making (No Labels); the use of outside bipartisan groups to map policy solutions that split the differences between the polarized parties (Committee for a Responsible Federal Budget); and the support of independent presidential candidates or third parties to lay claim to the allegedly abandoned political "center" (Americans Elect). These efforts by and large seek to create a spirit of compromise, an atmosphere of civility and mutual respect, and a focus on problem-solving – outcomes which are indeed commendable.

But we believe that these well-intentioned efforts are limited by the strength and reach of party polarization, which is buttressed not only by genuine ideological differences among elected officials, but also by like-minded citizens clustered in safe districts, committed activists, a partisan media, a tribal culture, interest groups increasingly segregated by party, a party-based campaign funding system that now encompasses allegedly independent groups, and a degree of parity in party strength that turns legislating into strategic political campaigning. Most of these efforts also suffer from an unwillingness to acknowledge the striking asymmetry between today's political parties, which in the process gives a pass to obstructionist and dysfunctional behavior.

A more promising strategy of reform is to bring the Republican Party back into the mainstream of American politics and policy as the conservative, not radical, force. Ultimately, this is the responsibility of the citizenry. Nothing is as persuasive to a wayward party as a clear message from the voters. The 2012 election results and the widespread speculation of the diminishing prospects of the Republican coalition in presidential elections may be the start of that process. But it can be boosted and accelerated by the groups discussed above speaking clearly and forthrightly about the damage caused to constructive public policy by tax pledges, debt limit hostage-taking, the abuse of the filibuster, climate change denial, the demonization of government, and ideological zealotry. The mainstream press could also do its part by shedding its convention of balancing the conflicting arguments between the two parties at the cost of obscuring the reality. Voters cannot do their job holding parties and representatives accountable if they do not have the necessary information. Some in the media think it is biased or unprofessional to discuss the many manifestations of our asymmetric polarization. We think it is simply a matter of collecting the evidence and telling the truth.

More significant, for both parties, would be to enlarge the electorate to dilute the overweening influence of narrow, ideologically driven partisan bases that dominate party primaries. As a result, these bases have an outsized role in choosing candidates, who often do not reflect the views of their broader constituencies; and as a means of heading off primary challenges, the bases can intimidate lawmakers searching for compromise or a common good into moving away from solutions. Meanwhile, the enlarged influence of party bases pushes campaign operatives and candidates away from broader appeals and toward strategies to turn out one's own base (often by scaring them to death), and to suppress the other side's base. The politics of division trump the politics of unity.

To counter this set of problems, we propose adoption of the Australian system of mandatory attendance at the polls, where voters who do not show up (they do not have to vote for specific candidates, but can cast unmarked ballots) and do not have a written excuse are subject to modest fines, the equivalent of a parking ticket. This system moved Australian turnout from around 55 percent, similar to the United States, to over 90 percent.[10] Most important, it changed Australian campaign discourse. Politicians of all stripes have told us that when they know that their own base will turn out en masse, and will be balanced by the other party's base, they shift their efforts to persuading voters in the middle. That means talking less about wedge issues, like abortion or guns, and more about larger issues like education and jobs; and it means using less of the fiery or divisive rhetoric that excites base voters but turns off those in the middle.

Another option is to expand the use of open primaries and combine them with preference voting. Several states, including California, now use open primaries, in which all candidates from all sides run together; the top two finishers go on the ballot for the general election. Add in preference voting, whereby voters rank their choices in order of preference (something also done in Australia), and it reduces the chances of an extreme candidate winning a top-two finish because multiple non-extreme candidates divide the votes of the more populous, moderate electorate. Another advantage of an open primary is that lawmakers who cast contentious votes would be less intimidated by threats of a primary challenge funded by ideological organizations if they knew the primary electorate would be expanded beyond a small fringe base. If we could combine these changes with redistricting reform, using impartial citizen commissions to draw district lines as we have seen operate in states like Iowa and California, we might get somewhere.

Of course, the enhanced leverage that smaller groups possess over the sentiments of the larger populace has other roots, including especially the post–*Citizens United* campaign finance world. When groups like the Club for Growth, wealthy individuals, or "social welfare" organizations funded by anonymous sources threaten lawmakers with massive negative campaigns sprung in the final weeks of the election season, or threaten to finance primary opponents against them, it gives immense leverage to the well-heeled few against the viewpoints of the many. Absent a new Supreme Court, a multiple public match for contributions from small donors would give additional leverage to the broader population.

The pull toward tribal politics and away from a focus on the common good has also been shaped by the emergence of tribal media, via cable television and talk radio. The tribal media have established lucrative business models built on apocalyptic rhetoric and divisive messages that guarantee regular audiences within select demographics. These business models have emerged in large part because of the dramatic technological changes that have created hundreds or thousands of alternative information outlets, which are amplified by the emergence of social media. All of this has devastated the concept of a public square, where most Americans could get their information, share a common set of facts, and debate vigorously what to do about common problems. Having real debate and deliberation at the public level, much less the governmental level, depends on sharing a common set of facts and assumptions.

Re-creating a public square is a Herculean task given the contemporary media and technology landscape. But it must be attempted. Public media would be the best venue; finding a way to fund a public/private foundation that would focus on innovative ways to use public media for straightforward analysis and discourse, including vigorous debate based on common understanding of the facts, should be a priority here. One way to do so would be to apply a rental fee to broadcasters and others for their use of the public airwaves, in return for erasure of the public-interest requirements that now have little impact.[11]

Most of these changes will be hard to implement in the short run. The best we can hope for is a more tempered Republican Party willing to do business (that is, deliberate, negotiate, and compromise without hostage-taking or brinksmanship) with their Democratic counterparts. Over the long haul, both political parties in the United States need to depolarize to some degree. The parties may maintain clear differences in philosophy and policy, to be sure, but they must also cultivate enough agreement on major issues to permit the government to work as designed. The parties must also serve an electorate that shares a common vision and common facts, even with sharp differences in philosophy, lifestyles, and backgrounds. Despite the obstacles, we must think big about changing the structures and the culture of our partisan government and populace; the stakes are high.

ENDNOTES

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Can the Judicial Branch be a Steward in a Polarized Democracy?

Jeffrey Rosen

Abstract: At the beginning of his first term as Chief Justice, John Roberts pledged to try to persuade his colleagues to consider the bipartisan legitimacy of the Court rather than their own ideological agendas. Roberts had mixed success during his first years on the bench, as the Court handed down a series of high-profile decisions by polarized, 5-4 votes. In the health care decision, however, Roberts did precisely what he said he would do, casting a tie-breaking vote to uphold the Affordable Care Act because he thought the bipartisan legitimacy of the Court required it. But the reaction to the health care decision – which Democrats approved and Republicans did not – suggests that Roberts's task of preserving the Court's bipartisan legitimacy is more complicated than he may have imagined, and that his success in the future will depend on the willingness of his colleagues to embrace his vision. Given the Court's declining approval ratings, an increase in partisan attacks on the Court, and a growing perception that the Court decides cases based on politics rather than law, the Chief Justice's vision of the Court as a bipartisan steward is more difficult – and also more urgently needed – than ever.

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In July 2006, at the end of his first term as Chief Justice of the United States, I interviewed John G. Roberts about his vision for the Supreme Court. In the interview, Roberts expressed frustration that his colleagues were acting more like law professors than members of a collegial court. By handing down a series of 5-4 decisions along predictable ideological lines, he suggested, the Court was undermining its democratic legitimacy, making it harder for the public to respect the judiciary as an impartial institution that transcends partisan politics.

Roberts said he would make it his goal as Chief Justice to help persuade his colleagues to put the institutional legitimacy of the Court above their own ideological agendas. He pledged to embrace as a model his greatest predecessor, John Marshall, who served as Chief Justice from 1801 to 1835 and championed the idea that the judicial branch should be a nonpartisan steward in a polarized democracy. In particular, Roberts said he would follow Marshall in discouraging his colleagues from issuing separate opinions. "I think that every justice should be worried about the Court acting as a Court and functioning as a Court," he said. "[T]hey should all be worried, when they're writing separately, about the effect on the Court as an institution."[1]

Roberts suggested that Marshall's success in unifying the Court was a reflection of his temperament: he persuaded his colleagues to live together in the same boardinghouse, where they discussed cases over a hogshead of Marshall's Madeira. Roberts explained that he had embraced Marshall as a model in reaction to the "personalization of judicial politics," which had led both the justices and court observers in recent years to be more concerned about the consistency and coherence of the votes of individual justices than about the legitimacy of the Court as a whole. By emphasizing the benefits of unanimity for his colleagues, Roberts said, he hoped to influence the "team dynamic" that would lead both sides to work toward consensus, in order to achieve a kind of bilateral disarmament.

Roberts was effective in achieving his goal of unanimity during his first, abbreviated term, in which there were far fewer 5-4 decisions (13 percent) than in the previous term (30 percent).[2] But the following term ended in 2007 with a cacophony of partisan disagreement: 33 percent of the cases were decided by 5-4 votes – the highest percentage in at least a decade.[3] During this term, the Court decided high-profile disputes regarding partial birth abortion, affirmative action, and campaign finance reform, and the justices sniped at each other in unusually personal terms. Justice Antonin Scalia, for example, accused Roberts of "faux judicial restraint" – the equivalent of fighting words on the Supreme Court.[4] On the other side of the ideological divide, Justice Stephen Breyer accused Roberts of "distort[ing] precedent" and seeking to "rewrite this Court's prior jurisprudence, at least in practical application."[5]

Since then, the rate of 5-4 decisions has fluctuated from 17 percent in the 2007 term, 29 percent in 2008, 18 percent in 2009, and 20 percent in 2010.[6] But then came the *Citizens United* case in 2010, which struck down the McCain-Feingold campaign finance reform by a 5-4 vote and earned a rebuke from President Obama during his State of the Union address just a week after the decision was made.

Against this background of partisan divisions, many observers expected the Roberts Court to strike down the Affordable Care Act, the centerpiece of President Obama's domestic agenda, by a 5-4 vote. In the landmark health care decision in 2012, however, Chief Justice Roberts did precisely what he said he would do. He joined the four liberal justices in holding that the Affordable Care Act's individual mandate is justified by Congress's taxing power, even though he joined the four conservative justices in holding that the mandate is not justified by Congress's power to regulate interstate commerce. For placing the bipartisan legitimacy of the Court above his own ideological agenda, Roberts deserves praise not only from liberals but from all Americans who believe that it is important for the Court to stand for something larger than politics. Seven years into his chief justiceship, the Supreme Court finally became the Roberts Court.

To question the combination of legal arguments that Roberts embraced would be beside the point: Roberts's decision was above all an act of judicial statesmanship. On both the left and the right, commentators praised his "political genius" in handing the president the victory he sought even as he laid the groundwork for restricting congressional power in the future.

That is not to say that Roberts has reinvented himself as a liberal. He has strong views that he is unwilling to compromise, and with his strategic maneuvering in the health care case, he increased the political capital that will allow him to continue to move the Court in a conservative direction. Marshall achieved a similar act of judicial jujitsu in *Marbury v. Madison*, when he refused to confront President Jefferson over a question of executive privilege but laid the groundwork for expanding judicial power in the future. All this suggests that, as long as the composition of the Court remains balanced between five conservatives and four liberals, partisan divisions on the Roberts Court will continue. But in the most highly visible cases, in which the Court's institutional legitimacy is at stake, the Chief Justice may occasionally break ranks with his conservative colleagues.

What can explain the, at best, mixed success that Chief Justice Roberts has had in reducing polarization on the Court, despite his stated ambition to do so? Part of the explanation has to do with the Court's docket: as Justice Breyer once told me in a public interview, the more constitutional cases the Court agrees to hear, the more likely the justices are to divide because they have stronger preconceived views in constitutional, as opposed to statutory, cases. Breyer's observation is supported by the fact that Roberts has had success in achieving something approaching unanimity in cases affecting business interests, which are often decided on statutory rather than constitutional grounds. About 40 percent of the Court's docket is now made up of business cases, up from 30 percent in recent years, and 79 percent of these cases are decided by margins of 7-2 or better.[7] Roberts seems to have made a self-conscious effort to encourage the Court to hear business cases; and as the percentage of business cases heard by the Roberts Court has grown, so has the percentage won by business interests: a study conducted for *The New York Times* found that the Roberts Court ruled for business interests 61 percent of the time in its five terms, compared with 46 percent in the last five years of the Rehnquist Court and 42 percent by all Supreme Courts after 1953.[8]

Because the Supreme Court has broad control over its docket, it does not have to agree to hear the most contentious constitutional cases. The fact that it continues to do so suggests that at least four justices are consistently voting to hear these cases despite their tendency to provoke polarization. And once the Court agrees to hear a potentially contentious case – such as *Citizens United* – the Chief Justice's ability to persuade his colleagues to decide that case on narrow, consensus-based grounds rather than broad and polarizing ones is limited by the interests, temperaments, and judicial philosophies of his fellow justices.

At the moment, the swing justice on the Court is Anthony Kennedy, who prefers sweeping abstractions to narrow legalisms. As a result, decisions like *Citizens United* are more likely to include incendiary generalizations about the constitutional personhood of corporations than they were when Sandra Day O'Connor, a more incremental and politically pragmatic judge, controlled the balance of the Court.

But Justice Kennedy cannot be blamed for the most salient symptom of polarization on the Roberts Court: the fact that the conservative justices are more conservative than their predecessors. The Roberts Court issued conservative decisions 58 percent of the time in its first five years, compared to a rate of 55 percent for the courts led by Chief Justices Warren E. Burger and William Rehnquist, and only 34 percent for the Court led by Chief Justice Earl Warren. The Roberts Court also has issued conservative opinions in 71 percent of ideologically divided cases, as opposed to less than half the time in the final years of the Rehnquist Court.[9]

To some degree, these differences simply reflect a change in the numbers of conservative versus liberal justices: the Roberts Court is not striking down laws or overturning precedents at a higher rate than its predecessors. But in another sense, the willingness of the Roberts Court to issue polarizing decisions by narrowly divided votes reveals a decline in the culture of bipartisanship on the Court.

To be sure, this is not a culture that has prevailed for much of the Court's history. As Chief Justice Roberts told me, "It's sobering to think of the seventeen chief justices. . . . Certainly a solid majority of them have to be characterized as failures" in terms of their ability to promote consensus and unanimity.[10] After the comity of the early Marshall era, there have been many periods when the justices have divided along partisan lines and openly squabbled, perhaps most notably in the period before and immediately after the New Deal. The Court struck down the core of Franklin Roosevelt's recovery program by closely divided votes and, after stepping back from the brink, continued to indulge in personal and ideological vendettas. Justices Hugo Black and Robert Jackson sniped openly at each other, and Chief Justice Fred Vinson once nearly punched Justice Felix Frankfurter in the nose.

By the 1950s, however, Chief Justice Warren's leadership of the Court was characterized by a sense of stewardship, a belief that the common good would suffer if momentous decisions were made along ideological lines. Under Chief Justice Vinson, the Court had tentatively voted to uphold school segregation. But after the case was set for reargument, Vinson suddenly died, prompting Justice Frankfurter to remark, "This is the first indication I have ever had that there is a God." After Warren replaced Vinson, the Court voted tentatively to strike down school segregation in *Brown v. Board of Education*. Warren then famously lobbied his skeptical colleagues and persuaded them to make the decision unanimously. It would be bad for the Court, he told the last holdout, Stanley Reed, for the decision to be made over a single dissent. Out of deference to Warren's leadership, Justice Reed agreed, and when Warren read the decision to a spellbound courtroom, Thurgood Marshall, the lawyer for the NAACP Legal Defense Fund, looked up at Reed in astonishment and gratitude.

Despite his reputation as the head of a liberal court, moreover, Warren viewed the Court under his leadership as a partner of Congress and the president, rather than an adversary, and he rarely made decisions that the other branches of the federal government strenuously resisted.[11] Warren himself was a former politician: a former GOP presidential and vice presidential candidate who had also been an elected county prosecutor, state attorney general, and governor of California, where he had a reputation for working with Democrats in the state legislature. Indeed, a majority of the justices who decided *Brown* came from a political background – including two former senators (Harold Burton and Hugo Black), two former attorneys general (Tom Clark and Robert Jackson), a former head of the Securities and Exchange Commission (William O. Douglas), and one former judge who had also served as a senator (Sherman Minton). On the court today, by contrast, there are no former politicians and eight former federal judges.

Even if the current Court contained more politicians, it could hardly reconstruct the sense of stewardship that prevailed in the Warren era. That's because the nature of politics has changed dramatically since the 1950s, as both the House and the Senate have become much more polarized and less susceptible to bipartisan compromise. The causes of this polarization have been extensively discussed – changes in media technology have surely contributed, for example – but one of the most salient causes is the growth of partisan gerrymandering. In the 1950s, a candidate who won a primary election by appealing to his base had an incentive to move to the center in the general election in order to win over undecided voters in a closely divided district. But once partisan gerrymandering increasingly ensured safe seats for the winners of primary elections, candidates instead had an incentive to move hard left or hard right to win the primary. Partisan gerrymandering explains much of the polarization of the House of Representatives; and because many senators now come from the House, it has contributed to polarization in the Senate as well.

As politics in general have become more polarized since the Warren era, judicial politics, too, have become polarized. The collapse of the center in Congress has made judicial confirmation a bruising process, and has guaranteed that those who get nominated and confirmed are farther than ever from the judicial center. It is also impossible to ignore the role of interest groups that sprung up in the wake of *Roe v. Wade*. *Roe* was decided in 1973, and by the 1980s, interest groups emerged on both sides of the political spectrum, dedicated to the goal of either overturning *Roe* or preserving it. These interest groups helped turn every Supreme Court confirmation hearing since the unsuccessful nomination of Robert Bork in 1986 into a referendum on the rightness or wrongness of *Roe*. This litmus test, in turn, led presidents of both parties to choose nominees for their ideological reliability above all: Republican nominees had to commit to overturning *Roe*, while Democrats had to commit to upholding it. It took several judicial nominations for this strategy of ideological polarization to become well established: David Souter and Anthony Kennedy ended up affirming *Roe* rather than repudiating it. But galvanized by a "No more Souters!" battle cry, President George W. Bush appointed two justices, Roberts and Alito, who have proved to be reliably conservative votes, disinclined to moderate their views in order to meet their liberal colleagues halfway. Thus the ideological hardening of the Court, like that of Congress, seems to be increasingly entrenched.

This problem is not limited to the conservative wing of the Court. As the stakes in judicial battles have grown, both Democratic and Republican presidents have put greater emphasis on ideological reliability than they did in the 1950s, when the Court was a place to reward political allies (or opponents) rather than a perceived battleground for the culture wars. And as justices have become ideologically less flexible, so have their law clerks. Perhaps the most telling sign of judicial polarization is the fact that liberal justices are now far more likely than they were in the past to hire law clerks who worked for judges appointed by Democrats, and Republican justices are more likely than their predecessors to hire clerks who worked for judges appointed by Republicans.[12] Clerks are vetted for their ideological reliability by a screening system that begins in law school, where they are expected to declare their political allegiances by joining either the Federalist Society or the American Constitution Society; the system continues by securing clerkship with ideologically identified appellate judges who are considered feeders for Supreme Court clerkships. As a result, the prospect of clerks who will challenge their justices' ideological preconceptions, rather than encouraging them, becomes increasingly remote.

The polarization of the nominations process and of the Court itself has led to more strident attacks on judicial independence in the political arena. As politicians on both sides no longer have faith in the Court to provide neutral justice, they are willing to attack the justices in political terms. The rhetorical attacks on judges, which became especially pronounced after the Terry Schiavo controversy in 2005, culminated in the Republican presidential primaries of 2011, in which nearly all the major candidates sharply questioned judicial power. From Texas Governor Rick Perry, who called for term limits for Supreme Court justices, to former Speaker of the House Newt Gingrich, who proposed abolishing the U.S. Court of Appeals for the Ninth Circuit,[13] the candidates used anti-judicial rhetoric more shrill than we have heard since the Progressive Era. Together with Gingrich, candidates Michele Bachmann, a U.S. representative from Minnesota, and Herman Cain, a business executive, went so far as to say they would sign a federal ban on abortion in direct contradiction of *Roe v. Wade*, intentionally provoking a constitutional crisis.[14]

During the 2012 campaign, Gingrich offered the most extreme attacks along these lines, calling on Congress to subpoena judges and force them to explain their rulings under threat of arrest. But if Gingrich's judge-bashing was extreme, it was by no means an isolated phenomenon. More than at any point in recent American history, judge-bashing is now an accepted part of both conservative and liberal discourse. If we are not careful, we may slide toward a future in which neither liberals nor conservatives are willing to accept the legitimacy of judicial opinions with which they disagree.

Until recently, in the post–Warren Court era, Republican presidential candidates were more extreme in their attacks on judges than Democrats. In the 1996 presidential campaign, for example, Pat Buchanan gave a speech called "Ending Judicial Dictatorship" that presaged many of the ideas of Gingrich's white paper "Bringing the Courts Back Under the Constitution." Buchanan's speech was ghostwritten by William J. Quirk, a law professor at the University of South Carolina and coauthor of the 1995 book *Judicial Dictatorship*. In the book and in the speech, Quirk, as channeled by Buchanan, quoted from Thomas Jefferson's writings questioning the wisdom of judicial review and endorsed Theodore Roosevelt's Progressive Era proposal to allow the people to overrule judicial decisions by popular vote.

Although Gingrich quoted some of the same Jeffersonian passages as Buchanan, his 2011 white paper on the judiciary includes some surprising sources that were not available in 1996: articles by liberal scholars questioning judicial supremacy. In the past decade, there has been an explosion of books and articles by liberals on popular constitutionalism, led by former dean of Stanford Law School Larry Kramer, whose 2004 book *The People Themselves* Gingrich quotes extensively and sympathetically. Of course, many liberal popular constitutionalists question judicial supremacy – that is, the claim that judges alone have the right to interpret the Constitution – without endorsing Gingrich's extreme attacks on judicial independence, such as his claim that the president should ignore Supreme Court decisions with which he disagrees.

Popular constitutionalism is a provocative movement, of which I'm a card-carrying member. Regardless of whether you think the courts *should* thwart the deeply felt constitutional views of the people, it is hard to deny that on the rare occasions when they *have* done so, they have often provoked popular backlashes followed by judicial retreats.

The problem is that the rise of liberal popular constitutionalism has coincided with the rise of a political and media culture in which partisan attacks on individual judges are multiplying. As a result, popular constitutionalists' criticism of judges for second-guessing democratic decisions is increasingly showing up in the political arena – where it sometimes takes the form of reasonable critiques of judicial overreach, sometimes takes the form of anti-judge demagoguery, and sometimes treads a fine line between the two. Recently, for example, Michele Bachmann took to RedState.com after Justice Ruth Bader Ginsburg recommended that post–Hosni Mubarak Egypt use the South African constitution as a model, rather than the much older U.S. one: "Unfortunately, Supreme Court Justice Ruth Bader Ginsburg doesn't believe in the importance of the U.S. Constitution," Bachmann wrote.

Figuring out where to draw the line between criticism and demagoguery is not easy. Sometimes the line is clearly crossed, as with Gingrich's claim that "if the court makes a fundamentally wrong decision, the president can in fact ignore it." In other cases, the boundary is harder to discern. Consider President Obama's 2010 State of the Union address, in which he challenged the Court's *Citizens United* decision while six of the justices sat in front of him. "With all due deference to separation of powers," he said, "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections." Chief Justice Roberts clearly believed that some kind of protocol had been violated: "I think anybody can criticize the Supreme Court," but "there is the issue of the setting, the circumstances, and the decorum."

Did Obama go too far, as Roberts suggested? I don't think so. Our greatest presidents have criticized the Court, including Abraham Lincoln and Franklin Roosevelt, who did so during his 1937 State of the Union address. And Obama was careful to acknowledge "all due deference to separation of powers" before launching into his attack; like Lincoln and Roosevelt – but unlike Gingrich – he was making clear that he would obey the decision with which he disagreed.

But if Obama's criticism of *Citizens United* was legitimate, others on the left have made more troubling arguments. "I hope Anthony Kennedy is happy," wrote political commentator Elie Mystal in a post at Above the Law, a widely read legal blog. "[P]oint out to me a Supreme Court justice who didn't know the *Citizens United* ruling would disproportionately favor Republicans, and I'll point to a liar." This is a dramatic allegation that seems intended to delegitimize the Court. Kennedy's ruling may have been naive; but in the absence of evidence to the contrary, one must assume it was offered in good faith.

Some liberal politicians have been similarly extreme. In 2010, Democratic Representative Peter DeFazio of Oregon said that he was "investigating articles of impeachment against Justice Roberts for perjuring during his Senate hearings, where he said he wouldn't be a judicial activist and he wouldn't overturn precedents." Last year, Democratic Representative Chris Murphy of Connecticut, outraged about Justice Clarence Thomas's ties to conservative donors, argued that "there should start to be some real investigations as to whether [he] can continue to serve as a justice on the Supreme Court."

Meanwhile, the most prominent critic of *Citizens United* has been comedian and political satirist Stephen Colbert. His central stunt – setting up his own super PAC – has been funny and illuminating, a clever way of highlighting the ruling's drawbacks. But the limits of his approach were clear during his recent interview with retired Justice John Paul Stevens, who wrote the greatest dissent of his career in *Citizens United*. Instead of allowing Stevens to explain his reasoning, Colbert mocked the 91-year-old justice and cut off his answers. (When asked whether he regretted any decision in his long career, Stevens gamely joked, "Other than this interview?") Colbert's attack on the Court works brilliantly as comedy; but by blurring the line between entertainment and constitutional criticism, he is arguably both parodying *and* exacerbating the climate of judge-bashing.

Of course, judges on both the left and the right have contributed to the current situation by unnecessarily interfering in political debates and by issuing polarizing decisions on the most contested questions of American life by ideologically divided votes. But not all judges succumb to this temptation: in the health care cases, two of the most respected conservative appellate court judges in the country, Jeffrey Sutton and Lawrence Silberman, upheld the health care reform without hesitation, setting the stage for Chief Justice Roberts's career-defining decision to uphold the law as well. And there are many occasions when the Supreme Court and lower courts defy ideological predictions and rule against type. Chief Justice Roberts persuaded all his colleagues to join him in a narrow, nearly unanimous decision upholding the 2006 amendments to the Voting Rights Act, despite widespread expectations that the Court would strike down the amendments on a 5-4 vote.[15] And following the lead of a bipartisan panel of the D.C. Circuit, the Supreme Court unanimously rejected the position that we have no expectations of privacy in public and voted to ban the police from attaching a GPS device to the bottom of a suspect's car without a valid warrant and tracking his every move for a month. But because, as Chief Justice Roberts has noted, ideologically divided decisions receive far more attention than ideologically unexpected or unanimous ones, a few cases like *Citizens United* may create the impression among citizens that the courts are more polarized than they actually are.

Are ideologically divided decisions in fact harmful to the legitimacy of the Court, as Chief Justice Roberts has suggested? Possibly not: the Court's legitimacy may turn less on whether its decisions are bipartisan than on whether the public generally agrees with the handful of decisions that catch its attention. As long as the Roberts Court remains broadly within the mainstream of public opinion – as it has done on questions like partial birth abortion, law and order, affirmative action, and even the health care mandate – then perhaps it can issue a handful of unpopular decisions, such as *Citizens United*, without significantly diminishing its legitimacy. Nevertheless, the Court's approval rating seems to be falling under Chief Justice Roberts: in Gallup polls since 2000, the Court's approval rating has fluctuated between a high of 62 percent and a low of 42 percent in 2005.[16] Today that figure is 46 percent, the second lowest rating of the decade.[17] This may be part of an overall decline in public confidence in institutions more generally: the Court's institutional confidence rating rose throughout the 1990s from of a low of 39 percent in 1991 to about 50 percent in 1997, and it remained in that range until 2002, when it began to plummet. By 2007, only 34 percent of those surveyed had a "great deal" of confidence in the Court.[18]

The health care decision had a small but significant effect on public attitudes toward the Supreme Court. A study by Nathan Persily of Columbia Law School found that the Court's historically low approval ratings dropped further after the decision was issued. The Court's approval rating in a *New York Times*/CBS poll fell from 44 percent in May and early June before the ruling to 41 percent in July after the ruling, although a Gallup poll in September suggested a rebound in the Court's approval, to 49 percent. Furthermore, opinions about the Court became even more polarized after the decision, with Democrats approving the decision and Republicans disapproving. But most polls showed more Americans approving of the decision than disapproving, especially when they were told that the Court had upheld the law. Before and after the decision, similar numbers of Americans thought the Court would decide the case based on their personal views, rather than the law; but after the decision, these numbers polarized, with almost two thirds of Republicans, but only 40 percent of Democrats, saying that the justices had put their personal views above their legal views. Persily also found that the Court's approval of the Affordable Care Act led some Democrats to change their minds about the health care mandate, leading to a small increase in approval of the mandate after the decision came down.[19]

The reaction to the health care decision suggests that Chief Justice Roberts's task of persuading the public that the Court bases its decisions on the law rather than on partisan views is complicated by the fact that people tend to approve of decisions with which they agree and to assume decisions with which they disagree are based on the justices' personal views rather than on the law. Moreover, although there may be some correlation between public approval, institutional confidence, and particular controversial decisions, the Court appears to be steadily losing ground with the public regardless of individual decisions, a reflection of declining trust in American institutions in general rather than simply the increased perception that the Court is a polarized body. (In part, as political scientist Sarah Binder has demonstrated, partisan controversies over judicial confirmations decrease public confidence in the legitimacy of the courts.[20]) Therefore, Chief Justice Roberts was correct to be concerned about judicial and political polarization, but his ability to counter this perception may be more constrained than he expected.

Given the broader political forces contributing to the polarization of judicial politics, there are limits to what any individual justice or judge can do to resurrect the sense of bipartisan stewardship that characterized the judiciary of previous eras. Nevertheless, the Court can avoid self-inflicted wounds – from *Bush v. Gore* to *Citizens United* – by ruling narrowly rather than broadly; avoiding ideologically divided, 5-4 opinions; and promoting consensus as much as possible. In this sense, Chief Justice Roberts was correct to embrace Marshall's vision of narrow, unanimous opinions as a model. And by upholding health care reform, Roberts provided an inspiring example of judicial bipartisanship. Other institutional proposals to reduce judicial partisanship – from the elimination of life tenure and adaptation of a fixed eighteen-year term for Supreme Court justices to a requirement that appellate panels include judges appointed by presidents of different parties – require a constitutional amendment or bipartisan legislation and are thus unlikely to be adopted. Therefore, the only realistic antidote to judicial polarization may, for the moment, be judicial self-restraint.

If the Court is unable or unwilling to restrain itself in less visible cases, it might at least take more seriously its role in educating Americans about its role in American democracy. When the Court handed down the *Brown v. Board of Education* opinion in 1954, Chief Justice Warren insisted that it be written as plainly as possible, so that it could be printed in newspapers and understood by all American citizens. Similarly, in *Cooper v. Aaron* in 1958, all nine justices signed the opinion in their own hands, in order to signal the Court's seriousness (and to enlist President Eisenhower's support) in ordering the admission of African American students to Little Rock public schools over the opposition of that state's governor and the local school board. *Brown* and *Cooper* did not, on their own, create public support for ending segregation, but they were part of a dialogue between the Court, the president, Congress, and the public. The Court saw itself as playing a pedagogical role, educating and persuading Americans about basic constitutional principles. In the end, what paved the way for greater public acceptance of the societal changes heralded by *Brown* and *Cooper* was political activism that transformed social norms: in particular, the civil rights movement, followed by guidelines from the Department of Health and Human Services withholding federal funds from schools that failed to achieve integration. But the civil rights movement and the administrative regulations that followed were themselves galvanized by the *Brown* decision and the educative role that it adopted.

Might the Court reclaim this public education function today? The justices' resistance to the introduction of cameras in the courtroom suggests that they may be more concerned about enhancing their own reputations (by maintaining a sense of mystery and authority) rather than educating the public. On the other hand, Justice Scalia has argued plausibly that cameras might decrease public understanding because individual clips would be taken out of context and played on the evening news. On the other hand, the Court's decision to post audio files and same-day transcripts of oral arguments has clearly increased the public's understanding of how the Court works and has given Americans the ability to engage with the constitutional arguments on their own terms. If the justices are unable to respond to Stephen Colbert's highly effective attacks, they can at least present their own deliberations to as wide an audience as possible.

Still, cameras or audio will never substitute for the role of public educator that the Court took on in decisions like *Brown* and *Cooper*: that required bipartisan stewardship, of unanimity across party lines, and a recognition that the Court was engaged in a task transcending partisan politics, a task that could be explained to citizens of different ideologies and backgrounds. That sense of bipartisan stewardship, which Chief Justice Roberts resurrected in the health care decision, is embattled on the Court – and Roberts cannot preserve it on his own. All of his colleagues have to decide whether they want to transcend their differences and present a united face to a divided nation, or whether they are more interested in being right than being bipartisan. Roberts has offered his vision of leadership; it remains to be seen whether the other justices will follow.

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The Supreme Court in the 21st Century

Geoffrey R. Stone

Abstract: How does the Supreme Court serve the "common good"? What is the Court's responsibility, as the ultimate interpreter of the Constitution, in our constitutional system of government? This essay explores that question with an eye on the recent performance of the Court in highly controversial and divisive cases. What explains the Court's decisions in cases involving such issues as campaign finance regulation, gun control, abortion, affirmative action, health care reform, voting rights, and even the 2000 presidential election? This essay argues that there is a right and a wrong way for the Supreme Court to interpret and apply the Constitution; and whereas the Warren Court properly understood its responsibilities, the Court in more recent decades has adopted a less legitimate and more troubling mode of constitutional interpretation.

The Supreme Court plays an essential role in the American constitutional system. As John Roberts stated in his confirmation hearings, the role of the Court is to serve as a neutral and detached "umpire" when it enforces the fundamental guarantees of our Constitution.[1] To fulfill that essential role, the Court must have the confidence and respect of the American people. This is a tricky business because when the Court enforces the guarantees of our Constitution, it usually frustrates the will of the majority. That is, when it holds a law unconstitutional it is in effect telling the majority of citizens who supported that law that they cannot do what they want to do. This is not the way to be popular.

Nonetheless, the Supreme Court has consistently been the most respected of the three branches of the federal government. This is so because, although the Court often frustrates the short-term preferences of the majority, the public generally seems to understand that it is acting in a principled manner that will serve the long-term interests of the nation. Since 2000, however, the percentage of Americans who approve of the way the Supreme Court handles its responsibilities has fallen from 62 percent to only 46 percent. Indeed, in recent years the

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Court's approval rating has fallen to its lowest level since polling began in 1972.[2]

In this essay, I explore three possible reasons for the decline in public respect for the Supreme Court: 1) the politicization of the confirmation process; 2) the polarization and apparent politicization of the justices; and 3) the Court's current approach to constitutional interpretation.

Conventional wisdom says that the confirmation process for Supreme Court justices is now terribly broken. The prevailing assumption is that the process has become so polarized and so politicized that nominees feel they must mask their views from members of the Senate in a way that makes informed consideration impossible. As one commentator has observed, many "Americans would like to think the manner in which people become justices on the Supreme Court is governed by merit and objectivity," but "recent events suggest something very different."[3] Supreme Court nominations, it is said, "have become public pitched battles involving partisans, ideological groups, single-issue groups, and the press."[4] The common refrain is that "if only we could get back to the way we did things in the past, the process would be so much better."

This turns out to be mostly correct. In one sense, though, the assessment is wrong. It is usually assumed that the change in the Supreme Court confirmation process began with the Robert Bork confirmation battle in 1987, but in fact it did not occur until after 2000.[5] The change, though, has been dramatic. Between 1964 and 2000, only 27 percent of eighteen Supreme Court nominees received twenty or more negative votes in the Senate. In the four confirmations since 2000, 100 percent of the nominees (Roberts, Alito, Sotomayor, and Kagan) received more than twenty negative votes. Moreover, between 1964 and 2000, only 30 percent of the opposing-party senators opposed confirmation. Since 2000, 74 percent of the opposing-party's senators voted against confirmation. This is an extraordinary shift. In the four confirmations since 2000, 67 percent of Democrats voted against Roberts and Alito, and 81 percent of Republicans voted against Sotomayor and Kagan. Even more striking, the four most recent nominees were viewed at the time of confirmation as more moderate on average than the eighteen nominees put forth between 1964 and 2000. Thus the dramatic change in voting since 2000 cannot be explained by any shift in the perceived ideologies of the nominees themselves.[6]

Several factors seem to have contributed to this much more polarized approach to Supreme Court confirmations. First, the Court's most controversial decision in the years leading up to this era – *Bush v. Gore*[7] – undoubtedly highlighted the ideological inclinations of the justices in both the public and political consciousness. In that decision, there was a bitter divide between the more conservative and more liberal justices, with dramatic consequences for the nation, at a moment when Americans were paying close attention to the Court. The role of ideology could not have been clearer, and it was missed by neither the public nor their elected representatives.

Second, historically the confirmation process was a largely non-public event. The press has always covered the most controversial nominees, such as Alexander Wolcott in 1811, Louis Brandeis in 1916, and Hugo Black in 1937; but apart from such rare exceptions, the public was largely unaware of – and uninterested in – the details of nomination and confirmation. The process therefore had little political salience. Today, however, the news media cover Supreme Court nominees as they do presidential candidates; and senators, presidents, and nominees are all acutely aware that television cameras are beaming their faces and words to millions of Americans. People eagerly await the opportunity to watch the hearings "to see whether the nominee survives." As legal scholar Chris Eisgruber has observed, the hearings now take on the aura of "a high-stakes reality show."[8] This attention has dramatically increased the political salience of the process.

Third, the politicization of the confirmation process has been made even more dramatic by the increasingly aggressive involvement of interest groups. Although such groups have long played a role in the process, there has been a dramatic increase in interest-group participation. An average of 1.6 interest groups participated in the hearings for the nine nominees between 1952 and 1967; the average rose to 8.8 for the nine nominees between 1968 and 1983; and it rose again to 27.6 for the eight nominees between 1984 and 1994. The average number of interest groups has skyrocketed to almost one hundred for the four nominees since 2000.[9] Not only do these groups attempt directly to persuade senators to their point of view, but they often carry out aggressive public relations campaigns to gather public support by portraying nominees as either harmful or helpful to the political goals of their members, which may involve such divisive issues as abortion, affirmative action, law enforcement, capital punishment, gun control, state's rights, women's rights, immigration, and the rights of gays and lesbians. Senators pay careful attention to these groups because they communicate directly with their constituents, generate substantial contributions for political campaigns, and can help make or break a bid for reelection. A senator who ignores these groups does so at his peril.

Fourth, the more general polarization of the political process has had a substantial impact on the confirmation process. As public law expert Richard Pildes reports, the political parties are now "internally more unified and coherent, and externally more distant from each other, than anytime over the last 100 years." Indeed, "in 1970, moderates constituted 41 percent of the Senate; today, they are 5 percent." The center "has all but disappeared."[10] In the confirmation process, this has significantly magnified the effects of the other three factors.

The impact of these four factors seems clear. With a heightened public awareness of the central role the Supreme Court plays in resolving fundamental and often highly controversial conflicts in American society, a greater public appreciation of the political/ideological nature of the Court's decision-making process, effective mechanisms – such as cable news programs, radio talk shows, the Internet, and energetic interest groups – to bring public and political pressure to bear on senators, and a political environment that is increasingly polarized for reasons unrelated to the confirmation process, the traditional understanding that senators ordinarily should err on the side of deference to reasonable presidential nominations has fallen by the boards. The consequence is a highly politicized and polarized confirmation process unlike anything we have seen before.

It is often thought that, as in *Bush v. Gore*, the justices generally vote their ideological convictions. That is, the "conservative" justices vote for politically conservative positions, and the "liberal" justices vote for politically liberal positions. The assumption, moreover, is that they do this not because of principled differences in their overall judicial philosophies, but because they are permitting their ideological preference to trump whatever principled approach to constitutional interpretation they purport to hold. Is this a fair criticism?

Before going any further, I should note that I am using the terms *conservative* and *liberal* rather loosely. In fact, as federal judge Richard Posner, legal scholar Lee Epstein, and economist William Landes have demonstrated, relative to all justices who have served in the past seventy-five years, recent "conservative" justices (especially Rehnquist, Scalia, Thomas, Roberts, and Alito) have been *very* conservative. Indeed, they are the five *most* conservative justices to serve on the Supreme Court in three-quarters of a century. On the other hand, the recent "liberal" justices (Stevens, Souter, Ginsburg, Breyer, Sotomayor, and Kagan) have been only *moderately* liberal. They are nowhere near as liberal as justices like Brennan, Warren, Marshall, and Douglas. They have not been nearly as extreme in their liberalism as recent conservative justices have been in their conservatism. Moreover, the two so-called swing justices in recent years (O'Connor and Kennedy) have in fact been quite conservative, though not as extreme in their conservatism as Rehnquist, Scalia, Thomas, Roberts, and Alito.[11]

In the rest of this discussion I will therefore refer to the "very conservative" justices (Rehnquist, Scalia, Thomas, Roberts, and Alito), the "moderately conservative" swing justices (O'Connor and Kennedy), and the "moderately liberal" justices (Stevens, Souter, Ginsburg, Breyer, Sotomayor, and Kagan). How, then, have these justices actually voted? To get a handle on this question, I asked several colleagues (without telling them why I was asking) to identify the most important constitutional decisions since 2000. They came up with a list of eighteen cases, ranging across a broad spectrum of constitutional issues involving, for example, the 2000 presidential election, gun control, voter disenfranchisement, affirmative action, abortion, habeas corpus, due process for terrorism suspects, takings of private property, the death penalty, the free speech rights of corporations, freedom of religion, the rights of gays and lesbians, and the commerce clause.[12]

The moderately liberal justices voted for what would generally be understood as the more liberal political position 97 percent of the time (seventy of seventy-two votes; Justice Stevens joined the conservative justices in one of the Guantánamo cases and in a voting case). The very conservative justices voted for the politically conservative position 98 percent of the time (fifty-nine of sixty votes; Chief Justice Roberts broke ranks in the Affordable Care Act decision). Based on these votes, it is easy to see why both the public and members of the Senate perceive the justices as both ideological and polarized. The all-important swing justices, by the way, voted two-thirds of the time with the very conservative justices.[13]

With this information, it is easy to see why the public is suspicious of the justices and why the stakes in the nomination and confirmation process are so high. Indeed, if one more moderately liberal justice had been on the Court since 2000 in lieu of one of the very conservative justices, the moderately liberal justices would have won seventeen of the eighteen cases.[14] If one more very conservative justice had been on the Court in place of one of the moderately liberal justices, the very conservative justices would have won sixteen of the eighteen cases.[15]

Citizens United v. Federal Election Commission[16] is a useful example of how the conservative justices have played fast-and-loose with the law in order to reach the outcomes they prefer. In *Citizens United*, the Court, in a 5-4 decision, held unconstitutional a key provision of the Bipartisan Campaign Reform Act of 2002 (BCRA).[17] The specific provision the Court invalidated limited the amount of money that corporations could spend in certain circumstances to support or oppose the election of named candidates for federal office.[18]

To understand *Citizens United*, it is first necessary to establish the constitutional context of the decision. In 1976, in *Buckley v. Valeo*,[19] the Supreme Court struck down several provisions of the Federal Election Campaign Act of 1971.[20] In a key part of the decision, the Court held in *Buckley* that the government cannot constitutionally limit the amount *individuals* can spend to support or oppose the election of political candidates. The Court reasoned that because expenditure limitations "limit political expression 'at the core of our electoral process and of the First Amendment freedoms,'" they cannot withstand First Amendment scrutiny.[21]

The question later arose whether corporations have the same First Amendment rights as individuals to spend unlimited amounts of money in the electoral process. In 1990, the Supreme Court held in *Austin v. Michigan Chamber of Commerce*[22] that corporations do *not* have the same right in this respect as individuals. In a 6-3 decision, the Court upheld a Michigan statute that limited the amount that corporations could spend to support or oppose the election of candidates for state office. The Court explained that "the unique legal and economic characteristics of corporations" – such as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" – enable corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"[23] Noting that the act was designed to deal with "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," the Court concluded that "the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations."[24]

The Court adhered to this view for the next twenty years. In 2003, for example, in *McConnell v. Federal Election Commission*,[25] the Court upheld the same provision of the BCRA that it later invalidated in *Citizens United*. In *McConnell*, in a 5-4 decision, the Court followed *Austin* and held that the provision of the 2002 legislation that limited the amount that corporations could spend in the political process did not violate the First Amendment. The Court reaffirmed that government's "power to prohibit corporations . . . from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates . . . has been firmly embedded in our law."[26]

In the seven years between *McConnell* and *Citizens United*, it became clear that the positions of the justices on this question were fixed in stone. Beginning with *Austin*, Justices Scalia, Kennedy, and Thomas voted consistently, in dissent, to protect what they saw as the First Amendment rights of corporations, without regard to precedent; and after joining the Court in 2005 and 2006, respectively, Chief Justice Roberts and Justice Alito quickly made clear that they too were in that camp.[27] As legal expert Lillian BeVier astutely observed at the time, "[D]ebate on these issues has reached an impasse. . . . The chasm that separates the Justices from one another appears unbridgeable."[28]

Sure enough, in *Citizens United*, the Court overruled *Austin* and *McConnell* in a 5-4 decision. It held that corporations, like individuals, have a First Amendment right to spend unlimited funds in order to elect or defeat particular political candidates. The five justices in the majority were Roberts, Scalia, Kennedy, Thomas, and Alito. The only "relevant" change in the seven years since *McConnell* was that the moderately conservative Justice O'Connor (who had voted with the majority in *McConnell*) had been replaced by the very conservative Justice Alito.[29]

Justice Kennedy, who wrote the opinion of the Court in *Citizens United*, reiterated the arguments of the dissenters in the earlier cases, declaring, for example, that even though corporations are granted special powers and prerogatives to enable them to function efficiently as economic entities, "'[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights,'"[30] and that corporations should not "be treated differently under the First Amendment simply because [they] are not 'natural persons.'"[31]

Citizens United has been criticized on a variety of grounds. The most interesting criticisms suggest not only that the majority was wrong on the merits of the First Amendment issue, but also that the conservative justices behaved disingenuously in their handling of the case. There are at least three reasons for this accusation.

First, there is the issue of precedent. In theory, at least, "conservative" judges claim to be respectful of *stare decisis*. Indeed, that is part of what it has traditionally meant to be conservative. Yet in this instance there were two definitive decisions of the Supreme Court in the twenty years leading up to *Citizens United* – *Austin* and *McConnell* – in which the Court had held unequivocally that government can constitutionally limit corporate political expenditures. The plain and simple fact is that nothing had changed in the intervening years – except the makeup of the Court itself.

Second, there is the issue of judicial overreaching. Both Citizens United and the solicitor general offered the Court several ways to resolve the case in favor of Citizens United without requiring the Court even to consider the continuing vitality of *Austin* and *McConnell*.[32] Traditionally, conservatives have insisted that courts should resolve constitutional controversies on narrow rather than broad grounds and should avoiding holding laws unconstitutional unless there is no other way to dispose of the case. In *Citizens United*, however, the conservative justices eschewed the narrow grounds of decision that were available to it, and actually ordered the parties to file briefs on the much broader and more controversial question of whether *Austin* and *McConnell* should be overruled. Because this sort of aggressive overreaching has traditionally been disdained by conservatives, the Court's performance in *Citizens United* was fair and easy game for those who condemned the majority's evident eagerness to reach out unnecessarily to pronounce the limit on corporate spending unconstitutional.

Third, there is the question of judicial activism versus judicial restraint. This is, for me, the most intriguing facet of the decision in *Citizens United*. How should courts decide how much deference/how much scrutiny is appropriate in considering the constitutionality of government action? That is the central question of American constitutional law, at least insofar as courts are concerned. In the last half-century, conservatives have derided judicial activism as illegitimate and called for a more restrained exercise of the power of judicial review. In *Citizens United*, however, the conservative majority embraced an aggressively activist approach, disregarding an effort by our nation's elected officials to bring order to what they regarded as a dangerously out-of-control electoral process. The stakes were clearly high, and members of Congress and the president (Bush II, by the way) obviously have a high degree of expertise in such matters. Why, then, didn't the conservative justices exercise restraint and defer to the judgment of our elected leaders? This is the question to which I now turn.

It is often assumed that liberals like judicial activism and conservatives like judicial restraint. It is not so simple. For one thing, judicial activism and judicial restraint do not necessarily correlate with liberal and conservative outcomes. For example, on such questions as the constitutionality of affirmative action, regulations of commercial advertising, gun control laws, and campaign finance regulation, judicial restraint would lead to politically "liberal" results (upholding the laws) and judicial activism would produce politically "conservative" results (invalidating the laws). Not surprisingly, then, at some times in our history judicial activism has been embraced by conservatives and criticized by liberals, and at other times judicial activism has been embraced by liberals and criticized by conservatives.

In the early years of the twentieth century, for example, conservative justices employed an aggressive form of judicial activism to invalidate a broad range of progressive legislation. During the *Lochner* era,[33] which lasted for some forty years,[34] the Supreme Court invoked "economic substantive due process" in the name of protecting the "liberty of contract" to invalidate more than 150 state and federal laws regulating such matters as child labor, the insurance industry, banks, minimum wages, maximum hours, the rights of labor, and the transportation industry.[35] Progressive critics of the *Lochner*-era jurisprudence, like Felix Frankfurter, concluded that judicial activism was presumptively illegitimate and unwarranted. The only principled stance for a responsible justice, he argued, was judicial restraint.[36]

Other critics of *Lochner*, however, took away a very different lesson. In their view, *Lochner* was wrong not because judicial activism is wrong, but because *Lochner* was not an appropriate situation for judicial activism. It was this view that Chief Justice Harlan Fiske Stone set forth in 1938 in his famous footnote #4 in *United States v. Carolene Products Co.*[37] While burying the doctrine of economic substantive due process, Stone at the same time suggested that "there may be narrower scope for operation of the presumption of constitutionality when legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or when it discriminates "against discrete and insular minorities" in circumstances in which it is reasonable to infer that prejudice, intolerance, or indifference might seriously have curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities."[38]

This conception of *selective* judicial activism is deeply rooted in the original understanding of the essential purpose of judicial review in our system of constitutional governance. The framers of our Constitution wrestled with the problem of how to cabin the dangers of overbearing and intolerant majorities. For example, those who initially opposed a bill of rights argued that a list of rights would serve little, if any, practical purpose, for in a self-governing society the majority could simply disregard whatever rights might be "guaranteed" in the Constitution. In the face of strenuous objections from the Anti-Federalists during the ratification debates, however, it became necessary to reconsider the issue.

On December 20, 1787, Thomas Jefferson wrote James Madison from Paris that, after reviewing the proposed Constitution, he regretted "the omission of a bill of rights."[39] In response, Madison expressed doubt that a bill of rights would "provide any check on the passions and interests of the popular majorities." He maintained that "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State" that already had a bill of rights. In such circumstances, he asked, "What use ... can a bill of rights serve in popular Governments?"[40]

Jefferson replied, "Your thoughts on the subject of the Declaration of rights" fail to address one consideration "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent ... merits great confidence for their learning and integrity."[41] This exchange apparently carried some weight with Madison. On June 8, 1789, Madison proposed a bill of rights to the House of Representatives. At the outset, he reminded his colleagues that "the greatest danger" to liberty was found "in the body of the people, operating by the majority against the minority."[42] Echoing Jefferson's letter, he stated the position for judicial review, contending that if these rights are "incorporated into the constitution, independent tribunals of justice will consider themselves ... the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[43]

This reliance on judges, whose lifetime tenure would hopefully insulate them from the need to curry favor with the governing majority, was central to the framers' understanding. Alexander Hamilton, for example, strongly endorsed judicial review as "obvious and uncontroversial." The "independence of the judges," he reasoned, is "requisite to guard the constitution and the rights of individuals from the effects of those ill humours which ... sometimes disseminate among the people themselves." Judges, he insisted, have a duty to resist invasions of constitutional rights even if they are "instigated by the major voice of the community."[44]

It was this "originalist" conception of judicial review that informed the Warren Court's selective judicial activism, as well as the approach of the moderate liberals who are currently on the Court. As a rule, the Warren Court gave a great deal of deference to the elected branches of government – except when such deference would effectively abdicate the responsibility the framers had imposed upon the judiciary to serve as an essential check against the inherent dangers of democratic majoritarianism. They therefore invoked activist judicial review primarily in two situations: 1) when the governing majority systematically disregarded the interests of a historically underrepresented group (such as blacks, ethnic minorities, political dissidents, religious dissenters, and persons accused of crime); and 2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the political status quo, and/or perpetuate its own political power.

Consider, for example, *Brown v. Board of Education*,[45] which prohibited racial segregation in public schools, *Loving v. Virginia*,[46] which invalidated laws forbidding interracial marriage, *Engel v. Vitale*,[47] which prohibited school prayer, *Goldberg v. Kelly*,[48] which guaranteed a hearing before an individual's welfare benefits could be terminated, *Reynolds v. Sims*,[49] which guaranteed "one person, one vote," *Miranda v. Arizona*,[50] which gave effect to the prohibition of compelled self-incrimination, *Gideon v. Wainwright*,[51] which guaranteed all persons accused of crime the right to effective assistance of counsel, *New York Times v. Sullivan*,[52] which limited the ability of public officials to use libel actions to silence their critics, and *Elfbrandt v. Russell*,[53] which protected the First Amendment rights of members of the Communist Party. Each of these decisions clearly reflected the central purpose of judicial review – to guard against the distinctive dangers of majoritarian abuse.

As I noted at the outset of this essay, anti-majoritarian decisions generally do not sit well with the majority. It is therefore hardly surprising that this jurisprudence excited biting criticism, especially in the political arena. By the late 1960s, Richard Nixon was able to make the Court's "judicial activism" a significant issue in national politics. Within a few short years, Nixon appointed Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist to the Court. Although these justices varied over time in their adherence to "judicial restraint," their presence soon transformed the Court, leaving the vision of the Warren Court in its wake.

The change in the Court's understanding of its role since 1968 has been dramatic. In the twenty-five years between 1968 and 1993, Republican presidents made *twelve* consecutive appointments to the Court. The movement to the right continued under George W. Bush, who appointed the very conservative Samuel Alito to replace the moderately conservative Sandra Day O'Connor. But that still leaves the question: what does "conservative" mean in the modern era?

This brings me back to *Citizens United*. If conservative justices adhered to the judicial restraint conception of judicial review, they would surely have upheld the law at issue in *Citizens United*. Only by invoking a high degree of judicial scrutiny and aggressively second-guessing the judgments of Congress and the president could the conservative justices justify their position in *Citizens United*. How, then, could the five conservative justices have invalidated the challenged law in *Citizens United*? The answer is simple. John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito are not committed to judicial restraint. Rather, like the liberal justices of the Warren Court, they employ a form of *selective* judicial activism. But these justices would have joined few, if any, of the Warren Court decisions I listed earlier. Nonetheless, and despite the conservative rhetoric about "strict constructionism," "originalism," "judicial restraint," and "call[ing] balls and strikes,"[54] the current conservative justices are just as activist as their liberal predecessors – but in a wholly different set of cases.

In a series of aggressively activist decisions, the current conservative justices have held unconstitutional affirmative action programs,[55] gun control regulations,[56] limitations on the authority of corporations to spend at will in the political process,[57] restrictions on commercial advertising,[58] laws prohibiting groups like the Boy Scouts from discriminating on the basis of sexual orientation,[59] policies of the state of Florida relating to the outcome of the 2000 presidential election,[60] and federal legislation regulating guns, age discrimination, the environment, and violence against women.[61] The challenge is to figure out what theory of judicial review or constitutional interpretation drives this particular form of activism.

Conservative justices and politicians repeat endlessly that, in their interpretation and application of the Constitution, they are strict constructionists who apply rather than invent the law. They are judicially restrained. They just call balls and strikes. But *Citizens United*, and a host of other similarly activist decisions in recent years, cannot be explained or justified with any of these clichés. What, then, is going on in these cases?

To answer that question, we need to step back and do the same thing with the

Rehnquist and Roberts Courts that I suggested earlier about the Warren Court. That is, we should look at the outcomes and identify those cases in which the conservative justices tend to be judicially restrained and deferential and those in which they take an activist approach. If we do that, we discover two obvious patterns. First, the conservative justices have generally been very deferential in cases in which minorities (whether African Americans, Hispanics, gays and lesbians, women, religious minorities, or persons accused of crime) challenge the constitutionality of government action that disadvantages them.[62] But these are precisely the cases in which activist judicial scrutiny is most appropriate. Second, these same justices have generally been most activist in protecting the interests of corporations, commercial advertisers, gun owners, whites challenging affirmative action programs, the Boy Scouts when that organization claims a First Amendment right to exclude gay scoutmasters, and George W. Bush in the 2000 presidential election.

These patterns cannot plausibly be explained by any principled theory of constitutional interpretation. Rather, to paraphrase Justice Frankfurter's critique of an earlier generation's judicial activism, the selective activism of the current conservative majority seems to be born out of "their prejudices and their respective pasts and self-conscious desires."[63] These decisions reflect not a principled approach to constitutional interpretation, but a set of personal and ideological preferences about such matters as guns, corporations, gays, commercial activity, religion, and George W. Bush. This is, to say the least, a worrisome state of affairs. It is no wonder that the Supreme Court has fallen, and fallen hard, in the eyes of the American people.

A central responsibility of the Supreme Court is to promote the common good by thoughtfully interpreting and applying the U.S. Constitution in a disinterested and principled manner. The American republic is deeply dependent on the confidence of our citizens in the Constitution and in the rule of law. When justices undermine that confidence, they betray their most fundamental responsibility and endanger the common good.

ENDNOTES

1 *Hearings on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States Before the Committee on the Judiciary*, 109th Cong., 1st Sess. 56 (2005) (testimony of John G. Roberts).

2 See http://www.gallup.com/poll/4732/supreme-court.aspx.

3 Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005), 4.

4 Ibid.

5 See Geoffrey R. Stone, "Understanding Supreme Court Confirmations," *Supreme Court Review* (2010): 415 – 440.

6 Ibid., 421 – 425.

7 531 U.S. 98 (2000).

8 Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, N.J.: Princeton University Press, 2007), 151 – 152.

9 See Stone, "Understanding Supreme Court Confirmations," 451.

10 Richard H. Pildes, "Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America," *California Law Review* 68 (2011): 277.

11 See Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, Mass.: Harvard University Press, 2013), chap. 3.

12 See *United States v. Morrison*, 529 U.S. 598 (2000) (commerce clause); *Bush v. Gore*, 531 U.S. 98 (2000) (2000 presidential election); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (religion); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (terrorism detainees); *Lawrence v. Texas*, 539 U.S. 558 (2003) (rights of gays and lesbians); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty); *Kelo v. City of New London*, 545 U.S. 469 (2005) (takings of private property); *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005) (religion); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (terrorism detainees); *Gonzales v. Carhart*, 550 U.S. 124 (2007) ("partial birth" abortion); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (racial integration of schools); *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (right to vote); *Boumediene v. Bush*, 553 U.S. 723 (2008) (terrorism detainees); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (gun control); *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2009) (free speech rights of corporations); *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (commerce clause/Affordable Care Act).

13 Justice O'Connor voted with the moderate liberals in four of the eleven cases in which she participated, involving affirmative action, the rights of gays and lesbians, one of the three Guantánamo cases, and one of the two religion cases; Justice Kennedy voted with the moderate liberals in six of the eighteen cases, involving the rights of gays and lesbians, the death penalty, takings of private property, and all three of the Guantánamo cases.

14 The one exception would be *Crawford*, a voting rights case.

15 The two exceptions would be *Lawrence*, a gay rights case, and *Hamdi*, a terrorism case.

16 130 S.Ct. 876 (2009).

17 Pub.L. 107-155, 116 Stat. 81, enacted March 27, 2002, H.R. 2356.

18 2 U.S.C. sec. 441b. The act also limited labor unions, but for the sake of simplicity I will refer only to corporations.

19 424 U.S. 1 (1976).

[20] Pub.L. 92-225, 86 Stat. 3, enacted February 7, 1972, 2 U.S.C. sec. 431 et seq.

[21] 424 U.S. at 39, quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

[22] 494 U.S. 652 (1990).

[23] Ibid. at 659, quoting *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

[24] Ibid. at 659 – 660.

[25] 540 U.S. 93 (2003).

[26] Ibid. at 203.

[27] See, for example, *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

[28] Lillian R. BeVier, "Full of Surprises – And More to Come: *Randall v. Sorrell*, the First Amendment, and Campaign Finance Regulation," *Supreme Court Review* (2006): 195 – 196.

[29] Justice Roberts replaced Chief Justice Rehnquist, but because Rehnquist had dissented in *McConnell*, this did not affect the vote in *Citizens United*.

[30] 130 S.Ct. at 905, quoting Justice Scalia's dissenting opinion in *Austin*, 484 U.S. at 680.

[31] Ibid. at 900.

[32] These included, for example, a quite plausible statutory interpretation argument that the specific speech at issue in *Citizens United* did not even violate BCRA, and an equally credible argument that the challenged provision was unconstitutional *as applied* to Citizens United because Citizens United is a *nonprofit* corporation and thus in a very different position constitutionally in terms of need for the limitation on corporate spending than *for-profit* corporations such as Exxon Mobil, General Electric, and Pfizer.

[33] *Lochner v. New York*, 198 U.S. 45 (1905).

[34] The era is generally said to have begun with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and ended with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[35] See, for example, *Adair v. United States*, 208 U.S. 161 (1908) ("yellow dog contracts"); *Hammer v. Dagenhart*, 247 U.S. 241 (1918) (child labor); *Adkins v. Children's Hospital*, 261 U.S. 525 (1928) (minimum wage); *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hours).

[36] See Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (Boston: Houghton Mifflin Harcourt, 2010), 101.

[37] 304 U.S. 144 (1938).

[38] Ibid at 152 n.4.

[39] Thomas Jefferson to James Madison, December 20, 1787, in Jack N. Rakove, *Declaring Rights: A Brief History with Documents* (Boston: Bedford, 1998), 154, 156.

[40] James Madison to Thomas Jefferson, October 17, 1788, in ibid., 160 – 162.

[41] Thomas Jefferson to James Madison, March 15, 1789, in ibid., 165.

[42] James Madison, Speech to the House of Representatives, June 8, 1789, in *The Papers of James Madison*, vol. 12, ed. Charles F. Hobson, Robert A. Rutland, and William M.E. Rachal (Charlottesville: University of Virginia Press, 1979), 204.

[43] James Madison, Speech to the House of Representatives, June 8, 1789, in Rakove, *Declaring Rights*, 170, 179.

[44] Alexander Hamilton, The Federalist No. 78, June 14, 1788, in *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*, ed. John P. Kaminski and Richard Leffler (Madison, Wis.: Madison House, 1989).

[45] 347 U.S. 483 (1954).

46 388 U.S. 1 (1967).

47 370 U.S. 421 (1962).

48 397 U.S. 254 (1970).

49 377 U.S. 533 (1964).

50 384 U.S. 436 (1966).

51 372 U.S. 335 (1963).

52 376 U.S. 254 (1964).

53 384 U.S. 11 (1966).

54 *Hearings on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States before the Committee on the Judiciary*, 109th Cong., 1st Sess. 56 (2005) (testimony of John G. Roberts).

55 See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

56 See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

57 See *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

58 See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

59 See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

60 See *Bush v. Gore*, 531 U.S. 98 (2000).

61 See *Printz v. United States*, 521 U.S. 898 (1997) (guns); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (age discrimination); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (environment); *United States v. Morrison*, 529 U.S. 598 (2000) (violence against women).

62 See, for example, *Lawrence v. Texas*, 539 U.S. 558 (2003) (Rehnquist, Scalia, and Thomas dissenting from a decision protecting the rights of gays and lesbians); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Roberts, Scalia, Kennedy, Thomas, and Alito voting to narrow a woman's right to abortion); *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia dissenting from a decision protecting the equal protection rights of women); *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011) (Roberts, Scalia, Thomas, Kennedy, and Alito voting to uphold a state law disadvantaging illegal immigrants); *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010) (Roberts, Scalia, Kennedy, Thomas, and Alito voting to narrow Miranda rights); *Salazar v. Buono*, 130 S.Ct. 1803 (2010) (Roberts, Scalia, Kennedy, Thomas, and Alito voting to uphold the installation of a cross on public property over the objections of members of minority religions).

63 Melvin I. Urofsky, "Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court," *Duke Law Journal* (1988): 105.

“Self-Interest Well Understood”: The Origins & Lessons of Public Confidence in the Military

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Abstract: In recent decades, the U.S. military has enjoyed high levels of public confidence. We argue that the rise (and sustainment) of public confidence in the military reflects two phenomena. First, the public has a high regard for the military and its mission, arising from a shift to a professional (nonconscript) force that is perceived to be competent, fair, and accountable. Second, the public has little fear of military abuses in the domestic arena, owing chiefly to the reduced domestic presence of the military in the post–World War II era, with less emphasis on the physical defense of the homeland; and to the military's careful cultivation of an apolitical culture since Vietnam. We conclude with a brief discussion of the military's efforts to develop and encourage public-mindedness among its members, and the challenges to replicating the military approach in other institutional settings.

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The U.S. military continues to be America's most admired public institution, held in high esteem despite a broader decline in the public's regard for American institutions.[1] Indeed, many see the military as *the* exemplary American institution, from which the nation should derive lessons for application to myriad aspects of public and private life, including developing citizenship and civic engagement among America's youth. Yet the relationship between the American people and its defense establishment has historically been anchored in two opposing sentiments: on one side, Americans see a large, standing military as a potential threat to liberty; on the other, they revere the U.S. military for its role in establishing the nation in revolution, preserving it against rebellion, and defending it from foreign aggression. In this essay, we examine the sources and implications of public trust in the military. We argue that the rise and sustainment of public confidence in the military reflects the ascendance of the latter view (reverence for the military and its mission) and the subsidence of the former (fear of military abuses in the domestic arena); and we explore the possible causes of these changes.

In recent decades, Americans' confidence in the military and its leaders has risen (see Figures 1 and 2, and Table 1). This increasing trust in and regard for the armed forces has been the notable exception to a general decline or stagnation in Americans' regard for other key institutions. The judiciary, organized religion, public schools, universities, the executive and legislative branches of government, the press, corporations, banks, organized labor – all have suffered to some extent. Why not the military? What accounts for this divergence?

One possible explanation is that the country is becoming more militaristic, but little evidence supports this view. Fewer and fewer Americans serve in the military. As of 2010, active-duty military personnel made up less than 1 percent of the labor force; adding the National Guard and Reserve Component raises the total to about 1.5 percent (see Figure 3). Indeed, some are concerned that the men and women of the armed services are becoming increasingly isolated from the nation they serve. In a speech at Duke University in September 2010, then-Secretary of Defense Robert Gates observed, "There is a risk over time of developing a cadre of military leaders that politically, culturally and geographically have less and less in common with the people they have sworn to defend." Such was the gist of a recent *Time* magazine cover story as well.[2]

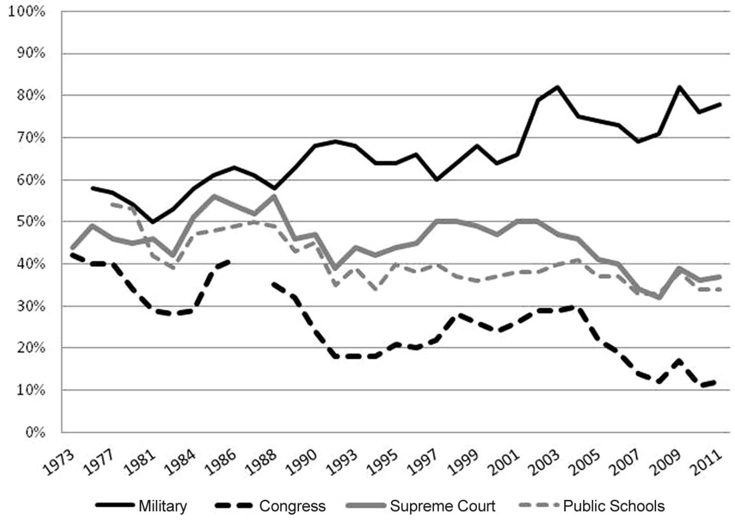
What about the defense industry? Are public sympathies driven by economic ties to the military? It appears unlikely. Since 1981, defense spending has declined relative to GDP and has been relatively stable as a percentage of total government outlays. Thus, America's personal and economic ties to its armed services have weakened in recent decades.

Suspicion of military power is rooted in the revolutionary ideals of the early American republic. The founders' fear of an unchecked military reflected both their personal experience of abuse at the hands of the British soldiery and their knowledge of history, particularly that of the Roman republic. In the military rule of Sulla, Julius Caesar, and other Romans, the American revolutionaries and framers of the Constitution perceived archetypes for what happens when too much power is entrusted to a charismatic leader of an army. Though agrarian democrats (Thomas Jefferson) disagreed with federalists (Alexander Hamilton and James Madison) in many fundamental questions of government, both groups believed that a standing army could endanger freedom. In a speech to the Constitutional Convention in 1787, Madison expressed that fear:

> In time of actual war, great discretionary powers are constantly given to the Executive Magistrate. Constant apprehension of War, has the same tendency to render the head too large for the body. A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger, have been always the instruments of tyranny at home.

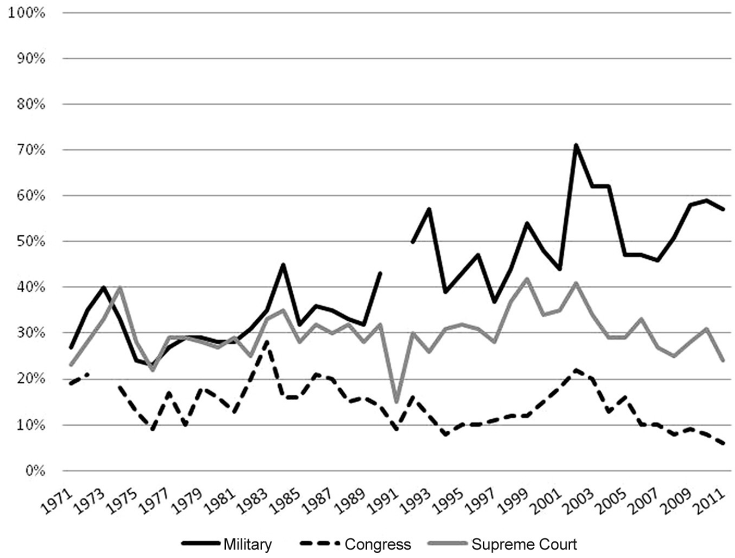
Article 2, Section 2 of the Constitution lays out civilian control of the armed forces. More limitations (direct and indirect) on the powers of the military were enumerated in the Bill of Rights: notably, in the right to bear arms, the protection from quartering troops, and the protection from unreasonable search and seizure. The Posse Comitatus Act (1878) further limited the military's role in the domestic sphere. Reacting against Reconstruction, the Congress forbade the use of the Army for the enforcement of domes-

Figure 1
Percentage of Respondents Expressing "a great deal" or "quite a lot" of Confidence in American Institutions, 1973 – 2011



Note that no survey was conducted in 1992. Source: Figure created by authors based on Gallup poll data.

Figure 2
Percentage of Respondents Expressing "a great deal" of Confidence in the "people in charge of running" American Institutions, 1971 – 2011



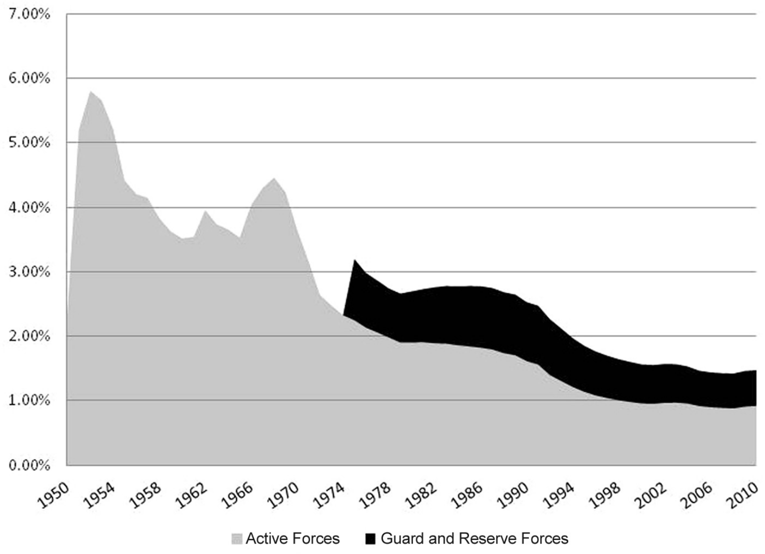
Source: Figure created by authors based on Harris poll data.

Table 1
Twenty-Year Change (between 1981 and 2011) in Percentage of Respondents Expressing "a great deal" or "quite a lot" of Confidence in American Institutions

	1981	2011	Change
The Church/Organized Religion	64	48	-16
The Military	50	78	28
U.S. Supreme Court	46	37	-9
Public Schools	42	34	-8
Congress	28	12	-16
Organized Labor	28	21	-7
Big Business	20	19	-1

Source: Table created by authors based on Gallup poll data.

Figure 3
The Military as a Percentage of the Labor Force, 1950 – 2010



Source: Figure created by authors with data provided courtesy of the Bureau of Labor Statistics and the Congressional Research Service.

tic laws, except by another act of Congress or a modification of the Constitution. Although one may still find fears of the domestic abuses of a too-powerful military in works of fiction, and in the paranoid fantasies of the political fringes, recent history has given Americans little cause for worry in this regard. As a result, Americans' historical fears of a too-powerful military have faded. Three changes have driven this trend.

First, the domestic footprint of the military has been dramatically reduced in recent decades. Through five rounds of Base Realignment and Closure (BRAC) from 1989 to 2005, 350 military installations have been closed. The number of active-duty military personnel has declined as well, from around 3 million in 1970, to 2 million in 1980, to slightly fewer than 1.5 million today. Relative to the U.S. population, this downsizing has been large: active-duty military personnel accounted for 1.5 percent of the population in 1970, 0.9 percent in 1980, and just 0.48 percent in 2010.

Second, the U.S. military's role of national defense (the physical garrisoning and defense of the United States itself) has had little significance in military planning and deployment since 1945. Ostensibly, all American military actions are in defense of the U.S. Constitution. The oath taken by the men and women of the armed services names "all enemies, *foreign and domestic*" (emphasis added); but in recent U.S. history, foreign enemies operating on foreign soil have predominated. The 9/11 attacks are a notable exception, although their unconventional character and brief duration precluded any significant U.S. military involvement in combating them. U.S. military power is projected across the globe but is barely noticeable at home. Since 1970, federal forces have been used only once in the domestic enforcement of law and order, when Marine and Army units were sent to rioting areas of Los Angeles in 1992.[3]

Third, the military has generally detached itself from domestic politics. In the first century of U.S. presidential politics, the boundary between military and political high office was porous. Military accomplishments figured largely in the political rise of numerous American presidents, including thirteen of the first twenty-five, from George Washington to Theodore Roosevelt. Yet the current culture of the U.S. armed services frowns on overt political activity by senior military leaders – active or retired – despite the conservative leanings of the majority of officers. If the spectrum of politicization ranges from the apolitical model espoused by General George Marshall to the highly politicized maneuverings of General Douglas MacArthur, the current military leans strongly in the direction of Marshall.

The political community is also increasingly detached from the military. While numerous veterans (primarily from World War II) have sought and obtained the presidency,[4] the last senior military officer to obtain his party's nomination for the presidency is also the last one to win the office: General Eisenhower, who served as NATO commander prior to the 1952 election. Of the nation's 541 Senators and Representatives in the 112th Congress (2011–2013), 118 served or currently serve in the military (9 served in the National Guard or the Reserve), approximately 22 percent of the membership.[5] Although this figure is considerably higher than the proportion of veterans in the general U.S. population, Congress is more male (83 percent) and older (an average age of 57.8) than the general population, so a greater proportion became adults during the conscription era, skewing the probability of military service. Perhaps more significant is the strong downward trend in military experience in Congress, demonstrating how the post–conscription era population is now occupying a greater proportion of government positions. According to the Congressional Research Service:

> The number of veterans in the [current] Congress reflects the trend of a steady decline in recent decades in the number of Members who have served in the military. For example, there were 298 veterans (240 Representatives, 58 Senators) in the 96th Congress (1979–1981); and 398 veterans (329 Representatives, 69 Senators) in the 91st Congress (1969–1971).[6]

Thus, through the military's shrinking footprint, its far-flung activities, and its maintenance of an apolitical culture (at least when viewed from the outside), it has become less relevant to the daily life of the average citizen. It may be that a crucial element to preserving and increasing public trust in the military is maintaining a distance between the preparation, conduct, and control of military operations and the domestic lives of Americans. In this way, the nation's traditional wariness toward military power has to some extent receded in recent decades. At the inception of the all-volunteer military four decades ago, some observers worried that it would emerge as a modern Praetorian Guard or a potent political menace. These fears have thus far been unfounded.

Societal trust in the military has not always been as high as it is today. The American people have a long-standing respect for the principles of duty and sacrifice embodied by the nation's armed forces, as well as a belief that the conduct of war has a rightful place in establishing and protecting the nation. The United States may have been "conceived in liberty," but it was birthed, and preserved, in blood: in the rebellion against England; in the Civil War; in wars of expansion against Mexico, Native Americans, and Spain; and in the wars of the twentieth and twenty-first centuries. Indeed, from the viewpoint of the American people, the great lesson of the twentieth century was that American military power accompanied by the spread of Anglo-Saxon models of government and economy wrought widespread peace and prosperity.

This triumph, however, was not without setbacks. The Vietnam War was a traumatic experience for the U.S. military, and it damaged public confidence in the armed services. In 1966, a Harris survey found that 61 percent of respondents had "a great deal of confidence" in the military's leadership; five years later, just 27 percent felt that way.[7] Yet these effects of the war were not restricted to the leadership of the armed services. The events surrounding the war undermined trust in the leadership of virtually all major American institutions (see Table 2). What is notable is that only the military has recovered the confidence that it lost.[8]

As discussed above, part of this recovery may stem from a decline in public fears of military interference in civic life. But a purely negative explanation for the rise in confidence in the military is incomplete. Institutions also derive public support from other factors: namely, competence and a concern for society's best interests. Thus, has the military become more competent and more public-minded since the Vietnam War?

The consensus within the military is that the force has achieved a high level of readiness and effectiveness. Yet the transition from a conscript to an all-volunteer force initially resulted in a decline in competence–what then-Army Chief of Staff General Edward Meyer called "the hollow force."[9] (The term still has great

Table 2
Percentage of Respondents Expressing "a great deal" of Confidence in the "people in charge of running" American Institutions (bold indicates decline from prior survey)

	1966	**1971**	**1981**	**1991**	**2001**	**2011**	**Change, 1966–2011**
Organized Religion	41	**27**	**22**	**21**	25	**24**	**-17**
The Military	61	**27**	28	47*	**44**	57	**-4**
U.S. Supreme Court	50	**23**	29	**15**	35	**24**	**-26**
Congress	42	**19**	**16**	**9**	18	**6**	**-36**
Major Educational Institutions	61	**37**	**34**	**32***	35	**30**	**-31**
The Press	29	**18**	**16**	**13***	13	**11**	**-18**
Organized Labor	22	**14**	**12**	21	**15**	15	**-7**
Major Companies	55	**27**	**16**	20	20	**13**	**-42**

*Figure is an average of nearest adjacent data because no response was provided for 1991. Source: Harris, *Index of Confidence*, May 18, 2011, http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/780/Default.aspx.

resonance in the defense community; it has been invoked, for example, in current discussions of the effects of defense budget cuts.) By the mid-1970s, significant changes were under way in the Army (and in the military more broadly) that would result in the professional, effective force that executed U.S. policy in Grenada, Panama, Kuwait, the Balkans, and elsewhere.[10]

Certainly, there have been struggles and failures. For the sake of this analysis, we distinguish operational/tactical problems (the result of poor *military* planning or execution, or of effective enemy action) from scandal (the result of personal or *institutional* failure). Operational struggles include the failed rescue of hostages in Iran in 1980 (*Operation Eagle Claw*); the 1983 bombing of the Marine Corps barracks in Beirut; Task Force Ranger ("Black Hawk Down") in Somalia in 1993; and most recently, the military's slow response to the development of the insurgency in Iraq. In the wake of these setbacks, the U.S. military has demonstrated remarkable resilience and strength, and the American public has been forgiving. Indeed, the blame for operational or tactical military failures tends to rest with the *political* leadership of the military: the president and the secretary of defense, among others. Consider, for instance, the repudiation of the conduct of the Iraq War as demonstrated in the 2006 U.S. midterm elections. This pattern is supported by the civil-military relations model described above: U.S. military leaders have assumed a largely instrumental role in the formulation of national security and military policy. Thus, they advise but defer final judgment to their civilian leaders and, perhaps more significant, avoid public dissent once a policy decision is made. As General Colin Powell describes it: "When we are debating an issue, loyalty means giving me your honest opinion, whether you think I'll like it or not. Disagreement, at this stage, stimulates me. But once a decision has been made, the debate ends. From that point on, loyalty means executing the decision as if it were your own."[11]

The military's ability to avoid blame for its recent operational or tactical struggles may be partly rooted in its current approach to civil-military relations. While loyalty in response to criticism of policy may seem an obvious behavior for military professionals, there are legal alternatives available to them. Indeed, a standard question asked of service chiefs in their confirmation hearings is whether they will express their personal views of executive policy when questioned by Congress. The answer given is yes; but in recent memory there have been few instances of such candor. We would do well to remember that an officer's oath is to support and defend the Constitution – not the policies of an administration. Prior generations of military leaders occasionally interpreted this as an obligation to resist what they perceived to be the dangerous errors of their civilian leaders.

From the 1930s through the 1960s, the debate on military policy was often both public and acrimonious. For example, Army Chief of Staff General Matthew Ridgway waged a long (and futile) campaign against President Eisenhower's "new look" military policy.[12] The president did not nominate Ridgway to a second term, selecting as his replacement General Maxwell Taylor, who promised to be more pliant. (He wasn't, as it turned out.) At the end of the Vietnam War, the U.S. military's leaders understood well that exercising a firmer hand in the formulation of policy has a cost: shared responsibility for policy failures. The current model for civil-military relations pushes much of that responsibility back to civilian leaders. The military has sustained the public perception of competence through its effective execution of the policies it is given. Rightly or not, the public therefore understands military failures as being rooted not in the military's execution, but in unwise policy.

In addition to valuing competence, society also expects institutions to serve a greater good. This public-mindedness is grounded in three principles: selflessness, accountability, and fairness. These factors are highlighted by the other institutions that enjoy widespread public confidence: small business and the police. According to a 2011 Gallup poll, 78 percent of Americans expressed "a great deal" or "quite a lot" of confidence in the military; 64 percent said the same for small business, and 56 percent for the police. In contrast, Congress (12 percent), the presidency (35 percent), and big business (19 percent) are held in relatively low regard by the American public.

What does the military have in common with the police and small business? In the case of the former, unselfish service is a common trait. The police (ideally) have no other purpose than to protect and serve the nation's communities. In performing this service, capable men and women make sacrifices. They give up potentially lucrative and rewarding opportunities in other jobs. They put themselves in danger, sometimes sacrificing their lives. Small business is perceived to share two key traits with the military: fairness and accountability. In small business, Americans see the best qualities of the nation's economic system (opportunity for those who seek it, rewards for those who succeed), absent the abuses and corruption that they impute to big business and banks. Small business owners pursue self-interest, but their success is deserved because it emerges from their own hard work and not from a manipulation of the system's resources. Small businesses create wealth and opportunity; they are a gateway for immigrants to enter the American middle class, and they evoke the entrepreneurial spirit and mythos of American economic history – think of Andrew Carnegie, Bill Gates, the fictional heroes of Horatio Alger stories, and so on. Furthermore, small business owners are exposed to risk; if a small business fails, it is left to fail. Thus, fairness works both ways.

Accountability and merit-based rewards are two sides of the same coin: there is no justice in rewarding success if there are no consequences to failure. In this regard, we may understand some of what lies behind the military's resilience in the face of a second challenge: scandal. Unlike tactical or operational failure, scandal presents a different problem. It is typically a failure of the institution itself, and blame therefore must reside within it. One may ask how the military has sustained the public's confidence through wrenching institutional failures: for example, Abu Ghraib, the Walter Reed scandal, and the Pat Tillman friendly-fire cover-up. This is a complex question that is beyond the scope of this essay. However, the military's culture of accountability is a crucial element of the institution's resilience.

The military's internal processes of self-correction and policing are swift and generally unambiguous. When wrongdoing occurs, the perpetrators are brought to justice. Incompetent leaders are removed from their positions; for senior leaders, such removals are usually career-ending. The Walter Reed scandal, for instance, ended the careers of two generals (including the surgeon general at the time); the secretary of the army was fired as well. For men and women who have chosen careers in the military, honor and reputation are the currency of personal success. To end a career in disgrace is a powerful symbol and a reminder of personal and institutional accountability. The public appears to understand this. It does not expect perfection from the military; it expects consequences for internal failures. The military has generally satisfied these expectations.

In their book *The Meritocracy Myth*, sociologists Stephen McNamee and Robert Miller argue that the American dream rests upon the belief that America is a land of limitless opportunity in which individuals can go as far as their own merit takes them.[13] Individuals get out of the system what they put into it, and getting ahead is based on individual merit – a combination of factors including innate abilities, working hard, having the right attitude, and having high moral character. McNamee and Miller go on to point out, however, that certain social forces in America can suppress or negate the effects of merit in the race to get ahead. Such forces include inheritance, social and cultural advantages, unequal educational opportunity, the decline of self-employment, and discrimination in all its forms. Yet the military is seen to be relatively free of these sources of injustice.

The military places soldiers, sailors, marines, and airmen and women in a culture in which advancement and recognition are based on individual achievement. The social sources of injustice described by McNamee and Miller are countered by military policies that eliminate nepotism, negate socioeconomic and cultural differences, and express zero tolerance for any type of discrimination. Nepotism and inheritance are eliminated by the lack of horizontal entry into the profession. The only way to move up the hierarchy in the military is to start at the bottom. Thus, most Americans believe that the military provides opportunity to all Americans; they have faith that competence is recognized and rewarded, and that training and educational resources are provided. Simultaneously, they are reassured by the fact that incompetence and failure have consequences in the military. Much of the anger toward American corporations today stems from the feeling that the men and women who lead these firms have escaped the just consequences of their actions. This offends Americans' strong sense of fairness.

The military's embodiment of selflessness, merit, and accountability has led some to seek broader lessons from the example set by the armed forces. In particular, the military is offered as an exemplar in instilling the notions of service and civic responsibility in America's youth. Calls to reinstate a draft (or at least a draft as a part of compulsory national service) are indicative of this sentiment. According to this view, the draft, beyond meeting the manpower requirements of the military in a way that reflects the society it serves, would draw the country together through the common experience of national service, would encourage the development of shared values, and would be a powerful remedy for the individualism that seems to dominate today's society. The sociologist Charles Moskos, harkening back to the draft days in the post–World War II era, has noted:

> During the peaceful years of the 1950s – a time not unlike our own, when the threat of mass destruction hung in the air – most Ivy League men had to spend two years in uniform, before or after college, working and bunking with others of very different backgrounds and races (the military, remember, was about the only racially integrated institution at the time).
>
> This shared experience helped instill in those who served, as in the national culture generally, a sense of unity and moral seriousness that we would not see again – until after September 11, 2001. It's a shame that it has taken terrorist attacks to awaken us to the reality of our shared national fate. We should use this moment to rebuild institutions like the draft that will keep us awake to this reality even as the memory of the attacks fades.[14]

While a return to the draft seems a remote possibility, there are other ways to leverage the virtues of the military in promoting good citizenship, and to translate the values engendered through military training, education, and leadership development. Retired military officers have been summoned to lead troubled school districts in places such as Washington, D.C., Seattle, Huntsville, and Wake County, North Carolina. Programs to rehabilitate wayward juveniles via teen boot camps and junior ROTC detachments have multiplied in schools across the nation in an effort to instill the values of self-discipline and leadership. Additionally, public school military academies have emerged in response to the yearning for renewed citizenship. In Chicago – where more than ten thousand high school students now wear a uniform to class – retired Army officer and current principal of the Chicago Marine Academy, Paul Stroh, has stated that the mission of public military schools is simply to "produce a student that is prepared for post-secondary education and that eventually will become a leader in their community, at the city, the state, or even the national level."[15]

Turning to the military model for the education of America's youth has received some criticism. Boot camps have been under closer scrutiny after instances of abuse, junior ROTC and public school military academies have been accused of surreptitiously serving as recruiting offices, and the pedagogical competence of military officers serving in positions of educational leadership has been questioned. Nevertheless, admiration for the role of the military in imbuing the values of citizenship in young people has endured.

But what exactly is it about the military that takes America's youth – who are often in a stage of life more characterized by self-interest and selfishness than sacrifice and selflessness – and transforms them into soldiers, marines, sailors, and airmen who are willing to set aside self-interest in pursuit of the greater good?[16] What makes them willing to expose themselves to the consequences of their decisions (including the potential loss of life) when a different career choice would offer a path less fraught with danger? Is it the stripping away of the individual identity in order to emphasize uniformity (and uniforms)? Is it the discipline of a hierarchical system with clearly defined ranks, organizational rituals, customs, and courtesies? While these aspects of the military are often the most noticeable, they are also the most superficial. The development of selfless and responsible citizens begins with the recognition that service members are, above all, Americans; and an acceptance of the contradiction inherent to American society: the tension between self-interest and individualism, on the one hand, and commitment to and sacrifice for the common good, on the other.

Instead of stamping out all vestiges of American individualism in its members, the U.S. military surrounds its members with a culture that redefines self-interest. It is a culture that relies on what Alexis de Tocqueville called "self-interest well understood." From his travels throughout the United States during the early 1800s, Tocqueville noted:

> Americans . . . are pleased to explain almost all the actions of their life with the aid of self-interest well understood; they complacently show how the enlightened love of themselves constantly brings them to aid each other and disposes them willingly to sacrifice a part of their time and their wealth to the good of the state. . . . Each American knows how to sacrifice a part of his particular interests to save the rest.[17]

Tocqueville's Americans valued their liberty – their ability to choose for themselves and enjoy the fruits of their labors – yet they also grasped the essential paradox of liberty: that its maintenance requires collective action. People during that period understood that citizens who acted to further the interests of society ultimately served their own interests through the betterment of the society in which they lived. This could happen only if they subjected themselves to a collective authority of civic and political groups.

Some have lamented the decline of the civic society Tocqueville observed (notably Robert Putnam in his book *Bowling Alone*), but the American military retains the individualism essential to being an American while also emphasizing the principle of "self-interest well understood." Uniforms, jargon, salutes, discipline, and hierarchy may encourage this principle, but as social psychologist Edgar Schein points out, these are secondary *reinforcing* mechanisms – practices that are visible to outsiders, and therefore likely to be seen as the roots of the organizational culture.[18] They tell us that some sort of culture is present, but they do not tell us how it came about, what it does, or how it endures.

It is through its leaders – from the lowest level sergeant to the highest ranking general – that the military passes on its culture of "self-interest well understood." In the army, for example, this process begins the first day a new member is introduced to the military via the drill sergeant, who, along with the noncommissioned officer (NCO) corps in general, epitomizes the two characteristics that make the military a well-regarded American institution: competence and selflessness. These two themes characterize the Noncommissioned Officer Creed (abridged below), which is recited with pride by every sergeant in the Army:

> No one is more professional than I. . . . Competence is my watchword. My two basic responsibilities will always be uppermost in my mind – accomplishment of my mission and the welfare of my soldiers. . . . All soldiers are entitled to outstanding leadership; I will provide that leadership. I know my soldiers and I will always place their needs above my own.

For many new soldiers, the NCO is the first adult in their lives whose primary purpose is to develop them into better men and women, and better leaders. In their NCOs, soldiers discover a curious mix of high expectations, hard truths, and unexpected compassion. Soldiers gradually realize that NCOs are drastically underpaid considering their line of work, spend inordinate time working with soldiers at the expense of family and personal needs, and are utterly devoted to their soldiers and the Army. Soldiers learn that NCOs take equal pride in being the "backbone of the Army" and subordinating their needs and interests to those of the officers over them or the soldiers under them. Through constant exposure to these role models, each new generation in every service of the military learns the principle of "self-interest well understood."

The culture is also embedded through the actions and attitudes of military leaders at the highest levels. As discussed above, the U.S. military is led by civilians. The concept of civilian control of the military ensures that the most decorated, highest ranking officers will still subordinate their views to the civilians appointed over them. It is the duty of military officers to render their expert military opinion, but it is the decision of the civilian political leadership that determines the strategic direction of the military. For the good of the nation, military leaders are subordinate to their elected political leaders. From President Truman's firing of General Douglas MacArthur in 1951, to General Stanley McChrystal's relief as commander of forces in Afghanistan in 2010 by President Obama, history provides numerous examples of this subordination – a fact built on service and accountability.

The men and women of the armed forces, including senior officers, sacrifice a great deal of personal liberty. They subordinate their wills to the protection of the U.S. Constitution and, more tangibly, to the will of their superiors and the code of conduct of the organization. Yet such a commitment must be reinforced by other organizational practices. In this regard, the reinforcing mechanisms of military culture establish and guard privileges that are found almost nowhere else in American society. This is the implicit contract of military service. To the soldier, sailor, marine, and airman, the nation says, "Give me your liberty, and I will give you freedom."

Members of the armed forces live free from many of the fears that daily weigh on their civilian counterparts. The value of the individual is reinforced in the complete social safety net (by "complete," we do not suggest it is without flaws) that surrounds service members from the day they enter the service until the day they leave, and in some cases, long after they retire. Individual identity may be diminished by providing soldiers common uniforms, for example, but the value of individuals is enhanced. Socioeconomic differences are erased. Personnel of similar rank receive similar housing, health care, and compensation. They shop in the same department and grocery stores (the post exchange, or PX, and the commissary). Discrimination is minimized in a system that emphasizes (and includes in performance evaluations) equal opportunity, but stops short of using quotas in order to avoid reverse discrimination. Thus, contrary to McNamee and Miller's observations that meritocracy is a myth in America, individualism via the workings of meritocracy is alive and well in the U.S. military.

This push-pull dynamic of the subordination and protection of individual liberty is perhaps most powerfully demonstrated in the military's code of comradeship. Military men and women take tremendous personal risks for the sake of a fallen or wounded fellow. Returning to the example of the Army, soldiers are encouraged to strive for personal advancement, but always within the context of others – whether that be a buddy, the unit, or the profession. This juxtaposition of the individual with the obligation toward others is core to the Soldier's Creed:

> I am an American Soldier.
> I am a warrior and a member of a team.
> I serve the people of the United States, and live the Army Values.
> I will always place the mission first.
> I will never accept defeat.
> I will never quit.
> I will never leave a fallen comrade.
> I am disciplined, physically and mentally tough, trained and proficient in my warrior tasks and drills.
> I always maintain my arms, my equipment and myself.
> I am an expert and I am a professional.
> I stand ready to deploy, engage, and destroy, the enemies of the United States of America in close combat.
> I am a guardian of freedom and the American way of life.
> I am an American Soldier.

For a soldier to promise never to leave a fallen comrade – even if that means endangering himself in the process – requires a transformed understanding of individualism. The individual is of great worth, but it is always *the other* individual. No soldier demands special treatment, for he or she knows that such demands are unnecessary. It is the principle of "self-interest well understood."

The Soldier's Creed, though, is merely an artifact of Army culture. We find an organization's true values and beliefs not in creeds or published proclamations, but in observing how rewards and recognition are dispensed within the organization. Corporations dole out pay raises and bonuses to reinforce and recognize those who exemplify desired corporate values. Instead of monetary remuneration, the military relies on awards or medals to applaud those who uphold and exemplify its values. The highest award in the military is the Congressional Medal of Honor, awarded by the president to a service member who "distinguishes himself or herself conspicuously by gallantry and intrepidity at the risk of his or her life above and beyond the call of duty while engaged in an action against an enemy of the United States."[19]

Recipients of the Medal of Honor are so respected by other members of the

Table 3
Post–9/11 Medal of Honor Recipients

Recipient	Service	Location	Year	Situation
Paul R. Smith	Army	Iraq	2003	Killed while holding the enemy at bay, allowing for the wounded to be carried out
Jason Dunham	Marines	Iraq	2004	Fought hand-to-hand with the enemy and hurled himself on a grenade to protect fellow Marines
Michael P. Murphy	Navy	Afghanistan	2005	Led a four-man reconnaissance team in a fight against superior numbers, exposed himself to hostile fire in order to call for help
Jared C. Monti	Army	Afghanistan	2006	Killed while trying to rescue a wounded soldier from intense small arms and rocket-propelled grenade fire
Michael A. Monsoor	Navy	Iraq	2006	Saved the lives of his fellow SEALs at his sniper position by diving on a grenade
Ross A. McGinnis	Army	Iraq	2006	Saved the lives of four soldiers by diving on a grenade while inside a Humvee
Salvatore Giunta	Army	Afghanistan	2007	For risking his life to save a wounded soldier from being captured
Robert James Miller	Army	Afghanistan	2008	Fatally shot while diverting gunfire from Taliban forces so that his fellow soldiers could escape
Leroy Petry	Army	Afghanistan	2008	Picked up and threw a live grenade away from his fellow soldiers
Dakota Meyer	Marines	Afghanistan	2009	Rescued 23 Afghans and 13 Americans in the heat of battle

military that they are customarily saluted, regardless of rank or status. The Medal of Honor may be the military's most vivid symbol of the application of the principle of "self-interest well understood." Of the servicemen awarded the medal during and since World War II, almost 60 percent died as a result of their heroism. This extraordinary standard of self-sacrifice has continued in the conflicts in Iraq and Afghanistan (see Table 3).

In a time of cynicism toward public institutions, American society continues to hold the U.S. military in high esteem. Competence, accountability, and subordination of the institution's interests to those of society are the main drivers of societal confidence. American society has also taken notice of the military's success in transferring institutional selflessness to the individual. As a result, many aspects of the military are being emulated throughout the country in an effort to instill the principles of citizenship in America's young people. Yet the symbols of military culture – including discipline, uniforms, and ceremony – only scratch the surface. While meaningful and perhaps ennobling to many of today's youth, these characteristics of the military are themselves subordinate to the fundamental principle of "self-interest well understood." This principle is conveyed through a culture that retains American individualism and American collective engagement. It strives to maintain and protect a meritocracy built on accountability, while equally emphasizing the institution's obligations to the soldiers and their families, and the soldiers' obligations to their comrades and the profession.

ENDNOTES

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1 The views expressed in this essay are those of the authors and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. government.

2 Mark Thompson, "An Army Apart: 45,000 Troops are Coming Home to a Country that Doesn't Know Them," *Time*, November 21, 2011.

3 National Guard units from all fifty states were sent to support the recovery of the Gulf Coast following Hurricane Katrina – a quasi-federal response. Some federal units were sent as well, though not for the purpose of law enforcement.

4 President Truman served in World War I. Nominees Wendell Willkie (Army) and Adlai Stevenson (Navy) enlisted during World War I, but the war ended before they saw action. Presidents Kennedy, Nixon, Ford, and George H.W. Bush served in World War II, and President Johnson served briefly in the Pacific. President Carter entered the U.S. Naval Academy in 1943 and served in the post–World War II Navy. Democratic nominees George McGovern (World War II), Al Gore (Vietnam), and John Kerry (Vietnam) saw combat, and Michael Dukakis served in the peacetime Army. Republican nominees Bob Dole (World War II) and John McCain (Vietnam) also saw combat. Independent nominee Ross Perot served in the Navy. This review is restricted to presidents and presidential candidates who served in the nationally controlled military, as opposed to National Guard units.

5 Note that a very small proportion of members of Congress have children in the military.

6 Jennifer Manning, "Membership in the 112th Congress: A Profile" (Washington, D.C.: Congressional Research Service, March 1, 2011), http://www.senate.gov/reference/resources/pdf/R41647.pdf.

7 In evaluating such polls, we should remember that to some respondents, one may do no wrong, and to others, one may do no right. The important changes occur in between, and the Harris data show a significant shift in the way the "middle" of the country feels about the leadership of the military since the end of the Vietnam War. Gallup confidence polls support this result, but because they aggregate two responses in the historical tables ("a great deal" and "quite a lot"), the data show less variance and are somewhat less informative. See Figure 1, above. Gallup, *Confidence in Institutions*, June 9–12, 2011, http://www.gallup.com/poll/1597/confidence-institutions.aspx.

8 The decline in public confidence in labor leadership has been small, but that is from a low baseline (just 22 percent).

9 James J. Carafano, "Avoiding the Hollow Army," *Army* (July 2005): 69–70.

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11 Colin L. Powell, with Joseph E. Persico, *My American Journey* (New York: Random House, 1995).

12 A. J. Bacevich and Lawrence F. Kaplan, "Generals versus the President: Eisenhower and the Army, 1953–1955, a Case in Civil-Military Relations" (Syracuse, N.Y.: Syracuse University, 1997).

13 Stephen J. McNamee and Robert K. Miller, Jr., *The Meritocracy Myth*, 2nd ed. (Lanham, Md.: Rowman & Littlefield, 2009).

14 Charles Moskos and Paul Glastris, "Now Do You Believe We Need A Draft?" *Washington Monthly*, November 2001.

15 Paul Stroh, as interviewed in the segment "Chicago's Military Academies Raise Education Debate," *PBS NewsHour*, December 26, 2007.

16 The perspective in this section reflects the Army service experience of two of the authors, and many examples are therefore drawn from the Army. It is the authors' belief, however, that these examples are also representative of the experiences of members of the Navy, Air Force, and Marine Corps.

17 Alexis de Tocqueville, *Democracy in America*, trans. Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 502–503.

18 Edgar H. Schein, "How Founders and Leaders Embed and Transmit Culture: Socialization from a Leadership Perspective," in *Organizational Culture and Leadership*, 2nd ed. (San Francisco: Jossey-Bass, 1992), chap. 13.

19 *Military Awards*, Army Regulation 600-8-22 (Washington, D.C.: U.S. Government Printing Office, 2011), 53.

The Challenges Facing Civic Education in the 21st Century

Kathleen Hall Jamieson

Abstract: This essay explores the value and state of civics education in the United States and identifies five challenges facing those seeking to improve its quality and accessibility: 1) ensuring that the quality of civics education is high is not a state or federal priority; 2) social studies textbooks do not facilitate the development of needed civic skills; 3) upper-income students are better served by our schools than are lower-income individuals; 4) cutbacks in funds available to schools make implementing changes in civics education difficult; and 5) reform efforts are complicated by the fact that civics education has become a pawn in a polarized debate among partisans.

Because, as John Dewey contended, "[d]emocracy has to be born anew every generation, and education is its midwife,"[1] the quality of civic education has been a concern of those interested in the health of our system of government and the well-being of the citizenry. For much of the nation's history, our leaders have viewed civics education as a means of realizing the country's democratic ideals. In the past decade, low levels of youth voting and non-proficient student performance on a widely respected civics assessment test have elicited efforts to increase the amount and quality of time spent teaching civic education and have ignited a movement to create common standards in the social studies. Complicating these efforts is ideological disagreement about the content that should be taught and the values that ought to be inculcated. Validating the belief in the worth of civics education and underscoring the importance of reform efforts, data reveal that schooling in civics and other, related cocurricular activities are associated with increased knowledge of the U.S. system of government and heightened participation in democratic activities such as voting.

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Reformers seeking to increase the quality and accessibility of civic education in schools confront five challenges. First, neither the federal government nor the states have made high-quality civics education a priority, a conclusion justified by evidence showing that the systematic study of civics in high school is not universal; that fewer high school civics courses are offered now than were offered in the past; that the time devoted to teaching the subject in lower grades has been reduced; and that most states do not require meaningful civics assessment. Second, social studies textbooks may not adequately convey the knowledge or facilitate development of the skills required of an informed, engaged citizenry. Third, consequential differences in access and outcomes between upper- and lower-class students persist. Fourth, cutbacks in funding for schools make implementation of changes in any area of the curriculum difficult. Fifth, the polarized political climate increases the likelihood that curricular changes will be cast as advancing a partisan agenda.

Throughout much of its history, the United States has "relied upon government schools as a principal purveyor of deeply cherished democratic values."[2] So interconnected are education and citizenship that some historians contend that "the most basic purpose of America's schools is to teach children the moral and intellectual responsibilities of living and working in a democracy."[3] Consistent with this view, Americans "have expected schools to prepare future citizens, nurturing in children loyalty and common values and forging from them a strong national character."[4] Among the implications of these arguments is the notion that the classroom is both the training ground for democracy and the incubator of its leaders.

Scholars of U.S. history argue that "it was first religion and next education that engaged the attention of the early settlers."[5] Whereas the Puritans justified the teaching of reading primarily as a means of accessing Scripture, Benjamin Franklin envisioned schooling as a means of "laying such a foundation of knowledge and ability as, properly improved, may qualify [individuals] to pass through and execute the several offices of civil life, with advantage and reputation to themselves and country."[6]

Unsurprisingly, then, those governing under the Articles of Confederation signaled education's centrality to national well-being as early as the Land Ordinance of 1785, which "set aside the sixteenth section of government land in each township for school support." Two years later, Article Three of the Northwest Ordinance of 1787 proclaimed, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[7]

Recognizing the importance of education in developing the capacities of citizenship, early U.S. presidents championed government-supported schooling for at least some citizens. As a result, the Military Academy at West Point was established in 1802. In the years that followed, the Founders continued to associate an educated populace with a secure union. Motivating George Washington's argument for a national university, for example, was his belief that

> the assimilation of the principles, opinions, and manners of our country-men by the common education of a portion of our youth from every quarter well deserves attention. The more homogenous our citizens can be made in these particulars the greater will be our prospect of permanent union; and a primary object of such a

national institution should be the education of our youth in the science of government.

"In a republic," the father of the nation asked, "what species of knowledge can be equally important and what duty more pressing on its legislature than to patronize a plan for communicating it to those who are to be the future guardians of the liberties of the country?"[8]

In a like vein, Thomas Jefferson included public education, along with roads, rivers, and canals, in a list of "objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers."[9] Drawing a similar connection between education and the productive exercise of citizenship, President James Madison argued in his second annual message:

> I... invite your attention to the advantages of superadding [*sic*] to the means of education provided by the several States a seminary of learning instituted by the National Legislature within the limits of their exclusive jurisdiction.... Such an institution, though local in its legal character, would be universal in its beneficial effects. By enlightening the opinions, by expanding the patriotism, and by assimilating the principles, the sentiments, and the manners of those who might resort to this temple of science, to be redistributed in due time through every part of the community, sources of jealousy and prejudice would be diminished, the features of national character would be multiplied, and greater extent given to social harmony. But, above all, a well-constituted seminary in the center of the nation is recommended by the consideration that the additional instruction emanating from it would contribute not less to strengthen the foundations than to adorn the structure of our free and happy system of government.[10]

These presidential encomia to the indispensable role of education in a democracy prefigure the enactment of such landmark legislation as the 1862 Morrill Act, which gave each state federal land to establish land grant colleges, and the 1965 Elementary and Secondary Education Act (ESEA), which gave public schools federal assistance and oversight.

The importance of schooling was magnified by the young country's impulse to turn away from primogeniture and entail. "The English laws concerning the transmission of property were abolished in almost all the States at the time of the Revolution," noted Alexis de Tocqueville. "The law of entail was so modified as not materially to interrupt the free circulation of property.... [T]he families of the great landed proprietors are almost all commingled with the general mass....The last trace of hereditary ranks and distinctions is destroyed."[11]

Unsurprisingly, the educational system that ultimately developed in the United States bore the imprint of the country's founding philosophy. If taken seriously, principles such as freedom of speech and of assembly and consent of the governed should be construed as inviting education of the many. The need for public schools was also driven by the extension of voting rights, first beyond the propertied class and, eventually, to African Americans and women. "Education must be universal," argued Horace Mann. "It is well, when the wise and the learned discover new truths; but how much better to diffuse the truth already discovered, amongst the multitude.... With us, the qualification of voters is as important as the qualification of governors, and even comes first, in the natural order."[12] And as the country faced the challenge of absorbing waves of immigrants during the turbulent Gilded Age and Progressive Era, educators came to see public schools "as helping different groups assimilate into American culture and society."[13] "For many generations of immigrants," write historian of education Diane Ravitch and public policy expert Joseph Viteritti, "the common school was the primary teacher of patriotism and civic values."[14]

Unlike its European counterpart, the U.S. educational system "reflected the ideal of equality," an aspiration expressed in the notion of "educational opportunity for all regardless of wealth and ability."[15] Still, the country was more than a half-century old before "real efforts to achieve universal opportunities for education" were undertaken. And "[e]ven after the 1840s . . . most boys could not expect to attend school for more than a few years, and girls could hardly hope to attend at all."[16] The extent to which the country failed to realize its ideals was evident in the fact that, when the Fourteenth Amendment was adopted in 1868, common tax-supported schooling had not yet taken hold in the South, and the education of those identified as "Negroes" was still forbidden by law in some states.[17]

Those who feared an empowered rabble challenged the notion that universal education would benefit both the individual and the country. On the other side of the argument, Jeffersonians echoed the sentiments of the author of the Declaration of Independence, who noted that "[i]f a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be."[18] Whereas Jefferson envisioned an "aristocracy of worth and genius,"[19] the worriers forecast that the combination of widespread schooling and its corollary, expanded suffrage, would vest elected power in those least – rather than best – suited to govern.

In the contest over these competing worldviews, Jefferson's prevailed. "In New England," Tocqueville noted in 1838, "every citizen receives the elementary notions of human knowledge; he is taught, moreover, the doctrines and the evidences of his religion, the history of his country, and the leading features of its Constitution."[20] The state of affairs we assume today had its roots in arguments made by such champions of education as Pennsylvania's Thaddeus Stevens, who told that state's House of Representatives:

> If then, education be of admitted importance to the people under all forms of governments; and of unquestioned *necessity* when they govern themselves, it follows, of course, that its cultivation and diffusion is a matter of *public* concern; and a duty which every government owes to its people.[21]

Because views such as Jefferson's and Stevens's won the day, "[o]ver 49 million students" headed "to approximately 99,000 public elementary and secondary schools for the fall 2011 term" at an estimated one-year cost of $525 billion.[22]

On the role of schooling in inculcating the values of citizenship, contemporary presidents share the Founders' views. Thus, for example, President Ronald Reagan noted, "Since the founding of this Nation, education and democracy have gone hand in hand."[23] Similarly, President George W. Bush observed, "A love of democratic principles must be taught."[24] And President Bill Clinton challenged "all our schools to teach character education, to teach good values and good citizenship."[25]

In the past decade, a number of major initiatives have concentrated on enhancing educational quality at the elementary and secondary levels. Signed into law in January 2002, the No Child Left Behind Act (NCLB) focused on increased student proficiency in language arts and mathematics. In 2007, NCLB added student proficiency in science to its goals. In light of the long-lived perception that education should increase civic knowledge and enhance the capacities of citizenship, it is surprising that Title I of NCLB did not list civic education as a priority.

That omission is seen by some as a sign that other priorities have displaced civic education on the public agenda. Reformers have been motivated by concerns that civic education is not as central to public schooling as it once was. They worry that the standards movement may have inadvertently made the delivery of high-quality civic education more difficult. The largest group responding to both of these concerns is the Civic Mission of the Schools (CMS) Coalition.[26]

In response to low levels of voting and civics knowledge among the young, in 2003 Carnegie Corporation of New York released *The Civic Mission of Schools* report[27] and created the Campaign for the Civic Mission of Schools, "a coalition of 40 organizations committed to improving the quality and quantity of civic learning in American schools." Both the 2003 report and its 2011 follow-up, *Guardian of Democracy: Civic Mission of Schools*,[28] proposed agendas for action. Among the Campaign's goals, along with college and career preparation, is reestablishing civic learning as one of the three principal purposes of American education. The CMS Coalition now includes more than sixty participating organizations and individuals representing groups concerned with civic learning, general education, civic engagement, policy-making, civil rights, and business.

The 2003 *Civic Mission of Schools* report argued that schools should not only "help young people acquire and learn to use the skills, knowledge, and attitudes that will prepare them to be competent and responsible citizens throughout their lives" but also work to ensure that students:

- *Are informed and thoughtful*. They have a grasp and an appreciation of history and the fundamental processes of American democracy; an understanding and awareness of public and community issues; an ability to obtain information when needed; a capacity to think critically; and a willingness to enter into dialogue with others about different points of view and to understand diverse perspectives. They are tolerant of ambiguity and resist simplistic answers to complex questions.
- *Participate in their communities*. They belong to and contribute to groups in civil society that offer venues for Americans to participate in public service, work together to overcome problems, and pursue an array of cultural, social, political, and religious interests and beliefs.
- *Act politically*. They have the skills, knowledge, and commitment needed to accomplish public purposes – for instance, by organizing people to address social issues, solving problems in groups, speaking in public, petitioning and protesting to influence public policy, and voting.
- *Have moral and civic virtues*. They are concerned for the rights and welfare of others, and are socially responsible, willing to listen to alternative perspectives, and confident in their capacity to make a difference.[29]

Since its inception in 2003, CMS has:

- Developed state-level campaign coalitions in each state.
- Developed an online database of more than two hundred civic-learning practice examples. The Civic Learning OnLine database contains best-practice examples of each of the six promising civic-learning practices of the *Civic Mission of Schools* report.
- Helped the CMS state affiliates pass nearly seventy pieces of supportive state

legislation in thirty-five states during the 2004 to 2010 legislative sessions.

- Conducted a study of schools and school districts around the nation that are meeting their civic mission through employment of the six promising practices of the *Civic Mission of Schools* report.
- Participated in efforts to create common standards for social studies education.

Elements of this reform agenda are controversial. As education scholars Wayne Ross and Perry Marker argue, "[R]eform efforts have brought to the fore the primary tensions in the field of social studies: 1) the relative emphasis on the cultural heritage of the dominant society versus the development of critical thought; and 2) conflicting conceptions of citizenship, that is, citizenship for social reproduction or social reconstruction."[30] It is not difficult to imagine political progressives favoring the development of "critical thought" and "social reconstruction" and conservatives championing the cultural heritage of the dominant society and citizenship for social reproduction. Political scientist Amy Gutmann provides a fair summary of the key points of disagreement when she writes:

> The first issue is whether civic education that is publicly mandated must be minimal so that parental choice can be maximal. The second issue concerns the way in which publicly subsidized schools should respond to the increasingly multicultural character of societies. The third issue is whether democratic education should try to cultivate cosmopolitan or patriotic sentiments among students.[31]

The heat generated by the controversy over content is evident in the Thomas B. Fordham Institute's 2003 publication *Where Did Social Studies Go Wrong?*[32] In the foreword to that work, Fordham Foundation President Chester E. Finn, Jr., laid the failures of social studies at the feet of the social studies establishment:

> Evidence also accumulated that, in the field of social studies itself, the lunatics had taken over the asylum. Its leaders were people who had plenty of grand degrees and impressive titles but who possessed no respect for Western civilization; who were inclined to view America's evolution as a problem for humanity rather than mankind's last, best hope; who pooh-poohed history's chronological and factual skeleton as somehow "privileging" elites and white males over the poor and oppressed; who saw the study of geography in terms of despoiling the rain forest rather than locating London or the Mississippi River on a map; who interpreted "civics" as consisting largely of political activism and "service learning" rather than understanding how laws are made and why it is important to live in a society governed by laws.[33]

Evidence from a 2010 survey of social studies teachers calls Finn's assessment into question. In a national random sample of 866 public high school teachers and an oversample of 245 Catholic and private high school instructors, 83 percent viewed the United States "as a unique country that stands for something special in the world"; 82 percent thought pupils should be taught to "respect and appreciate their country but know its shortcomings"; and only 1 percent wanted students to learn "that the U.S. is a fundamentally flawed country."[34]

The ideological tensions at play here were also on display in the early 1990s, when those attempting to develop national guidelines for the teaching of American history faced off against critics, including National Endowment for the Humanities Chair Lynne Cheney, over the balance between focusing on past injustices and on narratives centered on traditional historical figures.

In the broad sweep of things, efforts to expand the focus of textbooks have succeeded. As a result of challenges to traditional accounts that excluded the struggles of blacks and women, for example, the content of social studies texts has changed remarkably over the past half-century. In the 1940s, for example, Dred Scott was the only black individual featured more than once; by the 1960s, and even more so by the 1980s, texts contained a notable amount of multicultural and feminist content.[35] Increasingly, textbook publishers have incorporated the aspiration that "students can learn about multiple viewpoints and competing narratives."[36]

Still, clashes among competing views of social studies are so intense that education scholar Ronald Evans has labeled them the "social studies wars."[37]

Even though social studies was ignored in NCLB, states have standardized their civics curricula "as part of the sweeping trend toward greater teacher accountability and systemized decision making."[38] Since 1989, when a national education summit convened by President George H.W. Bush made the case for common standards, every state has developed standards of learning in curricular areas including social studies, which is defined as the core academic area consisting of civics, history, economics, and geography. Influencing these deliberations were the two voluntary sets of social studies standards developed by the National Council for the Social Studies[39] and the Center for Civic Education.[40]

However, as the states have revised their standards over the years, benchmarks have proliferated to the point that even the most skilled teacher would have difficulty meeting them within the available class time. In short, rather than improving the state of civic education, the standards movement may in some ways have undercut it. As the *Guardian of Democracy* report notes, "In social studies standards revisions . . . most states have added to the amount of material to be covered, rather than developing fewer and clearer standards that encourage an understanding of the vital importance of citizen engagement in our democracy."[41]

Recognizing the problem, in June 2010 the National Governors Association Center for Best Practices and the Council of Chief State School Officers released a set of state-led education standards designed to reduce the number and increase the quality of the standards set in math and science. Since then, forty-seven states have agreed to implement the Common Core State Standards in those two subjects. Although acceptance by the states was voluntary, President Barack Obama's Department of Education accelerated adoption by making it a criterion for entry into the federal Race to the Top education grant competition.

Push back against the standards took two very different forms. Some argued that the math standards were problematic because they were lower than those in place in high-achieving states such as Massachusetts.[42] Others contended that national standards would stifle innovation in the states and constituted an unconstitutional expansion of federal authority.[43]

Motivated in part by the Albert Shanker Institute's influential 2003 study *Educating Democracy: State Standards to Ensure a Civic Core*,[44] reformers are now focused on clarifying the standards in social studies. The Shanker study found that standards in many states consisted simply of a laundry list of people, events, and dates to be memorized and therefore failed to develop civic competence and critical thinking.

In early 2010, the CMS coalition and the National Council for the Social Studies agreed to develop common state standards in the social studies designed to prepare students for informed and engaged citizenship, and so they established a task force to pursue that goal. Working with the states, the task force is charged with:

1) Drafting, and agreeing on, the actual standards;
2) Identifying assessment instruments for use with the standards; and
3) Developing resources to help teachers use the standards and assessments effectively.

To date, twenty-one states have joined the effort to develop common state standards.

Decades of scholarship suggest that civics classes and certain cocurricular activities help develop the civic skills, transmit the knowledge, and inculcate the civic dispositions valorized by *The Civic Mission of Schools*. Specifically, schooling in civics increases knowledge of our system of government and its history and laws; builds students' confidence in their ability to exercise the prerogatives of citizenship; and increases participation in the community and in governments, including voting. In the presence of controls for other factors that could affect civics knowledge, having taken classes in that subject predicts a command of central concepts,[45] an increase reflected in improved performance on the National Assessment of Educational Progress (NAEP) test.[46] Civics education also heightens students' confidence in their ability to perform such participatory functions as writing a letter to Congress.[47]

By increasing the representativeness and perceived legitimacy of our system of government as well as the accountability of its leaders, widespread citizen voting protects democratic governance as surely as lackluster civic participation jeopardizes it. With balloting in U.S. presidential contests hovering around 50 percent of those eligible, U.S. voter participation falls far from the democratic ideal. Overall, the percentage that chooses to cast a ballot in U.S. elections compares unfavorably to that of many other developed countries. In general, for example, turnout in U.S. elections is lower than in comparable ones in much of Europe and Canada. Although balloting among eighteen to twenty-nine year olds increased in 2008, it remained proportionately below that of other age groups.

These data signal the importance of the link between civics education and an inclination to act on the notion that voting is a citizen's right and duty. In particular, completing a year's worth of coursework in civics or American government heightens one's propensity to vote by 3 to 6 percent.[48] Involvement in some forms of extracurricular activities and voluntary associations predicts increased balloting as well.[49] Programs that engage students in gathering and using information in political contexts both increase basic knowledge about our governmental system and stimulate voting behavior.[50] So, too, do course exercises that involve newspaper reading.[51] Importantly, evidence drawn from the National Education Longitudinal Study correlates participation in student government with increased civic and political participation.[52] These findings are consistent with those drawn from the National Education Longitudinal Study and the National Longitudinal Study of Adolescent Health that revealed that high school students active in "youth voluntary associations" are more politically engaged in adulthood.[53]

Specific curricula have also yielded robust effects. A randomized field experiment concluded that involvement "in Student Voices significantly boosted students' confidence in their ability to make informed political decisions, their knowledge about how to register to vote, and their belief that their vote matters."[54] Moreover, in a randomized controlled experiment, "participation in Facing History and Ourselves programs result[ed] in: greater engagement in learning; increased skills for understanding and analyzing history; greater empathy and ethical awareness; increased civic knowledge, skills, and dispositions; an improved ability to recognize racism, anti-Semitism and other forms of bigotry in themselves and in others; and reduced racist attitudes and self-reported fighting."[55] Some civics programs, such as Kids Voting USA, have been shown to create a trickle-up effect, not only increasing the knowledge level and civic dispositions of the young but enhancing their parents' political knowledge as well.[56] Evidence also suggests that inclusion of civics education in a curriculum may correlate with a decreased dropout rate.[57]

In a similar vein, student involvement in service learning has produced civic benefits. As the Corporation for National and Community Service notes, "[T]he state of youth volunteering is robust – with 55% of youth participating in volunteer activities each year – and ... the level of their volunteer commitment is directly related to the nature of the social institutions with which they interact."[58] The *Guardian of Democracy* report adds, "Service learning is far more than community service alone; high-quality service learning experiences incorporate intentional opportunities for students to analyze and solve community problems through the application of knowledge and skills."[59] When well executed, service learning can have positive effects on civic knowledge and engagement.[60]

Despite the fact that civic education produces an array of positive outcomes, the citizenry's current level of civic knowledge is far from ideal, and the role of civic education in schools is far from secure. Over the last half of the twentieth century, political scientists Michael Delli Carpini and Scott Keeter observe, levels of political knowledge changed little, a conclusion made more remarkable by the fact that education levels in the citizenry increased markedly over that period.[61] In practice, this finding means that in the mid-1990s, high school graduates' knowledge was about the same as that of high school dropouts in the late 1940s; college graduates of the mid-1990s were more or less comparable to high school graduates at the end of World War II.[62]

Leaders of both political parties have joined prominent scholars in lamenting the fact that, according to the rigorous standards set by the NAEP, a majority of our elementary and secondary students are not proficient in civics. As President Obama has noted, "The loss of quality civic education from so many of our classrooms has left too many young Americans without the most basic knowledge of who our forefathers are, or the significance of the founding documents." They were unaware of "the risks and sacrifices made by previous generations, to ensure that this country survived war and depression; through the great struggles for civil, and social, and worker's rights. It is up to us, then, to teach them."[63]

Consistent with this view, the 2006 NAEP concluded that 27 percent of twelfth graders were at a proficient level and 66 percent at or above the basic level. Although the 2010 NAEP[64] found that the average score for fourth graders was higher than it had been in either 1998 or 2006, there was no year-over-year improvement in grades eight or twelve. And, overall, the performance levels of all three grades were unimpressive. "Twenty-seven percent of fourth-graders, 22 percent of eighth-graders, and 24 percent of twelfth-graders performed at or above the Proficient level in civics in 2010."[65]

Not all of the news about students' performance in civics is negative. By international standards, U.S. students hold their own. In contrast to their subpar command of math and science relative to other countries, on civic knowledge and skills U.S. students fair reasonably well. When compared to students in other industrialized nations in an international study of twenty-eight democracies, American fourteen year olds performed at a higher level than their counterparts in other democracies.[66] U.S. students also outperformed their international peers at the task of interpreting media content such as political cartoons. These data suggest that in satisfying its obligation to impart civics knowledge and critical thinking skills, the overall U.S. educational system may be performing somewhat better than the systems in place in other democracies.

The NAEP conclusion that many students are not proficient in civics is consistent with the finding that the adult population is ignorant of some basic concepts underlying our system of government. For example, in the past decade, surveys conducted by the Annenberg Public Policy Center have found that:

- Only one-third of Americans could name all three branches of government; one-third could not name any.
- Just over a third thought that the Founding Fathers intended for each branch to hold a lot of power but for the president to have the final say.
- Just under half of Americans (47 percent) knew that a 5-4 decision by the Supreme Court carries the same legal weight as a 9-0 ruling.
- Almost a third mistakenly believed that a U.S. Supreme Court ruling could be appealed.
- Roughly one in four (23 percent) believed that when the Supreme Court divides 5-4, the decision is referred to Congress for resolution; 16 percent thought it needed to be sent back to the lower courts.[67]

One can debate the importance of knowing the name of the Chief Justice of the Supreme Court or the details of Paul Revere's ride, but there is little doubt that understanding such foundational concepts as checks and balances and the importance of an independent judiciary affects one's other attitudes. Those bewildered by such basics as the branches of government and the concept of judicial review are less likely to express trust in the courts and, as trust declines, more likely to say that courts are too powerful, that judges should be impeached or court jurisdiction stripped when unpopular rulings are issued, and that under some circumstances, it might simply be best to abolish the Supreme Court.

Not only does civics knowledge predict normatively desirable beliefs about the value of our existing structures of government,[68] but heightened knowledge is tied to increased politically relevant activity such as discussing politics and engaging in the community.[69] Overall, "[i]nformed citizens are demonstrably better citizens . . . more likely to participate in politics, more likely to have meaningful, stable attitudes on issues, better able to link their interests with their attitudes, more likely to choose candidates who are consistent with their own attitudes, and more likely to support democratic norms, such as extending basic civil liberties to members of unpopular groups."[70]

As mentioned earlier, five hurdles confront those working to improve the quality and accessibility of civic education in the schools: 1) neither the federal government nor the states have made high-quality civics education a priority; 2) social studies textbooks may not adequately convey the knowledge or facilitate the development of the skills required of an informed, engaged citizenry; 3) consequential differences in access and outcomes between upper- and lower-class students persist; 4) cutbacks in funding for schools make implementation of changes in any area of the curriculum difficult; and 5) the polarized political climate increases the likelihood that curricular changes will be cast as advancing a partisan agenda.

There is a widespread belief among social studies educators that "civic knowledge and inquiry" are "not validated" within the accountability system established by NCLB.[71] Other evidence underscores the conclusion that neither the federal government nor the states have made high-quality civics education a priority. Specifically, the systematic study of civics in high school is not universal; fewer high school civics courses are now offered than in the past; the time devoted to teaching the subject in lower grades has been reduced; and most states do not require meaningful civics assessment. The 2010 NAEP found that "88% of fourth-graders had teachers who reported emphasizing politics and government to a small extent or more in social studies classes."[72] Just over three-quarters of students said that they had learned about Congress in 2010. And slightly fewer than seven in ten twelfth graders reported that they had studied the U.S. Constitution in that year.[73]

Significantly, those who have taken a high school civics class are more likely to have a command of key constitutional concepts.[74] However, proportionately fewer students are now exposed to multiple civic education courses than in the past. Since the generation now in power left high school, the number of civics and government courses completed by students has declined. As the *Guardian of Democracy* report concludes:

> Until the 1960s, three courses in civics and government were common in American high schools, and two of them ("civics" and "problems of democracy") explored the role of citizens and encouraged students to discuss current issues. Today those courses are very rare. What remains is a course on "American government" that usually spends little time on how people can – and why they should – participate as citizens.[75]

Furthermore, class time devoted to civic education appears to have declined in the lower grades. Public policy scholar Martin West's comparison of Department of Education Schools and Staffing Surveys from 1987 – 1988 to those from the years shortly after NCLB was implemented (2002 – 2004) showed a reduction in time spent on social studies instruction in elementary schools.[76] This finding has been amply corroborated.[77] A re-analysis by CIRCLE (The Center for Information and Research on Civic Learning and Engagement) not only confirmed West's results but went on to show that the reduction began even before NCLB was passed and continued after.[78] On a more encouraging note, studies of instructional time spent and credits earned in middle schools and high schools show either the same or increased attention to social studies compared to past decades.[79]

However, in a climate in which we signal what matters by testing it, comparatively few states require meaningful civics assessment. As of 2011, the *Guardian of Democracy* report noted that "only sixteen states require meaningful assessment in the social studies – a number that has declined in the past five years as states have eliminated civics assessments."[80]

In addition, social studies textbooks may not adequately convey the knowledge or facilitate development of the skills required of an informed, engaged citizenry. The public as well as parents, teachers, and administrators agree about the sorts of knowledge that one should gain in public schools. A 2003 Annenberg Public Policy Center survey of these groups found that more than half agreed that it is absolutely essential or very important that fourth graders are able to:

- Understand that the rules of the American government are established in a document called the Constitution;
- Give an example of a right protected by the Constitution;
- Understand the meaning of American holidays such as the Fourth of July and Presidents' Day; and
- Identify important figures in American history such as George Washington.

More than six in ten respondents concurred that eighth graders should be able to:

- Understand the idea of separation of powers in American government;
- Identify all fifty states on a map of the United States;
- Understand the effects of European settlement of the United States on Native Americans; and
- Understand the role of slavery in the history of the United States.

The same proportions held that twelfth graders should:

- Understand how immigration has shaped America at different points in history;
- Be able to compare and contrast the U.S. economic system with those of other countries; and
- Know what differentiates a "liberal" from a "conservative" and understand current American political debates.[81]

Nonetheless, a survey of eighteen U.S. government and civics textbooks concluded in 1987 that their tendency to avoid controversial topics "made them lifeless descriptions of the origins, structures, and relationships of government,"[82] a finding consistent with the one political scientists Richard Niemi and Jane Junn reached a decade later. "When we say that students have a 'textbook' knowledge of how government operates," they noted,

> what we mean is that they have a naïve view of it that glosses over the fact that democratic politics is all about disagreement and the attempt to settle quarrels peacefully, satisfactorily, and in an orderly manner. We believe that it is a disservice to students to let them think that government ideally operates without conflict, as if it were possible to enact and administer laws that benefit everyone and harm no one.[83]

In addition to arguing that "controversial issues should be discussed fairly and explicitly," the reviewers in that 1987 study recommended that texts change their focus "from imparting information to preparing students to become concerned citizens." Students need to learn the value of public participation by becoming involved, they concluded.[84] Nearly two decades later, political theorist Stephen Macedo and colleagues agreed that schools too often "teach *about* citizenship and government without teaching students the skills that are necessary to become active citizens themselves."[85] Importantly, human development scholars Judy Torney-Purta and Britt Wilkenfeld's 2009 analysis of data from the IEA Civic Education Study found that "[s]tudents who experience interactive discussion-based civic education (either by itself or in combination with lecture-based civic education) score the highest on the '21st Century Competencies,' including working with others (especially in diverse groups) and knowledge of economic and political processes."[86]

Consequential differences in access and outcomes between upper- and lower-class students persist. More worrisome than low levels of aggregate NAEP scores are indications that students from families of lower socioeconomic status (SES) have fewer opportunities to engage in activities that stimulate voting and civic engagement, and they substantially underperform those from upper SES families. Those high school students who attend "higher SES schools, those who are college-bound, and white students get more of these opportunities than low-income students, those not heading to college, and students of color."[87]

The twinned side of that reality is represented in the 2010 NAEP Civics Assessment's report of significant disparities in scores by family income and parents' level of education. Whereas at the fourth-grade level only 10 percent of students eligible for free or reduced lunch scored at the proficient level and just 40 percent were at a basic or higher level, that figure rose to 60 percent and 90 percent, respectively, for those fourth graders not eligible for the lunch program. At the twelfth-grade level, students whose parents failed to graduate from high school were significantly less likely to be proficient (8 percent proficient/33 percent at least basic) than those whose parents graduated from college (40 percent proficient/75 percent basic).[88]

In practice these disparities translate into a political penalty for the already disadvantaged.[89] As political theorist William Galston notes, "[C]itizens with low levels of information cannot follow public discussion of issues, are less accepting of the give and take of democratic policy debates, make judgments on the basis of character rather than issues, and are significantly less inclined to participate in politics at all."[90] When a segment of the population does not comprehend the political debate and lacks the wherewithal to affect collective decision-making, it forfeits its access to political power, a result that makes the political system both less representative of the will of the whole and less democratic.[91]

Underlying these findings are two realities. Given that, in general, non-Anglo students live in economically disadvantaged school districts, they have access to a lower quality education overall.[92] And children in higher income families are more likely to live in educationally enriched homes. Thus, for example, "[i]n the period from 1972 to 1973, high income families spent about $2,700 more per year on child enrichment than did low-income families. By 2005 to 2006, this gap had nearly tripled, to $7,500."[93]

As states face the need to balance their budgets in a time of higher-than-average unemployment and lower-than-expected revenues, school budgets in K-12 education are experiencing new pressures. It is unlikely that there will be increased funding for underperforming schools or that extra attention will be paid to any content not evaluated by high-stakes tests. In particular, as the Center on Budget Policy and Priorities reports, a majority of U.S. states funded their public elementary and secondary schools at a lower level in 2012 than they had in 2011.[94]

All these challenges are of course compounded by the fact that the polarized political climate all but ensures that curricular changes will be cast as advancing a partisan agenda.

Although it is uncontroversial to suggest that civic education is a means of advancing the well-being of the nation and realizing its democratic ideals, in recent decades concern has been elicited by low levels of voting and inadequate student performance on civics assessment tests. Reformers have responded with efforts both to increase the amount and quality of time spent teaching civic education and to create focused common standards in the social studies.[95] Underscoring the importance of these efforts are data associating civics education writ large with increased knowledge of the U.S. system of government and increased participation in democratic activities such as voting. However, the challenges confronting these reform efforts are substantial – ranging from reestablishing the centrality of civics education to attempting to institute changes at a time when school budgets are being cut and our political culture is increasingly polarized. As a result, any discussion of ways to inculcate civic identity will be controversial.

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93 Greg J. Duncan and Richard J. Murnane, "Introduction: The American Dream, Then and Now," in *Whither Opportunity: Rising Inequality, Schools, and Children's Life Chances*, ed. Greg J. Duncan and Richard J. Murnane (New York: Russell Sage, 2011), 11.

94 See "One Year (FY11 – FY12) Percent Changes in State K-12 Formula Funding," http://www.cbpp.org/cms/?fa=view&id=3569.

95 In November 2011, Representatives Tom Cole (R-Oklahoma) and Mike Honda (D-California) introduced HR 3464, the "Sandra Day O'Connor Civic Learning Act of 2011," calling on the National Assessment Governing Board to provide disaggregated (or state-level) data from the NAEPs in civics and history. The proposed legislation also sets up a competitive grant program for civic learning at the U.S. Department of Education that, among other things, focuses on currently underserved school populations. There is also a competitive grant program for civic education in the "Harkin-Enzi" ESEA reauthorization bill, which is currently in play in the Senate.

What is the Common Good? The Case for Transcending Partisanship

Mickey Edwards

Abstract: Even if most of us can agree on a definition of the "common good" (not a simple matter), there are substantial barriers to establishing public policies in accord with that agreement. The "democratic" element in our political system – the right of voters to choose the men and women who will create our laws – depends on the views of those voters being given considerable weight in determining eventual policy outcomes. Unfortunately, we have developed a political system – both in our elections and in the governing process – that gives disproportionate influence to relatively small numbers of voters (who are also the most partisan) and allows political parties through their closed procedures to limit the choices available to general election voters. Coupled with legislative rules that allow partisans to determine the makeup of legislative committees, the resulting process leaves the common good, however defined, a secondary consideration at best.

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I have yet to meet a person who is consciously opposed to furthering the common good. This universal sentiment has practical relevance, however, only if there is substantial agreement as to what constitutes "the common good." Are the collective good, the national good, and the majority good all the same? Good for whom? In the short term or the long term?

Rape, murder, arson, reckless driving through crowded intersections: all provide ample room for widespread agreement and, as a consequence, commonly accepted proscriptions. There are significant disagreements as to how each should be punished, debates about the practical and moral effects of capital punishment or the extent to which mitigating circumstances ought to lessen the price society exacts, but little dissent on the question of whether the actual commission of the deed should be punished. But what about telling a lie about another member of the community? What if that lie were to lower the esteem accorded that individual by other members of the community? Could we not all agree that such an act should also be punished both because it undermines the fabric of social life and because it devalues the life thereby damaged? Well, no.

In *New York Times v. Sullivan* (1964), the Supreme Court ruled that a lie, even if damaging to the person lied about, is perfectly acceptable (that is, not a punishable libel) if the spreader of the falsehood is a journalist, unless (a) the perpetrator knew or should have known that the statement was false, (b) the damages were substantial, and (c) the falsehood was motivated by malicious intent. Please note that the connective word is *and*, not *or*. If any of those elements were to be absent – for example, if the person lied about could not prove malicious intent – no suit for libel would prevail. Clearly, it is not beneficial to society to have its members lied about, to have their characters demeaned, to have their reputations damaged based on a falsehood. How does that advance the common good? The Court found that the benefit to society – the common good – would best flow from the existence of a free press unconstrained by fears of damaging repercussions in the event of error. It is a limitation imposed by weighing the harm to one against the presumed benefit to the larger community of which he or she is a part.

In 1735, John Peter Zenger, the publisher of *The New York Weekly Journal*, was put on trial for having published articles sharply critical of William Cosby, the Crown-appointed colonial governor. Under the laws of the time, simply the act of defaming Cosby was sufficient to sustain the charge. In addition, Zenger's libel trial was presided over by a Chief Justice whom Cosby himself had appointed. Zenger's lawyer, Andrew Hamilton, in a bold move, argued Zenger's case not to the bench but to the jury, claiming that because the assertions in Zenger's articles were largely based on fact, truth alone should be a sufficient defense. The jury agreed and Zenger was freed.

By one definition of the common good, damaging the reputation of a high public official (in this case, an appointed representative of the King) undermined the legitimacy of the government and harmed the cohesion and stability of the state. It was clearly contrary to the common good to allow such attacks to go unpunished. The opposing view held that the common good was best served by an unfettered press, empowered to hold officials accountable so long as what was said about them was true. The *Sullivan* case expanded the second view by concluding that the good of the community was further served by allowing even untrue criticisms unless made with malicious intent. The Zenger case was the principal step in creating a distinctly American freedom of the press; the *Sullivan* case severely compromised the citizen's right not to be defamed – and both cases can be defended on the grounds of serving a higher community good.

During George W. Bush's presidency, a major policy quarrel ensued after the public became aware that persons detained in the "war on terror" were being held in captivity indefinitely, with neither charges filed against them nor an opportunity to defend themselves. What's more, it became known that the United States had engaged in waterboarding and other forms of physical coercion in the process of interrogating captives. The *common* in common good usually refers to the people of a single community – in this case, the United States – and it could be argued that the prisoners in question fell outside that definition. But just as advocates and opponents of capital punishment debate the effect of such punishment on the society that employs it, the supporters and detractors of the Bush administration's interrogation policies argued whether the primary "common good" claim lay with national security or with adhering to traditional American values. (This country had, after all, argued forcefully during the Nuremberg trials that the sanctioning of torture was sufficient grounds for putting German officials to death and had denounced China for its use of waterboarding, describing it as torture.) But, the Bush administration's defenders answered, the prisoners whose treatment was in question were not "innocents" but enemies, engaged in war against the United States, even though no such charge had been made nor the factual basis of such a claim tested. To that point, the administration's defenders asserted that to put such persons on trial would pose risks to the nation's security. Those on both sides of these arguments had in mind some clear perspectives as to which position better supported the collective good of the American people.

The same distinctions arise in matters relating to taxes, spending, and the size and scope of government. It was once thought that an individual's income was his or hers to manage and to dispose of as that individual thought desirous; today it is often argued that leaving more money in a citizen's pocket, rather than taking it in taxes, is a de facto taking of money from the government ("how will we pay for the reduced taxes?"). Proponents of each position believe they are arguing from a common good perspective. Is the common good best served by ensuring "the greatest good for the greatest number" or by honoring the individuality – and the attendant rights – of each citizen?

Society is a collective, but its constituent parts are individuals. Is the common good determined by the weight of numbers – the greater good for the greater number? If so, the framework of American government is fatally flawed since its operating premise is that the individual (the component part, the cog in the societal machine) has rights that cannot be denied even by a vote of thousands to one.

To some extent, the fulcrum point in this balancing act is where conservatives and liberals divide. The problem is that where emotion overrules analysis, where outcome outweighs process, the sides themselves become confused, and conservatives and liberals alike sometimes champion the right of the individual and sometimes the right of the collective to deny an individual a right to which he or she might otherwise be entitled. There is a confusing lack of consistency in determining where the common good lies. This is true of adherents to the Republican Party as well as adherents to the Democratic Party. And while it may be argued that ideology (conservative or liberal) is a more consistent indicator than party affiliation, such is not always the case. Even the ACLU, which famously defended the right of Nazis to march in Skokie, Illinois, later cracked down on dissent within its own organization.

With well-meaning and intelligent citizens divided in their concepts of the common good, and a nation sufficiently large that there might well be millions on any side of the definitional divide, those who are empowered to make law and set policy in a democratic society have only three options available to them: they may (a) side with the more numerous faction (that is, majority rule); (b) take advantage of their own positions in government to impose their own views, regardless of the wishes of the citizens; or (c) find a way to forge a compromise between the competing visions. Assuming that the majority view would not impinge on the constitutional rights of the minority, the first option remains problematic because any significant changes in law or policy should have as much buy-in as possible; enthusiasm is not necessary but some degree of acceptance is if government policies are not to be divisive and fuel resentment. The second option is contrary to the democratic impulse. Edmund Burke was correct in arguing that elected officials are not to be rubber stamps for their constituents but should instead bring their own expertise, experience, and judgment to the decisions they make. But to ignore completely the wishes of citizens is to render the concept of representation moot; accountability after the fact – removing a legislator from office – cannot undo the decision that prompted the retaliation. The wishes of the people must at least be weighed in the decision-making process. That leaves the third option, compromise. And therein is the problem.

Simply put, incentives work. If elected officials understand that the electorate values compromise and problem-solving and that working cooperatively with those on the other side of an issue will be rewarded with reelection and a long career, the degree of partisanship and incivility in Congress, state legislatures, city and county councils, and executive branch offices will diminish. If, on the other hand, one's success at the ballot box is dependent on conveying intractability, political rigidity, and antagonism toward competing viewpoints, many candidates for office – and many elected officials – will be inclined to adopt those attitudes. People who run for office and pursue political careers tend to be more firmly set in their ideas about government than their neighbors. There is little evidence that conservatives become more liberal or liberals more conservative in pursuit of victory, but the election process does determine which candidates get elected in the first place and the attitudes they bring with them into the public arena.

A political system like ours, in which candidates must first pass through the fire of partisan primaries, dominated by the most zealous and uncompromising of party loyalists, tends to weed out the "good government" candidates in favor of a warrior class that sees politics not as a search for the common good but as a series of pitched battles to defeat the "enemy" by any means possible. The general electorate may desire compromise, but to many of those who participate in the partisan primaries that determine the choices available to voters in the general election, compromise is viewed not as a desirable process of working together but as selling out, an unforgivable abandonment of principle.

The party primary system, ironically, dates back to a major democratic reform of the late 1800s and early 1900s, a Progressive Party initiative that established primaries as an alternative to the proverbial smoke-filled rooms in which small groups of party insiders decided who would be put forth as a party's nominees. The reform opened the process, making it much more democratic, but by ensuring that the primaries would be dominated by the most partisan and ideological voters (the only ones likely to be motivated enough to participate in these semifinal rounds of an election), the power of the bosses was eventually replaced by the power of the ideologues.

In today's more frenetic environment, with its diversions, polarizing mass media, and a citizenry woefully uneducated in civics, a popular congressman like Delaware's Mike Castle can be kept off the general election ballot for a seat in the U.S. Senate by a primary opponent who receives a mere thirty thousand votes in a state of nearly a million people. Or a popular incumbent senator like Robert Bennett of Utah can be denied reelection by two thousand votes in a closed party convention in a state of nearly three million people. Those candidates who want to avoid the same fate will inevitably be under great pressure to adopt whatever hard-line positions are required to pass through the party primary barrier – and to remain firmly attached to those positions when they come up for reelection. Looking over their shoulders, Utah's Orrin Hatch and Indiana's Richard Lugar moved noticeably to the right in anticipation of primary challenges in 2012 (Lugar lost anyway), and Maine's Olympia Snowe decided to retire. Although it is most notable in the Republican Party, both major political parties have become engaged to some degree in this process of purification, purging from their ranks those who think for themselves and whose conclusions diverge from those of the activists who dominate the nomination process.

In addition to Castle and Bennett, Lisa Murkowski suffered the same fate in her campaign for reelection to the Senate from Alaska and narrowly won a write-in campaign because having lost her primary she was not eligible to be listed on the November ballot (a result of the "sore loser" laws which enable parties to control the election process). And years before, Democrat Joe Lieberman – who had been a state attorney general, U.S. senator, and his party's vice presidential nominee – was defeated for renomination by a liberal antiwar activist, Ned Lamont; fortunately for Lieberman, he lived in one of the few states without a sore loser law and was able to retain his seat by running in the general election as an independent.

Today the Republican Party is almost monolithically conservative, while moderate and conservative Democrats have all but disappeared from Congress. The average Republican in Congress is now more conservative than ever before, and the average Democrat is more liberal. As the positions have hardened, the gulf has widened. There is no need to come together to weigh where the greater national good may lie; the deciders have already decided.

Elected officials face other pressures to remain firmly locked in a partisan camp. In most states, congressional and state legislative districts are shaped by whichever political party holds a majority of state legislative seats. When population shifts necessitate a redrawing of district boundaries (perhaps pitting incumbents of the same party against each other, or determining which incumbents will be given more difficult districts in which to campaign), party leaders will have both opportunity and means to reward loyalists and punish independent thinking. Running in a district with no serious likelihood of losing to a member of an opposing party, a candidate becomes even more dependent on remaining in the good graces of members of his or her own party. "Sticking with the team" becomes a matter of political survival. Compelled by the pressures of partisan redistricting to stick to the party line, elected officials are further discouraged from reaching across the aisle to find common ground or forging compromises with members of another party.

Members of Congress also gain important reelection advantages if they are able to secure positions on committees with jurisdiction over matters of particular interest to their constituents. A seat on the Agriculture Committee may seem inconsequential to a citizen in inner-city Baltimore but it is of great importance to a citizen whose community depends on farming. Membership on the Armed Services Committee or the defense subcommittee of the Appropriations Committee is immensely important to constituents in districts that are heavily reliant on the jobs at military bases. Energy issues matter greatly to citizens of states that are home to large oil and gas producers. In an ideal world, one might expect familiarity with agriculture, defense, or energy issues to make one a natural fit for the committees that deal with such issues, but expertise in the subject matter is not always sufficient to land such an appointment. Instead, it is a pledge to support the party position, regardless of one's own beliefs, constituent preferences, or independent judgment, that often determines who wins prized committee seats, especially leadership positions on those committees. The ability to compromise is simply excised before the appointment is made.

These are examples of a systemic flaw in our politics and our governance. While political parties are endemic to democratic forms of government (the right of free association will inevitably bring together people who share similar political views), civil society has increasingly surrendered control of its election and governance processes to those parties and, through a party-oriented system of primary elections, to the most partisan and zealous party members. Consider, for example, the "sore loser" laws in most states. Under statutes promulgated by the parties, the names of candidates who lost in a party primary are prohibited from appearing on a general election ballot. Thus in the Delaware case cited above, while less than 6 percent of the state's population participated in the U.S. Senate primary, Mike Castle's name was not eligible to appear on the ballot when the rest of the state's voters went to choose the man who would be their voice in Washington. If Castle had won the primary, his Republican opponent, Christine O'Donnell, who was preferred by more Republican primary voters, would have been denied a place on the ballot. It was not the candidates but the citizens of Delaware who were the victims of this party-centric system, their options restricted by laws designed to help party insiders call the shots in determining how Americans will govern themselves.

Finally, there is another problem that makes it difficult to focus the government's attention on solutions that address our common problems in ways that benefit the community at large. In the Republican presidential primaries leading up to the 2012 election, former House Speaker Newt Gingrich, accused of persistently strange behavior ranging from proposing statehood for the moon to likening himself to Pericles, struggled early, had a brief flirtation with success in South Carolina, and then fell into a succession of third- and fourth-place finishes in a four-man race. And yet he persisted, able to do so because a wealthy owner of a Las Vegas casino poured millions of dollars into Gingrich's campaign. Other very rich men and women, empowered by the Supreme Court's *Citizens United* decision, used super PACs to direct millions into the efforts to elect Mitt Romney, Rick Santorum, and President Obama. The president benefited from the largesse of supporters who opposed construction of the proposed Keystone gas pipeline; Republican candidates were helped by the pipeline's advocates. Support for "Obamacare," the president's health care initiative, funded one side of the campaign, and those who wanted the legislation repealed were on the other side. The elections became a contest between rich people pursuing narrow interests.

The hand of the political parties is felt in this part of the process, too. While parties generally remain distant from contested primaries, the ultimate outcome of congressional races is heavily influenced by party contributions. Increasingly, members of Congress have been pressured to raise special funds for a pool to be drawn on to support the campaigns of candidates seeking to defeat officeholders of the other party or to win an open seat. Party leaders have complete discretion as to where to spend those dollars, and because nonincumbents have a harder time gaining the necessary funding for expensive advertising campaigns, winners often take office feeling a strong sense of indebtedness to the party leaders who helped them secure their victories. In addition, the largest super PACs are operated by party insiders. Obligation piles upon obligation, often a result of the great piles of money that now flow into campaign treasuries, and the ability to be open to alternative policy prescriptions is compromised still further.

Once elected to Congress, legislators who desire seats on prestigious – and powerful – committees may find themselves required to pledge fealty to party positions in exchange for the appointments they seek. Before the first hearing is held, the first witness questioned, the first brief written, the legislator knows what he or she is expected to do on those issues of most importance to the party.

In each of these instances – the need to cater to party activists in partisan primaries, the influence of party-directed campaign funds, and the required allegiance to partisan positions – the ability to independently assess where the greater common good may lie is seriously compromised. Critical thinking requires the ability to question assumptions, including those that underlie one's own preconceptions. Because determining what constitutes the common good is rarely a simple matter, anything that inhibits serious inquiry is more likely to perpetuate harm than to provide benefit, whether that benefit consists of expanding or constraining the role of government (so long, of course, as the action remains within the boundaries of constitutional permissibility). How, then, can we improve on the ability of our elected leaders to put their best intellectual efforts toward first defining and then advancing the common good, however they may ultimately perceive it?

Serving the common good, no matter how defined, requires workable institutions, public confidence, and public engagement. Not one of those three criteria is met in today's political environment. Our institutions are dysfunctional, public confidence in the ability of elected officials to deal with community difficulties is almost nonexistent, and even in a "high turnout year," the percentage of Americans who contribute to, work in, and even vote in public elections is disappointingly low, especially for a nation that likes to think of itself as the world's foremost beacon of democracy.

The solution to this problem may be difficult to achieve, but it is easy to describe. We must restore civility to America's public discourse, and we must reduce partisanship in governance. We must begin to make public decisions as Americans working together to address concerns rather than as members of rival armies doing battle over the trappings and privileges of power. Here's how we can start the process:

First, return the election process to a conversation among citizens rather than a battle between bank accounts. Given the importance of the citizen's right to be heard on political matters, it may be difficult to rein in independent expenditures on behalf of preferred candidates and policies; but the size of those expenditures can probably be limited, just as direct contributions to candidates have been limited. In addition, it is almost certain that non-individual contributions – by corporations, labor unions, political action committees, and political parties – can be limited or eliminated, either by legislation or constitutional amendment restricting campaign spending to fully disclosed expenditures by actual living human beings. (The law itself recognizes that corporations are only artificial people, not real ones, and labor unions, political parties, and political action committees are not people, either.) Limiting campaign support, either directly to a candidate or as an independent expenditure, would help return the focus to public, rather than private, interests.

Second, ensure that citizens will have a broad range of choices when they go to the polls to choose the men and women who will make the nation's laws, set tax rates, create or disband public programs, and decide whether to go to war. Three states – Louisiana, Washington, and most recently, California – have changed their laws to eliminate closed party primaries. In those states, any candidate who qualifies, by filing fee or voter signatures, can appear on the ballot in a primary in which every qualified voter is entitled to participate. The ballot may include two or more members of the same party and members of several parties. If no candidate wins a majority, the top two finishers face each other in a general election even if both are of the same party or if neither is from one of the two major parties. Americans, who demand choice in almost every aspect of their lives, from soups to stereos and from sneakers to cell phones, would again have a full range of choices when they go to the ballot box.

Third, take away the ability of party leaders to draw congressional and state legislative boundaries for partisan advantage. The Constitution, with its requirement that members of Congress actually live in the states from which they are elected, envisions citizens being represented in Congress and state legislatures by men and women who understand their concerns and interests. Conversely, voters would be able to select their representatives from among men and women with whom they are familiar. When political parties draw district lines, urban dwellers may end up attempting to represent the interests of farm communities with which they have little in common, all in the name of helping elect more members of whichever party is dominant in the state's legislature. Party, not common interest, becomes the primary factor.

After I won a congressional seat that had been held for nearly a half-century by the other party – which then had an overwhelming majority in the state legislature – my district was redrawn from a single square-shaped county in the middle of the state to a large upside-down "L" stretching from central Oklahoma to the Kansas border and halfway over to Arkansas, the only purpose being to put as many of my fellow Republicans as possible into my district and thus make the other districts safer for Democrats. The result was to place tens of thousands of wheat farmers, cattle ranchers, and small-town merchants in a new district where they would be represented by an urban congressman, familiar with big-city issues and unfamiliar with the economic interests of his new constituents. So much for the founders' intended representativeness.

Thirteen states have taken this power away from their state legislatures, either entirely or to some degree, and placed much of the redistricting authority in the hands of independent, nonpartisan redistricting commissions. Every state should do the same: drawing district lines should be about able representation, not partisan advantage. To genuinely consider alternative definitions of a common good, one must be freed of dependence on party.

However one may ultimately envision the common good, it is necessarily true that *common* must refer either to the people collectively or the national interest as a whole, which may, of course, diverge. And *good* must refer to "that which is best," whether in the short term or with a longer perspective. In either case, determining the common good must entail some diligent examination of fact and some serious reflection. Anything that intrudes upon that process, including previous commitments (pledges to various interest groups, which violate the congressional oath to carry out one's duties without condition or reservation), loyalty to party or person (a president, for example), or indebtedness to supporters (including financial contributors), renders moot the purposes of democratic representation and the purposes of the constitutional structure. This obligation argues for several important systemic changes.

In other places, including a book on this subject, I have spelled out my concerns about a number of the most common proposals to eliminate the corrosive effect of money on the political system. I won't repeat them here out of recognition of the limited space available to me in this essay but will repeat the basic conclusion I have reached. We are a nation of people – more than 300 million of us – and it is to us and to the Constitution that our elected officials owe their allegiance. It is people, not entities and not interests, that should select those who will write the laws and make the policies that will affect our lives. Just as only people – real, not artificial, people – may cast votes at the ballot box, only real people should be empowered to provide the funding for political campaigns. No money from corporations, labor unions, political action committees, or political parties. Votes and money should come from the same place: the individual American citizen.

When Congress acts, it should act on behalf of the *common* good, not the good of Republicans and not the good of Democrats. Our members of Congress should act as Americans, all members of the same club, not rival clubs. The problem is that the basic architecture of Congress reinforces not commonality but separateness. House Speakers, who exercise ultimate control over legislative procedure, even determining (through appointments to the House Rules Committee) which bills may be considered for enactment, are selected by the majority party. The majority chairs, and has more members on, every committee and every subcommittee; it determines which bills will get a hearing and who will be asked to testify as to the bill's merits. To "discharge" a bottled-up bill from a committee and bring it to the floor for a vote requires 218 members' signatures, which means that at least one, and usually far more than one, of the members of the majority party must sign the discharge petition, thereby incurring the wrath of both the Speaker and the chairman who might hold considerable sway over the member's own legislative initiatives and future committee assignments. One way to break this partisan control over our laws is to require that committee positions be filled without regard to party membership and to require that Speakers be elected by bipartisan majorities. (In the Senate, the leader is the head of the majority party, but Senate Majority Leaders are more constrained by the intricacies of the Senate's rules.)

Members of congressional committees receive briefings from staff members who conduct research, interview experts, and recommend which positions to take. The problem is, Republicans are briefed by partisan Republicans and Democrats by partisan Democrats. Briefings are inevitably tainted by partisan or philosophical preconception. A better answer would be to empower a nonpartisan House manager or parliamentarian to hire committee staff members based on education and experience and after sufficient vetting to ensure the ability to provide unbiased data to all members, without regard to party affiliation.

On the House floor, members who wish to address their colleagues move to the front of the chamber ("the well") and stand at a lectern. But it isn't that simple: there is not one lectern but two – one for Democrats, positioned in front of the Democrats (who all sit together, on one side of the chamber) and another for Republicans, positioned in front of the Republicans (who all sit together on the other side of the chamber). It is sometimes hard to remember that these are all members of the same Congress, all Americans, all having taken the same oath of office, as they divide from their first day in the House into separate camps, eating at separate tables, reading newspapers and making telephone calls in separate cloakrooms. Republicans meet in their "conference," Democrats in their "caucus"; they seldom meet together other than on the House floor or in committee rooms where they line up on opposing sides. All of those artificial divisions should be removed – cloakrooms available to all, single lecterns, mixed seating in committees (by seniority, perhaps). It is fruitless to seek agreement on the common good in an environment where there is no common.

In suggesting ways to improve the ability to discern and serve the common good, I have discussed the importance of systemic change in the election process, the redistricting process, the ways in which political campaigns are funded, and how Congress selects leaders, considers legislation, and functions on a daily basis. That, however, is not enough: the Congress operates, elections are conducted, and procedures are established within a broader context. It is not only Congress that needs repair.

Democracy is a participatory system. It requires an informed electorate, knowledgeable in the processes of government. It requires a citizenry competent in critical thinking, able to probe and question and consider alternatives. It requires civil conversation and the ability to listen without forming rebuttals even as other perspectives are offered. Our elected officials fail us; they operate in a system that fails us; our news media fails us; our schools fail us. American democracy is dysfunctional, but the dysfunction is not wholly the fault of those we have elected: those of us who elected them share in the blame. Our members of Congress are locked into philosophical boxes – but many of us are, too. We listen to only views we already agree with, read only writers whose perspectives we share. We listen to, and believe, the nonsense we hear whether we hear it from Rush Limbaugh or Keith Olbermann; we accept as truth the opinions of a Charles Krauthammer or a Paul Krugman, but rarely both.

In the broadest and most general sense, the pursuit of the common good is merely an expression of our desire to have our government – the members of society acting through a formal collective process – act in the best interests of the community as a whole. Because collective decisions in a democracy are made through intermediaries (the men and women we place in elective office), our first thoughts are often about whether the trust we have placed in them has been well rewarded. But it is a mistake to place the burden of advancing community interest solely, or even primarily, on the holders of public office. A functioning democracy requires a high degree of participation. That is generally thought to be measurable by the percentage of eligible voters who register and the percentage of registered voters who vote. But in fact that is a barometer of interest, not contribution. To be a contributing member of society and a valuable piece of the quest for the common good, citizens must be willing to adopt fundamental behaviors that are sorely absent from today's life. Let me reiterate just a few:

First, we must all be able to engage in constructive dialogue. That does not mean just a vigorous expression of a viewpoint

– something we all are quite good at – nor does being articulate and reasoned in that expression answer the need. Civil dialogue of the kind necessary to democratic governance is a two-way activity that requires both speaking and listening. Missing not just from government forums but from the private sector as well is a willingness to listen to, and fairly consider, a point of view that does not comport fully with our own preconceptions. Unfortunately, it is far more common for a citizen to begin forming a rebuttal even as another is speaking. It is not about learning so much as it is about "winning." True conversation requires not only a willingness to understand other points of view but to continue a dialogue so that we can integrate the varying perspectives into a story that will allow us to find those common interests and aspirations from which we can build the compromises necessary to achieve a truly common good.

It is also necessary for the citizens of a democracy to learn the skills of critical thinking – the ability to challenge, question, test that which is presented as fact or fact-based argument. A citizen who simply accepts as true whatever assertions are voiced by a favorite columnist or commentator or candidate of a preferred party quickly becomes a soldier in Army A, ready to do battle with the soldiers of Army B, with a goal not of coming together but of destroying the opposing force. Modern technology has given Americans a new ability to know more than ever before – more that is true and more that is not. Here we can learn a lot from science, for a good scientist begins by testing hypotheses: sounds good, but will it hold up under scrutiny? To a newspaper reader or screen watcher, such a system would require questioning the credentials of the person making the assertion, asking what advocates of a different position might say about the matter.

There is more required of the citizen than active listening and critical thinking – for instance, an education system that emphasizes civics and a media focused more on information than on conflict. The list is long because democracy requires not just participation but serious, informed, dedicated, intelligent participation. Ignorance and gullibility are useful skills for one who wishes to remain secure in an undemocratic society, but they are deadly to democratic governance. They make coming together to understand the common good nearly impossible. The reforms need to begin with government, but they cannot stop there.

The National Institute for Civil Discourse, the Aspen Institute, the Bipartisan Policy Center, No Labels, and other institutions have undertaken serious efforts to get beyond the divisiveness that paralyzes our search for commonality. It is not an attempt to erase disagreement: vigorous debate over alternative policies is the central ingredient of a vibrant democracy. Nor is it an attempt to create an artificial politics of the "center": many great advances in our society have come not from the center but from the edges of the conversation (the civil rights movement, the labor movement, the women's movement). Instead, it is a desire to create a conversation between citizens, whether in office or otherwise, who seek to find that common ground on which we can all stand, that win-win place of compromise and conciliation that will allow us to move forward together as a single nation, diverse in our ideas and our experiences but united in our desire to advance together as a national family. That should be our goal.

Citizens United: Robbing America of Its Democratic Idealism

Jim Leach

Abstract: The 2010 Citizens United ruling has been widely reviewed from the lens of legal precedent. In this critique, the author suggests the need to examine the logic and effects of the ruling from a historical, philosophical, and linguistic perspective. He challenges the Court's basis for providing inanimate entities First Amendment protection to "invest" in politics by equating corporations with individuals and money with speech. He holds that Citizens United employs parallel logic to the syllogism embedded in the most repugnant ruling the Court ever made, the 1857 Dred Scott decision. To justify slavery, the Court in Dred Scott defined a class of human beings as private property. To magnify corporate power a century-and-a-half later, it defines a class of private property (corporations) as people. The effect is to undercut the democratic basis of American governance.

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Having traveled to every state in the union and spoken with people in hundreds of venues over the past several years, I have become convinced that our country has never been more blessed with extraordinary leadership in almost every field of human endeavor, from business to medicine, from the arts to academia. Yet it is becoming harder for thoughtful, independent-minded leadership to emerge in the political system.

As money conflicts have multiplied and ideological cleavages intensified, the will and capacity of representatives of the people to mediate social differences are breaking down. Compromise may have once been the art of politics, but intransigence is the new art of political survival. If a legislator in today's environment chooses to seek common ground on an issue – that is, compromise – he or she becomes vulnerable to a primary challenge in which participation is low and money games are unforgiving.

When I first ran for public office, the joke was that no smart candidate should ever argue with those who buy ink by the barrel, a.k.a. the press.

Today, a not-so-funny corollary is that a smart candidate should never argue with those who buy ads by the bushel. Under the contemporary "win at all costs" political ethic, the first thing the new breed of political consultants tells their clients is to throw civility out the window. Civility requires a willingness to consider respectfully the views of others and an understanding that we are all connected and rely on each other. These ideas are anathema to those who now manipulate so much of the political process.

Yet seldom is there only one proper path determinable by one individual or one political party. Public decision-making does not lend itself to certitude. That is why humility is a valued character trait and why civility is an essential component of civil society.

To be clear, civility is not simply or principally about manners. Indeed, on Capitol Hill polite words are sometimes more problematic than raucous ones. Consider this example of a typical conversation between a lobbyist and a legislator walking to or from a vote on the House floor: "Congressman, as you know, we maxed out for you in the last election, and we and our allies sure hope to be able to more than match that support this fall. But please understand that tomorrow a bill of importance to us is coming up on the floor (or in your committee) and we would sure appreciate your support. By the way, how are your wife and kids?" Politely stated, but there is no reference to the common good. Instead, coercively implied is an ongoing, quasi-contractual relationship between an interest group and a public official.

These implicit uncivil contracts can be coercive even if never discussed because corporate power, newly magnified by the 2010 *Citizens United* decision, can so easily reward a candidate or inflict political retribution. On the assumption, for instance, that politicians have an instinct for political survival, a key component of which is a desire to raise campaign revenues and suppress opponent treasuries, why in a corporatist political system would a politician want to speak up against the drug companies or gambling interests or investment banks if corporate monies can quickly be shoveled into campaigns?

Over our tumultuous history, the U.S. Supreme Court has generally been at the forefront of advancing justice and protecting the rule of law. But from time to time, our politics and the Court have been out of step with our deepest ideals. For almost nine decades after our founders signed the Declaration of Independence, affirming that all men are created equal, a number of states sanctioned slavery; and until the Civil War, the Supreme Court formally upheld this egregious assault on human dignity.

Brazenly, in *Citizens United*, the Court employed parallel logic to the syllogism embedded in the most repugnant ruling it ever made, the 1857 *Dred Scott* decision. To justify slavery, the Court in *Dred Scott* defined a class of human beings as private property. To magnify corporate power a century-and-a-half later, it defined a class of private property (corporations) as people. Ironies abound. Despite overwhelming evidence to the contrary, the mid-nineteenth-century Court could see no oppression in an institution that allowed individuals to be bought and sold. In the *Citizens United* ruling, despite overwhelming evidence to the contrary, the Court implied that corporations were somehow oppressed – in this case considered to be censored – and therefore should be freed to buy political influence and sell opposing candidates down a river of negativity.

How are corporations oppressed? Do corporate leaders not have free speech and the right to give campaign contributions like all other citizens? Have they and the political action committees (PACs) that they control not already been over-empowered to infuse millions into the political process? Is it an accident that as the influence of moneyed interests has increased in American politics, the gap between the rich and poor has widened?

To advance the sophistic argument that more money in campaigns equates to more democracy, the Court had to employ a linguistic gyration. It presumed that *money* is *speech* and that a *corporation* is an *individual*. But where in any dictionary or in any founding documents are these equivalencies made?

Speech is the act of expressing thoughts, feelings, or perceptions by the articulation of words. It is a vocalized form of human communication. In pejorative jargon, money may "talk," but precisely defined, money is a medium of exchange, a measure of value, or a means of payment. In the manner it is used in politics it can be considered a campaign contribution. It is not "speech" in terms of what any strict constructionist could conceivably believe the First Amendment addresses.

A corporation is an artificial creation of the state, which in turn is a creation of the people. To vest an inanimate entity with constitutionally protected political rights makes mockery of our individual rights heritage. While corporations as a "legal fiction" have been given analogous status to individuals in aspects of commercial law, citizenship rights are of a very different nature. A corporation cannot vote or run for office. The inspiring words of our founders were about free men born with inalienable rights. It is they who speak. It is they who can assemble. It is they who are considered equal among each other.

To hold that a corporation is a person with citizenship rights simply does not square with the Declaration of Independence. All men may be created equal in relation to each other, but not necessarily in relation to corporations or, under *Citizens United*, in relation to how corporations may empower some individuals relative to others. There is great inequality between corporations, no equality of individual and corporate "personhood," and no equality of individuals when one with many corporate ties may have more capacity to influence decision-making than one with none or just a few.

Multiple personality disorder may from time to time seem to describe a candidate in regard to stances taken, but it never was intended to define the political system itself. More money is not more democracy.

Corporate larceny is at issue; so are democratic values. To presume that corporate money can be construed as "speech," that speech for many will be coerced rather than free. After all, to tap for political purposes the assets of shareholders or by implication union members, more than a few of whom can be expected to hold different political judgments than management or union stewards, is a "taking" of their assets, a perversion of their "speech," a diminution of their political rights.

What the Court has done is reason by analogy rather than constitutional logic. But analogy, like metaphor, is more suited to poets than jurists. When used in *Citizens United*, the analogies are not convincing. Music, for instance, is more analogous to speech than money is. Money may be used to buy many things, including influence, and when large amounts are given in the political process, conflicts of interest are created that undercut rather than embellish democracy. Likewise, a monkey or a gorilla is a closer analogy to a human being than a corporation is. But no one suggests that a primate be given citizenship rights. A corporation, to be sure, has shareholders, yet there is a distinction between a corporation and its ownership.

The main way "corporate-ness" can be analogized to personhood relates to its hierarchical structure. In the corporate world, one decision-maker or, at most, a collective few are accountable for how corporate resources are allocated. Authorizing corporate leaders to distribute shareholder assets – that is, other people's money – in political campaigns thus empowers small numbers of insiders. There is no escaping the reality that the precept of corporate personhood pushes American politics in an oligarchic direction. Nor is there escaping the only justification for spending corporate assets in campaigns. Money spent in campaigns must be considered good investments for shareholders, *quid pro quos* that can be banked. Could it be that the Court's definition of protected "speech" might more accurately be described as influence buying?

Prior to *Citizens United*, the Supreme Court implicitly recognized that citizen expression was different from issue advocacy backed by money. Hence it upheld congressionally established reporting requirements and limits on campaign giving for individuals making campaign contributions. However, in *Citizens United* corporate persons are granted "supraman" status: limited transparency requirements and unlimited capacity to spew money into the political system. The Court's lawmaking judgment cannot be challenged by Congress because an activist 5-4 majority has presumptuously held that the moneyed intervention capacities that it has granted corporations in the political process are protected by the First Amendment. And lacking an evidentiary basis and appreciation for human nature, the majority concluded that independent corporate political expenditures "do not rise to corruption or the appearance of corruption." Really? Is it not clear that under a free speech guise the Supreme Court has authorized influence wielders, in many cases masked to the public, to use unlimited resources to rob America of our democratic heritage?

Our founders were moral philosophers as well as political activists. They dwelled on a subject the Court ignores: human nature. To constrain what was implicitly considered a natural instinct of public figures to aggrandize power, John Hancock, Benjamin Franklin, and their fellow delegates to the Constitutional Convention followed James Madison's lead and adopted a governance framework for the American republic based on Montesquieu's separation of powers doctrine. Divided governmental authority was established in the Constitution with a similar legislative/executive/judicial model triplicated in decentralized fashion at the state, county, and city levels. The overlaps and continuous tension created between levels and branches of government were designed to bifurcate and constrain power. I note this background to underscore the human dimension of abstract principles. No politician will ever acknowledge that campaign contributions affect his or her votes or judgment. But for the public to assume that candidates whose campaigns are supported by large amounts of money from interest groups do not become indebted to these groups is to deny human nature. It is to flout how our founders thought about power and the role of citizenship.

At our country's founding, propertyless people as well as women and slaves were denied the right to vote, and there was an original constitutional acceptance that slaves could be considered threefifths of a person for legislative and Electoral College apportionment. But none of our founders ever advanced the notion that one individual could be several persons and have magnified influence based on control of corporate assets.

The arc of our history that has bent toward justice has suddenly with the *Citizens United* decision twisted back to that part of our constitutional heritage that was self-evidently unjust. Property considerations have again become accentuated in a key aspect of citizenship, the injustice of which weakens the links between government and the people.

Corporatist politics has several other ramifications of a very different dimension than our founders considered. When our constitutional system was established, the founders assumed that individuals elected to Congress would come from many different backgrounds and that they would be prepared to represent vigorously their state, its interests, and its people. A consequence of Court-enhanced corporatist power is the nationalization of local elections. Candidates across the country become indebted to the same corporate groups. Candidates in farm states, for example, increasingly find that their campaigns are supported by oil companies on one side and out-of-state unions on the other, causing indebtedness to groups that often do not reflect the same views as the majority of their constituents.

Secondary effects apply to political parties. Because the new financial empowerment under *Citizens United* is provided to unions as well as corporations, the tendency will be for the Democratic Party to become more like the old, union-dominated Labour Party in Great Britain and the Republican Party less like the pro-environment, trust-busting party of Teddy Roosevelt. The irony would remain, however, that corporate power often operates with one troubling bipartisan dimension. Corporations have a tendency to align with those in either party who hold positions that may affect issues of direct concern to their interests. Corporations are generally blind to the party affiliation of those they support in legislative committees that have jurisdiction over their interests. Surprising to some, *Citizens United* thus increases the likelihood that financial interests will increase their donations to both sides of banking-oriented committees; commodity groups to both sides of the agriculture committees; the military-industrial complex to both sides of the armed services committees; and so on. Ideology has its place, but power in the commercial sphere supports power in the political domain.

Tertiary effects involve empowerment of foreign interests. Granting to corporations the right to muscle further into the political fray is complicated by the fact that shareholding by sovereign wealth funds and foreign individuals in American corporations is substantial and growing. Foreign governments, citizens, and corporations have historically been barred from making political contributions. Under the new ruling, a door has been opened to allow them to be able to influence, explicitly or implicitly, how American institutions exercise political power, whether through companies that they control as U.S. incorporated subsidiaries or through stock owned in American companies on or off public exchanges.

Equally consequential, an American corporation controlled by American shareholders may have vested interests different from the national interest. In a global economy, corporate leadership is assumed to be profit driven. When an industry outsources jobs and facilities to foreign countries, its advocacy "investments" in the American political system may be unaligned with citizen interests. The corporate personhood precept established in *Citizens United* thus gives foreign countries and foreign nationals with American corporate ties the prospect of becoming more powerful factors in American elections than many American citizens.

As a candidate who campaigned seventeen times for Congress, eschewing PAC and out-of-state contributions, I can attest that a troubling effect of corporate-controlled giving is that it diminishes citizen respect for the political system, the desire to vote, and even the willingness to engage in the political process by giving small contributions. Over the years, for example, constituents would come up to me on the street or at Rotary or Farm Bureau meetings and say that they had sent a check for $20 or $30 to my campaign that they wouldn't otherwise have if I had not adopted a policy of not accepting PAC funds. The public understands that it is of marginal significance to make a modest contribution to a candidate if that candidate receives tens of thousands of dollars, sometimes now millions, from corporate- and union-controlled funds.

It is no accident that our tax laws are loaded with loopholes, that corporate muggings are frequent in American politics. Nor is it an accident that many Americans, from tea party advocates to middle-class homeowners to the Occupy Wall Street movement, believe that they are not being listened to, that vested interests hold an improper, behind-the-scenes sway in the political life of our country.

Nuances aside, the main casualty of the *Citizens United* ruling is idealism. At a time when the country needs to pull together, the Supreme Court has chosen a path to magnify public cynicism. It has determined to protect moneyed influence peddling that obscures citizen speech and eviscerates the capacity of citizens and policy-makers to weigh competing views in balanced ways.

At issue is whether a new analytical paradigm about the First Amendment more consistent with linguistic logic, American history, and democratic values is in order. Absent a clear directive from the Constitution, absent carefully expressed views of the founders, should not the courts follow a strict constructionist approach to the meaning of our individual rights–centered democracy? Rather than conflate a corporation with a person and money with speech, should not the focus be shifted to the transactional relationship inherent in speaking and listening?

If all men are created equal, surely it follows that all citizens are entitled to have their views respectfully listened to in the public square and, after elections, to have the representatives they choose be in a position to seek common ground in pursuit of the common good, unconstrained by having their ears plugged with corporate money.

In the wake of the *Citizens United* ruling, a distinguished former justice, Sandra Day O'Connor, has been speaking out about the need for states that elect their Supreme Court justices to change to a system in which governors nominate and legislatures confirm high court nominees. Justice O'Connor sees a conflict of interest problem potentially exploding in states like Texas where huge amounts of corporate money can quickly be marshaled in support of or opposition to judicial candidates.

I share Justice O'Connor's concerns but would add that the goal of advancing equal justice under the law applies just as much to the making and administering of laws as it does to their adjudication in a courtroom. Indeed, the objective of advancing equal justice begins in the first and second estates before it becomes the responsibility of the third estate, where judges, generally speaking, are tasked with interpreting and enforcing rather than making law – *Citizens United* being a sparingly embraced, lawmaking exception.

The standard of judiciousness in the making of law is fairness, while the standard of judiciousness in the adjudication of law is allegiance to the letter of law and its constitutional framework. Hence from an equal justice perspective, the judiciary should be acutely concerned about lawmaking that empowers deep-pocketed special interests to the detriment of the common good. No judge should be placed in the position of having to uphold patently unfair laws designed to appease corporate power brokers to whom legislators or elected executives may be indebted. In this circumstance, public confidence in the judicial as well as the legislative and executive branches of government is jeopardized. A citizenry simply cannot be expected to have confidence in a judicial system in which the standard becomes equal application of unfair laws. Equal justice requires that the law itself be fair.

Many are familiar with the saying, sometimes attributed to Bismarck, that the public should not look too closely at laws or sausages being made. Law- and sausage-making are different, but what unites them is a public concern that the seen and unseen ingredients of each be integrated in as "clean" a manner as possible.

In America, process is our most important product. Our founders recognized human frailty and thus went to great lengths to attempt to erect a system that would be democratic rather than aristocratic or oligarchic. Individuals could be expected to make mistakes, but the political system was to be above reproach, capable of evolving in ever fairer, more equalitarian ways.

Many good people enter politics only to find that the system causes the low road to become the one most traveled. Politicians routinely develop conflicts that do not technically rise to a legal standard of corruption because legislated law and now judicial fiat have weakened that standard.

The low road is traveled because it is the shortest path to office and justified because other contenders generally stampede alongside, though increasingly far from the center stripe. If a candidate chooses a less-conflicted route where few travel, the likelihood is that candidate will come up short.

Speech is thus at issue from two perspectives. At one end, uncivil speech must be protected by the courts, but filtered by the public; at the other, moneyed "speech" must not be allowed to weaken the voices of the people. The Constitution begins "We the people," not "We the corporations."

The American Corporation

Ralph Gomory & Richard Sylla

Abstract: The United States from its earliest years led the world in making the corporate form of business organization widely available to entrepreneurs. Starting in the 1790s, corporations became key institutions of the American economy, contributing greatly to its remarkable growth. This essay reviews the evolution of corporations across several eras of the country's history. The most recent era is marked by a shift away from a stakeholder view of corporate interests and purposes to one dominated by profit and shareholder-value maximization. We strongly question whether this shift has been beneficial to the country as a whole. If our assessment is correct, there is a need to find ways of inducing corporations to act in ways that produce better societal outcomes. We therefore explore ways – including some suggested by the history of U.S. corporations – in which corporate interests and the public interest might become better aligned.

> Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with those institutions.
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> –Theodore Roosevelt, First Annual Message to Congress, 1901

Questions about the actions and purposes of American corporations have been with us as long as corporations themselves. Both the questions and the answers to them have varied widely over time. The Occupy Wall Street movement that began in New York City in September 2011, spreading thereafter to other cities, raised or reiterated some of the basic questions about how well these American institutions work. The questions being raised today cover a wide range of issues.

Why, during the ongoing financial and economic crises that broke out beginning in 2007, did large financial institutions and industrial firms teetering on the brink of failure – often because of their own misguided strategies and decisions – get bailed out by the federal government? Why did the government seemingly do much less for homeowners facing foreclosures on houses now worth less than the

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mortgage debt incurred to buy them, perhaps because they had lost their jobs in the economic downturn and could not afford the mortgage payments due?

Why do the profits of American corporations and the compensations of their executives stay high and even rise in some cases while jobs disappear and both economic growth and median family incomes stagnate? Why does the judicial branch join in to strengthen the influence of corporations, financial and nonfinancial, as with the Supreme Court's *Citizens United* decision in 2010? That decision granted corporations relatively unlimited free-speech rights to spend corporate funds in electoral politics.

It is not the first time in U.S. history that people have wondered whether ours is a government of the people or a government of the corporations, by the corporations, and for the corporations. Such fears are as old as the republic. They were present in the 1790s, when the United States began to lead the world in the development of the corporation as the most dynamic form of modern business enterprise. They arose again in the financial and economic crises of the late 1830s and early 1840s, after state legislatures had created thousands of corporations. In the decades around the turn of the twentieth century, when many corporations became very large, the fear of corporate power resurfaced, leading to antitrust laws and federal regulation. The crises of the Great Depression led to further restraints on the financial and economic powers of corporations.

If there is any surprise about the current crisis, it is not that worries about corporate power and its abuse are once again being raised, but that so little is being done about them in comparison with the reforms of the 1840s, the Progressive Era, and the New Deal. Could we be witnessing the ultimate triumph of the corporation, one in which corporate rights and privileges vastly outweigh corporate social responsibilities?

Americans have always viewed corporations with mixed feelings. On the one hand, a corporation with limited liability and endowed with a long life is an attractive vehicle for numerous investors to pool their individual capitals, receiving tradable shares of the company in return. Pooling of capital makes possible large, long-term investments that can achieve economies of scale and scope in the production and distribution of goods and services that are beyond the capabilities of sole proprietorships and partnerships. Indeed, one of the less appreciated reasons for the rapid rise of the U.S. economy in the nineteenth century in comparison to other nations was the relative ease of obtaining a corporate charter in America.

On the other hand, inherent in the corporate form are problems of conflicting goals. Will the managers of corporations manage them in the interests of the shareholder-owners? Or will the managers act in their self-interest? Will corporate managers take into account the interests of employees, customers, suppliers, lenders, and the polity that made the corporation possible?

Inevitably, these problems of corporate goals that have arisen throughout the history of the American corporation are still with us. Our essay outlines how they have been addressed in several distinct eras of U.S. corporate development. This history perhaps can inform how we might deal with them now.

We conclude by strongly questioning whether today's dominant corporate goal – profit maximization – is beneficial to the country as a whole.

In the period from the 1790s to the 1860s, the United States led the world in modern corporate development. Recent research provides the first comprehensive look at corporate development, revealing that U.S. states from 1790 to 1860 chartered 22,419 business corporations under special legislative acts and several thousand more under general incorporation laws that were introduced mostly in the 1840s and 1850s.[1] These totals far exceed the number of corporations created in any other country (most likely in all other countries combined) during that time. The United States thus became what might be called the first *corporation nation*.

Most of the early American corporations, operating within a state or in a city or town, were small by later standards. The largest were banks and insurance companies, joined later in the era by railroads and manufacturers. Stockholders, often locals, could monitor corporate operations firsthand, and they were more directly involved in corporate affairs than would later be the case. Stockholders' meetings were frequent and actually provided guidance for management. Passive stockholders could keep an eye on their investments by checking prices in securities markets and by observing the dividends they received, which in this era accounted for the lion's share of corporate net earnings.

Legislative chartering meant that charters could be tailor-made for each corporation, with its powers, responsibilities – including those to the community – and basic governance provisions carefully specified.[2] Most charters were not perpetual, but rather had set terms of years and had to come up periodically for renewal, a constraint on corporate malfeasance. Voting rules for shareholders in elections of directors and other corporate matters varied. They were not always the modern norm of one vote per share, which favors large-block shareholders. Legislative chartering could easily be corrupted, however, with incumbent corporations using money and influence to defeat charters for potential competitors, and would-be corporations using the same tools to gain charters.

General incorporation laws, also a modern norm, were introduced late in the antebellum era as a way to avoid the corruption involved in legislative chartering as well as what was perceived as too close a relationship between corporations and the states. Under general laws, any group of incorporators meeting the specifications of the law could receive a charter, the granting of which became an administrative rather than legislative function of government. Access to the corporate form became more open – a gain for society. But state oversight of the creation and monitoring of corporations was reduced, which had costs in terms of corporate governance.

From the 1860s to the 1930s, most corporations remained small (as is still true), but growing numbers of them became very large and operated nationwide and even multinationally. Large corporations required professional managers, who often had limited or no ownership shares. These "Berle-Means" corporations, so named after the authors of a famous 1932 book, *The Modern Corporation and Private Property*, effectively separated ownership (shareholders) from control (management), marginalizing the influence of owner-shareholders in corporate affairs.

In this era, external checks on the possibility that managers would behave opportunistically against the interests of owners and anti-socially against the larger interests of the country came in two forms: investment bankers and government. Large corporations often had to access capital markets by selling shares and bonds, a process in which investment bankers served as intermediaries. These bankers had an interest in corporate governance to assure the investors who had purchased corporate securities from them that their investments were sound and secure. They exercised that interest by monitoring their corporate clients, even going so far as to place bank representatives on corporate boards. To many Americans, however, such banker influence was suspect, and charges of banker dominance and a "money trust" caused investment bankers late in this era to retreat from their monitoring and oversight roles in corporate affairs. That, of course, served to increase the powers of corporate managers.

Americans' suspicions about large banks and investment bankers were also directed at large corporations. The Gilded Age of the late nineteenth century featured the rise of the Robber Barons, both the business leaders who amassed great power and wealth in the rise of mass-production and mass-distribution industries, and the great financiers of Wall Street who collaborated with them. Popular politicos, such as trust-busting Theodore Roosevelt, adopted ordinary Americans' concerns about the concentration of wealth and power, leading to the passage of antitrust laws and corporate regulation at both the federal and state levels. The purported goal was to prevent or rein in monopoly, but in some cases the application of antitrust laws and regulations detracted from corporate efficiency and protected inefficient producers from more efficient competitors. (American political economy often protects particular competitors from competition in the name of avoiding monopoly.)

The period from the 1930s to the 1980s began with the Great Depression, which put the financial and corporate sectors under a cloud, resulting in a host of New Deal reforms. In finance, the Glass-Steagall Act (1933) separated investment banks and commercial banks, ramped up federal regulation, and introduced deposit insurance. A series of securities acts (1933, 1934, and 1940) compelled publicly traded corporations to disclose more (and more timely) information to their stockholders and the general public. The acts also provided regulatory oversight of securities trading and investment companies.

Corporations recovered much of the prestige they lost during the Depression through their contributions to the successful outcome of World War II. The lessons about the economy learned from World War II varied with the eye of the beholder. To some, the overwhelming factor in the U.S. contribution to the war effort was our immense ability to manufacture. That capacity was certainly there: already by the 1920s, the United States not only led the world in production of the key industrial products, steel and electricity, but also led in their per-capita production. When the United States entered the war, President Franklin Roosevelt created the War Production Board, comprised of industry leaders. Under their command, the country moved with incredible speed from civilian to military production. Airplanes in enormous numbers were produced in place of cars. U.S. shipbuilding capacity produced carrier-led fleets whose eventual scale dwarfed those of America's enemies.

But there was another influential way of looking at the war's outcome. This view, popular in academic and intellectual circles, attributed the favorable outcome to Allied scientific superiority. Radar played a key role in deflecting the German aerial assault on Britain following the fall of France and in determining the course of the war in the Pacific. The atomic bomb ended the war with Japan without the massive loss of American troops that a ground assault on the Japanese home islands almost certainly would have entailed.

Yet the wartime radar came from England, and European science underpinned the atomic bomb. Before the war, American science was not significant on a world scale. Science in this country, moreover, was not viewed as practical. The great productivity of the United States had its footing in mass production technologies and mass distribution capabilities, not in science.

The prestige of science, and the appreciation of its practicality, rose sharply following the war. Academia and government, especially after Sputnik (1957) and in the face of the intensifying Cold War, came together on the idea that the United States should lead the world in science. The National Science Foundation came into being to fund academic research in science and engineering. Cold War national defense budgets underwrote the transfer of cutting-edge science and engineering to a cadre of corporate military contractors. They left the more mundane area of manufacturing to established firms using older mass production technologies. At the end of his two terms in office (1953–1961), President Dwight Eisenhower, a military hero of World War II, would warn the country of a rising "military-industrial complex."

For two decades after 1945, large American corporations were subject to little international or domestic competition because of their oligopolistic market structures. Dividend payouts declined as corporations retained more and more of their profits to fund much of their investment. Because of New Deal reforms and profit retention, the financial sector, which earlier had both financed and strongly influenced corporate affairs, was essentially reduced to advisory and service roles. Stockholders did not mind lower dividends because prosperous times increased the value of their shares, and regulation by the Securities and Exchange Commission increased investor confidence that Wall Street provided a level playing field.

Managers still controlled corporations, and they exercised their power by choosing directors. Often these included top managers themselves. Outside directors chosen by management were obviously beholden to management. Stockholders, the putative owners, had little say. The Berle-Means corporation remained alive and well, enjoying its heyday in the two decades after World War II. Corporations did so well in this period because of a strong American economy, a worldwide demand for American products and know-how, and a lack of competition from abroad. A widespread, though not unanimous, view was that corporate and country prosperity were closely linked. It was during this period of prosperity in the 1950s that General Motors CEO Charles Wilson, in hearings related to his nomination by Eisenhower to be secretary of defense, made his famous statement that "what was good for our country was good for General Motors and vice versa."

In the early postwar decades, the problem of corporate goals seemed under control. Managers in general did not feather their own nests at the expense of owners and other stakeholders. J. K. Galbraith, a keen observer of corporate America, explained that the system worked as well as it did because managerial power was faced by countervailing powers in the form of big labor and big government. Unions were at their strongest in these decades, in part because of New Deal labor reforms, and they pushed for higher wages as well as health care and retirement benefits from corporate employers. As for big government, federal regulatory and antitrust laws put in place from the 1880s through the 1930s remained on the books, and postwar Congresses and administrations added a host of new laws.

The interests of managers, stockholders, workers, consumers, and society seemed well aligned. And they needed to be. Aside from purely economic issues, the United States and the Soviet Union were fighting a Cold War that was in significant part a war of ideas. Communism as practiced and advocated by the U.S.S.R. asserted that it would deliver the workers of the world from the slavery of capitalism and raise their standard of living. Soviet ideology dominated states of Eastern Europe, engulfed China and Cuba, and supported strong Communist parties in many parts of the world, including important West European countries such as France and Italy.

Fortunately, the widely shared growth and prosperity in the United States supported the idea that capitalism could be both effective and benign. Even the Soviet leader Nikita Khrushchev, in a widely quoted remark on a visit to the United States, admitted grudgingly that "the slaves of capitalism live well."

For several decades, corporate leaders recognized the claims of various stakeholders. As late as 1981, the Business Roundtable issued a statement recognizing the stewardship obligations of corporations to society:

> Corporations have a responsibility, first of all, to make available to the public quality goods and services at fair prices, thereby earning a profit that attracts investment to continue and enhance the enterprise, provide jobs, and build the economy.
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> [...]
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> That economic responsibility is by no means incompatible with other corporate responsibilities in society.
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> [...]
>
> The issue is one of defining, and achieving, responsible corporate management which fully integrates into the entire corporate planning, management, and decision-making process consideration of the impacts of all operating and policy decisions on each of the corporation's constituents. Responsibility to all these constituents *in toto* constitutes responsibility to society. . . . Business and society have a symbiotic relationship: The long-term viability of the corporation depends upon its responsibility to the society of which it is a part. And the well-being of society depends upon profitable and responsible business enterprises.[3]

Corporations thus for some decades after World War II were willing to accept a mix of goals; they aimed for good products, satisfied customers, a good effect on the community and nation, and a steady return to the shareholders. But that was about to change.

The economies of the rest of the non-Communist world began to revive. Foreign competition for the American market mattered more than ever because of the tremendous evolution of seaborne commerce in the form of container ships. Goods of every size made in one country could be shipped around the world to another nation at greatly reduced cost. Later, airborne freight also entered the picture for goods of more value per pound. The de facto protectionism provided by the oceans was being repealed by the march of transport technology.

Japan in particular, by providing government support and direction, emphasized manufacturing for export. It developed and adopted new and better manufacturing techniques, forging rapidly ahead in key industries ranging from automobiles, once the U.S. stronghold, to consumer electronics and, later, computer memories. American industry, used to easy success in an environment with limited competition, was slow to respond. Rising inflation and energy-price shocks further eroded American competitiveness. The U.S. dollar lost value compared to other leading currencies. The stock market languished. The easy years were over, and the 1970s saw a major slowdown in what had been steadily rising U.S. productivity, economic growth, and prosperity. Corporate America was in trouble.

The period from the 1980s to the present has been marked by a major shift away from a broad view of stakeholder interests to an almost exclusive focus on shareholder value. Galbraith's countervailing powers had in fact begun to break down by the 1970s. Declining union membership gradually reduced the influence of big labor on corporate managers. Corporations hastened the trend by closing factories in the old manufacturing belt of the Northeast and Midwest, where unions were strong, shifting production to Sun Belt states that had long antiunion traditions. The old manufacturing areas became known as the Rust Belt.

Countervailing power weakened further as academics and others began to attack government antitrust and regulatory policies as misguided. They called for deregulation and increasingly placed government itself under scrutiny. Instead of working in the public interest, many argued, government practiced interest-group politics. Bureaucrats had their own interests – larger budgets, more authority, more employees – which had little to do with the public interest. Ronald Reagan, the popular president from 1981 to 1989, epitomized this new view when he famously said government wasn't the solution, it was the problem.

Academics came to the rescue of corporations, or so it seemed, with new theories of what corporate managers should do. Instead of catering to the interests of various stakeholders, as they had done in the good old days of the postwar era, managers would best serve owners and society in general, the academics argued, by single-mindedly working to maximize shareholder value. The stakeholder view was complicated; actions that are in the interests of some stakeholders may be counter to the interests of others. Higher wages may mean lower profits, and lower wages may mean higher profits.

In contrast, shareholder value was determined daily in the stock market, which the efficient-markets hypothesis showed to be good for measuring that value. The stock market, academics further argued, would identify good corporate managers – those who increased share prices – and would expose bad ones: those who didn't. Managers who failed to maximize shareholder value would be disciplined and even jettisoned by the market for corporate control, which featured hostile takeovers and leveraged buyouts financed by a rejuvenated and innovative financial sector. Society supposedly benefited because the corporate goal was now to make the total value of the enterprise, as measured by what it would take to buy it on the open market, as large as possible.

This academic doctrine fell on receptive ears. From a shareholder perspective, it put their interests in the driver's seat; the success of the company was to be measured by their return. From the point of view of corporate management, it was a mixed blessing. After all, corporate leadership was used to a great deal of independence, they took pride in having good products and being respected members of the community, and they dealt with their fellow workers and managers every day. Shareholders, in contrast, were a distant and uninformed mass to be dealt with by dividends. But in a world of profit maximization, profits could be measured every day and had to be reported every quarter.

This gap in the natural orientation of shareholders and corporate managers was well recognized in academia: it was simply the old principal-agent problem. And, the academics argued, it was not that hard a problem to solve. The solution was to give corporate leadership major stock options. When the stock went up, management benefited hugely. This approach aligned the interests of managers with those of the shareholders.

The stock-options solution cost the company and its shareholders nothing if the stock did not go up, so it was possible to vote the corporate leadership amounts of options that overcame any hesitancy. In fact, CEO compensation soared to previously unheard-of heights. And under many circumstances, a CEO did not have to be exceptional to profit from stock options. In the rising stock market of the 1980s and 1990s, compensations for all CEOs rose together. Certain practices in corporate governance helped generate this result. CEOs sometimes served simultaneously as chairmen of their boards. They invited other CEOs to serve on their boards and possibly chair the compensation committee, a favor that often was returned. CEOs and boards hired compensation consultants that, perhaps unsurprisingly, seldom if ever recommended reducing CEO compensation.

Criticisms of CEO compensation usually elicited a response such as, "He created $2 billion of increased value, why shouldn't he get $100 million of it?" This attitude implied that the efforts of an entire company, with tens of thousands of employees, were the result of a single CEO or top-management team. John F. Welch, CEO of General Electric from 1981 to 2001, is a prominent example. In the 1980s, Welch was dubbed "Neutron Jack" for reducing GE employment by more than one hundred thousand (of about four hundred thousand) and for firing each year the bottom 10 percent of his managers. Welch also led the old manufacturing company into financial services, which came to account for a large proportion of GE's profits. Shareholder value and profits soared under Welch, whose stock options made him a very wealthy man. In 1999, *Fortune* magazine named him Manager of the Century. But Welch's initiatives would lead to problems for GE and his successor after he retired.

The principal-agent problem often did seem to be solved by the stock-option form of remuneration. Employees, however, were not discussed in the stock-option solution to the principal-agent problem, although they were affected by it. Wages, executive compensation, and profits all come out of the total "value added" by a corporation. With the extensive use of stock options, executive compensation and profit, which is reflected in stock price, are linked together. Both improve if wages can be held down. Thus, holding down wages became in the interest of both management and shareholders.

The path that the division of corporate value added has taken since 1980 is reflected in data on productivity, pay, and income shares. From 1947 to 1979, productivity rose 119 percent, average compensation of production and non-supervisory workers (who constitute more than four-fifths of the private-sector labor force) grew 100 percent, and the share of national income received by the top 1 percent of earners (which would include most of top corporate management) ranged from 9 to 13 percent. From 1979 to 2009, in contrast, productivity rose 80 percent, worker compensation rose 8 percent, and the top 1 percent of earners increased their share of national income to more than 23 percent.[4] The changes in compensation trends and top-income shares that began in the 1980s are striking.

Equally striking is the change in tone that top corporate executives take with regard to corporate responsibilities. In 1981, as earlier noted, the Business Roundtable emphasized stakeholders. But by 1997, the same organization of prominent senior executives stated:

> [T]he principal objective of a business enterprise is to generate economic returns to its owners. . . . [I]f the CEO and the directors are not focused on shareholder value, it may be less likely the corporation will realize that value.[5]

Stock options indeed had apparently aligned the interests of management with those of shareholders.

Does the emphasis on maximizing shareholder value invariably lead to higher stock prices? The evidence is mixed. Stock price indexes did trend upward from late 1982 to early 2000. But at the end of 2011 they had barely changed from the levels reached in 2000. And even if the emphasis on stock price results in higher stock prices, who benefits? Is maximizing shareholder value good for the country as a whole? To answer that question, one must ask who owns the stock. If, for example, stock ownership were spread evenly across the U.S. population, rising stock values would have a widely beneficial effect. On the other hand, if one person were to own all stock, it is doubtful that it would be in the national interest to have all corporations and their employees working to make that one person even wealthier, especially if they had to hold down wages to do it.

The actual situation is in between, but it is close enough to the second case to be worth mentioning. The most recent (precrisis) data show that the wealthiest 1 percent of Americans own roughly one-third of the value of all shares, that the wealthiest 5 percent hold more than two-thirds of the value of all shares, with the other third spread over the remaining 95 percent.[6] Ownership of U.S. corporations is highly concentrated.

The preceding section traced the grand outlines of what has been happening in the U.S. economy in recent decades. But other changes are transpiring underneath this picture. One major change is the rise of the Asian economies, especially that of China.

China has experienced rapid economic growth since the late 1970s, when leaders of the one-party Communist state turned their economy in a capitalist direction. China's rapid industrialization and export orientation have had a major negative impact, via imports of Chinese goods, on U.S. productive capability, especially in the area of manufacturing. One result is an enormous imbalance of trade, as imports from China are not balanced by a roughly equivalent counterflow of exports from the United States. Instead, China accumulates huge dollar balances and then lends them back to the United States by purchasing U.S. debt securities. The trade imbalance has led to a large increase in the availability of cheaper consumer goods. Wal-Mart, among other retailers, is a great outlet for these Chinese goods. While this has benefited American consumers, it has come at a high cost to parts of the American economy.

China's approach to trade is best described as traditional mercantilism, a pattern of government policies aimed at advancing a nation's industries in world trade. China's actions, which include mispriced currency, subsidies, and the rapid appropriation of foreign know-how, allow many Chinese industries to compete on the world scene with prices and capabilities that would otherwise have required decades to attain. The effect on many American industries has been devastating. Business scholars Gary Pisano and Willy Shih have enumerated the long list of high-tech goods no longer made in the United States.[7]

Meanwhile, U.S. global corporations, in their normal pursuit of profits, are strongly aiding the industrialization of China. They are also to a large extent using China as a manufacturing base to supply the

U.S. market. Either alone or in joint enterprises with Chinese corporations, U.S. corporations are building plants in China that enhance both that country's productive abilities and its technical know-how. The goods imported from these enterprises contribute largely to the enormous imbalance of trade. The result is $2–3 trillion at the disposal of the Chinese government for the purchase of more U.S. Treasury securities – or, as seems more likely in the future, for the acquisition of American companies and their technologies. In addition, U.S. corporations are increasingly locating their R&D in China, providing a further and direct way for China to acquire American technologies.

Competition from China has highlighted two general attitudes toward U.S. manufacturing. Some lament the destruction of American manufacturing, which is traditionally high wage, R&D intensive, and the greater part of U.S. exports in international trade. They ask where our manufactured goods will come from if we do not make them and do not have anything on the same scale to trade for manufactured imports.

Others believe in a "new economy" in which manufacturing is off-shored. America creates the design; those with developed manufacturing skills and perhaps lower wages build what we design. America specializes in R&D and innovation; the duller and older things that have become commodities are made abroad. This view is intrinsically appealing. It is pleasant to imagine that inventive Americans will design new products and leave the grunt work of making them to other nations. Although this view is popular in some academic and financial circles, its quantitative underpinnings are weak. R&D is simply too small a part of industrial activity across the board to replace the loss of manufacturing.[8]

What does theory have to tell us about the overall impact of these developments? Many economic observers believe that when you lose manufacturing, for example, it is because your comparative advantage is somewhere else; that it is more beneficial to let market forces move you in the direction of your comparative advantage; and that it is a mistake in these circumstances to try to hold on to what you once had.

These views, however, follow most standard economic models in assuming that countries have fixed capabilities. With capabilities fixed, the action of market forces will indeed respond in the way described, and thus the free-market, free-trade result is beneficial. But what are the effects on the home country when a trading partner changes its capabilities? To be specific, what is the effect on the United States when China does not hold its capabilities fixed, but instead substantially improves them?

Economic theory does not assert that when a trading partner improves its capabilities, and then market forces act on these new capabilities, the new free-trade result is better for the home country than the situation that existed before the change. In fact, it can be harmful.[9] According to standard models, a trading partner's initial development is good, but as that partner moves from less developed to more developed, further development can become harmful. The result is a decrease in the home country's GDP.[10] This theoretical result takes into account all the effects; it includes the consumer benefits of cheaper goods from the newly developed partner (China) as well as the negative impact of losing productive industries in the home country (the United States).

Hence, the simple assertion that free trade is beneficial does not enable us to conclude that China's development is good for the United States. (And recall that China's current approach is more accurately described as mercantilist than as free trade.) It is more reasonable to say that theory expects China's development to have a negative impact at some point. Indeed, that point has likely been reached.

We remarked earlier that U.S. global corporations are strongly aiding China's rapid development. *We cannot, therefore, ignore the possibility that the interests of our global corporations and the interests of our country may have diverged.*

Nobel laureate Michael Spence looks beyond U.S.-China trade in particular to describe the overall negative effect of globalization on the U.S. economy. Spence also goes beyond the overall economic effect to describe the effects on different parts of American society. He concludes that globalization has led to higher levels of unemployment, particularly in manufacturing industries that compete with imports, and that it has widened income disparities within the country.[11] Spence's analysis reminds us to consider not only how U.S. industries and corporations are faring on the world stage, but how well they are serving American citizens at home. To begin this discussion, we must first ask what we as Americans want from our corporations. Only then can we measure current circumstances against our ideals.

To do this sensibly we need a historical perspective on the corporation. It is important to remember that from the earliest times until the middle of the nineteenth century, most of the world's work was done on small farms or in small shops. This traditional world was dominated by agriculture and the need to provide food. Large organizations, with the exception of the army, the navy, and the church, were almost nonexistent. This was the world in which Adam Smith and David Ricardo lived and which they described in their influential economic writings.

The industrial revolution of the late 1800s changed this world. Steel mills and factories sprang up, and people migrated on a large scale to the new production centers. Economic activity became increasingly the province of large organizations. Agriculture itself gradually became more mechanized and less people-intense, and it was organized increasingly in large corporations.

These developments have fundamentally changed our way of life. The goods we consume today are too complex to be made at home, on a family farm, or in a small shop; they require large organizations to create them. You cannot manufacture a car in your garage; it takes a large-scale organization to do it. The food we eat is rarely produced by a family on a nearby farm, but is instead made by large organizations on highly mechanized farms with machinery produced by other large organizations, and then is transported on highly organized networks to huge outlets. The same is true of services; you cannot organize a telephone network on your own.

The goods and services we consume today are primarily created by organizations, not individuals. To contribute to the economy today, an individual usually must be part of an organization. Being part of an organization is what most people must do in the modern world to earn a living and support themselves and their families. Therefore, the fundamental social role of business organizations, usually corporations, is both to produce efficiently the goods and services that are consumed in the modern world and – equally important – to enable people to participate in that production, so that they earn a share of the value produced for themselves and their families.

With this background in mind, we suggest that Americans can reasonably expect two things from our corporations[12]:

1) Productivity: Our corporations should be productive, each contributing as much as possible to the total of goods and services produced in the United States. It is the sum of these efforts that makes America prosperous.

2) Sharing: Our corporations should provide productive and well-paying jobs so that the value the companies create is widely shared by Americans. This widely shared wealth gives the nation and its people economic security and political stability.

These expectations sound very different from the present goal of maximizing profit and shareholder value. They are closer to the role that corporations played during the prosperous 1950s and 1960s, when interests other than those of the top executives and large shareholders were also taken into account.

If these are the goals, how well are U.S. corporations doing? They are doing well by their own criterion of maximizing profitability and (less certainly) shareholder value. In fact, major corporations have had record profitability in recent years, even though the nation has been racked with declining incomes, high unemployment, and languishing stock prices.

But corporations are not doing very well by the two criteria we list above. With respect to the first criterion, GDP has increased more slowly in recent years, and the most productive sectors affected by corporate globalization are no longer the growth areas of the U.S. economy. Our high-tech and manufacturing areas have been among the hardest hit. On the first criterion, therefore, we are hard pressed to award a grade better than C.

On the second criterion, we have seen only small returns to most Americans over the last thirty years, the period in which the shareholder view overtook the stakeholder view. Almost all the gains from increased productivity, as noted earlier, have gone to the top economic tier. The resulting concentration of wealth and its attendant political power threatens the nature of our democracy. Three decades of this realignment merits a low grade, charitably a D.

Currently, the dominant motivation of the American corporation is to maximize profits and raise stock price in the interest of shareholders. While this is often regarded as a legal requirement, it is not. Corporate directors owe their fiduciary duties not to the shareholders, as is often thought, but to the corporation.[13] Indeed, it would be surprising if the law prescribed shareholder value as the only goal given that the Business Roundtable, as early as its 1981 statement quoted above, publicly urged the consideration of many other factors.

Despite its lack of legal standing, the sway of "maximizing shareholder value" appears absolute. In today's large corporations, shareholders are distant from the company and their sole attachment is to the shares they hold, although they usually hold them for only a short time. Corporate results, if the goal is shareholder value, are easily measured; companies that do not measure up will see a change of CEO or of the board, or possibly a hostile takeover.

If we assume that this motivation is unchangeable, then the road to better social outcomes must lie in making these outcomes more profitable for corporations. We begin by discussing ways to improve the performance of corporations on our first criterion, which, in homely terms, is about making a bigger total pie (GDP) for Americans without concern for how it is divided up.

Given the strong negative influence that Asian mercantilist policies have on our corporations, one measure that must be considered is *tariffs*. Tariffs have had a long history in this country. Although economists almost unanimously resist the imposition of tariffs and almost automatically support free trade, no economic theory says that persisting in free trade is the best response to mercantilism. Modern developments in strategic trade theory in fact suggest the opposite. Nor does the history of tariffs or other restrictive measures provide an unambiguous guide to their usefulness or harmfulness.

The situation in which tariffs are applied as well as the form of tariff can affect the outcome. In a 2003 *Fortune* article, Warren Buffett proposed what he called *import certificates*.[14] Buffett's import certificates, while certainly a form of tariff or quota, are closely connected to what economists refer to as *cap and trade*.

Cap and trade is familiar to economists through its application to air pollution. In the case of air pollution, the total of allowable emissions is decided on in advance and is called the cap. Pollution certificates are then issued, each allowing a certain amount of pollution, with the total of the certificate amounts equal to the cap. These certificates are then sold in an open market, and those companies with pollution most expensive to control end up with the certificates.

Similarly, a cap can be put on imports, and permits to import can be issued and traded. In order to balance trade, the cap (or total of import certificates issued) is set equal to, for example, the previous year's exports. If the U.S. government issues the certificates, it is a source of revenue. If the certificates are instead earned by exporters in quantities scaled to their exports, the price obtained by selling them in an open market becomes an incentive to export. As economies adjust to the presence of the certificates, the certificate value can be expected to move toward zero.

If other countries retaliate by imposing tariffs and reducing imports from the United States, the number of import certificates issued will automatically decrease so their ability to export their goods to the United States is also reduced. This creates an incentive not to impose tariffs. Alternatively, if they retaliate by adopting a similar import certificate system of their own, the result is a world of more balanced trade, a desirable outcome.

Another quite different but also traditional method employed in the United States is to use the individual or *corporate income tax* to bias individuals or corporations toward desired social goals. In the case of the individual, there are tax advantages given to promote homeownership, and in the corporate case there has been a reduction in the corporate income tax based on the company's growth in R&D spending.

What is suggested here is to use the corporate income tax to provide direct incentives for companies to have high value-added in the United States. While Asian countries have provided such incentives, usually by deals with individual companies, an approach better suited to the United States and to the capabilities of the American government would be an across-the-board approach: reward all companies for creating high value-added in the United States, whether they achieve that goal through R&D and advanced technology or by finding ways to improve production of goods and services.

One form that such an incentive could take would be to lower a corporation's income tax in proportion to the value added per U.S. employee. Such a tax could be made revenue neutral by having a high tax rate for unproductive companies and a low tax rate (or even a subsidy) for productive companies. Depending on the rates, the incentive could be strong or weak.

Many forms of this approach can be considered. An approach better suited to an economy struggling with unemployment would be to reward companies for their total value added in the United States rather than productivity or value added per employee. With such an incentive in place, a company moving work overseas would suffer a tax disadvantage.

There are many variants of these general approaches that can be considered. We are not alone in thinking that it is a direction worth considering. As Jeffrey Immelt, CEO of General Electric, stated in 2007: "If the U.S. government wants to fix the trade deficit, it's got to be pushed; GE wants to be an exporter. We want to be a good citizen. Do we want to make a lot of money? Sure we do. But I think at the end of the day we've got to have a tax system or a set of incentives that promote what the government wants to do."[15]

Next we need to consider the second goal, which bears on who gets how much of the bigger pie. The focus on shareholder value as the only corporate goal is a recent development. While it has the advantage of simplicity and measurability, it also pits wage-earners directly against those whose interest is mainly in share price: that is, the shareholders and top executives. There is no concept of sharing or distributing the fruits of greater productivity. Perhaps we should consider other forms of organization. The following suggestions are intended to provoke thought, not provide a solution. But we do think that such thought is needed.

Other forms of organization – namely, mutual corporations and cooperatives – have a significant history in the United States. In the insurance industry, the mutual form serves more than 135 million auto, home, and business policyholders; it accounts for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market. Cooperatives are more common in Europe, but in the United States they have had a significant presence in agriculture, farm credit, federal home loan banks, rural electric service, mutual insurance, and credit unions. There is also a recent movement advocating so-called B corporations, which are required to create a benefit for society as well as for shareholders.[16] These corporations represent a return to the earliest concept of the corporation in U.S. history, which was to achieve a specific public purpose stated in the charter of incorporation.

Perhaps most interesting, however, is the possible evolution of the corporate form itself. As we remarked above, early corporations in the United States were legislatively chartered, with charters especially made for each corporation. Charters laid out the corporate responsibilities and basic governance procedures; often the charter was for a limited time, not perpetual. Such charters, whether given by states or by the federal government, could be a way of creating corporations that do better on the second of the two corporate goals we laid out, providing American workers with well-paid jobs.

One form of such a corporation could be a corporation that is pledged to be value-added maximizing rather than profit maximizing. Maximizing value added is measurable, just as maximizing profit is. Furthermore, as it is the sum of value added by individuals and organizations in a country that adds up to GDP, maximizing value added makes the total economic pie as large as possible, without specifying what share of the value added is to be wages and what is profit. This is the essence of our first goal. If management's compensation is tied to value added rather than profit, all parties – wage-earners, shareholders, and management – can gain from greater value added, and this is an incentive for them to work together to increase it.

Dividing the value added is where there is conflict, which the present profit-maximizing arrangement settles entirely in favor of those who are compensated by profit. This approach leaves out the wage-earners. We have seen the consequences of that division over the past thirty years.

In a world of companies devoted to maximizing value added, there could be many ways to divide the portion of the value added that is available for wages and profits. Some companies will give as much as they can to profits, making them indistinguishable from today's profit maximizers. They may find it easier to raise money in the stock market. Some companies may choose to give more in wages, and they may find it easier to hire and keep good people. Some may choose to excel in being environmentally friendly.

Were such a change in the purpose of the corporation to be adopted we might become a nation with a great variety of companies, all in their different ways adding to the GDP and many adding to a better distribution of income, wealth, and, in turn, political power.

Adolf Berle and Gardiner Means, in the last chapter of *The Modern Corporation and Private Property*, expressed doubts about two views of the corporation. One was the view that the corporation belonged to its shareholders and ought to be for their sole benefit. They questioned this view because passive shareholders had ceased to have power over, or any responsibility for, the management of corporations. The other view was that the management that controlled a corporation, possessing powers obtained on a quasi-contractual basis, "can operate it in their own interests, and can divert a portion of the asset fund or income stream to their own uses." If these were the only two choices, Berle and Means said, "the former would appear to be the lesser of two evils."

But there was a third choice. Since passive shareholders had surrendered control of, and responsibility for, corporate management, and since managements had made no case that corporations should be operated in the interest of managers:

> They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society. . . . [I]f the corporate system is to survive . . . the "control" of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.[17]

American corporations from the 1930s to the 1980s appeared to follow Berle and Means's third choice, or what might be called the stakeholder view of the corporation. That changed when stock options came in to align the interests of shareholders and top managers, seemingly solving the conflict of shareholder and managerial interests that Berle and Means had exposed. With shareholders and management aligned, however, other interests took a back seat. Perhaps it is time to consider a different problem: *how do we align the actions of corporations with the broader interests of the country?*[18] This is the problem we have been addressing in the last part of this essay.

The great American corporations today are doing well for their top managers and shareholders, but this does not mean that they are doing well for the country as a whole. The growing concentration of income and wealth threatens both the long-range productivity of the country, through extensive off-shoring, and its long-range internal stability, through a growing concentration of wealth that carries with it political as well as economic dominance. These issues and what to do about them deserve more thought from the economics profession and, indeed, from all Americans.

ENDNOTES

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11 Michael Spence, "Globalization and Unemployment," *Foreign Affairs*, June 2011.

12 See Ralph Gomory, "Country and Company: Part I – Divergent Goals," http://www.huffingtonpost.com/ralph-gomory/country-and-company-part_b_174875.html.

13 Section 8.30(a) of the Model Business Corporation Act (which has been adopted in many states) reads as follows: "Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation." The act then follows with an almost identical section on the duties of the corporate officers, also requiring them to act in the interests of the corporation.

14 Warren Buffett and Carol J. Loomis, "The Nation's Growing Trade Deficit is Selling the Nation Out From Under Us," *Fortune*, November 10, 2003.

15 An interview with Jeffrey Immelt, in *Manufacturing & Technology News*, November 30, 2007.

16 See http://www.bcorporation.net/.

17 Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1932), 354–356.

18 Economists might well consider this a different principal-agent problem.

Unions & Civic Engagement: How the Assault on Labor Endangers Civil Society

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Abstract: American trade unions are a crucial segment of civil society that enriches our democracy. Union members are stewards of the public good, empowering the individual through collective action and solidarity. While union density has declined, the U.S. labor movement remains a substantial political and economic force. But the relentless attacks by the political right and its corporate allies could lead to an erosion of civic engagement, further economic inequality, and a political imbalance of power that can undermine society. The extreme assault on unions waged by Republicans in Wisconsin, Ohio, Michigan, and at a national level must be countered by a revitalized labor movement and by those who understand that unions are positive civil actors who bring together individuals who alone have little power. Unions need both structural reform and greater boldness; there are moments in which direct action and dramatic militancy can bring about positive social change. The current assault on labor can be rebuffed, and unions can expand their role as stewards for the public good and as defenders of efforts by the 99 percent to reduce inequality and protect democracy.

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The school board members didn't see it coming. The parents at the school's town hall meeting seemed to accept that enough had been done about the safety of kids on and near school grounds. Time to move on.

But then Lucia, an immigrant from Mexico with an eighth-grade education, took the floor. A janitor in a West Los Angeles office building and the mother of two young sons, she soon captured the crowd with her outspoken complaints about why administrators were not doing more to ensure a safe place for learning.

Other parents admired Lucia, who not only had the courage to confront school officials, but also had the ability to sum up parental concerns in a clear way that ultimately brought necessary and overdue safety improvements to a school plagued by gang violence.

"I was a very timid person, honestly, a very timid person," Lucia recalled of the period soon after she had arrived in the United States in the early 1990s. "If I had to speak in public, I would turn red and would not know what to say." Then she became involved with the Justice for Janitors campaign of Service Employees International Union (SEIU) Local 1877 in Southern California.[1]

Over time, participation in the union helped Lucia acquire the knowledge and confidence that later enabled her to speak out at her sons' school and in other public settings. "When we were trying to deal with overcrowding at the school, I brought a lot of people to the meetings – my sisters, the neighbors, other parents," Lucia said. Applying the training she had received in the union local, she used her new civic skills to rally collective action that often got results.

The sociologist Veronica Terriquez has studied the SEIU janitors' local and examined levels of civic engagement among union members, including Lucia, with schoolchildren. "The findings suggest that union members – independently and without prompting from the union – draw upon their acquired skills to effect change in their lives," Terriquez writes. "People learn to run meetings, communicate problems effectively, and use existing processes and protocols. This empowers people to help themselves and their children."[2]

The study found that mobilizing union protests and participating in union-led campaigns helped the Latino immigrants transcend barriers, including limited English language skills and low formal education levels. In essence, the janitors' involvement with their union led to greater civic engagement.

During my time as president of SEIU, I saw firsthand many examples of worker empowerment through labor-initiated programs like those in Los Angeles that helped Lucia. In New York City, for example, SEIU Local 32BJ joined with other unions and community groups to form the New York Civic Participation Project, which seeks to galvanize workers around jobs and civic issues in their neighborhoods, such as Queens, Bushwick, Washington Heights, and the South Bronx. In Miami, United for Dignity, an independent nonprofit started by 1199/SEIU United Healthcare Workers East, offers leadership classes to low-wage immigrant workers. And in Boston, worker centers originally created by SEIU Local 615 provide English-language training, teach computer and leadership skills, and build ties to other community-based organizations. Many unions engage in similar efforts, both with immigrant workers and the broader union membership.

American trade unions are a crucial segment of civil society that enriches our democracy. Unions often give a voice at work and in the community to those who individually lack power, particularly those on the bottom rungs of our economy: immigrants, low-wage workers, people of color, and other economically disadvantaged groups.

Every day across our country, union workers like Lucia not only perform their jobs and contribute to America's economic growth and prosperity. They also volunteer at homeless shelters, coach in youth sports programs, teach Sunday School, walk long miles in fundraising events for breast cancer awareness, register others to vote, and so on. These union members are stewards of the public good. Their daily acts of citizenship, like those of many other Americans, often do not come cloaked in the union label. While these acts flow from the innate desire people have to build a better world, those among the millions of union families benefit from both an organizational framework and a philosophical core. Unions empower the individual, but they do so through collective action and solidarity.

The janitors in Los Angeles fought hard struggles with antiunion employers, but workers stuck together and won decent wages and benefits, as well as a voice at work.[3] Their union-won economic gains enable them to buy the products and services made and provided by other workers and to pay taxes to support needed public services, such as schools, roads, clean water, firefighting, and police forces. Much harder to quantify on a balance sheet are all those daily acts by unionists that contribute to the common good, whether they occur at school board meetings, church cafeterias, or environmental cleanups in the neighborhood. Those are moments of civic good that help bond our society and make it better.

Unions empower workers in a variety of sectors that are increasingly marginalized by the problems of our current economic and political system:

- Labor, for example, speaks for manufacturing workers who continue to lose jobs to technology and outsourcing of work to other countries where labor is far cheaper.
- Labor gives a voice to teachers and school support workers, who are under harsh attack from many directions even as their unions push for greater resources for schools and improved teacher performance.
- Organized labor helps health care workers stand up against unwise changes in Medicare and Medicaid funding that will hurt the most vulnerable in our society, such as disabled individuals who need home care assistance to live decent lives.
- Unions enable public workers who provide services necessary to the functioning of society to counter the assault waged against them, most recently by Republican governors and legislators in states such as Wisconsin, Ohio, and Michigan.

Emboldened by gains in the 2010 elections, conservative leaders in those states and elsewhere pushed quickly to abolish or severely restrict collective bargaining by unions representing public employees, teachers, and others. The Republicans hoped to weaken labor, but in fact sparked a resurgence of union and progressive activism. Within months, the backlash resulted in some GOP legislators being recalled and a successful statewide vote in Ohio overturning the law curbing union bargaining rights.

The union mobilization in Ohio, Wisconsin, and Michigan underscores that trade unions are civic actors that engage far beyond collective bargaining. By bringing together individuals who alone have little power, unions join workers into a force that regularly contributes to positive outcomes in the workplace and broader arenas, including elections and legislation.

Much of the important social legislation that has built a better society came about because of the strong political support of labor. Unions backed civil rights legislation, Social Security, Medicare, environmental laws, wage and hour laws, the ban on child labor, and much more. In recent years, unions such as SEIU have given strong support to the struggle for marriage equality and for LGBT rights. Labor's collective bargaining gains over many years have helped bring important progress for all Americans. The bumper sticker "Unions – The Folks Who Brought You The Weekend" highlights, for example, labor's role in achieving the forty-hour work week at a time when most Americans were forced to work longer hours.

Few such gains seem possible in today's harsh antiunion climate. Those at the very top of our society in terms of wealth, income, and power have captured virtually all of our society's economic gains in recent years. Suffering is worsening for those at the bottom, and the broader middle class is rapidly eroding. Unions are one of the few forces that can help counterbalance this increased power of corporations and the wealthy.

The Occupy movement, which began in a park in New York City as a protest against Wall Street's abuses and the corrosive power of multinational corporations over our democratic process, went on to define the inequality issue powerfully and simply as the 99 percent versus the 1 percent. Unions are a crucial and incontestable component of that 99 percent, seeking greater economic and political fairness.

Today, the tremendous resources devoted to harsh attacks on unions by GOP political candidates and officeholders, conservative pundits such as Glenn Beck and Rush Limbaugh, and their corporate and right-wing allies might lead one to think that labor has gained massive power over America's businesses and politics. But a clear look at the current state of unions provides a different and more complex picture. In reality, unions have significantly less agenda-setting power than the GOP would have voters believe; yet they still function as a significant counterweight to other, less-democratic power centers of American life.

The union membership rate in 2010 was 11.9 percent, down from 12.3 percent the previous year[4] and down from about 36 percent in 1945. The percent of wage and salary workers who were members of unions in the private sector in 2010 dropped to 6.9 percent. By contrast, some 36.2 percent of public-sector workers belonged to unions – one factor in the recent round of campaigns against public employees. Over the last half-century, union levels in the private and public sectors have swapped places. Unionization rates in the public sector at the end of World War II were below 10 percent, while the private sector was at 36 percent.

While union density has declined, the actual numbers make clear that the American labor movement remains a substantial force. The Bureau of Labor Statistics reports that unions represented 16.3 million wage and salary workers in 2010. Of those, 14.7 million were themselves union members, and 1.6 million had jobs covered by – and benefiting from – union contracts. When family members are included, unions represent a sizable and important bloc of people despite lower union membership rates. (Declines in membership cannot simply be taken to mean that fewer Americans want unions to represent them. Other factors, such as the decline of unionized manufacturing through off-shoring and displacement of jobs owing to new technologies, have contributed to fall off in union membership. The economic collapse that began in 2008 has also been a factor.)

Unions are still a powerful force in key states as well. New York, for example, is home to 2 million union members (24 percent) and California to 2.4 million (17.5 percent). Not unexpectedly, the eight states with union membership rates below 5 percent in 2010 were all in the South, with the lowest being North Carolina (3.2 percent).[5]

It pays to belong to a union that can bargain collectively for its members. Despite declining membership rates, workers who belong to unions had median weekly earnings far above their nonunion counterparts. In 2010, union members took in $917 per week, compared to only $717 per week for nonunion workers.[6]

One of labor's contributions to the broader good over the years has been that many Americans not in unions have seen their wages and benefits improve as a result of union gains at the bargaining table. In their efforts to keep unions out, employers have had to raise pay, at times provide health care/pensions, and even treat workers with more dignity on the job. Even opponents of labor tend to concede that a rising union tide lifts many nonunion boats, particularly in tight labor markets. That may be one reason why historically pacesetting unions, such as the United Auto Workers (UAW), have been vilified in recent years. Employers and union opponents understand that forcing concessions in flagship collective bargaining sectors can help slow, and even reverse, worker gains throughout the economy, union and nonunion.

One might hope that more Americans would examine the strong contracts negotiated by the UAW, Teamsters, police/firefighters, SEIU, and other unions and say: "Look at the good wages and benefits they have; what do we need to do to get our employers to start paying the same?" Too often, however, the argument is made that union workers have it too good and they should be brought down. That is the path to the low-road economy we are on, rather than the high-road economy that we need – and that other nations, such as Germany, have achieved.

The United States needs a prosperous middle class if it is to be economically strong. Henry Ford understood this nearly a century ago when he increased Ford workers' pay dramatically because he wanted them to be able to afford to buy the cars they were building. Some of the downward economic pressure on workers today comes because of the declining union membership rates that erode labor's ability to win a fair share of the economic pie. Increasingly, larger and larger pieces of that pie go to shareholders, executives, Wall Street bankers, and others at the top.

The Occupy movement, and the alliances that unions formed with it in 2011, represented popular dissatisfaction with the status quo – a status quo that has arisen as unions have been vilified and have lost leverage to fight for a fair share of economic gains not only for their members, but for the American middle class in general. It is stunning, in fact, that weekly earnings for rank-and-file employees today have not increased in real terms for decades. Some segments of the current workforce now earn less in real terms than they did thirty years ago.

Government data released in October 2011 revealed that median pay for all American workers fell in 2010 to $26,364, down 1.2 percent from the previous year. Median pay was at the lowest level, after adjusting for inflation, since 1999. Certainly, factors such as increased globalization, expanded use of technology, new entrants into the workforce, and the economic collapse that began in 2008 all contributed. But another major factor is the decline in the bargaining power of unions.

Research on income numbers by David Madland and Nick Bunker at the Center for American Progress has found that if unionization rates increased by 10 percentage points – to roughly the level they were at in 1980 – the typical middle-class household, unionized or not, would earn $1,479 more. "One thing is clear," the study's authors argue, "stronger unions make a stronger middle class." They continue:

> A stronger middle class is the foundation for a vibrant American economy. [Unions] ensure that workers are considered in corporate decision-making and provide job training that helps workers advance in careers. In the political arena, unions get workers involved to boost voting rates, and are champions of economic programs that create a strong middle class. They pushed for and have defended Social Security, Medicare, family leave, the minimum wage, and more recent policies, such as health care reform.[7]

Other research by sociologists Bruce Western and Jake Rosenfeld has found that the decline of unions accounts for one-third of the rise in inequality in the United States over the last thirty years.[8] Inequality is the enemy of a strong democracy that has the vital civic engagement of its citizens. The share of pretax income taken by the richest 1 percent of Americans more than doubled between 1974 and 2007, rising to 23 percent from 9 percent according to the U.S. Census Bureau. And the ultra-rich, the top 0.1 percent of Americans, took an astounding 12.3 percent of America's total pretax income – four times what they took in the mid-1970s.

Some pundits argue that workers are just caught up in a world economy where inequality is inevitable. But a study by Thomas Harjes, an economist for the International Monetary Fund, reported that from the late 1970s to the early 2000s, inequality in Europe "rose modestly or even declined" while it skyrocketed in the United States. Those European countries where unions were strong faced the same globalization and technology challenges, yet did not develop the wide inequality gap seen in the United States. France, for example, saw a decline in inequality over the last twenty years, according to Harjes.[9]

Germany, as noted above, has a strong labor movement and has not developed an inequality gap, nor do we see the broad corporate and right-wing attack on unions that characterizes our current American dilemma. German employers generally work cooperatively with their unions. Both custom and statute require that unions and works councils have key decision-making powers.

Instead of the U.S. model of weakening unions, Germany's model of a strong labor movement has helped yield higher wages than those in America, huge trade surpluses, six weeks of annual vacation time, and other benefits by law. As opposed to the anti-labor warfare that we have seen in Wisconsin, Ohio, and Michigan, German employers, labor, and government normally all pull together. Not everything is rosy, and there are exceptions in Germany; but results there show alternative approaches that could strengthen labor-management outcomes here.

The assault on organized labor in the United States comes at a time when Americans of all demographics and persuasions need to act collaboratively to develop creative new ideas to move our economy into the twenty-first century, and to put our country back on a path of sustainable growth. The German example is illustrative of the economic power, and social prosperity, that arises from a healthy working relationship between organized labor, companies, and government.

I sometimes hear people (some of them liberals) argue that unions were needed earlier in our country's history when abuses such as child labor and unrelenting work hours were real problems. Now, they assert, unions have outlived their usefulness in the modern economy. When one reads of janitors at the nonunion company Wal-Mart being locked inside stores for their entire shifts, coal miners killed in disasters like the nonunion

Massey tragedy in West Virginia, and the Latina women at Chef Solutions in Connecticut being forced to trade sex with managers to keep their jobs, it is difficult to ignore how weak this argument really is. Unions need to adapt their practices for a new era, but there is no discounting their necessity in protecting the rights of workers.

The constant anti-labor drumbeat from corporate powers, the right wing, and much of the media, led by Fox News, has an impact on our society and its workers. But there are many indicators that a substantial number of workers would choose to be represented by a union if they could. In 2007, a poll by Peter D. Hart Research Associates found that among nonunion workers, a majority (53 percent) said they would vote to have a union tomorrow, given a free choice.[10] Were that to occur, more than sixty million workers would be added to the union rolls. As the veteran labor expert Philip Dine writes, "If even one-quarter of those 60 million workers actually formed unions, the size of the labor movement would double overnight."[11]

The harshness of today's economy has added to support for labor. In 1984, only 30 percent of nonunion workers polled said they would vote to join a union if they could. That support rose to 39 percent in 1993, 42 percent in 2001, and then 53 percent in 2007. The desire to have union representation thus grew over a period when employers' economic and political power expanded and that of labor weakened. It is no coincidence that the concentration of wealth at the upper echelon of society and the downturn of a prosperous economy occurred at a time when workers' voices were often suppressed by employers and antiunion politicians.

What explains the gap between those majorities now expressing support for joining unions and the failure of that to occur in most workplaces? The clearest reasons involve the harsh antiunion campaigns waged by companies and their hired consultants, as well as the overall weakness of our labor laws and their enforcement, as Dine has pointed out. In a 2007 study, the Center for Economic Policy Research found that one in five active union supporters is fired illegally as a result of union organizing activities.[12] Another study, by labor expert Kate Bronfenbrenner, reported that 80 percent of employers who face a union organizing campaign force workers to go through one-on-one, captive-audience meetings in which they pressure workers with threats, such as the closing of the plant/workplace or transfer of work elsewhere.[13] Only about 1 percent of companies make good on threats to close, but 51 percent of them threatened such closures (even though it is illegal to do so). Bronfenbrenner also found that more than half of the employers with immigrant workers threaten to call immigration officials during union drives.

Human Rights Watch, which conducts highly respected objective examinations of abuses occurring around the world, focused more than a decade ago on American workers' freedom to form unions and engage in collective bargaining. "Our findings are disturbing, to say the least," said the study's authors. "Loophole-ridden laws, paralyzing delays, and feeble enforcement have led to a culture of impunity in many areas of U.S. labor law and practice. Legal obstacles tilt the playing field so steeply against workers' freedom of association that the United States is in violation of international human rights standards for workers."[14] A similar study today would find the situation even worse.

The modest reforms in the Employee Free Choice Act proposed after the 2008 election would have helped restore some balance and would have given workers a fair chance to join unions. But that did not occur, largely due to the filibuster process in the Senate.

Labor issues are not the only ones derailed by the filibuster and other forms of political obstructionism. The threat of filibusters has effectively required a supermajority of sixty votes in the Senate to pass legislation. This severely weakens democracy and undermines civic engagement by discouraging the sense among workers and the broader public that positive change can occur if people work hard to win popular support for it. As we look to the future, it is hard to see meaningful labor law reform absent a change in the filibuster rules, even if a majority of the Senate and House as well as the president and the public all support it (as they did early in President Obama's tenure).

The inability to win a supermajority to pass labor law reforms and the renewed attacks on labor following the 2010 elections, particularly on public employees and teachers, bode ill for the future, despite President Obama's reelection and Democrats' success in 2012 Senate races. A key issue then is how labor can expand civic engagement of its members if it must devote almost all its energy to survival amidst this onslaught.

I strongly believe that the relentless attacks that weaken American unions will likely lead to an erosion of civic engagement in the United States, further economic inequality, and a political imbalance of power that can undermine society. Those who support a democracy with the thriving civil engagement of its citizens need to lend their voices in support of organized labor and necessary measures to strengthen unions, rather than allow the erosion that is occurring today. The extreme and unacceptable assault on unions waged by Governors Scott Walker (Wisconsin), John Kasich (Ohio), Rick Snyder (Michigan), and others truly stands out. Their actions in 2011 not only denied workers the right to collective bargaining, but violated both international norms described below and also, inextricably, delivered a harsh blow to the principles of civic engagement that uphold and strengthen a robust democracy.

Although much of the attack on unions following the 2010 elections has been at the state level, it can be seen also at the national level: in the Republican-controlled House of Representatives and on the campaign trail for the 2012 GOP presidential nomination. Mitt Romney, the 2012 Republican presidential candidate (and one perhaps less extreme than others he defeated for the nomination), repeatedly blasted unions during his campaign appearances. He lavished praise on Wisconsin Governor Walker for winning passage of the bill to outlaw public-sector bargaining, and he ended up supporting Ohio Governor Kasich's sweeping antiunion agenda that then was rejected overwhelmingly by Ohio voters in November 2011.

Romney in mid-October 2011 reversed his earlier opposition to right-to-work laws and came out in strong support of national right-to-work legislation that would bar even union security agreements requiring nonmembers to pay for representational services. In his television ads, Romney began to feature his support for right to work. He also devoted great energy to attacking the National Labor Relations Board (NLRB), particularly on the now-resolved complaint filed by NLRB Acting General Counsel against Boeing's decision to relocate work to South Carolina from Washington State in order to retaliate against unionized workers engaging in activities protected under labor law.[15] Romney went so far as to appoint Boeing's lead counsel in the NLRB case as his labor advisor for the presidential campaign.[16]

Not to be outdone, Republicans in the House passed legislation on November 30, 2011, to negate an NLRB rule that sought to give workers a timely vote on whether or not to be represented by a union, rather than the current procedure that allows long delays by employers opposed to unions. Although the Senate is unlikely to pass such legislation, the GOP-led House persists in its war on labor.

Why? Harold Meyerson, a columnist for *The Washington Post*, analyzed Republican motives this way:

> When it comes to elections, unions are still the most potent mobilizers of the Democratic vote – getting minorities to the polls and persuading members of the white working class to vote Democratic. Indeed, Republican gains among working-class whites (whom they carried by an unprecedented 63 percent to 33 percent in 2010) are, above all, the result of the deunionization of that class. An analysis of exit polling over the past 30 years shows that unionized white working-class men vote Democratic at a rate 20 percent higher than their nonunion counterparts. For political reasons, Republicans are determined to deunionize workers even more.[17]

For unions to be a catalyst that encourages and reinforces positive levels of civic engagement by their members, unions have to exist in the first place. The countries that scholars regularly judge to have the most vital civil societies often are those in which unions thrive and are accepted, usually as one of the three "social partners" along with business and government.

I would challenge labor opponents, such as those in Wisconsin, Michigan, and Ohio and in the Republican-controlled House, to name a true democracy that does not have a labor movement participating in the debates on major public questions. For example, the Nordic countries, where democracy and civic engagement thrive, have very strong unions, very low levels of inequality, and good economic growth. Canada, our neighbor and trading partner to the north, has strong unions (including SEIU) and a union density of above 30 percent – more than twice that of the United States. Germany, as noted, has powerful trade unions and tough laws that give workers a strong voice in corporate decision-making. Yet business thrives in these countries, and everyone benefits from unions and management working together for common goals.

Both the hostility of the corporate and political right toward unions and labor's powerful role as a steward of the common good have roots in American history. Unions actually predate our country's founding, as some nonagrarian workers pushed for a greater say than that of the old master-servant relationship.[18] Despite current reverence for the founding fathers, it is important to remember that civic engagement and political democracy had clear limits in America's opening century and even beyond. Voting in most states was restricted primarily to white property-owning males. Women, Native Americans and people of color (both slave and free), and most wage earners had their civic participation severely restricted by law, as John Kretzschmar, director of the Brennan Institute for Labor Studies, has pointed out.[19]

Judges here relied on British law in the absence of statutes on unions and bargaining; as a result, America's early unions were viewed as illegal criminal conspiracies. Employers could form groups to advance their interests, but employees who did so by joining unions engaged in illegal behavior. Over time, wage earners who were not property holders agitated and often got voting rights; workers also began fighting for expanded rights on economic matters.

Unions remained illegal conspiracies in many jurisdictions until the 1930s. As unemployment rose to 25 percent by 1932, a series of laws were passed that helped unions. The National Industrial Recovery Act adopted in 1933 sought greater fairness for workers through provisions that stated: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers." Although a conservative U.S. Supreme Court quickly deemed the pro-labor legislation unconstitutional, the Wagner Act passed by Congress in 1935 led to expanded union organizing in the years that followed.

By the end of World War II in 1945, union membership rose to more than 14.3 million from about 8.7 million in 1940. Predictably, as labor's numbers and power expanded, political enemies mobilized. A conservative Congress targeted unions in 1947 with the Taft-Hartley Act, passed over President Truman's veto; significantly, he called it the "slave labor act." It severely limited labor's right to strike, outlawed secondary boycotts, and banned closed shops that required an employer to hire only union labor. Opponents of the legislation pointed out that it had been drafted not by Congress, but by corporate lawyers working for the Chamber of Commerce and the National Association of Manufacturers.[20]

Despite the setback of Taft-Hartley in the United States, there remained a broad and global consensus that labor was an important component of democracy. The Nazi party viewed unions as a threat, and in 1933 Hitler seized funds of German unions, arrested labor leaders, sent them to concentration camps, and replaced collective bargaining. After World War II, a consensus emerged that unions were crucial to democratic societies as war-torn nations sought to rebuild. Japan had abolished unions, but General MacArthur and the Allies restored them in 1946.

Most significant from the standpoint of civil engagement was the discussion and adoption, with U.S. support, of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948. The declaration is widely viewed as a central pillar of international human rights law. It spells out a range of rights to which every individual is entitled, including the rights to life, liberty, equality of treatment before the law, freedom of movement, right to own property, freedom of thought and religion, freedom of expression, and many others. Article 23 specifically provides: "Everyone has the right to form and to join trade unions for the protection of his interests." It also details other accepted rights, such as equal pay for equal work and decent working conditions.

The global concurrence about the right to form and join unions was further solidified by what are commonly referred to as Core Labor Standards, a set of four internationally recognized basic rights and principles that countries have agreed to follow. They are: freedom of association and the right to bargain collectively; the elimination of forced labor; abolition of child labor; and the elimination of discrimination in employment.

The discussion of unions and civil society expanded significantly as workers in Eastern Europe struggled for democracy. In my late 20s, I watched Lech Walesa, the Polish trade union leader, rally shipyard workers in Gdańsk in a series of strikes that led to martial law and a vicious crackdown by the Communist government. Walesa and the *Solidarnosc* union movement went on to topple the repressive regime in Poland.

President Reagan and many on the political right embraced the *Solidarnosc* union very publicly and repeatedly. But here at home, almost simultaneously, Reagan succeeded in busting the air traffic controllers' union in 1981, setting off a war on labor that has yet to moderate. (The bizarre affection the right has for unions abroad but not at home could be seen yet again in late 2011 during the campaign for the Republican presidential nomination. Former GOP Senator Rick Santorum issued a strong call in Iowa for federal government support for labor unions – unions, that is, in Iran. Santorum wanted the United States to "have several avenues of getting money into Iran to help striking labor unions."[21] But on labor issues on his home turf, Santorum wants to abolish unions that represent federal, state, and local workers; he regularly attacks the NLRB; and he opposes most everything American unions support.)

The civic role played by unions threatened those in power not only in Eastern Europe, but also elsewhere in the world. The ruling elites in El Salvador in the 1980s were complicit in the killing of trade unionists; tens of thousands died at the hands of military-backed death squads. Under apartheid rule in South Africa, independent black trade unions developed negotiating and organizing skills, despite suffering torture and death. Labor was key to the broad mobilization in the period from 1986 to 1994 that brought an end to apartheid; it was then mineworkers' leader Cyril Ramaphosa who negotiated the transition to democracy, and many union leaders entered top levels of post-apartheid government.

Lula da Silva, the thirty-fifth president of Brazil, is another example of the important leadership roles unionists have played in building civil society globally. He left school after fourth grade and went on to work as a metalworker in the São Paulo auto industry. Lula led strikes during the late 1970s and was jailed by the military junta. The skills he honed in the union movement enabled him to go on to become president of his country.

The crucial role that unions have played in Brazil, South Africa, and other countries – from South Korea to Germany – contrasts with the United States, where the voices of corporations and their political allies in the 1 percent have dominated public debate in recent years. This has occurred for a confluence of reasons, but it is important for labor to take a hard look at itself and accelerate the process of change if workers are to play a significant role in shifting the status quo toward progressive outcomes.

Just as unions in other countries have evolved to address tough challenges, so, too, must American unions adapt and change.[22] Labor's 2011 victory in Ohio, overturning the harsh restrictions on collective bargaining rights by a 62-38 percent margin, showed a strong reservoir of public backing for union rights and underscored labor's ability to reach beyond its own ranks to build broad coalition support. A similar show of public support for unions could be seen in California when voters rejected Proposition 32, which was backed by the antiunion Koch brothers (Charles and David). That proposal would have decimated labor's ability to participate in the political process.

Nevertheless, many middle-class Americans have mixed views on unions, and some feel strongly negative. Much of the hostility toward labor is driven by the relentless antiunion drumbeat of the right wing as well as corporate America. But some is a by-product of labor's own shortcomings and the instances in which unions have acted in ways that cut against their role as stewards for society. Let me focus briefly on a few of the issues that have fed negativity toward labor.

First, while unions have a lower rate of corruption than that found in either business or government, there still is a need for strong efforts by unions to root out wrongdoing within their own ranks. As a young activist in my SEIU local union in Pennsylvania, I saw the corrupt president of the United Mine Workers, Tony Boyle, tried and convicted in federal court near Philadelphia for the murder of his election opponent, Joseph "Jock" Yablonski, and Yablonski's wife and daughter. Six years later, James R. Hoffa, who had led the Teamsters union from 1957 to 1967, went missing near Detroit never to be found – presumably murdered by organized crime elements opposed to his regaining power within the union. Such high-profile crimes, while infrequent, have severely harmed labor's image over the years.

Unions, as institutions with millions of members, are not immune to wrongdoing. During my tenure at SEIU, I had to trustee a large local in Los Angeles and permanently ban from membership a member of our International Executive Board after evidence emerged that he had misused member funds. In response, we established a Commission on Ethics and Standards and named outside authorities to it, such as James Zazzali, former Chief Justice of the New Jersey Supreme Court, as well as rank-and-file members and local union leaders. We sought to strengthen an ethical culture in which emerging leaders understand that they are the stewards of their members' resources; this cannot be done in one training session, but rather must be built into leadership development at all levels. Tough internal controls also are needed so that unions protect the workers' money and, more broadly, so that labor's role as a positive civic force is seen by the public.

I think, too, of the case of Barbara Bullock, the former president of the Washington, D.C., Teachers' Union, who served five years in prison for a scheme involving the embezzlement of nearly $5 million of union funds to pay for a lavish lifestyle of fur coats, jewelry, trips, and parties. Her actions unfairly tarred D.C. teachers who every day gave their all in tough classroom environments starved of the resources needed to provide quality education for mainly poor kids.

The American Federation of Teachers (AFT) and the D.C. teachers' union leaders took appropriate action in that sad situation, but whatever damage done by Bullock's malfeasance was minor compared to that inflicted by a much broader and far more sophisticated attack on teachers' unions in the years that followed. A sustained campaign has been waged for some time based on the central (but false) premise that teachers' unions are a root cause of America's education problems.

Many who urge education reform are people of good faith; but some, such as the antiunion Walton family, who owns Wal-Mart, and Michelle Rhee, former D.C. school chancellor, are not. Improving education in America involves developing and supporting our teachers, not constantly attacking them. A study released in 2011 found that teacher morale in the United States was at a twenty-year low. Attacks by those like the Waltons and Michelle Rhee serve only to prevent a climate in which teachers, school administrators, parents, and others can work together to build a more effective student-centered educational system and mobilize to win adequate funding for public education.

It will come as no surprise that I sympathize with the AFT and the National Education Association in this debate. But I do think the attacks on teachers' unions have helped fuel a false narrative of American labor as a special interest that selfishly protects its own at the expense of the broader society. That narrative has a special resonance with the public when it involves America's children, who in fact do deserve far better from our education system. It is easy for teachers' union opponents to attack the "rubber rooms" in New York City, where tenured teachers accused of incompetence or wrongdoing received full pay to sit in sparse rooms and do nothing (until this practice was ended in 2010). It is far harder to shift the focus to innovative labor-management partnerships, such as those in Cincinnati, Oklahoma City, and Pittsburgh, where students are benefiting from teachers and school administrators working together to transform schools servicing primarily low-income communities.

The Washington Post, to its credit, last year highlighted the success of the Montgomery County (MD) Education Association, which has worked cooperatively with the school system there to win a role in personnel decisions, teacher training, and budget decisions. The teachers' union helped create a peer review system that seeks to assist struggling teachers, but also facilitates firing in cases where it is clearly justified. Contrary to the argument of "reformers" such as Michelle Rhee who say that it is nearly impossible to fire a unionized teacher, more than five hundred have been dismissed or resigned in the last decade in Montgomery County with the union contract in place. At the same time, the union has helped convince school authorities that many of the "reforms" advocated by the Walton family, Rhee, and others will not help students in the end. By emphasizing student achievement as their primary goal, the union has won a broad role in shaping Montgomery County's educational program. School employees voluntarily gave up scheduled raises in the last three years to help cope with the budget crisis in the aftermath of the economic downturn, yet the union has protected important health and pension benefits highly valued by its members.[23]

Another step in the right direction occurred in November 2012, when the teachers' union in Newark, New Jersey, ratified a historic agreement that rewards teachers with higher pay and bonuses based on performance. Newark teachers will have a seat at the table evaluating one another, and the contract empowers a majority of teachers in any school with authority to decide issues such as how to adapt school schedules or how to use training and preparation time as they deem in the best interests of their students.[24]

Public employees face a challenge similar to teachers. Again, much of the attack on public workers is driven by forces strongly hostile to unions. But labor's cause is hurt when citizens read of firefighters in St. Louis who receive large disability pensions for being totally and permanently incapacitated, yet who go on to work at new jobs involving physical labor while collecting those pensions. We all honor our firefighters for going into harm's way to save lives, but support for them and their union can erode if the public believes it is paying for a costly entitlement that is unfairly administered. In California, an outcry occurred in 2010 when an administrator for the Forestry Department retired with a check for $294,440 for unused time off – one of nearly four hundred employees who left state jobs with checks equal to or exceeding their previous year's salary. Most people understand that there needs to be some "banking" of time off when public workers, such as prison guards or public safety officers, are denied vacation or holidays due to emergencies or special circumstances. But the backlash to the huge payouts in California clearly hurt public unions and played into the political narrative orchestrated by those whose primary goal is to weaken labor.

Public employee unions needed over the years to break out from the narrow constraints of traditional collective bargaining and negotiate instead not only for wages and benefits, but also for the delivery of high-quality public services. Management usually resisted such efforts, but public worker unions are gaining citizen support by partnering with government to improve public services. Citizens often are frustrated by inefficiencies and bureaucracy and need to see public workers siding with them in the effort to have services delivered better and at fair cost.

Yet another problem unions must confront is the need for greater racial, ethnic, and gender diversity in the labor movement. Looking back in history, African Americans had to fight to join unions, and many American Federation of Labor (AFL) unions in their early years barred blacks from membership, particularly in the crafts. My own union, SEIU, by contrast brought together white and black janitors in Chicago in the early 1900s and, indeed, had an elected vice president and three executive board members who were African Americans. By the 1930s, the Congress of Industrial Organizations (CIO), made up of industrial unions, aggressively recruited black members and became an important force for desegregation and antidiscrimination before many other segments of American society.

In the 1960s, African Americans made up about 25 percent of U.S. union members, but some unions, such as those in the construction trades, continued to bar black apprentices and otherwise limit African American membership. But at the same time, unions such as the UAW and SEIU embraced the civil rights movement, fought racism in the workplace, and joined in the push for antidiscrimination legislation. Unions helped organize the Montgomery bus boycott, joined the Selma to Montgomery march in force, and worked with Dr. Martin Luther King, Jr., who was assassinated while in Memphis to support striking union members.

Given their mixed record through the years, unions today need to face the challenge of becoming more diverse throughout their leadership, from local unions to the very top positions. I used to say frequently that union leaders are too often "male, pale, and stale." In SEIU, more than a million new members joined between 1996 and 2010, and a majority of them were women and workers of color. A concerted effort was made to reflect that in our leadership, and by 2005 we had an executive board that was 40 percent women and 33 percent people of color. But there is so much more that needs to be done in this area.

Unfortunately, many other unions do not do as well at reflecting the diversity of their memberships. If labor is to prosper in the decades ahead, all unions must do a far better job of developing multicultural leadership that is more inclusive of women and people of color. We need more people like Mother Jones and A. Philip Randoph. I am proud that SEIU is today led by a woman, Mary Kay Henry, a veteran labor organizer who also is a leader in America's LGBT community, and Eliseo Medina, a respected figure in the Latino community who has helped lead the national immigration reform effort.

As part of the broad effort for gender and racial equity, labor needs to embrace the movement for immigrant rights more vigorously than it has so far. America needs comprehensive immigration reform that provides a meaningful legal path to citizenship for undocumented workers.

In the past, unfortunately, some unions saw immigrants from Mexico and Central America as threats to their jobs and mistakenly supported bad immigration policies. Today labor is united in pushing for immigrant rights and works closely with grassroots coalitions of religious and community groups both for changes in federal law and also in opposition to racist and reactionary laws recently enacted in states such as Arizona and Alabama. Unions need to be out front on the immigration issue both because it is the right thing to do and because they will benefit as our country's demographics grow more diverse in coming years.

As labor faces strong attacks from antiunion corporations and the political right, there are a number of other changes that must occur if it is to win and expand public support. I pressed to modernize and streamline union structures during my tenure as SEIU president. I based my suggestions for reform on changes that had been made within SEIU over a number of years. Those changes enabled my union to more than double, to 2.1 million members, during my time in office. After a long period of internal discussion within the AFL-CIO in the early to mid-2000s, needed reforms did not seem likely. SEIU and a group of other unions withdrew and formed Change to Win.

Unfortunately, real reform did not develop out of those events, and changes are still needed to strengthen unions. The labor movement needs to:

- Embrace the mission of seeking justice for *all* workers, including, but not limited to, current union members;
- Confront labor's own underlying structural impediments and those of its affiliates;
- Refocus on membership growth through reinvigorated organizing of nonunion workers;
- Modernize strategic approaches to employers in the new, competitive global environment;
- Improve labor's messaging to the broader public, using all the tools of modern technology and communication;
- Widen efforts to build coalitions with citizens' groups, civil rights advocates, church activists, environmentalists, the LGBT community, and others who share a progressive outlook; and
- Expand and improve labor's political effectiveness by further involving workers and their families in the civic process.[25]

In future, unions need to streamline. Many members are divided into national unions that do not have the size, strength, resources, and focus to win for workers against today's ever-larger employers. As the attack on public workers escalated, we had thirteen unions with significant numbers of public employees. Transportation workers were divided into fifteen different unions, health care workers into more than thirty, and manufacturing workers into nine. We need consolidation so that labor can bring size, power, and focus to the table. There are too many small unions that lack what is needed to deliver for their members. When I pushed for change, only fifteen of the sixty-five AFL-CIO national unions had more than two hundred fifty thousand members, and forty had fewer than one hundred thousand. Many of these unions, even with good leadership, do not have the strength to unite more workers in their industry in order to improve workers' lives and civic engagement.

I have proposed, as have others, that we seek to unite the strength of workers who do the same type of work (or are in the same industry, sector, or craft) to take on their employers. And we need to ensure that workers are in national unions with the strength, resources, focus, and strategy to help nonunion workers join together to improve pay, benefits, and working conditions. This also means that unions will have to adopt new strategies of incorporating nonunion workers into their structures, and that they must constantly look to protect the rights of all workers while simultaneously fighting for the rights of their own members.

Because the economy today is global, unions must speed the building of a global labor movement. Transnational corporations move country to country, without national loyalties, to find and exploit the cheapest labor. Today's global corporations have no permanent home, recognize no national borders, salute no flag but their own corporate logo, and move their money to anywhere they can make the most and pay the least.

Global firms have won trade agreements that make it easier to move production, while providing no rights to help workers improve pay, working conditions, and job security. The result of globalization is that workers in any one country cannot set and maintain high labor standards without uniting to raise standards everywhere. If American manufacturing is to recover, unions need to work to level the global playing field so that corporations are made to decide where to locate their production operations based on where the best labor force is, rather than the cheapest.

I also believe that unions need to learn from the success of the Occupy movement, which helped shift the public debate dramatically a year ago. There are moments in which direct action and dramatic militancy can change things. Labor needs a greater boldness, like that evidenced by unemployed workers, students and young people, those who suffered home foreclosures, and others in the diverse Occupy movement.

At the onset, the media and many politicians – conservative and liberal – scoffed at Occupy for not serving up a ten-point program or outlining detailed legislative solutions to the problems it protested. But as time passed, the Occupy movement forced a broad and ongoing national discussion about the central issue of income inequality in America. Unions did the right thing by supporting Occupy while refraining from actions that would have infringed on its independence.

In the face of harsh police repression, Occupy receded from public focus in 2012, but Occupy still serves to remind labor of the importance of direct action and confrontation, which can yield more results than speeches by union leaders at the National Press Club. This is particularly so in an era when strikes by unions happen infrequently given the huge balance of power currently possessed by employers.

Workers going forward need to develop even more effective political action efforts; this is crucial to labor's role as a steward of the common good. With the U.S. Supreme Court's decision in *Citizens United* to allow unlimited political spending by corporations, the challenge to unions today is severe. While unions also are free to spend politically, everyone knows that corporations can far outspend labor and other progressive forces.

With the intensity of the 2012 campaign now behind us, one cannot help but remember the movement of hope that occurred at the beginning of the Obama administration four years ago. It came about in part because union members did what the civic textbooks urge: they participated in the electoral process.

SEIU implemented a program a few years ago called "Walk a Day in My Shoes" that put politicians to the test. Candidates had to earn the union's endorsement in part by spending time at home and on the job with workers. So in August 2007, then-Senator Barack Obama arrived before dawn at the home of Pauline Beck, an SEIU home care worker in Oakland, California.[26] Together that day, Beck and Obama helped John Thornton, an 86-year-old former cement mason with a broken hip and a prosthetic leg, get out of bed, bathe, dress, eat breakfast, and prepare for the day. Obama mopped floors, did some sweeping, and ran loads of laundry. As SEIU member Beck began to outline more tasks for the future president, patient Thornton laughed and said, "She's working the hell out of him."

Other candidates, such as Joe Biden and Hillary Clinton, also got a taste of life as an SEIU member. Biden walked a day in the shoes of school custodian Marshall Clemons, and Clinton went through a shift with a registered nurse. John McCain and the other GOP candidates all declined to participate.

SEIU members also challenged presidential candidates in 2008 to release a detailed health care reform plan. And the union pressed them on immigration reform, jobs, and workplace fairness issues, among others. SEIU initially let state councils go their own way, but after Obama's win in Iowa, there was strong rank-and-file pressure to endorse the Illinois senator, which the union did in February. SEIU members in their purple T-shirts and jackets went out knocking on doors, passing out campaign literature, calling voters from union phone banks, and using every modern campaign tool available.

Underscoring its civic engagement role, the union had done extensive training of members in their locals. Those skills had been honed in political races from local school boards to state legislature campaigns, House and Senate contests, and, of course, the presidency. More than three thousand SEIU members and staff worked full-time in the 2008 Obama campaign, pounding the pavement and talking with voters in nineteen target states. More than one hundred thousand SEIU janitors, nurses, home care and child care providers, and others volunteered to work after their shifts and on weekends.

Data were not yet available for the 2012 elections at the time of this writing, but a nationwide survey of SEIU members commissioned by the union after the 2008 election found that 77 percent voted for Obama and 21 percent for McCain. Of the nineteen states that SEIU targeted, Obama carried seventeen. SEIU members helped win eight of the eleven targeted Senate races and twenty-two of twenty-nine targeted House races. SEIU workers knocked on 3,571,955 doors seeking support; made 16,539,038 political phone calls during that election cycle; sent out 5,125,378 pieces of campaign mail; registered more than 227,000 new voters in battleground states and California; and helped 10,992 voters to cast early ballots or vote absentee.

Catalist, a data services firm, issued an analysis of the 2008 election using its detailed database of all voting-age individuals in the United States. The firm provided data services to a majority of the progressive political community that year, including SEIU, so it had the ability to compile an increasingly accurate picture of the American electorate and the forces influencing it. Catalist independently was able to break out data on the efforts of SEIU members, finding that they turned out at higher rates than nonunion workers.

Catalist also reported that 88 percent of SEIU activities were done person-to-person through live phone calls (64 percent) or in-person interactions (24 percent). That was about 50 percent more than the average of all progressive organizations in 2008. SEIU alone did more overall voter contact in Virginia (20 percent), New Mexico (13 percent), and Colorado (8.5 percent) than any force, including the campaigns themselves and the party committees.

In Indiana, after subtracting the work of the Obama campaign, data showed that more than 40 percent of all voter contact was done by SEIU. Catalist reported that SEIU members knocked on 118,765 doors in Indiana; made 186,145 phone calls to voters; and registered 14,003 Hoosier voters. That huge outpouring of individuals engaged in electoral participation had a big impact: Obama won the state by a margin of 25,000 votes.

Other unions also performed at high levels in 2008. And if we look more broadly at the rate of voter participation as one metric for civic engagement, it is clear that unions are an important element of increased turnout. Political scientist Benjamin Radcliff and Patricia Davis, of the U.S. Department of State, studied nineteen industrial democracies around the world and all fifty U.S. states. They found that aggregate rates of turnout are affected strongly by the strength of the labor movement: "The results indicate that the greater the share of workers represented by unions, the greater is the turnout."[27]

De Tocqueville feared domination of society by the state and saw the Americans he studied in the 1830s to be joiners of private associations that counterbalanced the state. He also argued that economic greed fosters political apathy. Unions historically have helped counter that apathy, but Tocqueville's fear of greed can be seen in the growth of inequality, as discussed above.

Legal scholar Lawrence Lessig and Glenn Greenwald, a writer now at *The Guardian*, have argued effectively that policy outcomes today often are indifferent to the will of the people and to democratic debate.[28] The power of money in politics has enabled elites to shape outcomes that are at odds with most voters. In a discussion of Lessig's book *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*, he and Greenwald agreed that the Occupy protests in late 2011 expanded rapidly and developed resonance because people now understand that voting no longer fixes systemic problems in our "money for influence" culture. Greenwald says that "the only recourse for citizens becomes either passive acceptance of their powerlessness (i.e., apathy and withdrawal) or disruption and unrest fomented outside the electoral system." More people today, including union members, fear that both political parties are too subservient to corporations, which seem to own the political process, and that citizens, as Lessig argues, have largely lost the ability to affect what government does.

When we look at the period following the 2008 economic collapse, one might have expected very tough legislation and regulations on banks and Wall Street aimed at preventing a future reoccurrence. Instead, even the very modest Dodd-Frank reforms – far short of the retooling of the financial sector that is needed – continue to be resisted and watered down by members of Congress whose campaigns are funded by the very institutions opposing regulation.

We have thus entered an era that is very threatening to civic engagement and democratic society. People who vote for "change they can believe in" understandably become disillusioned by not seeing that promise become reality.

America is a country divided. The process has broken down. The danger is we no longer seem capable of transcending our divisions to accomplish anything. Our checks and balances allow a minority – usually a small minority – to block the will of the majority on issue after issue. Debt ceiling approval and disaster aid end up being levers for political hostage-taking by Republicans in this new era.

The *Citizens United* decision by an extremist and activist conservative Supreme Court will only worsen the huge and corrosive impact of money – mainly corporate and right-wing money – that now further floods our public debate. The current voter suppression agenda gives further cause for concern, as Republicans and their corporate/right allies push to deny voting rights through new restrictions (allegedly intended to prevent fraud that most observers agree is minimal).

Unions are the only segment of civil society with the resources and grassroots numbers to provide some counterbalance on both the political and economic fronts; that is why labor has been targeted by state politicians in Wisconsin, Ohio, and Michigan, and by GOP presidential and congressional candidates nationally. Those who believe in strong civic engagement as a foundation for a vigorous democracy need to speak out against the wave of anti-labor legislation and action around the country. And they need to support new steps to strengthen workers' abilities to exercise their endangered right to join unions and participate fully in our system as a counterbalance to the growing inequality, both political and economic.

There are millions of workers out there like Lucia, the immigrant janitor in Los Angeles fighting for a better life for her children with the skills she gained through the union – the same union that also helped her to win decent wages and a better life for her family. Lucia's future, as well as America's, will be bright indeed if the current assault on labor can be rebuffed and unions can expand their role as stewards for the public good – and as defenders of efforts by the 99 percent to reduce inequality and protect democracy.

ENDNOTES

1 SEIU Local 1877 is part of SEIU United Service Workers West, which represents more than forty thousand janitors, security officers, airport service workers, and other property service workers in California.

2 Veronica Terriquez, "Schools for Democracy: Labor Union Participation and Latino Immigrant Parents' School-Based Civic Engagement," *American Sociological Review* 76 (4) (August 2011). The quotes from Lucia in the preceding paragraphs are taken from Terriquez's article.

3 Don Stillman, *Stronger Together: The Story of SEIU* (White River Junction, Vt.: Chelsea Green Publishing, 2010).

4 Bureau of Labor Statistics, "Union Membership (Annual)," press release, January 21, 2011.

5 Ibid.

6 Ibid.

7 David Madland and Nick Bunker, "As Unions Weaken So Does the Middle Class: New Census Data Shows the Importance of Unions to the Middle Class," Center for American Progress Action Fund, September 23, 2011, http://www.americanprogressaction.org/issues/2011/09/madland_unions.html.

8 Bruce Western and Jake Rosenfeld, "Unions, Norms, and the Rise in U.S. Wage Inequality," *American Sociological Review* 76 (4) (August 2011).

9 The study is cited in Thomas Geoghegan, *Were You Born on the Wrong Continent? How the European Model Can Help You Get a Life* (New York: New Press, 2010), 187.

10 Philip M. Dine, *State of the Unions: How Labor Can Strengthen the Middle Class, Improve Our Economy, and Regain Political Influence* (New York: McGraw-Hill, 2008). Dine, whose work I draw on here, was the highly respected labor reporter at the *St. Louis Post-Dispatch* for many years and now works for the National Association of Letter Carriers.

11 Ibid., 140–141.

12 Ibid., 138.

13 Ibid., 137.

14 Ibid., 139–140.

15 See John Logan, of San Francisco State University, writing in *The Hill*, http://thehill.com/blogs/congress-blog/presidential-campaign/185651-romney-puts-anti-union-politics-front-and-center.

16 The NLRB-Boeing issue may have helped Romney in South Carolina, a state not in play in 2012. Romney's broader attack on labor did not help him in key swing states, such as Ohio and Michigan.

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18 John Kretzschmar, "A Little History of Unions and Civic Engagement," William Brennan Institute for Labor Studies, University of Nebraska at Omaha.

19 Ibid.

20 Philip Dray, *There is Power in a Union: The Epic Story of Labor in America* (New York: Doubleday, 2010), 497. Dray's history of the American labor movement is a good source for those interested in how unions evolved.

21 Evan McMorris-Santoro, "Santorum: Labor Unions Are Force For Good . . . If You're Iranian," Talking Points Memo, November 19, 2011.

22 A discussion of the union reforms that I and others proposed to the AFL-CIO during the last decade can be found in Stillman, *Stronger Together*.

23 Michael Alison Chandler, "Redefining Unionism: Montgomery Teachers' Path Values Partnership, not Confrontation," *The Washington Post*, March 10, 2012.

24 Andy Stern and Eli Broad, "Teachers Deserve This 'Thank You,'" *The Huffington Post*, November 15, 2012.

25 For more detail, see *Stronger Together*, from which these recommendations, as well as the following discussion of streamlining, are drawn.

26 See Stillman, *Stronger Together*, chap. 27, from which this discussion of SEIU's role in the 2008 election is drawn, along with internal SEIU reports.

27 Benjamin Radcliff and Patricia Davis, "Labor Organization and Electoral Participation in Industrial Democracies," *American Journal of Political Science* 44 (1) (January 2000): 132–141.

28 See Glenn Greenwald's discussion with Lawrence Lessig on the blog FireDogLake's Book Salon, http://fdlbooksalon.com/2011/10/08/fdl-book-salon-welcomes-lawrence-lessig-republic-lost-a-declaration-for-independence/.

Philanthropy, the Nonprofit Sector & the Democratic Dilemma

Peter Dobkin Hall

Abstract: The central dilemma of American democracy is the tension between "voice" and "equality": between the Constitution's unconditional guarantees of citizens' expressive, associational, and property rights and the legal and political equality that is the foundation of majoritarian decision-making. Philanthropy and nonprofit organizations – which enable citizens to give money and time to support causes in which they believe – have posed this dilemma with unusual force, allowing moneyed minorities to oppose and sometimes overwhelm the popular will. In the past, these assertions of private power have inevitably aroused popular opposition producing legislative and regulatory outcomes that have maintained a balance between voice and equality. Today, with unprecedented accumulations of wealth and legal changes permitting the unrestricted use of wealth in politics, the unchallenged exercise of private power through philanthropy and the nonprofit sector poses grave threats to the democratic process.

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The components of the nonprofit sector – philanthropy, voluntary associations, charity, and nonprofit organizations – are often regarded as quintessentially civic institutions: avatars of the common good that stand above self-interest and eschew partisanship.

But despite their proclaimed high purposes, at no time in American history – not even now, when private wealth and its creators are so effusively celebrated – have these nonprofit institutions been unshadowed by public skepticism and distrust. Inevitably, private initiatives in the public interest, whether promoted by wealthy individuals or by groups of citizens in support of causes that do not command majority support, are – and always have been – problematic among a people with a foundational commitment to democratic governance and principles of equality.

Tensions between political and legal *equality* (with its corollary, majority rule) and the *voice* provided citizens by the Constitution's First Amendment – which guaranteed our expressive (freedom of speech, worship, and the press), associational (assembly and petition), and property rights (including giving and volunteering) – have been both endemic and persistent since colonial days.

In its purest form, eighteenth-century democratic theory envisioned the state as the instrumentality through which citizens exercised their rights. It frowned on private associations and activities that weakened or challenged elected governments. Not only were political parties and factions regarded with suspicion, any and all kinds of private associations were viewed as instruments for advancing private interests at the expense of the people, the common good, and the state.

James Madison's famous Federalist No. 10 (1787) addressed the hazards that "factions," as associations representing special interests, posed to democratic government. George Washington himself warned in his 1796 Farewell Address against "all combinations and Associations, under whatever plausible character, with the real design to direct, controul, counteract, or awe the regular deliberation and action of the Constituted authorities." These, he asserted, "serve to organize faction, to give it an artificial and extraordinary force; to put in the place of the delegated will of the Nation, the will of a party; often a small but artful and enterprising minority of the Community." They are likely, he declared, "in the course of time and things, to become potent engines, by which cunning, ambitious and unprincipled men will be enabled to subvert the Power of the People, and to usurp for themselves the reins of Government; destroying afterwards the very engines which have lifted them to unjust domination."[1]

Practical necessity compelled Americans to accept – and ultimately to embrace – philanthropy and voluntary associations as indispensable to democratic politics and market capitalism. Standing alone among an unconditionally equal citizenry, as De Tocqueville noted, an individual was powerless.[2] Only by combining with others could individuals influence government and, failing that, join together to do what government could or would not do. It was not long before groups like the conservative Society of the Cincinnati, representing the views of the "wealthy, learned, and respectable," and the radical democratic societies, which assembled more humble citizens, matured into political parties – the Federalists and the Democratic Republicans – which have, in one form or another, dominated American politics ever since.

Because it can be wielded only periodically, the vote is, at best, a blunt instrument for influencing government.[3] There are other more effective ways of influencing the state – demonstrating, lobbying, letter-writing, editorializing, participation in public meetings, litigation, political contributions, and organizing – that can empower vocal minorities not only to influence the actions of political bodies, candidates, and officeholders, but also to shape opinion and mobilize the public.

But explicit political action is not the only means of shaping and influencing public policy. Even before the Revolution and the ratification of the federal Constitution, Americans had begun to learn that crafting fellow citizens' values and beliefs could have powerful political consequences.[4] As early as the mid-eighteenth century, churches, schools, and colleges were all being used to promote ideas and practices that often ran counter both to ecclesiastical and political establishments and to popular opinion.

The ratification of the Constitution effectively nationalized politics and empowered a new mass of citizens. As a result, the cultural, economic, and social leaders who once could count on deference to maintain their influence found themselves increasingly excluded from power. In the early nineteenth century, these disempowered elites increasingly turned to philanthropy and voluntary associations to promote views and causes that could neither muster popular support nor enlist the resources of government.[5]

This is not to suggest that the agendas of these disenfranchised elites were necessarily malign. In the antebellum period, when few states were willing to tax their citizens to support education, the willingness of committed citizens of means to establish private academies and support private higher education was no doubt admirable and, more often than not, produced cohorts of educated citizens essential to the new republic. At the same time, the plurality of religious and political views that flourished ensured that these private cultural enterprises produced a widening variety of perspectives and skills.

Still, the fields in which eleemosynary corporations were becoming most active – higher education, health care, religion, and social welfare – were likely to be led by the institutions that commanded the greatest material support. In higher education, Harvard, which could elicit the generosity of Boston's increasingly wealthy elite, and Yale, which drew on smaller but more numerous contributions from the nation's evangelical Protestant network, emerged as America's leading colleges by the middle of the nineteenth century.[6]

While Harvard and Yale attracted their share of striving young men of humble origins, they also increasingly served the elites whose generosity enriched them – by educating their sons and sending them off into careers as corporate executives and leaders of the learned professions. Harvard helped Boston, as Oliver Wendell Holmes put it, "drain a large watershed of intellect" and attracted to the city the "promising young author and rising lawyer and large capitalist" – and "the prettiest girl." In doing so, Harvard made Boston one of the nation's chief producers of human and intellectual capital.[7]

Although Boston's growing wealth produced a virtual tidal wave of philanthropic giving by the mid-nineteenth century, such generosity could not dispel public suspicion of donors' motives. Giving an overview of Boston's charities in 1845, Harvard Treasurer Samuel Atkins Eliot complained that

> persons who are farmers or mechanics in this country often use a language and exhibit a tone of feeling which are inconsistent with the state of things here, and are applicable only to what is found in Europe. They talk of oppression of the rich; when there is not a rich man in America that can, and perhaps not one that wishes, to oppress them.

"Riches alone do not enable a man to be much of an oppressor anywhere," Eliot continued,

> and in this country the rich man can cut no figure at all in that line. There must be position and privilege superadded to wealth to make it possible to oppress, and in New England neither that position nor that privilege can be attained by any body. So far is the rich man from having attained them, that he is, in truth, farther from them than other persons. He is jealously watched, constantly suspected.[8]

While suspicion of the "voluntary system" was unable to prevent the emergence of powerful private institutions in New England, it was far more effective elsewhere in the country.[9] Both New York and Pennsylvania annulled British charities laws that had been retained in Massachusetts and Connecticut, substituting their own indigenous legal codes.

In 1784, New York created an oversight body, the Regents of the University of the State of New York, which exercised broad authority over all charitable, educational, and religious institutions. In the 1820s, New York's legislature passed laws that gave the state authority to regulate the size of institutional endowments and to limit the proportion of estates that could be bequeathed for charitable purposes. Pennsylvania not only delayed giving its courts equity jurisdiction (and with it the power to enforce charitable and other trusts) until the 1870s, it also embraced highly restrictive criteria – the purely public charities standard – for what qualified legally as a charity. Philadelphia may have been the "city of brotherly love," but its solicitude did not extend to organized charities. And despite their wealth, until the last decades of the nineteenth century, both New York and Pennsylvania lagged far behind New England in charitable giving and in the establishment of eleemosynary corporations.

In the South, hostility toward private giving and voluntary associations was even more overt. Some states forbade the establishment of charitable corporations. Others permitted them, but with charters that limited their life spans and mandated the presence of public officials on their governing boards. An 1832 Virginia Supreme Court decision regarding the property holdings of charities captured Southern attitudes toward private philanthropy, warning of "the whole property of society" being "swallowed up in the insatiable gulph of public charities."[10]

This hostility toward private charity also manifested on the federal level. In 1835, the U.S. government was informed that James Smithson, a wealthy British amateur scientist, left the bulk of his substantial estate – a half-million dollars – "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men."[11]

President Andrew Jackson – as a Southerner with a deep-seated hostility to private philanthropy – curtly notified Congress of the bequest, noting that the Executive had no authority to take any steps for accepting the trust nor for obtaining the funds, and that it was Congress' responsibility to take such measures as it deemed necessary.[12] When the Senate moved to approve the Judiciary Committee's report that confirmed the Smithson trust, an acrimonious debate broke out. Senator William C. Preston of South Carolina led off the opposition, mixing traditional Jeffersonian opposition to private endowments with aggressive nationalism. On the one hand, Preston questioned both the propriety of the government's accepting the legacy and whether its powers extended to executing the purposes of the trust; on the other, he argued that if the bequest were to be accepted, it should be applied to national purposes, not merely to the benefit of the citizens of the District of Columbia. Denying that the government had the authority to receive and administer such a trust, Preston declared that the "donation had been partly made with a view to immortalize the donor, and that it was too cheap a way of conferring immortality . . . and he had no idea of this District being used as a fulcrum to raise foreigners to immortality by getting Congress as the *parens patriæ* of the District of Columbia to accept donations from them."[13]

Beyond questioning the legality of the nation's receiving the bequest, the congressmen began to fight among themselves about what sort of institution could best increase and diffuse knowledge. Each congressman had his pet scheme, ranging from a national university and a public lecture series through experimental farms and factories. It took until 1839 for the Senate to resolve to create a public corporation, the Smithsonian Institution, which, at its outset, would establish and operate an astronomical observatory and sponsor public lectures on natural, moral, and political sciences.

Congress continued to debate how best to realize Smithson's vision when finally, in 1846, it was revealed that the Smithson bequest had been invested in bonds issued by the states of Arkansas, Illinois, and Michigan – all of which had defaulted on their obligations, wiping out the fund. After weeks of wrangling, much of it still about the legality of the government's accepting the bequest, a phalanx of representatives, led by former President John Quincy Adams, voted to restore the Smithsonian fund and to entrust it to a corporation whose trustees (the Regents) would be elected and appointed federal officials serving *ex officio*. All told, it took more than a decade to overcome opposition to what would eventually become a great national institution.

Northern intellectuals expressed a parallel suspicion of private philanthropic and associational initiatives. In an 1829 essay in the *Christian Examiner*, a leading New England journal of opinion, William Ellery Channing, the "pope" of Boston Unitarianism, warned against the power of voluntary associations: "Let Associations devoted to any objects which excite the passions, be everywhere spread and leagued together for mutual support, and nothing is easier than to establish a control over newspaper." Channing continued:

> We are persuaded that by an artful multiplication of societies, devoted apparently to different objects, but all swayed by the same leaders, and all intended to bear against a hated party, as cruel a persecution may be carried on in a free country as in a despotism. Public opinion may be so combined, and inflamed, and brought to bear on odious individuals or opinions, that it will be as perilous to think and speak with manly freedom, as if an Inquisition were open before us. It is now discovered that the way to rule in this country, is by an array of numbers, which a prudent man will not like to face. Of consequence, all Associations aiming or tending to establish sway by numbers, ought to be opposed. They create tyrants as effectually as standing armies. Let them be withstood from the beginning.

"They are perilous instruments," he cautioned.

> They ought to be suspected. They are a kind of irregular government created within our Constitutional government. Let them be watched closely. As soon as we find them resolved or even disposed to bear down on a respectable man or set of men, or to force on the community measures about which wise and good men differ, let us feel that a dangerous engine is at work among us, and oppose to it our steady and stern disapprobation.[14]

Channing was not alone in his apprehensions. In 1838, Brown University President Francis Wayland, a political economist and the nation's leading Baptist intellectual, wrote a passionate denunciation of associations, published under the title *The Limitations of Human Responsibility*.

Wayland first outlined the moral hazards that associations pose by encouraging citizens to sacrifice their own conscience to that of the group. "When men are thus associated," he wrote,

> it is well known that their feeling of moral responsibility is vastly less acute than when they act as individuals. Associations will perpetrate acts, at which every member of the association would individually

> revolt. Hence, the common proverb that "corporate bodies have no consciences." The leaders throw the responsibility upon the members, and the members throw it back again upon the leaders, and between the two, we find that although the thing has been done, yet who is to be blamed for it, it is by no means easy to ascertain.[15]

"What were the *French Jacobin clubs* but *voluntary associations*?" Wayland asked, connecting seemingly innocuous voluntary associations to the emergence of tyranny.

> At first, they were mere societies for the harmless purpose of discussing theoretical questions of civil politics. Soon they were changed into associations, for the purpose of carrying into practice those truths which they supposed themselves to have demonstrated. They were next multiplied, by the establishment of affiliated branches in every town of France, (each one, however, governed and directed by the central association in Paris,) until they were able to control the public sentiment of the nation. They then boldly assumed the government of the empire. The throne and the legislative assemblies were prostrate at their feet. The right of franchise, that palladium of liberty, was valueless; for elect whom you would to be a legislator, he dared not disobey the mandate of the club. Legislative proceedings were regularly decided upon, in the meetings of these voluntary associations, before they were brought forward in the assembly; and the representatives of the people did nothing but record the mandates of a sanguinary mob. Thus was a tyranny enacted, to which the history of the world affords no parallel; and all this was done by men, who, at first, were associated to discuss abstract principles of right, and who were merely pledged to carry into effect some truly salutary measures of reform.[16]

Severely limiting the powers of associations, in Wayland's view, would only protect and empower the individual. "Responsibility, instead of being thrown upon masses," he concluded,

> would be thrown more distinctly upon individuals. Every man, instead of inquiring for the decision of the majority, would be obliged to decide for himself. Instead of following thoughtlessly the movement of public opinion, every man would learn to act from the promptings of individual conscience and duty. Public opinion would thus be formed by the deliberate reflection of every individual acting in the fear of God, instead of being formed by the clamor of men who "make a trade of philanthropy."[17]

Despite restrictive charities laws in most states outside of New England, private philanthropy and voluntary associations continued to grow and spread throughout the United States. Just as the Civil War stimulated the growth of enormous corporate business enterprises as components of an emergent national economy, so it also fueled the burgeoning of associational and philanthropic activities.[18]

A key element in the Union cause was the U.S. Sanitary Commission, a federally chartered but privately funded relief agency that took charge of the medical and public health tasks associated with the war effort. After the war, a host of voluntary organizations played key roles in the reconstruction of the South, building churches, schools, and social welfare agencies to help millions of emancipated slaves adjust to their freedom. These initiatives excited as much hostility as admiration. Called "Gideonites" (after the Old Testament hero) by their admirers, these reformers were known as "carpetbaggers" by their detractors. As the failure of Reconstruction and the disenfranchisement of African Americans in the decades following the war suggests, the currents of racism ran deep on both sides of the

Mason-Dixon line and doubtless shaped the attitudes of many Americans. Nonetheless, Reconstruction had a major impact on philanthropy, encouraging a number of wealthy Americans – among them, international banker George Peabody – to establish the forerunners of modern grant-making foundations to support educational activities in the South.[19]

The increasingly national character of economic, social, and cultural life helped foster other ambitious associational and philanthropic initiatives. In the decades following the war, virtually every major profession came to be organized as a national association. Millions of Americans joined fraternal, sororal, veterans, patriotic, and advocacy organizations.[20] As institutions like Harvard and Yale aspired to become national universities, they began to tap the generosity of the enormous fortunes accumulated during and after the war, fundraising not only locally, but also regionally and nationally.

The scale of the fortunes of the post–Civil War "robber barons" challenged their creators to devise entirely new forms of philanthropy – and in doing so rekindled public skepticism about the motives of the extremely rich. In his 1889 essay, "Wealth" (better known as "The Gospel of Wealth"), Andrew Carnegie harshly criticized the passing of large fortunes to descendants and urged his fellow millionaires to use their surplus wealth "to place within the reach of the community ladders upon which the aspiring can rise."[21] The progress of the human race, Carnegie argued, required that millionaires use the same "genius for affairs" that had enabled them to earn great fortunes in redistributing their wealth. Over the course of the next three decades, Carnegie launched increasingly bold philanthropic initiatives, beginning with fairly conventional charities like the Hero's Fund and concluding with broadly purposed grant-making entities like the Carnegie Corporation.[22]

As a devout Christian, John D. Rockefeller tried conscientiously to tithe his earnings, reading and responding to thousands of "begging letters" from individuals and organizations. "Your fortune is rolling up, rolling up like an avalanche," Frederick Gates, Rockefeller's philanthropic advisor, is said to have shouted one day early in the century. "You must keep up with it! You must distribute it faster than it grows! If you do not, it will crush you and your children and your children's children."[23] Like Carnegie, Rockefeller's philanthropy moved from giving that targeted specific problems toward ever more open-ended objectives: the mission of his $100 million Rockefeller Foundation, established in 1913, was simply the "benefit of mankind."

The effort to establish the Rockefeller Foundation ignited a firestorm of criticism. Already regarded as "the most hated man in America" because of monopolistic business practices and bloody suppression of labor unions, Rockefeller's grand philanthropic gesture was widely perceived as a transparent attempt to buy public favor. Most disturbing to the Foundation's critics was not only its extraordinary size, but also the generality of its mandate:

> To promote the well-being and to advance the civilization of the peoples of the United States and its Territories and possessions and of foreign lands in the acquisition and dissemination of knowledge; in the prevention and relief of suffering; and in the promotion of any and all of the elements of human progress.[24]

According to Rockefeller's spokesman, his experience with his earlier philanthropies had led him to push the principle of an "elastic charter," which would give the Foundation a "freedom of scope" that would "not be limited in any way": "wherever arises a human need this board may be in position to meet it, if that shall seem wise."[25]

"Of course no amount of charities in spending such fortunes can compensate in any way for the misconduct in acquiring them," remarked former President Theodore Roosevelt. President William Taft opposed the Foundation, calling it a "bill to incorporate Mr. Rockefeller." American Federation of Labor President Samuel Gompers growled, "The one thing that the world would gratefully accept from Mr. Rockefeller now would be the establishment of a great endowment of research and education to help other people see in time how they can keep from being like him."[26]

If Rockefeller expected that Congress would grant the Foundation complete freedom to select the causes it would support, to co-opt as trustees whomever it wished, and to increase its endowment without limit, he was disappointed. After nearly three years of debate, Congress proposed major limitations on the Foundation's charter. It passed a series of amendments that allowed Congress to "impose such limitations upon the objects of the corporation as the public interests should demand, and that all gifts or property received by the corporation should be held subject to this provision." One amendment "specifically limited" the total amount of property to $100 million and forbade the Foundation from accumulating additional property. Another amendment gave Congress the power to require the dissolution of the Foundation after a century. Another made appointments to its board subject to review by a committee consisting of the President of the United States, the Chief Justice of the Supreme Court, the President of the Senate, the Speaker of the House, and the presidents of Harvard, Yale, Columbia, Johns Hopkins, and the University of Chicago. Among the amendments to the motives of the Foundation was one "to make this munificent gift directly to the whole American people, and forever subject to the control of their elected representatives."[27] Rockefeller representatives agreed to all the amendments, but in the end, even these concessions were insufficient to overcome congressional opposition to the Foundation's proposal. It was eventually submitted to the more pliant New York State legislature, which approved it without any of the congressional reservations.

The resistance to large-scale philanthropy was not based solely on hostility toward the rich. Rather, it rested on deep historical foundations, particularly the long legacy of legal efforts to restrict private giving. The front line of this battle was New York, which had become the nation's economic center after the Civil War and, in consequence, home to the country's wealthiest men – including Carnegie and Rockefeller. As noted, the state's efforts to limit private philanthropy dated back to the eighteenth century and were renewed periodically by legislative enactments and court decisions. These legal obstacles began to capture public attention in the 1880s, as the wealthy attempted to make large charitable gifts and bequests. The first of these collisions between wealth and the law occurred in 1886, when the impecunious nephews of corporate lawyer and former presidential candidate Samuel Tilden challenged his will, which had left the multimillion dollar remainder of his estate to his trustees, with a recommendation that it be used "for such charitable, educational, and scientific purposes" as they might deem "beneficial to the interests of mankind."[28] Given Tilden's influence as a Democratic political leader and the prominence of his trustees, it seemed unlikely that the challenge would be taken seriously. However, Governor David Hill, one of Tilden's political rivals, had stacked the court that would consider the case – and Hill harbored a deep hostility toward private charity. The will was, in due course, declared invalid on a number of grounds including "vagueness" (the failure to specify a particular charitable purpose), improper delegation of powers to Tilden's trustees, and violation of a law forbidding gifts and bequests to charities not yet in being.

The decision in favor of Tilden's "laughing heirs" provoked dismay among the friends of private philanthropy – as well as among those who worried that limiting the ability of the rich to leave money to charity would further isolate the already alarming concentration of wealth. "Melancholy the spectacle must always be," intoned Harvard Law professor James Barr Ames,

> when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction. But society is powerless, in a given case, so long as the forms of law are observed. When, however, charitable bequests have been repeatedly defeated, under cover of law, and that, too, although the beneficent purpose of the testator was unmistakably expressed in a will executed with all due formalities, and although the trustees were ready and anxious to perform the trust reposed on them, one cannot help wondering if there is not something wrong in a system of law which permits this deplorable disappointment of the testator's will and the consequent loss to the community.[29]

The ruling against the Tilden Trust was followed in 1887 by the decision to invalidate a million-dollar bequest to Cornell University on grounds that the university could not legally receive a gift that increased its endowment beyond the amount authorized by the state's legislature. (Like the Tilden case, *Fisk v. Cornell* had been brought by a covetous relative of the testator – in this instance her widower – who also happened to be the university's librarian!)

Ames and others concerned about the future of American philanthropy, as well as the fate of American society should such barriers continue to obstruct the flow of benevolence, launched a stealth campaign of legal reform intended to recraft charities laws in the major industrial states akin to New England's charity-friendly regime. In 1893, New York adopted the Tilden Act, which began with this ringing affirmation of the legality of broad-purpose, open-ended bequests like Tilden's:

> No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty or the persons designated as the beneficiaries thereunder in the instrument creating the same.[30]

By the turn of the century, similar statutes had been passed in Pennsylvania, Illinois, and Ohio, in effect "Bostonizing" charities law in those states and, more important, permitting the kind of open-ended giving that made possible the modern charitable foundation.

The establishment of the Rockefeller Foundation sparked the first congressional investigation of the big philanthropy that was emerging from the great Gilded Age fortunes. Congress worried that these vast accumulations of wealth, devoted to shaping public institutions and public opinion, would be the mechanisms through which the wealthy could exert control beyond the economy. The Senate Commission on Industrial Relations (generally known as the Walsh Commission, after its chair, Senator Frank Walsh) was impaneled at the peak of violent conflict between big corporations and organized labor.[31] The commission had a broad agenda, including the handling of major labor disputes and the Rockefeller's influence on the policies and personnel of the New York Bureau of Municipal Research. But because the debate over the establishment of the Rockefeller Foundation came in the wake of the extraordinarily violent open warfare in the Rockefeller-controlled Colorado coal fields, a significant part of the investigation focused on the Foundation and its own proposed investigation of industrial relations.

The testimony of American Federation of Labor President Samuel Gompers offered a view of what many Americans thought of the social desirability of foundations controlled by the corporate interests investigating labor conditions. "I believe," Gompers stated,

> that such foundations as the Rockefeller Foundation cannot impartially investigate a problem in the field of industry. The whole basic principle upon which that foundation is instituted – the guiding spirit behind it all precludes the possibility of impartial investigation as to the relations between employers and employees.[32]

"As to the desirability of such foundations as the Russell Sage and Carnegie," Gompers continued,

> that may be open to question but there is no dissention among thoughtful and liberty-loving persons as to the position, the object, and the scope and spirit of the Rockefeller Foundation.[33]

"Granting you do not consider that the activities of the foundations named above are socially desirable, please outline," Chairman Walsh asked, "the course of action or character of legislation which you would consider desirable?"

"Insofar as these foundations would devote their activities to the sciences, medical, surgical; to the laboratory, to the contributions toward history; for the arts, the sciences, they would be helpful," Gompers replied.

> But the effort to undertake to be an all-pervading machinery for the molding of the minds of the people for their relations between each other in the constant industrial struggle for human betterment – in so far they should be prohibited from exercising their functions either by law or by regulation. . . . I think one of the worst features, one of the most dangerous features of these foundations is where they undertake to mold the opinion and judgment of the people. I do not think that the Government of our country or that the people of our country are ready to surrender the function of teaching to a private institution such as the Rockefeller Foundation with the history behind that foundation – the means by which their moneys were first made and later accumulated.[34]

But the resistance of Congress to chartering foundations did not prevent the states from doing so. In the years immediately preceding and following World War I, major foundations established themselves and steadily expanded their influence despite episodic public opposition. Their greatest impact was on higher education, where foundation-supported research and reforms in graduate and professional education helped produce enthusiastic cadres of experts who moved easily between the worlds of academic teaching and research and of public policy. Despite political differences between the pro-business Hoover administration and Franklin Roosevelt's New Deal, both depended on the university-based expertise nurtured by the foundations. It was only natural, for example, that Roosevelt turned to the operating foundation, the Brookings Institution, to plan Social Security and that the Hoover Institution became one of the nation's early and leading conservative think tanks. By the end of World War II, foundations were involved in virtually every aspect of American life on both the national and local levels.

World War II, with its high taxes on individual and corporate incomes and excess profits, produced a second massive wave of foundation formation – and, perhaps not surprisingly, revived the Progressive Era suspicions of private philanthropy. Resentment of the ways in which philanthropy was being used as a mechanism of tax avoidance certainly contributed to its negative public image. Another key factor, as the political right began to regroup its forces in the postwar years, was the ways in which foundations had become part of the liberal machinery of government.

The Ford Foundation exemplified both of these characteristics of philanthropy.[35] Because the Ford Motor Company was privately held, the death of its aged founder, Henry Ford, was likely to carry tax liabilities that would exceed the family's ability to continue to control the company. Accordingly, the Ford's estate plan proposed the company's reorganization as a joint-stock company based on two classes of securities, one of which (retained by the family) would carry voting rights, while the other would be donated to a charitable foundation to produce major tax savings for the family. When Henry Ford died in 1947, the estate plan was enacted – creating the largest charitable foundation in the world and enabling the family to pass control of the company from one generation to another without significant tax liabilities.

It took the Foundation several years to define its purposes, but they generally followed a liberal and internationalist bent, much to the annoyance of congressional conservatives, who were already vexed about the profound influence that earlier foundations – particularly those associated with the Rockefellers – had demonstrated during the New Deal. The tax aspects of the Ford Foundation did not provoke a congressional inquiry, since the Internal Revenue Code was in the midst of a long-term revisal that would take nearly a decade to complete. But because conservative outrage over the liberal biases of philanthropy coincided with the emergence of Senator Joseph McCarthy as a public figure, the politics of the foundations became a matter of investigatory interest.[36]

The Cox Committee (1952 – 1953) and the Reece Committee (1953 – 1954), impaneled in the House "to investigate tax-exempt foundations and comparable organizations," launched protracted and widely publicized inquiries into the motives for establishing foundations and their influence on public life. Areas of committee interest included the use of foundations as mechanisms of tax avoidance and corporate control, their influence on the social sciences, their capacity to influence public opinion and policy through their patronage of academic research, their influence on the press and broadcasting, and their role in promoting internationalist foreign policy and supporting subversive activities and institutions.

While the committees determined that the foundations were not supporters of Communism, they criticized their role in empowering donors and administrators who used their power to control research, education, and the media to promote internationalism and moral relativism, which they regarded as threats to democratic governance.[37] Because publication of the findings of the Reece Committee coincided with the censure of Senator McCarthy, its activities produced no legislative outcomes. Nonetheless, the world of philanthropy was put on notice that, as its influence increased, it was likely to be the target of further attacks. Within months, the largest foundations – led by Ford, Rockefeller, Carnegie, and Sage – began organizing what would become a decades-long defense of the public record of foundations, working through new organizations like the Foundation Center Library, which worked to underwrite scholarly research that portrayed American philanthropy in a favorable light.

The political activism of foundations like the Ford Foundation, which contributed to the civil rights movement and other liberal initiatives of the era, set off a new wave of congressional inquiry in the late 1960s, this time in connection with major tax reform legislation. Thanks to a relentless decade of hearings and reports by conservative populist Democrat Wright Patman, and books on the power of the wealthy and privileged by academics such as C. Wright Mills and journalists such as Ferdinand Lundberg, the House Ways and Means Committee and Senate Finance Committee were primed to take on the foundations and the abuses associated with them.[38] Their bitter and angry hearings led to the passage of the Tax Reform Act of 1969, the first serious effort to regulate philanthropy. The bill included limitations on excess business holdings, donor control, and political activity, as well as payout requirements and taxes on the investments of private grant-making foundations.

The legislation so alarmed philanthropic leaders like John D. Rockefeller III and John Gardner that they were moved to create a national body to defend their philanthropic interests, the Commission on Private Philanthropy and Public Needs (better known as the Filer Commission, after its chair, Aetna Life Insurance CEO John Filer).[39] The blue ribbon commission produced a set of recommendations and sponsored the first concerted research initiative on America's charitable tax-exempt domain (which came, as a result, to be known as the "nonprofit sector"). The commission hoped to persuade Congress to shift oversight of philanthropy and nonprofits from the Internal Revenue Service, a tax collecting agency, to a new body, modeled on the British Charity Commission. But this effort died with the election of Jimmy Carter to the presidency. Accordingly, the group refocused its efforts on creating a national trade association to represent nonprofits – Independent Sector – and sponsoring continued university and think tank research and advocacy for philanthropy and related activities.

The third great wave of foundation establishment coincided with the IT revolution and the enormous new fortunes to which it gave rise, as well as with the ideological revolution that discredited government and elevated the market as the source of public good. Unlike its predecessors, this period of growth did not kindle public outrage or congressional indignation, a shift chiefly due to the conservatives' rapid embrace of philanthropy in politics.

For much of the twentieth century, conservatives had been among the leading critics of philanthropy and nonprofits. But this changed after the crushing defeat of Barry Goldwater in 1964, when conservative intellectuals such as Lewis Powell (later to serve on the U.S. Supreme Court) and Irving Kristol began urging the right to create the kind of institutional infrastructure that had enabled the liberals to dominate public life for decades.[40]

Within a decade, policy think tanks like the Heritage Foundation and the American Enterprise Institute and a host of new right-wing foundations became pillars of the new Republican establishment, laying the groundwork for the Reagan victory of 1980 and the conservative revolution that followed. Once the darlings of the left, foundations and other nonprofits quickly became ubiquitous across the political spectrum as sources of policy and shapers of public opinion.[41]

Curiously, modes of activity that had originated as "politics by other means" for disenfranchised elites in the early nineteenth century had become instrumentalities of politics by the early twenty-first century. And the powers of foundations and nonprofits were enhanced by a series of federal court decisions, beginning with *Buckley v. Valeo* in 1976, which equated money with speech and began the process of dismantling campaign finance regulations, first enacted in the Progressive Era to limit the power of wealth in the democratic process.[42]

Supreme Court Justice Lewis Powell played a key role in reshaping charities law in ways that would supply a powerful rationale for the argument that money is speech. In *Bob Jones University v. United States*, a 1983 Supreme Court case regarding the government's efforts to strip racially segregated institutions of their tax exemptions, the court's majority ruled that institutions "seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[43] Although concurring with the majority decision, Powell questioned the court's assertion that the exemption of charitable organizations required that they be in harmony with established public policy. "I am unconvinced," he declared,

> that the critical question in determining tax-exempt status is whether an individual organization provides a "clear public benefit" as defined by the Court. Over 106,000 organizations filed Section 501(c)(3) returns in 1981. . . . I find it impossible to believe that all or even most of those organizations could prove that they "demonstrably serve and [are] in harmony with the public interest," or that they are "beneficial and stabilizing influences in community life."[44]

"Even more troubling," he continued,

> is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole Government." Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view . . . ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice Brennan has observed, private, nonprofit groups receive tax exemptions because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.". . . Far from representing an effort to reinforce any perceived "common community conscience," the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.[45]

"It would be difficult indeed," Powell expanded,

> to argue that each of these organizations reflects the views of the "common community conscience" or "demonstrably . . .

> [is] in harmony with the public interest." . . . They illustrate the commendable tolerance by our Government of even the most strongly held divergent views, including views that at least from time to time are "at odds" with the position of our Government. We have consistently recognized that such disparate groups are entitled to share the privilege of tax exemption.

Given the importance of our tradition of pluralism, Powell concluded, "[the] interest in preserving an area of untrammeled choice for private philanthropy is very great."[46]

Powell argued that tax exemption, rather than serving as a subsidy for organizations supporting government policies, was a subsidy for pluralism and freedom of speech and belief – a view entirely compatible with the notion of money as speech endorsed in *Buckley v. Valeo*.

The process of monetizing politics was completed in 2010, with the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*, which opened the electoral process to unlimited contributions by corporations and individuals.[47] Following that decision, nonprofits began to serve as important conduits of campaign contributions by wealthy individuals, corporations, and trade associations.

In the meantime, the distinctions between nonprofit and for-profit forms were breaking down. Through the 1960s, charitable tax-exempt status had been restricted to organizations engaged in a limited range of charitable, educational, and religious activities. By the end of the century, these enumerated purposes had largely been replaced by a far more expansive nondistribution rule, under which the only criteria for exempt status were that an organization's activities not be illegal, impossible, or impracticable and that financial surpluses, if any, not be distributed to organizational principals.[48] This meant that virtually any organization, regardless of its purposes, could apply for and receive charitable tax-exempt status from the Internal Revenue Service.[49]

At the same time, traditional membership organizations, which had once commanded the loyalty and engagement of millions of Americans, virtually disappeared – to be replaced by nationally headquartered "checkbook membership" entities, in which members had no roles save as financial contributors.[50]

Accompanying this development was a major shift in the sources of nonprofit financing from donations to earned income – which included not only sales of goods and services, but also government contracts. By the early twenty-first century, nearly 90 percent of nonprofit revenues came from earned income and little more than 10 percent from donations. As the distinctions between for-profit and nonprofit enterprises became less clear, the tax privileges accorded the latter became increasingly difficult to justify.[51] More seriously, as nonprofits became increasingly market-driven, their ties to historic missions like social justice diminished.

The erosion of clear boundaries between business and charity was accompanied by a similar erosion of distinctions between nonprofits and government. This was primarily due to conservative policies that promoted the outsourcing of activities that had once been the province of government to contractors, both for-profit and nonprofit.

A few jurisdictions resisted these trends. Pennsylvania court decisions, later codified in statute, made tax exemption contingent on a five-prong test: a) that the entity advance a charitable purpose; b) that it donate or render gratuitously a substantial portion of its services; c) that it benefit a substantial and indefinite class of persons who are legitimate subjects of charity; d) that it relieve government of some of its burden; and e) that it operate entirely free from private profit motive. But Pennsylvania was exceptional in its fidelity to a genuinely charitable standard.[52]

Writing in the late 1980s, political scientist Lester Salamon argued that the partnership that had evolved between government and the nonprofit sector had produced the modern welfare state. Salamon pointed out that while the federal government played a crucial role as a provider of funds and direction, for the actual delivery of services it had depended on other institutions – "states, cities, counties, universities, hospitals, banks, industrial corporations," and, of course, nonprofits. "Far from the bureaucratic monolith pictured in conventional theories, the welfare state in the American context makes use of a wide variety of third parties to carry out government functions."[53]

These third parties, particularly the nonprofit sector, in turn relied on the government to fulfill its own purposes because of a number of key "voluntary failures" in efforts to privately provide for public needs. These included: "philanthropic insufficiency," the inability of the voluntary system to generate resources on a scale both sufficiently adequate and reliable to cope with the human services problems of an advanced industrial society; "philanthropic particularism," the inability of private organizations and their benefactors to identify and focus on the groups most in need of services; "philanthropic paternalism," the undue influence of the wealthy in determining which groups receive services; and "philanthropic amateurism," the tendency to offer moral and religious remedies to problems that demanded more pragmatic solutions.[54]

Significantly, Salamon notes,

> the voluntary sector's weaknesses correspond well with the government's strengths, and vice-versa. Potentially, at least, government is in a position to generate a more reliable stream of resources, to set priorities on the basis of a democratic political process instead of the wishes of the wealthy, to offset part of the paternalism of the charitable system by making access to care a right instead of a privilege, and to improve the quality of care by instituting quality-control standards. By the same token, however, voluntary organizations are in a better position than government to personalize the provision of services, to operate on a smaller scale, to adjust care to the needs of clients rather than to the structure of government agencies, and to permit a degree of competition among service providers.[55]

Unfortunately, the fortuitous complementarities between the private sector and the state described by Salamon three decades ago have largely disappeared and have been replaced by an extraordinary concentration of wealth and power in the hands of a few hundred individuals and corporations. Government no longer has either the resources to compensate for the insufficiency of philanthropic resources, or the authority to counteract the particularism, paternalism, or amateurism of the wealthy who now control not only the major sources of policy (particularly the universities), but also the political process itself.

With the extraordinary growth in wealth inequality over the past quarter century and the increasing laxity of the laws regulating charity, it is hardly surprising that rich – especially the newly rich – have turned enthusiastically to philanthropy. The most recent *Forbes* magazine annual billionaires issue, under the title "making it big, giving it big," was devoted to the ways that the wealthiest Americans, led by Bill Gates and Warren Buffett, were dispensing their charitable dollars.[56] The magazine included profiles of major philanthropists and panel discussions on topics of common interest, giving particular attention to Bill and Melinda Gates, whose foundation, with its $36 billion endowment, is the largest in the world. The Gates Foundation, while notable for the breadth of its interests, which include major efforts to address global health and poverty, is surprising in the shallowness of its understanding of the causes of these problems. An essay by Bill Gates titled "The Power of Catalytic Philanthropy" begins with a paean to the economic system that gave him his wealth. "I am a true believer," Gates declares, "in the power of capitalism to improve lives. Where the free market is allowed to operate, it is agile and creative. It can meet demand the world over and plays a central role in increasing living standards."[57] At no point, either in the essay or in his and Melinda's contributions to the Forbes 400 Philanthropy Summit, did they – or any of their fellow billionaires – address questions of power, powerlessness, or democratic process.

Whatever good they may do in their giving, the Gateses and their fellow megadonors exemplify Salamon's critique of the shortcomings of private philanthropy unconstrained (and evidently uninformed) by the core political and ethical values of the society that produced them. They see no need for fundamental change in the world order. Rather, they remain committed, as one recent critic put it, to "high-tech expert-led solutions, free-market and 'comparative advantage' economics, and to American/western power and global leadership," which soar above "the oft-expressed and lofty interest in feeding the hungry and poor of this world.... The foundations remain primordially attached to the American state, a broadly neo-liberal order with a safety net, and a global rules-based system as the basis of continued American global hegemony."[58]

The ongoing legislative struggle over the national budget reflects this constricted vision. Among the "loopholes" Congress and interested policy-makers are considering eliminating is the charitable deduction. Almost uniformly, the deduction is defended – in the face of obvious facts – both in scholarly journals and in the daily press as essential to sustaining American philanthropy. The reality is that large-scale philanthropy existed long before the charitable deduction, which is less than a century old.[59] Analyses of charitable giving show that lower income Americans, who receive no tax incentives for giving, give as much – or, some scholars argue – greater proportions of household income than the wealthy. (This is called the "U-shaped curve.")[60] Since fewer than half of American taxpayers itemize their deductions – which is necessary to qualify for tax benefits – the deduction is clearly a subsidy for the well-to-do rather than the average taxpayer. In addition, the poorest states in the union – those with the lowest reported household incomes – are the most generous in terms of charitable giving; the most wealthy states are among the least generous.[61] Finally, the overall decline since the 1930s in the proportion of annual income donated to charity suggests that the deduction's impact is far less powerful than we conventionally assume.[62]

Ironically, the larger the scope and scale of philanthropy and the nonprofit sector, the more evident their shortcomings have become. Economic inequality created the very system that made big philanthropy possible. Under the circumstances, it is hardly surprising that contemporary philanthropy is largely unconcerned about growing economic inequality domestically and globally, nor is it surprising that philanthropy has made so little effort to be more publicly accountable or more democratic in its decision-making.

The central dilemmas of private initiatives in democratic contexts, viewed as unsolvable two centuries ago, remain insoluble today: unrestricted expressive and property rights are fundamentally incompatible with legal and political equality so long as government lacks the capacity to counterbalance the power of special interests. For most of our history, government had this capacity, though that is no longer the case.

More worrisome, the extraordinary accumulation of philanthropic resources in the last thirty years and the steadily growing power of nonprofit institutions have not been matched by an expansion of our moral imagination. Huge donations from the titans of technology and finance have not produced any great new institutions (comparable to the modern research university) or initiatives (like the anti-slavery movement) that would make the world more just. Rather, they have served primarily to burnish the public reputations of donors, to promote market triumphalism, and to remove regulations that historically limited the public influence of private wealth.

ENDNOTES

1 George Washington, "Farewell Address," in *Basic Writings of George Washington*, ed. Saxe Commins (New York: Random House, 1948), 608 – 616.

2 "Among democratic nations," Tocqueville writes, "all the citizens are independent and feeble; they can hardly do anything by themselves, and none of them can oblige his fellow men to lend him their assistance. They all, therefore, become powerless if they do not learn voluntarily to help one another. If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy . . . whereas if they never acquired the habit of forming associations in ordinary life, civilization itself would be endangered"; Alexis de Tocqueville, *Democracy in America*, vol. 2 (New York: Vintage Books, 1945), 115.

3 "In contrast to other forms of participation which can be multiplied in volume and which are capable of communicating detailed messages about citizen concerns, the vote is the single mode of participation for which the maximum input is equalized across actors, and it is a singularly blunt instrument for the communication of information"; Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady, *Voice and Equality: Civic Voluntarism in American Politics* (Cambridge, Mass.: Harvard University Press, 1995), 23 – 24.

4 See Charles I. Foster, *An Errand of Mercy: The Evangelical United Front, 1790 – 1837* (Chapel Hill: University of North Carolina Press, 1960); and Clifford S. Griffin, *The Brothers' Keepers: Moral Stewardship in the United States, 1800 – 1865* (New Brunswick, N.J.: Rutgers University Press, 1960).

5 In describing the "remains of the aristocratic party in the United States," Tocqueville writes: "When the democratic party got the upper hand, it took exclusive possession of the conduct of affairs, and from that time the laws and the customs of society have been adapted to its caprices. At the present day, the more affluent classes of society have no influence in political affairs; and wealth, far from conferring a right, is rather a cause of unpopularity than a means of attaining power. . . . As they cannot occupy in public a position equivalent to what they hold in private life, they abandon the former and give themselves up to the latter; and they constitute a private society in the state which has its own tastes and pleasures"; Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage Books, 1945), 186 – 187. In an uncharacteristic lapse, Tocqueville failed to note the extent to which "private society" included private philanthropy and the elite-controlled institutions it supported. On this, see

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7 Oliver Wendell Holmes, *Autocrat of the Breakfast Table* (New York: Sagamore Press, 1957), 119 – 120.

8 Samuel Atkins Eliot, "Public and Private Charities of Boston," *North American Review* 56 (July 1845): 135 – 159.

9 On legal hostility to charities, see Howard S. Miller, *The Legal Foundations of American Philanthropy, 1776 – 1844* (Madison: State Historical Society of Wisconsin, 1961). See also, Peter Dobkin Hall, "Inventing the Nonprofit Sector," in *Inventing the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations* (Baltimore: Johns Hopkins University Press, 1992), 25 – 36.

10 *Gallego's Executors v. The Attorney-General* (3 Leigh (Va.), 450).

11 William J. Rhees, ed., *The Smithsonian Institution: Documents Relative to Its Origin and History*, Smithsonian Miscellaneous Collections, vol. 17, publ. no. 328 (Washington, D.C.: Smithsonian Institution, 1879), 1 – 2.

12 Ibid., 135.

13 Ibid.

14 William Ellery Channing, "Associations," *Christian Examiner and General Review* 7 (1829): 1, 105.

15 Francis Wayland, *The Limitations of Human Responsibility* (New York: D. Appleton & Co., 1838), 109 – 110.

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20 Theda Skocpol, "How Americans Became Civic," in *Civic Engagement in American Democracy*, ed. Theda Skocpol and Morris P. Fiorina (Washington, D.C.: Brookings Institution Press, 1998), 27 – 80.

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24 "Hearing before Committee on the District of Columbia on the Bill to Incorporate the Rockefeller Foundation," Bill S. 6888, 61st Cong., 2nd sess., March 11, 1910, 2.

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27 The Rockefeller Foundation, "Report of the Committee on the Judiciary to Accompany H.R. 21532," Report No. 529, 62nd Cong., 2nd sess., April 11, 1912, 5 – 6.

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Reluctant Stewards: Journalism in a Democratic Society

Michael Schudson

Abstract: Journalists are reluctant stewards for democracy because they believe that democracy makes citizens their own stewards. They resist donning the mantle of moral guides on behalf of those who are authorized to guide themselves. Yet sometimes journalists do exercise responsibility for the public good in ways that are not subsumed under their professional duty to be nonpartisan, accurate, and fair-minded. Examining some of these exceptions, this essay argues that journalistic stewardship should be loosely defined, decentralized, multiform, and open to invention. In fact, today's economic crisis in journalism (and the identity crisis it stimulated) has launched a new set of initiatives – from fact-checking to organized crowd-sourcing – that have each sought to address a specific problem of democracy, truth-seeking, or the public good. Pluralism, pragmatism, and decentralized invention may do better at stewarding democracy than a coherent philosophy of moral guardianship ever could.

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Journalism, for all its occasional lofty pretensions, sits awkwardly in a discussion about stewards of democracy. Journalism is not even supposed to be about stewardship – that is, a kind of trusteeship or moral management suggesting that stewards, like fathers, "know best" (with all the paternalism that this message implies). The premise of "objective journalism" is otherwise: namely, that the citizen knows best and that the journalist is only providing the parts – pre-cut but unfinished – for citizens to assemble themselves. Journalists are reluctant stewards for democracy because they believe democracy makes citizens their own stewards.

However, this philosophy of journalistic professionalism is riddled with self-deception, as the daily practice of journalism regularly demonstrates. There is a long list of exceptions to "just the facts" journalism, including not only disapproved exceptions – advocacy under the guise of objectivity, say – but highly respected ones, too. These range from avowed advocacy on the editorial page to analysis that, without endorsing specific policy conclusions, is more substantially interpretive and context-providing than a straightforward news story. There is also a widely shared view among mainstream journalists that their coverage should be inclusive of women as well as men, young as well as old, racial minorities as well as whites, and non-heterosexuals as well as heterosexuals. Today, news organizations seek diversity in the newsroom as well as in news coverage not to reach a larger market in quest of profit, but to realize ideals of social justice, even though they fought the employment and advancement of women in the 1960s and 1970s.[1]

Patriotism is also part of the package of exceptions. In Europe, it is commonplace in the charters of public service broadcasting organizations to acknowledge and affirm an obligation to serve the needs of national identity and national affiliation even while also meeting statutory requirements to provide programming for recognized minority populations. The BBC, at its beginning, was dedicated to promoting a sense of "Britishness" that included celebrating a distinctively British heritage and even an allegiance to the practices of the Church of England. Stewardship indeed! For many Americans and for most American journalists, such an openly tutelary mission is not only not part of their creed – it would turn their stomachs.

Still, American journalists also act in ways that express obligation to and affiliation with the nation-state.[2] When American journalists have a story they think may reveal secrets that bear on national security, they customarily notify the government ahead of time and even negotiate the content of the story with the White House or relevant executive agencies. This was the case in 1961 when *The New York Times* got wind of the impending Bay of Pigs invasion and voluntarily modified its story on the strenuous urgings of the White House.[3]

It was again the case in 1986 when *The Washington Post* learned of a secret U.S. underwater mechanism code-named "Ivy Bells" that had successfully tapped Soviet cable communications. The *Post* also knew that the operation had been compromised by the efforts of Jack Pelton, a low-level technician for the National Security Agency (NSA) and spy who sold information to the Russians. Newsroom executives at the *Post* met with NSA Director Lieutenant General William Odom, who urged them not to publish anything. Odom contended that any story about Ivy Bells would be dangerous to the country, revealing to the Soviets something they did not know. But they already know, editor Ben Bradlee countered. Nevertheless, Odom said, it was unclear precisely which Soviets knew about Ivy Bells. There might have been internal Soviet secrecy or a cover-up. A story in the *Post* would set off a general alarm in the Soviet Union, increasing Soviet anti-espionage measures – a bad outcome for the United States. Odom's protest was enough to make the *Post* cautious. Successive drafts were written, each with less detail than the one before. Bradlee repeatedly asked his colleagues, "What is this story's social purpose?" In the end, the *Post* published the story – over the objections of the administration – after a back and forth that lasted months.[4]

The *Post* has made similar decisions much more recently. In 2009, as editor Marcus Brauchli recounts it, longtime investigative reporter Bob Woodward received a copy of a confidential report produced by General Stanley McChrystal about the war in Afghanistan. The *Post* informed both the Pentagon and the White House that it planned to write about the report and to publish the complete document on its website. The secretary of defense, national security advisor, and vice chair of the Joint Chiefs of Staff each asked the *Post* to reconsider. Brauchli, in telling this story, has said: "We should pause on that word, 'ask.' ... [I]t is a curiously American phenomenon that the most powerful officials in the world's most powerful country have virtually no power to do anything but ask an editor to weigh the national interests against the impulse to publish and then leave the editor to make his decision."[5] But note that by conceding to the government the opportunity to do the asking, the *Post*, as an institution, recognized obligations beyond journalism in deciding what to publish.

These practices express a sense of stewardship with regard to the public interest – in this case, a public good jointly guarded by the press and the government. This coguardianship is most notable in times of war or other moments when national security appears to be at risk. In the United States, but also in France and Britain, the news media and the state share in what media scholars Daniel Hallin and Paolo Mancini term a "national security culture" in which government officials and journalists "both in some sense represent a common public interest" and therefore institutionalize "relations of trust and mutual dependence."[6] During the war in Iraq, there was great controversy among journalists about the advantages and disadvantages to fair-minded reporting brought about by the system of embedding journalists in U.S. military combat units; but no one raised the question of whether reporters should also be embedded with Saddam Hussein's forces. Leading news organizations have accepted an awkward, but notable, affiliation with their own country's interests.

American journalism professionals understand their job to consist of publishing news. Their professionalism resides in knowing what "news" is, or more assertively, what "*the* news" is, how to locate it, how to verify it, and how to present it. Any decisions that introduce other matters, even if they are considerations that journalists are committed to – social justice or community pride or national security – are uncomfortable. They complicate or pollute the purity of the journalistic task. In 2003, Dean Baquet, who is today managing editor of *The New York Times* but was then managing editor at the *Los Angeles Times*, was involved in a decision about whether to publish a damaging story about Arnold Schwarzenegger, then a leading gubernatorial candidate in California. The paper had gathered a half-dozen credible allegations by women in the movie industry that Schwarzenegger had sexually harassed them. With the story ready to print just days before the election, the editors wondered if they should delay running it until after the election. Would the article not seem to be a "hit piece" sprung on Schwarzenegger? Would the timing not make it difficult for him to respond? Baquet later told a reporter (after the *Times* went ahead and published the story): "Sometimes people don't understand that to not publish is a big decision for a newspaper and almost a political act. That's not an act of journalism. You're letting your decision-making get clouded by things that have nothing to do with what a newspaper is supposed to do."[7]

Baquet's is a revealing and representative statement: journalism is journalism, not politics, and it should stick to that role. Journalism is making information public; choosing not to publish for any reason – except, in Baquet's view, insufficient journalistic quality or the possibility that publishing could endanger a life – abrogates one's professional responsibility. How did such a view of journalism arise out of what had been the standard assumption in nineteenth-century America (and most of Europe) that journalism is and obviously should be a political vocation?

In 1889, Woodrow Wilson, then a political scientist at Princeton, gave an address on the "Nature of Democracy in the United States." He observed that popular education for democracy did not rely only on schools. "Not much of the world, after all, goes to school in the schoolhouse," Wilson noted. "But through the mighty influences of commerce and the press *the world itself has become a school*." He did not say that we live in a "globalized" society, but the implication was clear. The newspaper press, Wilson argued,

> makes men conscious of the existence and interest of affairs lying outside of the dull round of their own daily lives. It gives them nations, instead of neighborhoods, to look upon and think about. They catch glimpses of the international connexions of their trades, of the universal application of law, of the endless variety of life, of diversities of race, of a world teeming with men like themselves and yet full of strange customs, puzzled by dim omens, stained by crime, ringing with voices familiar and unfamiliar.

Nor did he say that we lived in an age of information abundance, but this, too, was his belief: "And all this a man can get nowadays without stirring from home, by merely spelling out the print that covers every piece of paper about him."[8]

In 1889, the typical newspaper was closely affiliated with a political party; its news pages, as well as its editorial page, reflected this allegiance. At the same time, newspapers were only beginning to speak in what we would recognize today as a distinctively journalistic voice. In a study of British journalism, media scholar Donald Matheson finds that modern news discourse, certainly absent in 1880, was not widespread until the 1920s. But it was not, in Matheson's view, that putting news in newspapers was unheard of at that time. There were not only newspapers but also reporters. (Newspapers, or "journals," as they were called, predate the hiring of people to gather news; hired reporters were rare before the nineteenth century.) Rather, it was that a newspaper in 1880 served primarily as "a collection of raw information." By 1930, however, it had become "a form of knowledge in itself, not dependent on other discourses to be able to make statements about the world."[9]

The Victorian newspaper was "a medley of various public styles, voices and types of text." Not until around 1920 did the emergence of "a journalistic discourse" allow "the news to subsume these various voices under a universal, standard voice."[10] Journalism scholar Marcel Broersma, in a study of change in Dutch newspapers, describes the period of the nineteenth century and up to the 1940s as an era in journalism in which reporters had not yet accepted that their job was to "extract news from events." But by the mid-1940s, Broersma observes, "[r]eaders were no longer left to draw their own conclusions; the journalist now told them what the most important information was."[11] Modern news discourse in Holland – borrowed from British and American models – was a mid-twentieth-century development.

The American newspaper adopted a "modern news discourse" well before the Dutch and roughly a generation before the British, in the period from 1890 to 1910. Before that time, the front page had a jumbled, random quality to it. Stories were composed in a variety of voices, and news was arranged on the page (to the extent that it was arranged at all) according to the conveyance by which items reached the paper ("Latest by Telegraph"). Only at the turn of the twentieth century did newspapers begin to utilize front page design – including headline size, number of columns, and placement of stories on the page – to signal to the reader that one item merited attention more than another. Thus, as judgment about the significance of news items became central to journalism, a more uniform journalistic stance and voice emerged. At about the same time, newspapers adopted the *summary lead*, an opening paragraph in each story that quickly presented the most newsworthy "who, what, when, where, and – sometimes or by implication – why" of the story to follow.[12] In the layout of the page, the structure of the news story, and the delegation of an overwhelming amount of the news space to the work of full-time journalists, modern news discourse emerged.

All of this is to say that the journalism we often take to be "traditional" is only about a century old. The notion of journalistic professionalism that has accompanied this twentieth-century phenomenon is a strong, self-conscious commitment to a news-gathering mission that transcends parochial allegiances and even, to some degree, national borders. Journalistic professionalism erects partial shields against the demands of state or source control, audience preferences, and commercial pressures. It does not share all the major attributes of "classic" professions such as law, medicine, and the clergy. Journalists' professional independence is tempered by reporters' (sometimes abject) dependence on political insiders for content. The information that insiders provide to journalists is then relayed to the general public through news stories about electoral contests and the operation and performance of government. Ever present in this process is the danger that journalists will become the unpaid public relations agents of public officials and political candidates who have the power to turn on and off the spigots of political information. (Of course, political news is not the only news, but it is the news most closely identified with journalism's democratic rationale.)

The other danger is that journalists are vulnerable not only to their sources but to their audiences or to the drive to attract an audience. This is scarcely unknown in other professional pursuits. Even members of the clergy want to draw a crowd at occasions other than the christenings, marriages, funerals, and high holidays that ensure a captive audience. To this extent, the clergy, too, are market oriented; they strive to invent weekly services that appeal to their congregation and create a buzz. Still, they are not answerable to boards of directors who must award shareholders a return on their financial investments.

Further, journalists have little control over who may enter their field. They cannot prescribe a course of study or a degree, as in law or medicine, nor do they have mechanisms for removing members of the profession who fail to live up to professional ethics, the way bar associations and medical societies do. So journalists are vulnerable to the seductions of the marketplace. Their task as professionals is not to find an audience but to find an audience without prostrating themselves before its tastes and prejudices.

The power that sources and audiences exercise over news makes stewardship problematic because journalists do not control their own vocational agenda. Another difficulty is that journalists are resistant to the idea of stewardship itself. Journalists frequently enter the field with high moral purpose along with a love of writing, photography, or digital expression; perhaps a sense of adventure; and often an ambient curiosity rather than a focused intensity. They also have, or develop, a pride in their familiarity with practical life. They resist assuming too much in the way of moral responsibility; they object to choosing a topic or adopting a tone as if they were drafting Sunday's sermon. Journalists are determined to face facts: *New York Times* reporter Harrison Salisbury recalls in his memoir that he had little use for ideas and a "fierce antagonism to ideologues." He liked to see himself as "a hard-hitting, two-fisted, call-them-as-they-come reporter." Salisbury was guided by his "Minnesota turn of mind" and his "commonsense approach." For him, as for so many reporters, the rule of journalism is to leave codes, doctrines, and textbooks behind and be led by reality itself.[13]

This has usually meant placing a higher value on reporting than on opining. But even opinion-spouting journalists often refuse to issue their views from Mount Olympus. Political commentator Andrew Sullivan rejects "[t]he notion that journalists have reputations, that we should be up on a pedestal." "[M]aybe it's because I am British," he suggests, but "I think we're the lowest of the low. I think our job is to say things that no one else will say and to find out things that make people very uncomfortable, the powerful and the powerless. I think our job is not to worry about the impact of what we find out and say but to say what we think and to report what we see."[14] Sullivan, of course, is no ordinary journalist. Equipped with a Harvard Ph.D., he has successfully reached the public since 2000 primarily as a blogger.

Is Andrew Sullivan's position less responsible than Marcus Brauchli's, as discussed above? Brauchli's argument sounds more grown-up; he speaks as someone aware that he is in a position to do great, even irreparable, harm to the world not only by reporting poorly but by reporting without recognition of overarching loyalties – including fidelity to the well-being of a polity and a political system that enables the press to be formally and legally autonomous. Sullivan, by contrast, identifies himself with the "lowest of the low" and revels in making trouble. Is Brauchli the parent, Sullivan the rebellious child? Is one position better for journalism than the other? Brauchli is the old steward of moral responsibility, even though he invokes that obligation only at the margins – that is, only at the uncomfortable extremes where everyday acts of reporting prove insufficient to the weight of the world on journalists' shoulders. Sullivan speaks for everyday journalism as a truth-regarding, heat-seeking missile for attacking ignorance and thoughtlessness.

The absence of a self-conscious and consistent philosophy of stewardship should not be mistaken for a lack of instruction and influence. The news media describe, define, and, to a degree, direct public life and the discourse surrounding it, whether or not they intend to be its stewards. When golf fanatic Dwight D. Eisenhower became president, the press routinely covered his passion for the sport. This contributed to the sharp upturn in people's taking up golf for the first time.[15] President Jimmy Carter was a fly fisherman. Fly-fishing grew vastly more popular after he came into office.[16] When the president sneezes, everyone thinks they have caught a cold. In 1985, when Ronald Reagan underwent surgery for colorectal cancer, the national Cancer Information Service received an unprecedented increase in phone calls, most of them from people seeking advice on colon cancer checkups. According to a *Newsweek* poll, 25 percent of adults gave thought to being tested in the days after Reagan's cancer became public knowledge. Five percent actually arranged to be tested – for a total of some five to ten million doctor's appointments![17]

Culture critic Robert Hughes suggested that Ronald Reagan "left his country a little stupider in 1988 than it had been in 1980, and a lot more tolerant of lies."[18] (Possibly, he also left the country a little better protected from colorectal cancer.) And political commentator David Bromwich wrote that Reagan's great work was "the education of a whole society down to his level," not just by his precept but "by example, simply by being who he was; day after day without blame, a president who had at his command not a fact of history more than two weeks old."[19] Neither Hughes nor Bromwich adduce any evidence for their assessments. But their critical remarks have a clear plausibility. If media coverage of presidents can stimulate the sale of golf clubs or fishing rods, if it can draw millions to accept the unpleasantness of a colonoscopy – all simply by reporting everyday facts about presidents – then it is easy to believe that Reagan, repeatedly willing, without qualms, to pass off movie-based anecdotes for actual historical events, taught dubious civics lessons about truthfulness simply by having his behaviors transcribed by the press for public transmission.

But these are cases of influence rather than stewardship – specifically, influences that derive from the subjects journalists cover and the sources they rely on. Here, the journalists serve as messengers, not stewards. But do journalists – and should they – seek to inflect this influence in one way or another? Should they choose their sources and subjects with some self-conscious ends in view? And can this be done without taking on the arrogant presumption that they are in a position to "elevate" their audiences? Or is that presumption arrogant? Might it be the appropriate stewardly office of a profession in the teaching, coaching, or counseling business of public information?

The question is not whether the press stewards or fails to, but what sort of stewardship and philosophy of stewardship best serve a democratic society – particularly *this* democratic society, with its resistance to government "intrusion" inherited from the nation's founders but exacerbated and exaggerated in the post-Reagan era. Let me propose three general principles for stewardship in the media: First, stewardship should be exercised in moderation; it should be a stewardship of loose reins. Second, stewardship should be decentralized and multiform, more a set of practices seeking to enhance a usefully vague sense of democracy than a set of guiding ideals based on a clearly articulated philosophy of the functional location of news in a democratic culture. Third, at rare but critical junctures, journalism cannot and should not give up what has been called "social trustee professionalism" for "expert professionalism," but it must acknowledge that it is suspended awkwardly between them.[20] That is, as necessary as a focused professionalism is most of the time, it is not sufficient all of the time. Vital as professionalism is in guiding news practice ordinarily, it is not an adequate refuge in those moments when journalists face threats to transcendent values of democracy, human rights, public safety, and an accountability to future generations.

For the news media, there is a rationale for a tempered, practice-centered approach to institutional responsibility. This includes that journalists are, and should be, messengers of the views of others as much as or more than they are conveyers of their own views. In other words, the temptation to report uncritically the statements of public officials or political candidates is difficult to distinguish cleanly from the responsibility to report appropriately, and with some deference, what these democratically elected persons or aspirants to election have to say.

Certainly, various fields oblige the professional to convey the message of some higher authority; thus, one may criticize "activist judges" for substituting their personal or political positions for the letter of the law or the weight of a line of precedents. But in most cases that reach an appellate court, neither "the letter of the law" nor precedent communicates a message that has only one plausible reading. Judges must interpret the law. In a sense, then, every appellate judge is an activist judge. Otherwise, they could all be replaced with a good algorithm. Still, some judicial interventions are more inbounds than others; some show more integrity than others in making a good-faith effort to read the law in keeping with the highest (vague) ideals of justice and the (less vague but still disputable) weight and direction of past decisions. For journalists, a similar issue arises when a straightforward, fair-minded account of, say, a speech by a public official or candidate for office holds democratic value in itself. In this respect, it is not that journalists are bending to politicians – but that they are bowing to the idea and practice of democratic politics. Other things equal, this is itself a vital service that news provides democracy.

Journalists have long worked on the knife edge between accepted professionalism on one side and pure amateurism on the other. But the delicacy of this position has grown in the past decade with remarkable advances in what amateur or "citizen" journalists can contribute. As professionals, journalists have the obligations of trusteeship to an accumulated set of traditions and values. As practitioners in a field where amateurs, with little or no training or experience, make notable contributions, it is clear that they are artisans of the public discourse, not magicians operating with recondite knowledge. They may merit public respect and gratitude for their experience, talent, craft, and sometimes astonishing courage, but not for having mastered an arcane language as scientists have, or for having gained knowledge of the secret and sacred interior of the human body as doctors have, or for having been entrusted with the design of bridges or canals or skyscrapers as engineers and architects have, or having acquired a command of relatively esoteric lore of case law as judges and attorneys have. They have attained only a sense, often hard won, of what ingredients belong in that casserole of public significance, popular interest, immediate currency, and departure from the commonplace called *news*.

In practice, journalists frequently go beyond this craft knowledge to feel obligations to some ideal or authority higher than outdoing a rival, winning a more desirable audience, or pleasing their journalistic peers. But just what is that elusive higher authority? An allegiance to the public good? What do journalists know of that? That is, on what grounds do they presume to know more than others do? Or is the higher authority democracy? But what do journalists know of democracy that is unknown to ordinary mortals? Or is truth their ultimate objective? What do they know of truth that the rest of us do not?

Simply asking such questions has often been sufficient to resettle the conversation around the premise that journalism is just a trade, not a profession, and should not promise more than it can deliver. But skepticism about journalism's pretensions to professionalism has to some extent been put aside in the past decade as journalism organizations have been forced to cut newsroom jobs – by about a third – by the advent of the Internet, new possibilities for citizen journalism, the surplus of available information, the turning away of younger audiences from print newspapers and conventional TV news, and the huge loss of print advertising to Craigslist, eBay, Monster.com, and other independent websites. In many news organizations, there has been a powerful sense that, if they are not quite at death's door, they should nonetheless start shopping for long-term care insurance.[21]

These troubles for the news industry have fostered serious consideration of just what journalism's core mission is, precisely what it contributes to democratic society, and exactly what, if anything, full-time professional journalists contribute that unpaid amateurs cannot. This reflection – there being no Supreme Court of journalism – has not produced any definitive statements. Given not only the nature of journalism but the extraordinary new opportunities to create on a shoestring budget news-gathering and news-disseminating organizations of consequence, the best response to journalism's crisis has not come primarily from guiding essays or books, although they have had their place; rather, it has been found in the practical creation of entirely new news organizations by professional journalists young and old and by a radical reshaping of some leading old news organizations. These initiatives are a serious, if decentralized and not yet well recognized, response to the "stewardship" problem, as I will try to show here.

What is the core mission of journalism to which its ethics should be oriented and whose endangerment should raise public concern? Answers to this question have taken several forms in recent years. One formulation is *watchdog journalism*, a term that appeared in books in the early 1960s, was not seen again until the late 1970s, and rose into much wider use only in the 1990s. A similar term, *accountability journalism* (or *accountability reporting*), first surfaced around 1970, rose sharply by 1980, declined, and then shot up again in the 1990s.[22]

I first noticed this second term in Leonard Downie, Jr., and Robert G. Kaiser's *The News About the News* (2002), in which the authors, both of *The Washington Post*, link journalism to America's "culture of accountability."[23] Downie and Kaiser use *accountability reporting* to refer to the kind of journalism American communities deserve – but do not get enough of.[24] In *Losing the News* (2009), Alex S. Jones, former *New York Times* reporter and now director of the Shorenstein Center at the Harvard Kennedy School, argues that there is an "iron core" of news reporting that all else in journalism – editorials, opinion columns, and news analysis – depends on. And that core is "what is sometimes called 'accountability news,' because it is the form of news whose purpose is to hold government and those with power accountable." Sometimes called the "news of verification," this "fact-based accountability news is the essential food supply of democracy."[25] And we may be starved for it, particularly at the local level, as Paul Starr and others have forcefully suggested.[26]

Journalism, as these authors acknowledge, has never been single-mindedly devoted to its watchdog role, and I do not think that it should be. Journalism serves democracy in a variety of ways: providing citizens information-centered political news, offering political analysis, undertaking investigative reporting, presenting "social empathy" stories that – often in a human-interest vein – inform citizens about neighbors and groups they may not know or understand, providing a location for public conversation, attending to how representative democracies work, and mobilizing citizens for political life by advocating candidates, policies, and viewpoints.[27]

Some of these functions – notably, analysis, investigative reporting, and social-empathy coverage – have been better served by the news media since about 1970 than at any prior time in our history. Leading news organizations have come to accept that transmitting "just the facts" of the day's events should not be the exclusive task that journalism takes on. In a study in progress, Katherine Fink and I have found that in 1955, conventional "who, what, when, where" stories made up 91 percent of front page stories in a sample from *The New York Times*, but they made up only 49 percent by 2003. Figures for *The Washington Post* and *The Milwaukee Journal Sentinel* are similar. Over this time period, we also observed a large increase in analytical, or contextual, reporting.

It is also of note that one of the traditional functions of journalism in democracies – mobilization – speaks in praise of partisanship, whose reemergence, particularly on cable television, has caused considerable consternation – more than I think is merited. It would be devastating if advocacy journalism replaced accountability reporting, but that is not what has happened. I cannot say that the conservative drumbeat of some of the most popular shows on Fox News – much like the tone of conservative radio talk shows that frightened many people in the 1980s – leaves me untroubled. But I see no principled objection to it. Partisanship deserves a place at the table in print, television, radio, and online media. Opinion journalism is not only growing but, at its best – like contextual reporting at its best – deserves praise. In the first serious sociological study of what the authors call "the space of opinion" in journalism, Ronald Jacobs and Eleanor Townsley argue that even explicitly – and often obnoxiously – opinionated commentary stimulates public attention to political affairs and political participation when people have reliably opinionated figures – Bill O'Reilly or Rachel Maddow, George Will or Paul Krugman – to love or hate. According to Jacobs and Townsley, positing that public opinion is and should be formed on a "rational information model" oversimplifies a complex process; if we instead accepted a "cultural model of complex democracy," then we could acknowledge that various media formats may serve the public good. We could then see that "drama, disagreement, and strategic communication do not necessarily undermine democratic deliberation."[28] In fact, Jacobs and Townsley suggest, these often denigrated features of opinion journalism sometimes have proven superior to more conventional news shows, particularly on television. Specifically, in their content analysis of programs from the early 1990s and the early 2000s, *Hannity & Colmes* (Fox News) did a better job than *The NewsHour* (PBS) or *Face the Nation* (CBS) in challenging the high-level political officials that were interviewed.[29]

But isn't opinion dangerous, especially when so many people are easily confused about what separates opinion from fact? Even if we agree that individuals are entitled to their own opinions, isn't it crucial to assert that they are not entitled to their own facts? While I can agree with this, I also wonder what we can do about it except to hope that sunlight is indeed a good disinfectant. True, people have easy access to misinformation, whether about global warming or President Obama's religion or birthplace, but this is hardly without precedent in less technologically remarkable times. It was in 1965, not yesterday, that historian Richard Hofstadter wrote his account of "the paranoid style" in American politics, which he characterized as "overheated, oversuspicious, over-aggressive, grandiose, and apocalyptic."[30]

In practical terms, efforts to make journalism serve the public good in the age of databases, digital media, and cable television have been taken up in different, often imaginative, ways. First, an emphasis on truth-telling – that is, the policing of publicly relevant lies, spins, and misdirections issued by political figures themselves – has led in recent years to the creation of "fact-checking" news organizations or fact-checking departments within existing news organizations. These influential efforts have defined new venues and systematic procedures for holding accountable both governmental leaders and those who aspire to elective political office.

Second, others in journalism have been less interested in pruning misinformation from politicians' remarks than in getting behind the discourse of the day through the tough-slogging, often months-long (or longer) investigations of powerful public or private entities – work that is generally termed *investigative reporting*.

Third, news organizations have been established with the primary, or even the exclusive, intention of making up for specific shortfalls in political news coverage, particularly at the local level.

Fourth, experiments are under way to provide more and better interpretation and in-depth news analysis, to present it in more compelling ways, and to find means to help audiences visualize complex materials.

Fifth, there is increasing acceptance of the idea that stewardship can be practiced in concert with, not merely for the benefit of, media audiences. The shepherd's flock may be co-shepherds; the management's charges may be enlisted as co-managers; and for journalists, the "people formerly known as the audience," in media critic Jay Rosen's memorable phrase, can produce news content themselves. Stewardship in a self-consciously egalitarian culture is inherently unstable. There are ways, now powerfully reinforced by digital technologies, to approach this reality not as an impediment but as a workable new tool for professional journalism.

Sixth, journalistic functions are less confined than ever before to organizations that are identified primarily as news organizations. Human rights organizations report news, too. Polling organizations work with – or independently of – news organizations to produce newsworthy results on a regular basis.

Let me discuss each of these points a bit further, because in the past decade these efforts to hold journalism to a higher standard than simple (in principle, not necessarily in implementation) nonpartisanship or objectivity have given rise to significant journalistic innovations. The innovators are, if you will, practical philosophers, inventing notable responses to a crisis of journalistic legitimacy that is shaking the profession they thought they were a part of or hoped to enter. The result, although it has not yet stood the test of time, may be a pluralistic set of stewardships that are healthier, as a team, than "traditional" journalism proved to be in its single-minded – and stale – style of reluctant stewardship.

Policing Truthfulness in Political Discourse. Consider the rise and spread of so-called fact-checking organizations, usually traced to efforts beginning in the 1990s to police campaign rhetoric in TV advertising, speech-making, and candidate debates. The roots of organized fact-checking have something to do with a major shift in presidential political campaigning – while campaigning previously involved events and addresses that candidates hoped would generate "free media" (that is, news coverage), together with door-to-door work by volunteers, there is now a preponderant emphasis and substantial financial investment in television advertising.

Some fact-checking organizations are avowedly partisan – liberal groups seeking to fact-check conservatives, conservative groups fact-checking liberals. These groups are significant, but they do not claim to salute the flag of professional journalism. Others do. These include Factcheck.org, the earliest (2003) enduring nonpartisan fact-checking operation, which is largely supported by the Annenberg Foundation and sponsored by the Annenberg Public Policy Center of the University of Pensylvania. The website PolitiFact.com began in 2007 as a project of *The St. Petersburg Times* and its Washington bureau chief Bill Adair. It has since spun off eleven state-level PolitiFact operations. Also in 2007, *The Washington Post* launched The Fact Checker, a blog (and a column in the print edition) that focused on the 2008 presidential campaign. The project ended in 2008 and was reorganized with a much more general focus in early 2011.

These and other organizations take "truth" very seriously. PolitiFact scores politicians' statements on its "Truth-O-Meter" as "true," "mostly true," "half true," "mostly false," "false," or "pants on fire." *The Washington Post*'s Fact Checker scores politicians' statements on a scale from zero to four "Pinocchios." These initiatives recognize that they do not have direct access to truth; the self-mocking humor of their scoring systems emphasizes this. They also publish not only their conclusions but what sources they consulted and how they arrived at their judgments. In this respect, they are more forthcoming about their journalistic process than conventional news organizations. They are thereby implicitly offering a somewhat refined and revised model of what journalism can and should be. Far from abandoning a professional commitment to objectivity, fact-checking organizations are embracing that obligation and taking it further than news organizations generally do. In "showing their work," as math teachers say, professional fact-checkers not only advertise how thorough they are but "acknowledge their own imperfection as arbiters of truth, without relinquishing their faith in and commitment to objectivity."[31]

Constructing New Communities of Investigative Journalism. In 2009, a group of organizations focused on investigative reporting joined together to form the Investigative News Network (INN). The group initially included about a dozen organizations. It now counts over sixty organizations among its membership. To become a member, organizations must be nonprofits. They must be transparent about their donors and disclose names of anyone who donates $1,000 or more. They must be nonpartisan, as defined by their commitment to producing investigative or public interest reporting "that is not based upon, influenced by or supportive of the interests or policies of (i) any single political party or political viewpoint or (ii) any single religion or religious viewpoint." In short, these organizations, a majority of which were founded in the past five years, take their identity as professional journalism organizations very seriously, devoting the lion's share of their attention (if not their exclusive attention) to investigative reporting.

Not all nonprofit news organizations are INN members. Nor are all new news organizations that focus on investigative reporting nonprofits. The celebrated for-profit TalkingPointsMemo has won national awards for its investigations; it also operates from an avowedly left-liberal perspective. But there are at least seventy-five nonprofit news publishers today, most of them focusing on investigative journalism, and most of them begun in the past half-dozen years. The majority are small; at least a dozen have annual budgets under $100,000, which means that they operate on "'sweat equity,' heart and hope," as Charles Lewis and colleagues put it. Together, they employ seven hundred people and have a total annual budget of $92 million.[32]

The INN member organizations are committed to journalism in the public interest, not to liberalism or conservatism or any other political creed. Most of them are small and therefore potentially vulnerable to, say, a libel suit or the threat of one. This is one reason that INN arranges group libel insurance for members.

Reinventing Local News Coverage. The *Voice of San Diego*, an online news organization focused exclusively on issues of government and economy in San Diego and staffed by a dozen young journalists, was launched in 2005. Since then, local or regional start-ups (including the *Texas Tribune*, for example), all with slim budgets and low-cost, online operations, have been making up for the loss of "core" reporting capacity at hundreds of news organizations around the country. Can they do the job? Time will tell. No one knows if philanthropic organizations will be able or willing to sustain them indefinitely, and many are seeking to broaden their funding base. But their laser focus on core journalism means that they do not need to hire a movie reviewer or a sports staff, a lifestyle reporter or a local-color columnist. They are not all-purpose, general publications; they are special-purpose-politics and economy oriented. They have even found ways to write stories that require no writing: *Texas Tribune* routinely publishes the list of the highest salaries on the state payroll in Texas. No commentary is required when you can quickly show just how many millions of state taxpayer dollars go straight to the bank accounts of football coaches and assistant football coaches at the state's public universities.

Looking for Comparative Advantage in Analysis. Not all efforts to rethink the core functions of journalism take place at online start-ups. At the end of 2011, the Associated Press (AP) announced a new strategy in a memo that senior managing editor Michael Oreskes sent to the organization's three thousand journalists around the world. A 150-year-old cooperative owned by its many member newspapers, the AP is celebrated for its massive reach, its comprehensive coverage, and its capacity to be on top of more breaking news more quickly than any other news organization anywhere. But this news, even when the AP has broken a story exclusively or hours or minutes ahead of the next news organization, is quickly taken up by scores of other news outlets. What the AP needs, Oreskes argues, is to transform its reporting into "work with a longer shelf life." He has given this approach a slogan-like title: "The New Distinctiveness." He suggests a variety of approaches under this rubric, but one in particular gives the flavor of the policy: that is, the AP will launch a "running 'container' that can be used anywhere." Called "Why It Matters," this feature is meant to "focus our daily journalism on relevance without sacrificing depth." Nothing in the proposal, Oreskes insists, is "a product" so much as "an ever-growing toolbox of approaches."[33]

Incorporating Crowds into Serving Journalism's Core Mission. London's *Guardian* newspaper; ProPublica, the New York-based online investigative reporting organization established in 2009; and National Public Radio, by way of the Public Insight Network that Minnesota Public Radio launched in 2008: all have found distinctive ways to incorporate the insights and information of hundreds of thousands of nonprofessionals into their own labors. One could call these unpaid volunteers "ordinary citizens," but that is not necessarily accurate. Sometimes they are engaged because they have time to examine bits of publicly available data and contribute their insight to masses of material that would overwhelm any news organization if their own staffers had to take it all upon themselves. In other situations, it is not untutored eyes that are being enlisted but specific and distinctive backgrounds and skills; that is the novelty of the Public Insight Network. Citizen journalism, or "user-generated content," in some respects competes with professional journalism, but at the same time it serves as an enormously productive new resource that can be part of a collaboration with full-time, paid professional journalists. For some journalists, the surveillance of their work by audiences who voice their opinions is stunning and important. "I have 1.4 million fact checkers," writes blogger Andrew Sullivan. "Within seconds if I get the spelling wrong of some Latin word I will get three emails . . . That relationship, I think, is why I believe that online journalism blogging contains within it a revival of citizen journalism in a way that can bring truth back to a discourse."[34]

Accepting the Legitimacy of Non-Journalism Accountability Organizations. The present moment seems to call on journalism and its affiliated organizations – including journalism schools and journalism prizes – to accept into the circle of news-reporting organizations other information-gathering methods and opinion statements about public life directed to broad publics. By acknowledging the work of other accountability organizations, journalists can help make democracy work as part of their professional world. It is a very good thing that Pulitzer Prizes have beeen awarded to online news organizations. It might be good if the expert reporting of an advocacy organization like Human Rights Watch were also recognized. The inside-the-Beltway and beyond-the-Beltway advocacy groups that have outdone the federal government itself in making federal databases more searchable and accessible also belong in the ongoing reformation of a journalistic self-image. Journalism has never been able to draw sharp boundaries around itself to keep insiders and outsiders neatly delineated, nor should it. But it is one thing not to put up fences and another to invite the new neighbors over for coffee.

Could the media do better in serving democratic ends? Yes, of course. But this is only in part because they fall short of their ideals or fail to accept the responsibilities of stewardship; it is also because journalism's common understandings of democratic ideals fall short themselves. A better journalism might be possible if journalists had a more sophisticated sense of what it means to serve democratic ends. It is more than providing citizens with the information they need to make sound decisions in the voting booth. That is one key feature of what journalism should provide, but it is only one part; and this information-centered model foreshortens the obligations of journalism with respect to citizenship. Journalism can serve democracy by providing political information to help inform voters before they head to the polls, but journalism's role in serving democracy extends beyond this. It can also offer an understanding of the democratic process that might help educate people about what democracy entails and what reasonably can be expected of it (for instance, an appreciation of the value of compromise or an understanding of the gaps between rhetoric, legislation, and implementation); it can display compelling portraits of persons, groups, and problems in society that are not on the current political agenda at all; it can make available forums for public discussion; it can provide analysis, context, and interpretation for understanding events of the day; and, yes, it can offer partisan frameworks for interpreting news in a way designed to stimulate and mobilize people for specific political objectives.[35]

Widely shared views of good journalism typically tell us that the press should cover issues in campaigns and not devote so much attention to the "horse race" aspects of elections – but that may be the wrong approach. The horse race is part of what excites people about politics and therefore has the potential to intrigue them, later, in the "issues." Prevailing views further suggest that good journalism seeks in-depth analysis rather than quick coverage of every last accident, scandal, and mishap. This may be wrong, too; maybe "pretty good" analysis "quickly," as Dean of the Columbia Journalism School Nicholas Lemann puts it, is as important, if not more. A corollary is that long-form journalism is better than short-form, but even this may be an error: part of the progress of journalism over the past century is the greater skill of journalists in simplification – "data visualization," if you will – and taking on the burden of interpretation and analysis in a quick, rather than studied, way. It may also be that the shift we have witnessed in recent decades away from covering government itself does more to foster features of good citizenship than a preoccupation with government. And it provides an opening for social-empathy reporting that informs us about some neighbor or group of neighbors, often suffering visibly or silently from some personal or social or political ill fortune, that we would not know about otherwise.[36] Finally, it may even be that efforts to cater to the marketplace sometimes serve the public good better than efforts to fashion news as a type of pedagogy in which elites who "know best" work to educate the untutored masses. Without idealizing either the general public or the logic of the marketplace, sometimes the aggregated desires and interests of millions prove a better guide to what matters than the views of the professionals.

I do not mean to argue that the press that stewards least stewards best. However, I think that the news media have grown as institutional stewards of democratic citizenship by adapting: they were once organizations of elites speaking to elites, and then became for a long time political parties speaking through the newspapers to their own troops, and then emerged in an original blend of commercial organization and professional pride. And now, when the leading institutions of professional news-gathering are buffeted by gale-force winds in every direction, and when "professionalism" itself is under scrutiny, journalism is nowhere close to a clearly articulated understanding of its plan and purpose in democracy. And that, we need to understand, may be exactly right for us. It gives play to journalism. It offers running room for new ideas and projects – woefully undercapitalized as many of them are – to find audiences, to impassion young (and older) journalists, and to teach the grand thinkers of public life that there just might be a few new things under the sun.

ENDNOTES

1 Lynn Povich, *The Good Girls Revolt: How the Women of Newsweek Sued Their Bosses and Changed the Workplace* (New York: Public Affairs, 2012).

2 A survey comparing German, Swedish, Italian, British, and American journalists found that Americans affirm norms of objectivity, fairness, and neutrality more than any of their European counterparts. At the time the study was conducted in the early 1990s, only a sixth of American journalists whose primary task was reporting or editing also wrote commentary, but half of Italian and British reporters and editors, and more than 60 percent of German, did both. See Wolfgang Donsbach, "Lapdogs, Watchdogs and Junkyard Dogs," *Media Studies Journal* 9 (Fall 1995): 17–30; and Wolfgang Donsbach and Bettina Klett, "Subjective Objectivity: How Journalists in Four Countries Define a Key Term of Their Profession," *Gazette* 51 (1993): 53–83.

3 Susan E. Tifft and Alex S. Jones, *The Trust* (Boston: Little, Brown, 1999), 311–315. There are different versions of this story. Max Frankel recalls that the news story was "toned down" and "moved down the page" by order of publisher Orvil Dryfoos; that the headline was reduced to a single column; and that reference to the CIA and the anticipated time of the attack was omitted. John Stacks, in his biography of James Reston, writes that Dryfoos and Turner Catledge called Reston, then the Washington, D.C., bureau chief, who went to see CIA director Allen Dulles. Dulles told him not to publish – but if they did go ahead, to omit mention of the CIA. See Max Frankel, *The Times of My Life and My Life at the Times* (New York: Random House, 1999), 209; and John F. Stacks, *Scotty: James B. Reston and the Rise and Fall of American Journalism* (Boston: Little, Brown, 2003), 192.

4 See Bob Woodward, *Veil: The Secret Wars of the CIA, 1981–1987* (New York: Pocket Books, 1988), 516–535.

5 Marcus Brauchli, Third Annual Richard S. Salant Lecture, Joan Shorenstein Center on the Press, Politics and Public Policy, Kennedy School, Harvard University, Cambridge, Massachusetts, 2010, 12.

6 Daniel Hallin and Paolo Mancini, *Comparing Media Systems* (Cambridge: Cambridge University Press, 2004), 234.

7 Rachel Smolkin, "The Women," *American Journalism Review* (December–January 2004), http://www.ajr.org/article.asp?id=3507 (accessed December 22, 2011).

8 Woodrow Wilson, "An Address: Nature of Democracy in the United States," delivered before the Owl Club, Hartford, Connecticut, May 17, 1889, in *The Papers of Woodrow Wilson*, vol. 6, ed. Arthur S. Link (Princeton, N.J.: Princeton University Press, 1969), 226.

9 Donald Matheson, "The Birth of News Discourse: Changes in News Language in British Newspapers, 1880–1930," *Media, Culture and Society* 22 (2000): 559.

10 Ibid., 564.

11 Marcel Broersma, "Visual Strategies: Dutch Newspaper Design Between Text and Image, 1900–2000," in *Form and Style in Journalism*, ed. Marcel Broersma (Leuven, The Netherlands: Peeters, 2007), 187.

12 The professionalization of journalism in this era is discussed in Michael Schudson, *Discovering the News* (New York: Basic Books, 1978) and in several subsequent essays in Michael Schudson, *The Power of News* (Cambridge, Mass.: Harvard University Press, 1995) concerning the changing patterns of reporting the president's annual State of the Union message and the development of interviewing as the key tool of journalistic work. The international spread of these practices is documented in Svennik Hoyer and Horst Pottker, *Diffusion of the News Paradigm, 1850–2000* (Gothenburg, Sweden: NORDICOM, 2005). A recent review of the literature on journalism and professionalism is Michael Schudson and Chris Anderson, "Objectivity, Professionalism, and Truth Seeking in Journalism," in *The Handbook of Journalism Studies*, ed. Karin Wahl-Jorgensen and Thomas Hanitzsch (New York: Routledge, 2009), 88–101.

13 See Harrison E. Salisbury, *A Journey for Our Times* (New York : Harper & Row, 1983), 249, 348.

14 Andrew Sullivan, Twenty-Second Annual Theodore H. White Lecture, Joan Shorenstein Center on the Press, Politics and Public Policy, Kennedy School, Harvard University, Cambridge, Massachusetts, November 17, 2011, 26.

15 Reportedly, there were just over three million golfers when Eisenhower became president in 1953 ; that number had doubled by the time he left office in 1961. It would be difficult to attribute all of this growth to Eisenhower, but his many hours on the golf course – visible, much discussed, and much lampooned – are considered influential. The World Golf Hall of Fame elected Eisenhower to its membership in 2009. See http://www.pgatour.com/2009/r/06/26/wghof_eisenhower/index.html (accessed December 19, 2011).

16 Barry Meier, "Fly-Fishing Companies are Hip-Deep in Profits," *The New York Times*, September 6, 1993, 17.

17 *Newsweek*, July 29, 1985, 17, 20. All of this applies to the president's spouse, too. In the week after Betty Ford had a mastectomy in 1974 (soon after Gerald Ford succeeded Richard Nixon as president), breast cancer detection centers around the country were swamped with requests for screenings. Jane E. Brody, "Inquiries Soaring on Breast Cancer ; Progress Made," *The New York Times*, October 6, 1974.

18 Robert Hughes, *Culture of Complaint : The Fraying of America* (New York : Oxford University Press, 1993), 46.

19 David Bromwich, *Politics By Other Means : Higher Education and Group Thinking* (New Haven, Conn. : Yale University Press, 1992), 225.

20 These terms come from Steven Brint, *In an Age of Experts : The Changing Role of Professionals in Politics and Public Life* (Princeton, N.J. : Princeton University Press, 1994), 8 – 9.

21 There is now a seemingly endless array of discussions of the future of news, from journalists, media reformers, and academics. A useful compendium of thirty-two such pieces is Robert W. McChesney and Victor Pickard, eds., *Will the Last Reporter Please Turn Out the Lights : The Collapse of Journalism and What Can Be Done to Fix It* (New York : New Press, 2011).

22 My history of the usage of the terms *watchdog journalism* and *accountability journalism* is based on a quick glance at the Google Ngram Viewer. The Viewer is a tool that tracks the number of times a word or phrase appears in books in Google's digital collection that were published in a given year.

23 Leonard Downie, Jr., and Robert G. Kaiser, *The News About the News : American Journalism in Peril* (New York : Alfred A. Knopf, 2002), 7.

24 Ibid., 108.

25 Alex S. Jones, *Losing the News : The Future of the News that Feeds Democracy* (New York : Oxford University Press, 2009), 2 – 3.

26 Paul Starr, "Goodbye to the Age of Newspapers (Hello to a New Era of Corruption) : Why American Politics and Society Are About to Be Changed for the Worse," *The New Republic*, March 4, 2009, reprinted in McChesney and Pickard, *Will the Last Reporter Please Turn Out the Lights*, 18 – 37.

27 Michael Schudson, *Why Democracies Need an Unlovable Press* (Cambridge : Polity, 2008), 11 – 26. Of course, there are other sensible ways to categorize the various democratic functions of the press. Journalist Jonathan Stray, taking off from my list, has arrived at his own list of three functions : information, empathy, and collective action. See his thoughtful blog entry "What Should the Digital Public Sphere Do ?" November 29, 2011, http://jonathanstray.com/what-should-the-digital-public-sphere-do.

28 Ronald N. Jacobs and Eleanor Townsley, *The Space of Opinion : Media Intellectuals and the Public Sphere* (New York : Oxford University Press, 2011), 69, 71.

29 Ibid., 173, 234.

30 Richard Hofstadter, *The Paranoid Style in American Politics* (New York: Knopf, 1965), 4.

31 D. Lucas Graves, "Deciding What's True: Fact-Checking Journalism and the New Ecology of News," Ph.D. dissertation, Columbia University (2012), 213. While studying fact-checking organizations for his dissertation, Graves (now teaching at the University of Wisconsin-Madison) helped organize, with Tom Glaisyer, a conference about fact-checking at the New America Foundation that I attended on December 14, 2011.

32 Charles Lewis, Brittney Butts, and Kate Musselwhite, "A Second Look: The New Journalism Ecosystem," Investigative Reporting Workshop, American University School of Communication, November 30, 2011, http://investigativereportingworkshop.org/ilab/story/second-look/ (accessed December 12, 2011). If we include *Consumer Reports*, its annual budget of $43 million and six hundred employees dwarfs all others. *Consumer Reports* is a no-frills investigative news organization with a strong focus, but it takes up such a distinctive and slim slice of accountability reporting that including it would distort the overall figures and trends.

33 Michael Oreskes, memo to Associated Press staff, December 13, 2011, reprinted in full in Michael Calderone, "AP Launches Strategy to Go Beyond Breaking News, Become More 'Distinct,'" The Backstory blog, *The Huffington Post*, December 13, 2011, http://www.huffingtonpost.com/2011/12/13/associated-press-ap-breaking-news-new-distinctiveness_n_1144911.html?ref=email_share (accessed December 15, 2011). This is not to accept that "The New Distinctiveness" is in fact new – even at the AP. See a similar discussion about the AP in Kevin Barnhurst and Diana Mutz, "American Journalism and the Decline of Event-Centered Reporting," *Journal of Communication* 47 (4) (Autumn 1997).

34 Sullivan, Twenty-Second Annual Theodore H. White Lecture, 27.

35 I have developed this set of multiple goals for news in a democracy in "Six or Seven Things News Can Do for Democracy," in Schudson, *Why Democracies Need an Unlovable Press*, 11 – 26.

36 Ibid., 17 – 20.

The Argument Culture: Agonism & the Common Good

Deborah Tannen

Abstract: Agonism – taking a warlike stance in contexts that are not literally war – pervades our public and private discourse, leading us to approach issues and each other in an adversarial spirit. The resulting "argument culture" makes it more difficult to solve problems and is corrosive to the human spirit. While examples from the intertwined domains of politics and the press may seem beyond individuals' power to change, the domain of private interactions – where equally destructive effects of the argument culture are felt – is one in which individuals have power to make quotidian yet revolutionary contributions to the common good.

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When I was writing my book *The Argument Culture* in the late 1990s, I felt a sense of urgency because I believed that the moment for its message – that our public discourse had become destructively adversarial – might have peaked. How ironic that concern now seems. Today, "the argument culture" sounds like an extreme understatement; "the combat culture" would be more apt. I would be tempted to adopt that term were I not hesitant to become part of a problem that my book addressed: the ubiquity of war metaphors and their role in contributing to a widespread agonistic spirit. The phrase "combat culture," though appealing for its crisp consonants and satisfying alliteration, would be a verbal analogue to the visual metaphor on the cover of the first edition of *The Argument Culture*, a cover to which I objected in vain: against a stark white background was a photograph of a menacing dark gray bomb with an ominously short fuse.

Though the threat represented by the bomb was real, I felt that the violent visual metaphor contributed to the destructive effects of conceptualizing everything as a metaphorical battle. That risk is even more real today, as I argue in this essay (but argue in the sense of making an argument, not of having one). The aspect of the argument culture that I focus on here is captured in a recent *New Yorker* cartoon. A hunter, rifle slung over his shoulder, sits at a bar beside a deer. The affable hunter says to the doubtful-looking deer, "If we should meet in the woods and anything happens, remember it's just hunting." The cartoon reminded me of an experience I had on a San Francisco television talk show following the publication of my book *You Just Don't Understand: Women and Men in Conversation*. In the green room, where guests gathered before the show, an oddly dressed young man greeted me pleasantly. After telling me that he had read and admired my book, he said, "When I get out there, I'm going to attack you. Don't take it personally. That's why they invited me on the show, so that's what I'm going to do."

The show began like many others I was on at the time: I was seated facing a small studio audience, along with this young man and several women guests who had volunteered to come on the show to talk about frustrations they encountered in communicating with their husbands. But once the show began, it proceeded very differently. After I had made a few opening remarks about women's and men's ways of speaking, this young man leaned forward in his chair, thrust his arms out before him, and began to spew venomous invective. He directed his diatribe at me only briefly, then moved on to an apparently rehearsed litany of accusations against women in general. What stunned me was the effect this display had on the studio audience. Whereas audience members at other shows on which I had appeared matched guests' accounts of frustrations with similar anecdotes of their own, on this show (and no other), when invited to join the conversation, members of the audience turned vicious toward the unsuspecting women guests, accusing them of the offenses they had just heard described: exploiting their husbands, failing to appreciate his sacrifices, generally revealing the evil inherent in their sex.

The TV show guest who had aimed his invective against women was like the hunter in the cartoon: he was taking part in a warlike ritual, shooting at a target against which he felt no personal animosity. He was just participating in a verbal game that the show's producers believed would increase viewership. (The producer said as much when I complained, afterward, about the destructiveness of turning the show into a fight; she said that the wisdom of her choice would be revealed when the ratings became known.) But just as hunting has dire consequences for the deer, so the ritual verbal attack staged by the producers of this show had dire consequences for the real-life women who had agreed to be guests. Furthermore – and this is the point I want to emphasize – it had dire consequences for the members of the studio audience who followed the belligerent guest's lead. Although they were the perpetrators and not the victims of the verbal attacks on the women guests, they, too, were losing out. They were losing out on the sense of community that was created on other shows, when studio audience members responded to the experiences described by women or couples by saying that they had had similar experiences of their own. Hearing that others' experiences match one's own can provide comfort or reassurance that one is not alone. In contrast, seeing those with similar frustrations being vilified reinforces a sense of shame and reluctance to voice one's concerns. It leaves everyone feeling even more alone. Moreover, audience members, both in the studio and at home, were losing out on the opportunity to learn ways to solve those problems, as the entertainment-motivated metaphorical battle replaced any other possible form the television show could have taken.

That is what is doubly destructive about the argument culture: it makes it more difficult to solve the problems facing our society, and it is corrosive to the human spirit. By creating an atmosphere of animosity, it makes individuals more likely to turn on each other, so that everyone feels more vulnerable and more isolated. And that is why the argument culture is destructive to the common good.

Key to my notion of the argument culture is the term *agonism*, which I have borrowed from the late Jesuit scholar Walter Ong. From the Latin term for war, *agon*, agonism is taking a warlike stance to accomplish something that is not literally a war. Agonism underlies our conviction that opposition leads to truth, so the best way to discuss an idea is to have proponents of two opposing sides face off in a debate; the best way to cover news is to find spokespeople for the most extreme, polarized views and present them as "both sides"; the best way to settle disputes is litigation that pits one party against the other, with a winner-take-all result; the best way to frame an article is an attack; and the best way to show you are really thinking is to criticize.

Agonism surrounds us in the form of ubiquitous military metaphors: the war on poverty, war on cancer, war on drugs, war on terror, and so on. War metaphors come so naturally, and are so catchy, that we barely notice them. A survey of recent reality TV shows reveals those entitled *Weed Wars*, *Whale Wars*, *Shipping Wars*, *Storage Wars*, and *Parking Wars* – and these are only a few of innumerable examples. War metaphors are also everywhere in coverage of political campaigns. For example, an exhibit at the Newseum in Washington, D.C., traces the history of press coverage of presidential elections. It begins with a plaque saying: "Every four years, Americans elect a president. And every four years, battle lines are drawn as presidential candidates face off in the conflict zone known as the campaign trail." "Battle lines," "face off," and "conflict zone" seem self-evidently appropriate ways to frame presidential campaigns; indeed, the word *campaign* itself derives from a military action. The next plaque goes on to say, "This exhibit examines the tactics used by politicians – and illuminated by the press – to put democracy to the test and a candidate in the White House." This formulation casts the press as a mere observer – illuminating politicians' tactics – whereas in fact the role played by the press is far more active. This is acknowledged in a later plaque, which also makes use of war metaphors: "In the 20th century, new rules of engagement were drawn up between candidates and reporters. . . . The battle for control of the story and image was on."

There is ample evidence in coverage of any electoral season that the press does not just observe and report but also creates and reinforces the agonistic framework through which we view events. Any day's news contains a multitude of examples; here are just a few. A typical talk show host begins a discussion by saying that President Obama "came out swinging" on the payroll tax cut. A *New York Times* headline reads, "The Calculations that Led Romney to the Warpath." And visual metaphors reinforce verbal ones. When *New York* magazine featured a story entitled "2012: The Bloodiest Campaign Ever," the cover displayed a photo of Romney's and Obama's faces literally bloodied, black and blue, and plastered with band-aids and sutures. It would be as telling, I think, to show the American people similarly bruised and bloodied, because that is the result of the escalating agonism in our public discourse.

Why, you might wonder, be concerned about metaphors? They are just words – or, in the case of visual metaphors, just pictures. But metaphors seep into our thinking and shape our responses.

I am not against debate, opposition, controversy, or disagreement. Quite the opposite: I agree with the Yugoslavian-born poet Charles Simic, who wrote, "There are moments in life when true invective is called for, when it becomes an absolute necessity, out of a deep sense of justice, to denounce, mock, vituperate, lash out, in the strongest possible language." What I am questioning is agonism – the automatic, ritualized, knee-jerk use of opposition which has become pervasive in our lives. In *The Argument Culture*, I describe agonism in politics, the press, law, and education. Here I address only politics and journalism, and the ways that they are intertwined.

Agonism takes two forms in the press. The first is the more obvious: an ethic of aggression that places the highest value on attack. A second and perhaps less obvious form of agonism is the conviction that opposition leads to truth; this conviction accounts for the widespread belief that "balance" is the primary goal of coverage – indeed, that the journalistic job is done if and only if "both sides" of an issue have been presented.

Because of the ethic of aggression, an article that attacks needs no justification, while praise or support is regarded as suspect. A November 2011 *Newsweek* article about the Penn State scandal used the word *shameless* – not to describe the behavior of Jerry Sandusky, the assistant coach who had sexually molested children over many years, nor to describe the behavior of the university and law enforcement officials who had failed to punish Sandusky or limit his access to underage boys despite having been informed of his behavior. No; *shameless* was used to describe an article that had cast the governor of Pennsylvania in a favorable light. The *Newsweek* essay pointed out that the governor, who had been praised for his swift action in the latest accusation against Sandusky, had been state attorney general when investigation of complaints against Sandusky had been dragged out over three years, during which time the coach had been allowed to continue in his position and his criminal behavior. In that spirit, the essay called a *New York Times* article praising the governor a "shameless puff piece."

"Puff piece" is one of several expressions that are regularly used – and feared – by journalists to mock and berate articles that praise without also attacking. In another *Newsweek* article, Peggy Noonan repeatedly cited her editor's insistence that her article must attack its subject, thus fulfilling that requirement while pretending not to cave in to editorial pressure. This provides a revealing glimpse into the ethic of aggression that is common among journalists. Noonan's essay was about the "comeback" of film producer Harvey Weinstein after a film he had produced, *The Artist*, won a slew of prizes and dominated the 2012 Academy Awards. Noonan begins by saying that Weinstein's reputation had previously been for "coarse, threatening" and "thug"-like behavior, but that he now seems to have reformed. She then steps outside her narrative to raise the puff piece specter: "Here I must note that my editor fears I'm getting rolled. He wonders if I shouldn't include the testimony of an old Weinstein associate who doesn't quite buy the story of Harvey's permanent rebirth." She then quotes that associate as saying, "The day after the Oscars he will fall into his old bad habits." Noonan thus does exactly what she says her editor wanted her to do, to avoid the accusation of "getting rolled" (itself a fight metaphor).

Later in the article, Noonan writes: "Here another request from my pest of an editor: there are rumors in Hollywood that Weinstein has been throwing his weight around behind the scenes to be given the Irving G. Thalberg Award. 'He's using muscle to get an award for gentleness! Shouldn't we mention this?' No, I say, leave it alone. He sweetly pronounces it won't make the final edit." Noonan thus mentions what she says she argued should be left alone, including what she has just said would not make the final edit. In addition to being an impressive literary sleight of hand, her inclusion of her editor's injunctions illustrates journalists' fear of the puff piece accusation.

It is no surprise that Noonan puts the agonistic ethic in the mouth of her editor. Like the producer of the television talk show who assumed that the arbiter of success would be the show's ratings, newspaper editors must be concerned with readership. But just as raising ratings by turning a television show into an attack on women has consequences, so does assuming that journalism requires attack on its subjects. Consider the case of Bobby Ray Inman, who in 1994 withdrew as a nominee for secretary of defense. In explaining his decision, Inman said that although he had previously served in both Republican and Democratic administrations, nothing had prepared him for the attacks he was now experiencing, the effects of which he felt were not worth the privilege of serving again. He quoted an editor who had told him, "Bobby, you've just got to get thicker skin. We have to write a bad story about you every day. That's our job." The statement chillingly encapsulates the agonistic nature of the attack culture in the press. The daily "bad stories" were not sparked by specific wrongdoing that journalists uncovered but were triggered automatically by a perceived requirement. Also telling is the journalist's advice that Inman had to get thicker skin. In that regard, the longtime *Washington Post* editorial page editor Meg Greenfield once wrote, "Thin skin is the only kind of skin human beings come with."

Bobby Ray Inman's withdrawal of his nomination stands out because his personal experience dramatized that the nomination process had become far more agonistic than it had been in the past. His case, however, highlights one surely unintended effect of the press's ethic of aggression: fewer and fewer people are willing to make the personal sacrifices necessary to engage in public service. As political scientist Norman Ornstein has pointed out, public service has always required financial sacrifice (one's income usually goes down) and personal sacrifice (whether one's family moves to Washington or stays in a distant home state), but the sacrifices were counterbalanced by the prestige that accrued to holding public office. Now, increasingly, that prestige is significantly reduced because the continual attacks on public figures have resulted in widespread disdain for those in public life. Furthermore, individuals who enter public life now risk the destruction of their reputations and their lives because of the widespread conviction among journalists that their jobs require them to write "bad stories."

Political commentator Larry Sabato has described the evolution of journalism this way: the press used to be like a lapdog, failing to criticize those in power when criticism was warranted. Their role should be that of a watchdog, alert to malfeasance when it rears its head. Now, however, the press is like an attack dog. And this is another way that agonism results in less rather than more genuine opposition: a dog that is busy attacking is not watching. In other words, the result is a rhetorical boy who cried wolf: because we have scandal inflation, true scandals are more likely to be overlooked. If you hear a fight outside your window, you rush to open the window to see what is going on. But if there is a fight outside your window every night, you shut the window and try to block them out.

The second form of agonism that characterizes the press is the "everything has two sides" ethic. This sounds at first eminently reasonable. The problem, though, is that most issues have more than two sides – and some have only one. Religion scholar and historian Deborah Lipstadt experienced the fatuousness and destructiveness of this conviction when her book *Denying the Holocaust* was published. The producers of one television talk show invited her on, but only if she agreed to appear alongside Holocaust deniers. When Lipstadt refused, saying she did not want to provide a platform for the propagation of the very lies her book condemned, the producers challenged, "Don't you think viewers have a right to hear the other side?" Among the tactics deniers successfully employed was taking out ads in college newspapers. The editor of one such newspaper was explicit in explaining why he accepted the deniers' ad: "There are two sides to every issue and both have a place on the pages of any open-minded paper's editorial page." The ability to masquerade as the other side in a debate has resulted in Holocaust denial having more success in the United States than in any other country.

This is just one of many problems that result from our overreliance on the "two sides" metaphor. Another is that it creates the impression that both sides are equally valid: for example, when one side, such as scientists providing evidence of global climate change, is "balanced" by a tiny minority of scientists (typically funded by the fossil fuel industry) who deny that claim. A recent interview with the Detroit TV reporter Charlie LeDuff highlighted how the commitment to providing "two sides" can give credence to false information. On the NPR show *Fresh Air*, LeDuff, who had a successful career with both *The Detroit News* and *The New York Times*, was asked why he gave up writing for newspapers. Among his comments about the limits of print journalism, he said, "There's this construct, equal credence to what you think the truth is and what's probably false, but they both get some stature."

The "two sides" metaphor also creates the appearance of moral equivalence, such as the case where the Unabomber's deranged manifesto was published side by side with the writings of a university professor who was maimed by a bomb he sent. Indeed, so immutable is the assumption that every story must have two sides that some journalists find their stories rejected if they cannot find an opposing side to provide "balance." This parade of agonism has many unfortunate effects on members of society and on the common good. Readers often throw up their hands, concluding that it is impossible to know where the truth lies. It becomes difficult for policy to be informed by research, because findings seem to be questioned as quickly as they are reported. Perhaps most destructively, whereas democracy requires an informed electorate, the argument culture creates the opposite, as more and more people are so alienated by the agonistic rhetoric of political coverage that they cease to listen to it. Indeed, Dr. Andrew Weil recommends that people go on a "news fast" to preserve their equilibrium and mental health.

The agonism in politics that I described in the late 1990s has now reached unforeseen heights. In 1996, fourteen senators left Congress voluntarily, an unprecedented event that Norman Ornstein documented in his book *Lessons and Legacies: Farewell Addresses from the Senate*, a collection of essays by thirteen of the departing senators. Many named the increasing agonism of the Senate as their reason for leaving. Senator Olympia Snowe of Maine, who had been one of the few remaining centrist Republicans, has recently left Congress. In explaining her reasons for leaving, she decried the destructive extremism that has made it impossible to craft legislation, because every vote has become "a take-it-or-leave-it showdown intended to embarrass the opposition." In other words, whereas political campaigns once were staged only in the run-up to elections, we now have campaign tactics year-round, and they pervade the daily work of governance. The rise of the filibuster is often cited as evidence. In the 1950s, the use of this tactic averaged one per Congress. In the 110th Congress (2007–2008), it was employed fifty-two times. A supermajority is now required to pass almost any significant legislation.

These aspects of the argument culture are well known and frequently observed. As I said at the start, the aspect I would like to point out here is the way this increasing agonism is affecting our personal lives, perhaps the most deeply experienced aspect of the common good. I recently had occasion to witness an example of this while a passenger on the Acela, the high-speed train that connects Washington, D.C., and New York City. At one point during the ride, a man seated two rows in front of me turned to a teenage boy seated behind him and began shouting angrily, berating the boy for talking too loudly on his cell phone. The boy seemed genuinely puzzled and asked meekly, "What did I do?" This seemed to stoke the shouter's anger, as he railed, "You consider yourself a man and you don't know what you did?!" Two other passengers spoke up to ratify the attack: "It bothered me, too," said a woman seated across the aisle from the boy. "That's right," joined a man seated behind him. Like the studio audience members who echoed the misogynistic verbal attacks on the television show, these passengers were joining the chorus of attack.

I had not been bothered by the boy's cell phone conversation. The loud voice that intruded on my train ride was the verbal attacker's. And the boy's offense was simply the volume of his conversation, whereas his attacker was filling the train car not only with the volume of his diatribe but with its venom. The incident has stayed with me because I blamed myself – at the time and ever since – for not speaking up in the boy's defense. In asking myself why I did not calmly point out that the man could have asked the boy to please keep his voice down without egregiously upping the ante of disruptively loud rhetoric, I realized that I feared that the angry shouter (the word's similarity to *shooter* is not, I think, irrelevant) would turn his wrath on me. And that is another example of how the argument culture makes everyone feel vulnerable.

Many readers will regard with a sense of despair the rise of adversativeness in politics and the press, feeling that there is nothing they can do to change it. But that sense of helplessness need not apply to the rise of agonism in our personal lives. We have daily opportunities to change the spirit with which we approach each other (a change suggested by the wording I just chose, *each other*, in contrast to the alternative, *others*). To illustrate, I end with two examples of how individuals learned to resist agonism in their daily lives. Both were mentioned at the memorial service of a dear friend and colleague, Pete Becker, a scholar and professor whose Quaker background infused his personal and professional life.

During Pete's memorial service, his son Andrew rose to recall a brief conversation he had had with his father when he was in his teens. Andy came home from school one day brimming with anger about a "dumb rule" that the principal had announced. After explaining his indignation, he told his father that he was going to fight the rule. His father listened respectfully to Andy's account, then asked if it would be hard to comply with the rule. Andy said that it wouldn't, but he reiterated what seemed to him the main point: the rule was dumb, so he was right to fight it. "If you do that," his father said, "you'll be right, but you'll turn the principal into your adversary." He went on to point out that the principal might well be under pressures that Andy did not know about, and that there would be nothing to gain by turning him into an enemy when there was no need to do so. Recalling this brief conversation as an adult looking back, Andy explained that by shifting his attention from the rightness of his indignation to the consequences of turning someone into his enemy, his father had taught him a perspective that remained a touchstone for the rest of his life.

Later in the memorial service a woman rose to tell a story with a similar conclusion. When she was a graduate student, she recounted, she had served as a teaching assistant working with Pete. When the students turned in their first set of papers, Pete suggested that they meet to grade the papers together. As they began the task, she would pick up a student's paper and read aloud something she found foolish or baseless, assuming that Pete would laugh along with her. But he declined to join her in mockery or contempt. Instead, he picked up one after another student paper and read aloud sentences in order to praise their insight, inviting her to join in with his respect and admiration. It was a lesson, she said, that made her a better teacher – and a better person.

Key to both these anecdotes is a shifting of alignment with regard to others: in place of an agonistic stance – seeing others as "dumb" and therefore different from and opposed to oneself – this wise Quaker taught his young charges to see good in others rather than stupidity. He also taught them to try seeing the world from others' perspectives. By pointing out that the principal might be subject to pressures unknown to students, and that undergraduate writers came up not only with infelicities but also with insights, Pete taught his son and his teaching assistant to see others – those in authority as well as those in subordinate positions – as fundamentally human. This subtle change of stance transforms the world from a place of hostility to a place of community, in which we are connected to rather than separated from the many strangers we encounter daily. That is a change we all can aspire to – and one we can begin to enact. We have the power to resist taking adversarial stances toward each other in our private interactions. And who knows, if enough of us resolve to do this, by a strange alchemy, it might begin to defuse (yes, metaphorical reference to the bomb on the cover of my book is intended) some of the destructiveness of the argument culture. In this way, we all can make quotidian yet revolutionary contributions to the common good.

AUTHOR'S NOTE

Some of the material in this essay is drawn from Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (New York: Random House, 1998).

Valuing Compromise for the Common Good

Amy Gutmann & Dennis Thompson

Abstract: Pursuing the common good in a pluralist democracy is not possible without making compromises. Yet the spirit of compromise is in short supply in contemporary American politics. The permanent campaign has made compromise more difficult to achieve, as the uncompromising mindset suitable for campaigning has come to dominate the task of governing. To begin to make compromise more feasible and the common good more attainable, we need to appreciate the distinctive value of compromise and recognize the misconceptions that stand in its way. A common mistake is to assume that compromise requires finding the common ground on which all can agree. That undermines more realistic efforts to seek classic compromises, in which each party gains by sacrificing something valuable to the other, and together they serve the common good by improving upon the status quo. Institutional reforms are desirable, but they, too, cannot get off the ground without the support of leaders and citizens who learn how and when to adopt a compromising mindset.

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Democratic politics should serve the common good, which we understand as the goal of "maintaining conditions and achieving objectives" that benefit all members of society.[1] The individual components of the common good – such as a robust economy or universal health care – are not necessarily shared by everyone. But the goal is to secure these goods for all, and to maintain a democratic process that is valued by all.

Important as the common good is, it is less frequently invoked by politicians and pundits than is the common ground. Faced with the challenge of bridging polarized partisan divides on pressing issues such as tax reform, health care, and immigration policy, American politicians regularly claim to seek consensus on the common ground. They in effect deny the need to reach compromises that would require them to sacrifice something valuable to their opponents.

Consider this excerpt from a CBS *60 Minutes* interview with Representative John Boehner, who was then about to become Speaker of the House following the Republican success in the 2010 congressional elections:

> JOHN BOEHNER: It means working together.
>
> LESLEY STAHL: It also means compromising.
>
> [...]
>
> BOEHNER: I made clear I am not going to compromise on my principles, nor am I going to compromise . . . the will of the American people.
>
> STAHL: And you're saying, "I want common ground, but I'm not going to compromise." I don't understand that. I really don't.
>
> BOEHNER: When you say the word "compromise"... a lot of Americans look up and go, "Uh-oh, they're going to sell me out."
>
> [...]
>
> STAHL: . . . you did compromise [to get all the Bush tax cuts made permanent]?
>
> BOEHNER: ... we found common ground.
>
> STAHL: Why won't you say – you're afraid of the word.
>
> BOEHNER: I reject the word.[2]

Consensus on common ground is a lofty goal. That's one reason why politicians never tire of claiming that they are seeking it. "Leaders [are successful] not by attacking their opposition but by finding common ground where principles are shared," former Governor Mitt Romney declared during the Republican primary.[3] After the president's jobs bill failed in October 2011, Senate Majority Leader Harry Reid still insisted: "we'll be bringing up individual components of this legislation to do our utmost to find commonsense, common-ground, job-creating measures that the Republicans will support."[4]

All citizens want a better life for themselves and their children; all want security, decent health care, and a good education. By seeking consensus on these common ground desires, politicians believe they can serve the common good without giving up anything valuable to their political opponents.

Where common ground agreements can be found, they can in fact serve the common good. But they are not the only – or even the most productive – way to pursue that goal. The classic compromise – where all sides gain on balance but also sacrifice something valuable to their opponents – is a more promising route to the common good. This is especially the case in a polarized political environment.

Common ground agreements are morally and politically attractive because they have a principled coherence from all perspectives. They resemble what philosophers call an overlapping consensus. Citizens with fundamentally different moral views may agree on relevant principles, though for distinct reasons drawn from conflicting perspectives.[5] Analogously, legislators set aside conflicting parts of their perspectives in order to reach a shared agreement. Opposing legislators may disagree on the underlying principles of a common ground deal, but they need not make a principled concession in the content of their agreement.

Consensus on common ground is desirable if it can be found. But the common ground is more barren, its potential for yielding meaningful legislation more limited, than the inspiring rhetoric in its favor might suggest. Yes, a consensus exists among legislators and citizens that the tax system needs to be revised, and that the health care system needs to be reformed. But this general consensus on the need for reform does not translate into a common ground agreement on the particular provisions of either a tax or a health care reform bill. To produce reform legislation, specific terms have to be negotiated, and as is often the case at this stage, the common ground turns into fractured terrain.

Another problem with common ground agreements is that trying to find the usually small points of policy convergence is likely to prove less effective in addressing major issues than combining big ideas from the partisans. Describing how they managed to gather a majority on their politically diverse commission on fiscal responsibility, cochairs Alan Simpson and Erskine Bowles emphasized the value of "shared sacrifice" that comes from "bold and big" compromises. "The more comprehensive we made [our proposal], the easier our job became," they said. "The tougher our proposal, the more people came aboard. Commission members were willing to take on their sacred cows and fight special interests – but only if they saw others doing the same and if what they were voting for solved the country's problems."[6]

The most serious problem with the preoccupation with the common ground is that it undermines the pursuit of the more challenging but more promising form of agreement: the classic compromise. In a classic compromise, all sides sacrifice something in order to improve on the status quo from their perspective. The sacrifices accepted in a classic compromise are at least partly determined by the opposing side's will, and they therefore require parties not merely to get less than they want, but also, due to their opponents, to get less than they think they deserve.

Classic compromises differ from common ground and other consensual agreements that are based on an underlying convergence of values (the common ground). These agreements set aside the root disagreement in favor of a consensus on shared values expressed by the agreement itself. The values are held in common. A classic compromise differs in that it expresses an underlying and continuing conflict of values. Disagreements between the parties are embodied by the compromise. The values internal to the compromise are not all shared.

Classic compromises serve the common good not only by improving on the status quo from the agreeing parties' particular perspectives, but also by contributing to a robust democratic process. The goods in a classic compromise are not all held in common; yet all parties benefit from the compromise and value the process by which it is reached. The agreement itself demands the sacrifice of some goods that each party believes should be, but are not, shared.

In the polarized politics of our time, the prospects for consensual agreements based solely on common ground or containing only common goods are increasingly bleak. Exhortations to seek such agreements and exaltations of their value are misleadingly utopian at best. They divert effort from the pursuit of classic compromises and make them look even more like confused surrenders. As we will explain, compromises by their nature are vulnerable to charges of confusion and surrender. The unfavorable comparisons with common ground agreements only compound this vulnerability.

Yet the classic compromise today offers the best hope for political progress. The major issues in current legislative debates represent deep divisions on fundamental questions about the role of government, the nature of justice, and the liberties, rights, and responsibilities of citizens. The broad issues on which many Americans generally favor legislative compromise – taxation, government spending, health care, cost controls, job creation, immigration – are unlikely to be addressed at all if legislators hold out for common ground.

So if compromise is to be achieved on these major issues, we must value agreements that are less morally coherent and less politically appealing than those that rest on common ground or an overlapping consensus. The Tax Reform Act of 1986 – the most comprehensive tax-reform legislation in modern American history, passed with bipartisan support under the Reagan presidency – was a classic compromise. It combined some measures (eliminating loopholes that favor the wealthy) that reflected liberal principles and others (lowering the marginal rates on top incomes) that violated those principles. The same measure also created a conflict with conservative principles, but in reverse. The Affordable Care Act of 2010 – the most comprehensive health care reform in recent American history – was also a classic compromise. Though it was forged within a single party, the compromise displayed conspicuous tensions – between whether the reform should or should not offer a public option, for example.

Governing a democracy without compromise is impossible. To restrict political agreements to common ground or common goods, especially in a polarized partisan environment, is to privilege the status quo, even when all parties agree that reform is needed. Why, then, is compromise so hard when it is so necessary?

Much of the resistance to compromise lies in another necessary part of democracy: campaigning for political office. Increasingly, campaigning is intruding into governing, where it is often counterproductive. The means of winning office are subverting the ends of governing once in office. It is only a slight exaggeration to say that in the United States "every day is election day in the permanent campaign."[7] The effects of the continuous campaign – along with the distorting influence of media and money that accompanies it – encourage a mindset among politicians that rejects compromise.

The resistance to democratic compromise is anchored in an uncompromising mindset, a cluster of attitudes and arguments that encourage principled tenacity (standing on principle) and mutual mistrust (suspecting opponents). This mindset is conducive to campaigning but inimical to governing. Resistance to democratic compromise can be kept in check by a contrary cluster of attitudes and arguments – a compromising mindset – that displays principled prudence (adapting principles) and mutual respect (valuing opponents). It is the mindset better suited for governing because it enables politicians to recognize and embrace opportunities for desirable compromise. When enough politicians adopt it enough of the time, the spirit of compromise prevails and the common good benefits.

The influence of campaigning is not necessarily greater than other factors that interfere with compromise. Compromises are difficult for many reasons, including increased political polarization and the escalating influence of money in democratic politics. But the uncompromising mindset associated with campaigning in particular deserves greater attention than it has received. First of all, unlike ideological polarization, campaigning is a desirable part of any democratic process. It becomes a problem only when it interferes with governing. Second, if compromise is to play its proper role in the democratic process, politicians and citizens need to understand not only the relationship between partisan positions and particular compromises, but also the attitudes and arguments that resist or support compromise in general. Finally, the uncompromising mindset reinforces all the other obstacles to compromise.

Sharp ideological differences, for example, would present less of an obstacle to compromise were they not compounded by the continual pressures of campaigning that the uncompromising mindset supports. Despite standing tenaciously on the right and left wings of their parties, Senators Orrin Hatch and Ted Kennedy joined together to cosponsor many significant legislative initiatives, including measures to improve health care.

In an era characterized by the permanent campaign, the balance in democratic governing needs to shift toward the compromising mindset and the political compromises that it makes possible. The success of democratic politics depends on how elected leaders govern – and therefore on their attitudes toward compromise. But successful democracy also depends on the attitudes of citizens who elect the leaders. They, too, must grasp the value of compromise.

Compromise is necessary and desirable in a democracy – most Americans usually agree. But particular compromises are contestable – most Americans usually want to contest them. Within limits, a popular posture in democratic politics is: say yes to compromise, but no to compromises.

When asked about compromise in general, most Americans like the idea. In numerous surveys over the past several decades, large majorities of Americans declared themselves in favor of political compromise in general. Even after the sweeping Democratic victory in the midterm elections in 2006, three-quarters of the public continued to call for compromise.[8] The 2012 election may or may not have produced a clear mandate for any specific policy, but exit polls strongly suggest that most Americans want politicians to cooperate and compromise to end the gridlock in national politics, at least on some policies.

Of course, there are limits to this recurring enthusiasm for political compromise. After the strong Republican comeback in the 2010 congressional midterm elections, a majority of Americans – a large majority of Republicans and a minority of Democrats – said that they prefer political leaders who stick to their positions without compromising.[9] The favorable attitude toward compromise erodes when the political landscape shifts dramatically, especially when insurgent groups on the left or right gain in popularity and political power.[10]

Just as an electoral victory is typically not a mandate for the specific policies on which the candidates campaigned, so, too, the favorable attitude toward compromise in general does not regularly transfer to majority support for particular compromises. This disconnect between general support and the rejection of compromise on a specific issue – be it immigration, taxation, government spending, the environment, or abortion – is a persistent factor in preventing political progress. In fact, on most issues, "openness to compromise is inversely linked to the importance people place on the issue."[11] People seem to like compromise the most on the issues they care about the least.

There are important limits here, too. Opposition to particular compromises often fades in the face of a crisis. When compromise is a condition of avoiding an imminent public disaster, the vast majority of citizens, from across the political spectrum, support compromise. Six out of ten Americans – including a majority of Republicans, independents, and Democrats – wanted the debt supercommittee to compromise, even if they expected to disagree with its recommendations.[12] Faced with the possibility of a government default in July 2011, even a large majority of Tea Party supporters said Republicans in Congress should compromise in order to come to an agreement with Democrats to raise the debt ceiling. When presented with the choice of whether an agreement should include only spending cuts, tax increases, or a combination of both, two thirds of the Tea Party supporters said that it should include a combination of spending cuts and tax increases.[13] Strong public support for compromise on governmental revenue increases and spending cuts rose again in the face of the "fiscal cliff" – the massive across-the-board federal tax rate increases and defense and entitlement cuts that were threatened to take effect in January 2013.

But once the immediate threat is averted, the critics of the compromise come out in full force, especially when a compromise is reached through an acrimonious process. The debt ceiling agreement in August 2011 was followed by harsh, principled criticism from both sides of the aisle. Similarly, the compromise to avoid the fiscal cliff, brokered by Vice President Biden and Senate Majority Leader McConnell in the waning hours of 2012, was immediately met with intense criticism of both the content of the agreement and the tactics of the negotiators – despite consensus on the need to compromise and the overwhelming Senate vote in favor of the agreement.

Public ambivalence toward political compromise is not unique to Americans who respond to surveys. It reflects the inevitable tension between seeing the need to compromise to make political progress and appreciating the loss of something valuable in agreeing to a compromise.

Political philosophers share a similar ambivalence toward compromise. Edmund Burke, the eighteenth-century conservative thinker and British statesman, declared that "all government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter."[14] But as a politician, he famously refused to compromise with his constituents when their will contradicted his judgment.[15] John Stuart Mill's contemporaries knew the nineteenth-century liberal theorist as an uncompromising radical. But when elected to Parliament, Mill was quite willing to make deals and support concessions to achieve even relatively modest gains.[16]

It might seem, then, that conservatives favor compromise in principle but not in practice, whereas liberals oppose compromise in principle but accept it in practice. But consider the Pew Center's interpretation of its 2007 survey on attitudes toward compromise: "Democrats tend to favor compromise in principle, but not in practice, while Republicans favor compromise in practice, but not in principle."[17] This is precisely the reverse of the Burke/Mill contrast.

The more plausible interpretation is that attitudes toward compromise are not inherent in either ideology or party. Both liberals and conservatives, Democrats and Republicans, can favor compromise in principle while resisting it in practice – and vice versa. In the modern welfare state, even partisans who want less government must legislate to get it, and often that requires compromise. Attitudes toward compromise depend much more on the relative power of the parties at a particular time, the specific issues in question, and the mindsets of the individuals making the judgments.

What is consistent, however, is the persistent disconnect between the attitudes toward compromise in general and the inclinations to make particular compromises. Nothing is more common in political negotiation than praise for the idea of compromise coupled with resistance to realize it. Resistance to specific political compromises prevents the value of compromise in democratic politics from being appreciated. Politicians and citizens tend to discount the general value of compromise when they come to make decisions about particular compromises. To give compromise its due, we need to connect its general value to decisions about particular compromises, and then empower this value to influence negotiations.

Why should we be concerned that contemporary American politics makes compromise so difficult? After all, some compromises are undesirable, and politicians should sometimes stand resolutely on their principles and oppose legislation that violates those principles. The chief reason to be concerned is that the greater the resistance to compromise, the greater the bias in favor of the status quo.

Privileging the status quo does not mean that nothing changes. It simply means that politicians allow outside forces – the market, expiring agreements, social movements – to control the change. The status quo includes both the current state of affairs and the state that results from political inaction. In the deeply divided politics of 2011, rejecting congressional compromise on raising the debt ceiling would not have left the economy unchanged. Similarly, after the 2012 election, rejecting compromise on tax increases and spending cuts would have allowed economic changes that few wished to see. A status quo bias in politics can result in stasis; it can also produce unintended and undesirable change.

The status quo offers no assurance even of stability, let alone of political progress by any standard. The first value of compromise in practice is that it enables improvements in the existing and ongoing state of affairs. Democratic politics, which represents conflicting points of view, cannot produce change without some mutual accommodation. Without compromise on health care, taxation, and other major issues, the status quo prevails, even when it preserves a policy that does not serve the common good, or produces consequences that create a major crisis.

The key question to ask of any compromise: does the proposal (or any feasible alternative) represent an improvement over the status quo? This question in effect brings the general value of compromise to bear on the decision about a particular compromise. Although compromises are typically seen as, and often are, the products of unprincipled bargaining and reinforcements of the prevailing balance of power, they are also the primary – and often the only – means by which democratic politics can improve on the status quo.

In some cases, the status quo may be preferable to any of the proposed alternatives. Some political scientists have observed that legislative inertia induced by resistance to compromise may not be a problem when voters do not want Congress to act – for example, during the period of large budget surpluses in the late 1990s. But they also recognize that it becomes a serious problem when voters "believe the government should take some action to alleviate a problem."[18]

There can also be reasonable disagreement about whether a particular compromise actually is an improvement over the current state of affairs. Opponents of a health care compromise, for example, might agree that it would improve on the current system, but might also believe that accepting the compromise will prevent an even more desirable reform in the future. Or opponents may think that accepting the compromise now will lead to bigger government in the future, which they count as a worse outcome on balance than what they regard as only a modest improvement in the health care system. Admittedly, there may be good reasons for opposing a particular compromise, but they do not support a general resistance to compromise. They do not create the presumption against compromise that animates the uncompromising mindset and that dominates contemporary American politics.

General resistance to compromise presumes that the status quo is always preferable to compromise, or that it is always a mistake to yield something to your political adversaries, even when they are willing to yield something to you. Privileging the status quo in this way is not consistent with either a principled liberal or a principled conservative political perspective. Liberals do not always favor the change that compromise can bring, and conservatives do not always oppose it. The same holds for moderates, libertarians, socialists, and other advocates of principled political ideologies. The value of a compromise should be weighed against whether the new policies advance both sides' principles compared with what the status quo produces.

Resistance to compromise is often rooted in the fact that the costs of not compromising are never equal for all parties. The costs of refusing compromise depend on the difference between what credibly can be achieved through compromise and what the status quo offers. This perceived difference will vary according to the priorities of the parties to the compromise and the people they represent. Because political compromises rarely "split the difference" between what all parties hope to achieve, resistance may flow from the fear that a compromise will disproportionately benefit your political opponents, whom you are already disposed to distrust. Even when all parties stand to gain, such anticipatory resentment of unequal gain (or loss) can induce a blanket opposition to compromise.

Another source of general opposition to compromise – and the failure to recognize the costs of intransigence – is the perpetual hope that there is more to be gained (or less lost) in the future by avoiding compromise now. But notice: opponents of a compromise who use such a rationale are not opposing compromise in principle; they are introducing new, indirect, long-term projections of policy and strategy into the calculation of whether a compromise is truly preferable to the status quo. This perspective in turn opens the door for proponents of the compromise to introduce their own broader, long-term considerations. These may include the effects of the compromise on the possibility of future cooperation, as well as other consequences for the democratic process.

Those considerations point to the second important, but often neglected, value of compromise. Resistance to compromise undermines the mutual respect that is essential for a robust democratic process. Mutual respect expresses a constructive attitude toward one's political opponents and a willingness to engage in good faith with them. It is based on a principle of reciprocity, which is at the core of many different conceptions of democracy.[19] Reciprocity seeks mutually acceptable ways not only of resolving disagreements but also of living with the disagreements that inevitably remain.

Mutual respect is consistent with many strategies for reaching agreement, including hard bargaining, provided it is done in good faith. But mutual respect excludes means that are intended to degrade, humiliate, or otherwise demean opponents who themselves demonstrate a willingness to negotiate in good faith (or would demonstrate it were they not being disrespected). Avoiding compromise by alienating your adversaries not only harms the citizens who stand to benefit from a particular compromise, but also diminishes the prospects for future compromises. When parties enter into negotiations in bad faith, deliberately misrepresent their opponents' positions, and refuse to cooperate even on matters on which they could find agreement, they undermine the relationships that are necessary to sustain any morally justifiable democracy under the modern conditions of deep and persistent disagreement.

Recognizing these two values of compromise – that it enables mutually beneficial improvements and promotes mutually respectful politics – may still not be sufficient to tip the balance in favor of a particular compromise. To understand fully the case for compromise, it is necessary to appreciate the fact that any specific compromise will by its nature be vulnerable to criticisms from all sides.

The philosopher George Santayana, a friend of compromise, captured the dual nature of the aversion to it: it is "odious to passionate natures because it seems a *surrender*, and to intellectual natures because it seems a *confusion*."[20] The sense of surrender stems from the fact that compromise demands the sacrifice of something valuable, and gives rise to suspicions that, but for the base motives of the other side, the agreement could have been better. The sense of confusion comes from the fact that compromises are combinations of often contradictory principles. Both of these reactions obscure the true value of compromise.

First, consider the surrender. Attitudes toward compromise are path-dependent: how a compromise is reached affects how it is evaluated. This is because a compromise distinctly manifests an opposition of wills. It is this opposition of wills that fuels the anticipatory resentment that your party will gain less, or lose more, than your opponent's. If you agree to a compromise, your assessment of the deal is substantially affected by whether you believe the other party bargained in good faith. Given the inevitable uncertainty of motives in legislative negotiations, and the near certainty that the motives are at least partly political, the circumstances are singularly ripe for distrust. Often even minor procedural manipulations (such as the reconciliation tactic used by the Democrats in passing the Affordable Care Act) may be perceived as signs of bad faith and give rise to suspicions that the process has been unfair. You may be willing to give up a principle if the process is fair, but if it is not, you understandably see an already bad bargain as even worse. The compromising adds insult to injury. Because the process of political negotiation is imperfect, it is tempting to fasten on the immediate insult and dismiss the prospective benefit of the agreement.

Then there is Santayana's point about confusion. A compromise is not designed to be coherent or principled in the way that laws ideally are. Even if we seek coherence in law, it is a mistake to think that it can be achieved in compromise. A classic compromise gives something to all parties, which means that the end result is almost always internally contradictory. The outcome will not be satisfying if judged from the perspective of any single principle or set of principles – whether yours or those of your opponents. You will reject nearly every possible compromise if you try to anticipate the outcome by testing it against a coherent theory of justice. By its nature, the outcome of a compromise will almost never satisfy a single principle, a set of principles, or a theory of justice. The compromise will not only fall short, as does most legislation, but it will include elements that are inconsistent with each other and with any single theory.

Compromise has its limits, but it is a mistake to try to stipulate categorically or in advance what they are. Consider the common precept that it is permissible to compromise interests but not principles. The problem is not that the distinction between interests and principles is fuzzy (it is), but rather that any such distinction – implying that interests may be compromised and principles should not – will disqualify too many potentially desirable compromises. Principles can be – and most often are – realized only partially. We implicitly accept this truth throughout our lives: even without compromising, we are not likely to realize absolutely our most prized political principles – liberty, opportunity, justice for all. Less lofty political principles, which often are no less passionately held – such as a commitment to lower taxation and entitlement spending, or to provide universal health care coverage and decrease its cost – even more clearly admit of gradations of realization. Compromises of principle and interest are neither morally nor practically distinct.

Furthermore, no one can fully anticipate what results the complex process of compromise can be expected to yield, especially in major legislative struggles. Achieving the best possible outcome will depend in no small measure on the nature of the negotiations and the evolving political context. Drawing a line in the sand – if more than a negotiating tactic – is a prescription for thwarting mutually beneficial progress before it can take form. And once agreed upon, compromises are easy targets for criticism simply because the apparent results – often morally incoherent – are divorced from both the process and alternatives that were available at the time.

Instead of trying to find a formula for limiting compromise, we do better to locate its limits by identifying domains where it is less useful for the democratic process. The most salient domain, as we have indicated, is campaigning. A successful campaign strategy requires an uncompromising mindset. It favors candidates who stand firmly on their principles and condemn their opponents' positions at every turn. Candidates sometimes modify their positions to reach independents in general elections, but less than is usually assumed, and even a modest gesture toward the center is often suspect in the eyes of the candidate's base. The primary election effectively requires candidates to maximize their uncompromising positions to capture their partisan base, which will then assail primary winners if they diverge from their hard lines in the general election.

Tenaciously standing on principle, as the uncompromising mindset demands, is necessary for political mobilization. Candidates inspire supporters less effectively when they talk more about prudent compromises than about steadfast commitments. Their support and ultimately their success in the campaign depend on reaffirming their uncompromising commitment to core principles, and on distinguishing their positions sharply from those of their opponents.

Campaigning also requires mutual mistrust, the second element of the uncompromising mindset. Campaigns are competitive encounters, not cooperative enterprises. They are contests with zero-sum outcomes, not opportunities for win-win solutions. Mutual distrust is not only understandable but advisable.

But while the uncompromising mindset serves a useful democratic purpose in the domain of campaigns, it is detrimental when it dominates in the domain of governance. To govern, elected leaders have to adopt a compromising mindset. Rather than standing tenaciously on principle, they need to make concessions.

Rather than mistrusting and trying to defeat their opponents at every turn, they have to respect their opponents enough to collaborate on legislation.

In the era of the permanent campaign, the division of labor between campaigning and governing has dissolved.[21] Political leaders increasingly rely on political consultants, pollsters, and focus groups to formulate public policy. Interest groups and their lobbyists constantly remind politicians that what they do in office will affect whether they stay in office – reminders that often come as offers not to be refused. Politicians spend more and more time between elections raising funds for their next campaigns. Journalists increasingly cover governing as if it were campaigning.

No one should suppose that we could return to a time when governing and campaigning stayed mostly in separate spheres, each minding its own business. The process then was in many respects less democratic, and no more edifying than ours today. But if we wish to improve the prospects of compromise, we must find ways to keep the pressures of campaigning from overwhelming the business of governing. We need to respect the value of not compromising in campaigns without letting it obscure the value of compromising in governance.

There is another, no less significant domain in which the value of compromise is limited. Uncompromising politics is valuable in social movements, political protests, demonstrations, and activist organizations, and their surrogates in government. As political theorists and political scientists have long recognized, contestation is at least as important as consensus in a democracy.[22] Contentious politics is an essential part of the democratic process.

Among the most uncompromising activists in recent American political life have been the supporters of the Tea Party, the populist movement that began in 2009 and rapidly grew in numbers and influence.[23] Promoting various conservative and libertarian causes, including smaller government, lower taxes, and reduced debt and budget deficits, the movement was credited with electing dozens of new state legislators and members of Congress.

Yet here, too, the uncompromising mindset has limits. When the Tea Party congressional representatives faced the choice between legislating or protesting, these limits became apparent. As some political scientists observed, "Tea Party activism is more likely to produce political theater among competing agitators than to foster reasoned compromise within the GOP or between Republicans and Democrats in Washington." This approach may help "keep base supporters attentive and angry," but it is not conducive to bringing about legislative change or to expanding the movement itself.[24] This "just say no to compromise" approach also showed signs of frustrating even many Tea Party supporters.[25]

Compromise is essential for facilitating legislation to improve on the status quo and for cultivating the respect necessary for cooperation in democratic politics. It can in this way serve the common good without itself containing only common goods. Yet the political deck is stacked against compromise in many ways. The more the permanent campaign and its uncompromising mindset dominate the political landscape, the harder legislative agreements are to reach. When compromises are reached, they are, by their very nature, vulnerable. They rarely enjoy the luxury of resting on common ground; they too easily become casualties of confusion, dispatched for their incoherence, if they have not already become victims of death by distrust.

We have suggested why the general value of compromise needs to be better appreciated in governance. Politicians must confront the challenge of making specific compromises in order to address major public concerns and to overcome dysfunctional political gridlock. Because majorities of voters often favor compromise, some political scientists and reformers argue for the need to modify electoral institutions so as to give greater voice to majorities over intransigent minorities on both sides. Allowing independents to vote in all party primaries could help elect candidates with more compromising attitudes. Publicly financed campaigns could lessen the pressures of fundraising that both distract politicians from governing and influence the manner in which politicians govern. Rules that require members of Congress to spend more time working together in Washington, instead of rushing home to raise campaign money, could help.

These are all worthy reforms. We have elsewhere argued in favor of many of them.[26] But any attempt to carry out such reforms comes with a catch-22. Institutional reforms themselves require a change in the mindsets of our political leaders: the reforms are impossible without compromise. Either legislators adopt a compromising attitude, in which case the reforms are not essential, or they do not adopt it, in which case they will not be able to agree on the reforms. There is no *deus ex machina* that will save democratic government from itself.

If legislators themselves do not recognize the value of compromise, then voters need to use elections to show that they do. Voters must choose representatives who care enough about governing to take the risks of compromising. This does not mean accepting candidates who abandon their principles or forgo partisanship. But it does mean choosing candidates who are able to set aside their uncompromising mindsets long enough to craft the compromises necessary to improve on the status quo and serve the common good.

ENDNOTES

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Authors' Note: This essay is drawn substantially from parts of our book, *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It* (Princeton, N.J.: Princeton University Press, 2012).

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Reestablishing the Commons for the Common Good

Howard Gardner

Abstract: For individuals living in a small community, the notion of "common good" seems almost natural; it can be thought of simply as neighborly morality. However, in a complex modern society, it is far more challenging for individuals to define and agree upon what is the common good. Nonetheless, two contemporary roles would benefit from embracing a broader sense of the good: 1) membership in a profession; and 2) membership in a polity. Drawing on findings from the GoodWork Project, I describe how the common good can become a guiding value in the professional and civic realms; discuss threats to such guiding values; and suggest some ways to promote the common good in contemporary American society.

As high-end primates, human beings in earlier eras presumably had some notion of "common good." Parents made sacrifices for their children, and later in life, the favor was often returned. Siblings and more distant relatives cared for one another and, perhaps, for a broader group of persons.

Precisely when such solidarity transcended blood relationships will likely never be known. The work of anthropologist Robin Dunbar hints at the scope of early conceptions of the common good.[1] Dunbar argues that individuals can comfortably maintain relationships with up to 150 people: the maximum number of individuals in a clan or small tribe who see each other regularly, and whose behavior – friendly and helpful, or hostile and injurious – can be remembered for purposes of cooperation or retaliation.

I have coined the phrase *neighborly morality* to denote this conception of the common good.[2] Here, individuals handle a manageable cognitive load, with some capacity to solve existing problems and to anticipate new ones. It is logical for such individuals to help one another from time to time, to work together toward goals that would be difficult or impossible to achieve independently.

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Indeed, this is what happens in small settlements.

Consider the Ten Commandments and the Golden Rule. Traditional injunctions make sense when dealing with a manageable number of acquaintances. Honor your parents and desist from lying, stealing from, and disrespecting your neighbors. Moreover, sanctions that follow the breaking of these codes – whether imposed by the community or by God – reinforce the desirability of the neighborly form of the common good.

We lack thorough histories of such small human groups. Communities large and literate enough to leave written records have dwarfed the type of neighborhood that Dunbar describes. Yet the need to recognize and address the common good scarcely disappears with the emergence of larger settlements, villages, cities, and states.

Is there evidence of voluntarism in working for the common good in these larger communities? The slaves of Egypt built pyramids, burial tombs, and massive granaries that served others, but we have no reason to believe that their actions were voluntary. So, too, serfs and peasants in ancient and medieval times mined for precious metals and harvested crops. Indeed, much of the political theory developed in Europe in the seventeenth and eighteenth centuries was an attempt to determine whether such apparently selfless actions were compulsory; or whether people joined together voluntarily to serve what they believed was a broader good than that extended to kith and kin.

With the growth of states and the emergence of nations, centralized powers came to the fore. Inhabitants of the great empires – Chinese, Indian, Ottoman, Holy Roman – did not merely elect to pay taxes and tribute or to bear arms in a military expedition. At minimum they were compelled to do so; but some citizens also understood why it might be in their interest to cooperate in such large-scale ventures. Whether literally religious, like Christianity or Islam, or better described as spiritual, like Confucianism or Shinto, the belief systems of these civilizations provided rationales for pro-social behavior, which motivated some inhabitants. Both formal and informal educational systems also represented efforts to instill such cooperative behaviors in the next generation.

My concern is not with authoritarian or totalitarian societies – the pharaohs of Egypt, the Qin emperors in China – or the fascist and communist dictators of the twentieth century. Rather, the challenge is to understand the specific conditions under which a voluntary conscientiousness emerges in nonauthoritarian societies. In such cases, individuals who have the freedom to behave selfishly instead elect to devote significant effort to benefit the larger polity. In contrast to neighborly morality, I term this variety of service *the ethics of roles*. The two principal roles with regard to serving the common good are those of the worker and of the citizen.

The ethical citizen views the polity as an extension of himself and his interests. Not only does the ethical citizen identify with his city, region, or state; but concerned with the welfare of that entity, he is willing to contribute to it, whether or not he and his kin benefit directly.

Such powerful civic associations are illustrated by the Athenians' long-honored concern with the welfare of their city. In fifth century Athens, young adult males swore the following oath:

> We will never bring disgrace on this our city through an act of dishonesty or cowardice.
>
> We will fight for the ideals and Sacred Things of the city both alone and with many.

> We will revere and obey the city's laws, and will do our best to incite a like reverence and respect in those above us who are prone to annul them or set them at naught.
>
> We will strive increasingly to quicken the public's sense of civic duty.
>
> Thus, in all these ways we will transmit this city, not only not less, but greater and more beautiful that it was transmitted to us.[3]

In Western civilization since the height of Athens, there have been both periods of active ethical citizenship and periods when the role of the ethical citizen was quiescent or even absent. Some periods of ethical citizenship coincided with religious agendas: for example, participation in the Crusades on behalf of Christendom seems to have been voluntary on the part of many. Other periods coincided with political revolution – be it the American Revolution, the French Revolution, the founding of the modern Chinese state, or the Russian Revolution of the early twentieth century. It is also possible to evaluate and rank polities in terms of civic concern for the common good. Contemporary Scandinavian and other Northern European countries, for example, stand out for embracing a voluntary form of the common good. East Asian countries also demonstrate a concern with the common good, though it may be somewhat less volitional on the part of their citizens.

The role of the ethical worker complements that of the ethical citizen, and its history is no less complex. Early instances of the ethical worker include the emergence of trades and guilds in the late Middle Ages. Certainly, trades and guilds exhibited selfish and secretive behaviors. But within the guilds there was also an awareness of which actions and which ideals served the good of the budding profession and, perhaps, of the broader society as well. The guild's concern for the greater good can be discerned in the emergence of labor unions in Europe and the Americas.

The ethical worker emerged with the development of the professions, sometimes called the *learned professions*. Paralleling the oath of the Athenian citizen is the Hippocratic Oath, which is generally considered the first example of a professional oath and is still commonly taken today in one or another form. By taking the oath, the physician pledges to come to the aid of those who are sick, to do so without regard to the patient's ability to pay, to avoid any form of bribery, to pass on the trade to the next generation, and to respect the patient's privacy. While the oath may protect the special status of the profession, it also represents a pioneering effort to stipulate what it means to serve the larger community – the common good.

In the early 1960s *Dædalus* devoted an entire issue to the American professions. The professions were then at their heights: "Everywhere in American life, the professions are triumphant," remarked editor Kenneth Lynn.[4] Professionals had prestige, status, and adequate compensation. They were viewed as individuals, and because they had mastered their material, were current in knowledge, and had been endorsed by the masters of their chosen guild, they were granted considerable autonomy. They were perceived as authorities, capable of rendering disinterested judgments in the face of complexity and uncertainty. Soon additional sectors of society, from business to journalism, emulated the "gold standards" of medicine, law, and the professoriate with regard to credentialing, service, and objectivity.

The concept of "disinterestedness" is crucial to the roles of both the professional and the citizen.[5] Of course, the ethical worker and citizen does not ignore his or her own needs. Nevertheless, society benefits when those wielding power and influence – in professional offices, in the voting booth, in the public sphere – are able to transcend narrow self-interest. Professionals follow the precepts of the guild just as citizens follow their oath of citizenship. Thus, their understanding of personal gain is viewed within the context of the greater good over an extended period of time.

So why is a professor of cognition and education writing an essay on the ethical professional and the ethical citizen? I grew up in the 1950s and 1960s, when the professional in America was highly esteemed. Certainly, the professions were not without flaws: women and minorities were often barred from entering a profession, never mind ascending to the top ranks (a challenge that still remains in many sectors). Yet without romanticizing the era, I feel reasonably confident that American professionals in the mid-twentieth century cultivated a sense of the common good, and this framework guided them in their work. And flawed though they were, American citizens and public servants of the era viewed themselves as servants of this same common good, not servants of just their immediate needs, neighbors, or constituencies.

By 1995, my colleagues in psychology, Mihaly Csikszentmihalyi and William Damon, and I sensed that the era of the honored professional was already on the wane. We could see that law was becoming overwhelmingly corporate; that the practice of medicine was taking place in large, non-professionally-led health maintenance organizations, often for-profit; and that print and broadcast journalism had difficulty covering important news in a thorough and dispassionate way. (We were then unaware of the parallel pressures put on financial professionals – auditors, bankers, credit raters – but the events of the past decade have amply documented the difficulty of maintaining professionalism in the financial sector in the face of rapid change and the opportunity to make enormous sums of money when willing to cut corners.)

To understand and address this movement away from the honored professional, we founded the GoodWork Project. Active today, the GoodWork Project is concerned with what it means to be a professional in the modern world. We explore the question of how professions can survive when conditions are changing rapidly, when our sense of time and space has been radically altered by technology, when markets are very powerful, and when few if any counterforces can mediate or moderate the forces of the market. To answer these questions, we interviewed more than 1,200 professionals drawn from nine different realms of work, and we launched a series of sibling and offspring research projects. Our findings are detailed in a dozen books and numerous articles, and described at our website www.thegoodproject.org.[6]

Why has the role of the professional in America been undermined in such a short period of time? Indeed, the perception of the American professional has so shifted that many young persons assume that a professional is simply a businessman who does not make as much money as a successful entrepreneur, trader, or consultant.

A multitude of factors has contributed to the diminution of the role of the professional, and more specifically, of its ethical core. Among the contributing factors is the opening of the profession to groups that were hitherto not welcome. Without question, this access has on balance been a healthy and needed trend, echoing George Bernard Shaw's renowned quip that "all professions are conspiracies against the laity." However, this democratization has also often entailed an anti-elite, anti-expert sentiment. A heightened belief in the genius of the market, which is believed to be the optimal regulator of society and its institutions, has also lessened the value placed on professionals. In Ronald Reagan's United States and Margaret Thatcher's United Kingdom, there was little sympathy for professionals who sought protection of their status: "There is no such thing as society," Thatcher famously declared. And with cost-free access to copious technical information, the digital revolution has sometimes engendered unrealistic expectations of expertise on the part of professionals and placed unexpected pressures on those who, in earlier times, had been assumed to "know best."

Though it has largely been a hidden trend, the special status of the professional has been gradually worn down by the tide of market and value changes. One single event did not suddenly undermine the professional; rather, between 1970 and 2010, the once-esteemed professional came to be viewed with increased skepticism and distrust. And while diminution of status does not necessarily entail a diminution of ethical fiber, it is more difficult for the professional to serve the common good when society no longer elevates and empowers him.

The relatively positive milieu of the mid-twentieth century has been replaced by an atmosphere of fear and greed among many citizens and professionals: fear on the part of those who feel that they are losing their place in society; and greed on the part of those whose lives are driven by a desire for ever more possessions and ever-advancing status all too often yoked to the level of compensation, even in the not-for-profit sector. Concern for the common good cannot survive in the face of these two virulent forces. More worrisome, fear and greed combine to form a vicious cycle that is extremely difficult to reverse on an individual or societal level.

GoodWork Project researchers are often asked how we know that professionals are less ethical than they once were. Admittedly, we could not prove this claim to a skeptic, though much research with young people suggests an attenuation of the ethical muscle. But regardless of its standing in relation to the past, the ethical level of professions inarguably needs nurturing today.

And what of the role of the ethical citizen? The research of political scientist Robert Putnam documents the decline of civic communitarian groups, the weakening of civic trust in increasingly diverse societies, and the growing politicization of religion; not one of these developments favors the common good.[7] Voting percentages may fluctuate, but public trust in governmental institutions and practices has dropped steadily, if not precipitously. Considerable evidence from the digital world documents both the ignorance of citizens about basic constitutional and historical concepts and the increased tendency of citizens to associate principally with those who share their political views. The hope that the Internet would usher in an era of cosmopolitanism, empathy, and/or generosity has not – or at least not yet – been realized.

Given the dystopic trends in contemporary American society, it is necessary to search broadly for encouraging models. It is poignant that many formerly totalitarian states – in Eastern Europe and East Asia, for example – look to the United States for models of how to develop an independent legal system, a political process, a faculty governance, or a journalistic ethos, at a time when the ethics of the professions in the United States are being intensely challenged. Revealingly, a preliminary finding from one of our studies suggests that immigrant youth are no more trusting of institutions and public figures than are American-born youth; however, the immigrant youth at least trust the *processes* in areas such as law or investigative reporting.

Scandinavia (particularly Sweden and Denmark) and certain other pockets of Western Europe are probably the strongest bastions of ethical citizens and ethical professionals today. For many years, I have visited Reggio Emilia, a small city in northeastern Italy, celebrated for its remarkable preschool educational institutions. Not coincidentally, Reggio Emilia is in the region of Italy that, according to Robert Putnam, founded institutions of civic democracy as early as the twelfth century![8] Not only have I observed an exemplary concern for the common good in Reggio Emilia, but this Italian community represents a model learning organization, with leaders working tirelessly to learn from other sites as well as from their own experiments and mistakes.[9]

However, it is not clear either in Scandinavia or in other parts of Europe that the ethics of roles can endure in the face of these three factors: 1) pressures of the market and of globalization; 2) ready access of the general population to knowledge and expertise, both genuine and feigned, ushered in by the digital revolution; and 3) the large-scale movement of immigrants into once homogeneous societies. From what I have observed, countries like Sweden and the Netherlands make great efforts to integrate immigrants. Yet, particularly at times of financial pressure, it is easy to scapegoat immigrants and thereby narrow the scope of what is "common."

Specifically, in Scandinavia and parts of Northern and Western Europe, the common good is seen as the good of the whole nation. But if a significant part of the population is not integrated, and therefore is not accepted as part of the nation, then notions of the common good become truncated. The same issues arise in East Asia, where minorities in China or Japan have not been easily integrated into the majority culture. Countries with greater diversity and established histories of integrating ethnic minorities may have an easier time embracing an ecumenical notion of the common good. Recent social and political movements in the United States, Brazil, and India, however, demonstrate the constant pressures placed on ethnically diverse societies to limit the scope of what constitutes "we."

In addition to documenting threats to the common good, the GoodWork Project research group has sought to identify features that are most likely to engender a broader sense of community among professionals and citizens. Many of the professionals with whom we spoke cited early religious education or experiences as a principal contributor to their ethical sense. Though many participants identified their religious upbringing as a major influence on their adult understanding of ethics, most no longer actively practiced their birth religion, nor did God or their religion otherwise come up in our lengthy interviews. In fact, for only one interview group did religion continue to loom large: namely, subjects who had been nominated as "good businessmen or businesswomen." Note, however, that our interviews took place largely on the two coasts of the United States; if our sample had been more heavily skewed toward the South or the Midwest, religion might have been discussed more frequently.

Beyond the familial and religious milieus of early life, three factors prove influential in developing an ethical sense:

Vertical Support. Mentorship and other forms of institutional support are crucial to the individual's development of an ethical stance. An admired mentor possessing a strong ethical compass may be a hugely influential model to a developing citizen. The same holds true of the workplace milieu: do leaders and supervisors value a high ethical standard, and not just as a talking point?

Less predictably, our research subjects frequently mentioned individuals who served as negative role models – we called these *anti-mentors* or *tor-mentors*. Our subjects often explained: "He (or she) epitomized what I did NOT want to be." Of course, many ethically compromised workers lacked mentors, or had mentors who were themselves ethically deficient. Distance from a mentor with a negative influence may be required for a professional to realize that his or her mentor is not worthy of emulation.

Horizontal Support. In the contemporary United States, particularly with the rise of social media, the role of peer groups has taken on greater importance. With mentors scarce and senior individuals often moving from one institution to another, the influence of age-mates can be enormous. And as the GoodWork Project has documented, many young professionals perceive their peers to be extremely ambitious, often willing to cut corners to gain advancement. (We were not in a position to determine whether these perceptions were accurate.) Our subjects explained to us that they were not willing to hurt their odds of professional success by being more ethical than their peers. A low or inconsistent set of standards among peers – whether genuine or perceived – can confound one's ethical orientation.

Peer influence need not be destructive. It is certainly possible for peers to band together, to attempt to better the ethical milieu of their organization, or even to start a new institution that embodies high ethical standards. The remarkable young entrepreneurs who have recently founded organizations in education, citizenship, justice, and the environment have much to teach us about the pursuit of the common good. Alas, as John Gardner – the embodiment of the good citizen in an earlier era – has pointed out, their efforts can pale in the event that necessary and far-reaching legislation is not enacted.

Periodic Wake-up Calls. Even when attempting to serve the common good, workers and citizens can regress, acting either foolishly or selfishly. At such times, an unexpected event can be salutary. The event is often a negative one – malpractice on the part of an individual or group that threatens the viability of the overall enterprise. Such a wake-up call occurred at *The New York Times* early in the twenty-first century. Within a short time frame, two key events unfolded: 1) the *Times* discovered that staff reporter Jayson Blair had plagiarized and fabricated news stories; and 2) the national news division published the unsubstantiated claim that Saddam Hussein was hiding weapons of mass destruction in Iraq. Such wake-up calls may compel individuals to revisit the core values of their profession and redetermine how best to embody them. The wake-up call is therefore ultimately a positive event that can help workers entrenched in a profession appreciate how their role can serve the broader good. That was the case in 1971, when *The New York Times* and *The Washington Post* risked judicial proceedings and financial ruin by publishing the Pentagon Papers.

These forces are not limited to the professional realm, but operate in civic life as well. Young people are heavily influenced by the models of parents and teachers; indeed, the best predictor of interest in civics is growing up in a home where members of the family regularly discuss and debate the news. Peers exert potent influence as well: it matters whether a child's peers discuss participants and events in the political and economic worlds, or if they restrict their discourse to gossip about celebrities. And once again, the occurrence of a major event – carnage at an elementary or secondary school, the bombing of the Twin Towers – can serve as a civic wake-up call.

We began the GoodWork Project with the aim of understanding current stances toward the common good: what is happening with respect to various professions and, more generally, to the world of work; and what is happening with respect to citizenship, among youth in particular. As the data accumulated, and as we reflected on their implications, we elected to devote our efforts toward the promotion of good work and good citizenship.

Under the leadership of William Damon, and with the collaboration of the Committee of Concerned Journalists, the GoodWork Project designed a traveling curriculum for journalists. It is based on a series of off-site workshops where members of a journalistic organization can meet to discuss vexed ethical issues, such as how to minimize bias, how to verify sources while competing with blogs in a 24/7 news cycle, and how to undertake investigative journalism at a time of intense market pressures and diminished resources. Carried out in almost two hundred newsrooms and involving approximately three thousand journalists, the traveling curriculum has been well received, and a follow-up study has indicated that the workshops have had lasting value.

With the leadership of Lynn Barendsen and Wendy Fischman, we have designed the GoodWork Toolkit, which consists of dilemmas that have been reported by subjects in our GoodWork study. Organized around a series of lessons, the participants tackle questions such as: What work is admired, and why? Can work be both engaging and ethical? Is it appropriate to cut corners when your colleagues engage in such compromises? The Toolkit can be used in any educational setting, but is most effective when, like the traveling curriculum in journalism, all the stakeholders participate actively.

Several of us have taught courses centered on the GoodWork themes. We have also designed "reflection sessions" for undergraduates. In these voluntary sessions, students reflect on their goals and values; their current use of time and how consistent this is with their large-scale concerns; and the manner in which they deal with ethical issues that have arisen in their own lives, or ones that have been reported in the media.

Inspiring individuals to focus on the common good is particularly challenging in a social climate of fear, greed, and uncertainty. Indeed, in one study that included a pre- and post-test, adolescents exposed to GoodWork issues actually became *more* resistant to working for the common good.[10] It is unclear whether they became less generous as a means of resolving cognitive dissonance; or whether challenging the common good is, at least for some, a necessary step en route to a more capacious perspective. We are under no illusion that mere discussion of these issues is the same as working on them in our daily lives; many of us "talk" a better game than we "walk." Yet the results of our various interventions have sufficiently encouraged us to continue their practice and development. As a result of these and other activities, I have become convinced of the power of a "common space" or a "commons." Originally, of course, this phrase in English referred to public grounds to which herdsmen brought their cattle and on which farmers planted their crops. If the community did not show restraint, the commons was soon exhausted – hence the famous "tragedy of the commons." Conversely, if individuals at the commons worked together to serve the long-term needs of the larger community, broader benefits resulted. The same principles extend beyond a physical commons to the institutions and polities that link professionals and citizens today.[11]

Within my own institution I have felt the pronounced need for such an intellectual common space. At an institution as large, well known, and closely monitored as Harvard, ethical issues arise constantly. Some issues are large, some small, and most are gossiped about. Yet Harvard leadership is extremely reluctant to discuss these issues publicly, let alone reflect on them and promulgate lessons learned. Meanwhile, bloggers speak very frankly about "silenced" issues, but they do so anonymously, leaving no way of determining which claims have warrant and which do not. I hope that it may be possible to create a "commons" where members of the Harvard community can freely discuss consequential ethical issues, without fear of reprisal, and thereby perhaps discover new procedures that could contribute to the common good in other contexts.

I believe in voluntarism. I admire institutions and practices that begin modestly and yet prove so compelling that they "go viral" and take on a life of their own. The educational system in Reggio Emilia exemplifies this phenomenon. The educators are far from proselytizers; indeed, they do not seek out partners or search for multichanneled megaphones. And yet since the time of Maria Montessori a century ago, no educational effort with young persons has had as much positive influence throughout the world as that put forth by the schools of Reggio.

However, boutique examples are difficult to replicate, and in the meantime, valuable opportunities may be lost. Accordingly, I endorse the promulgation of regulations and the implementation of laws that counter selfishness and self-centeredness, and that "nudge" people and institutions toward the common good. Recent Anglo-American history reveals a sharp turn away from concern with the common good. It is high time to restore a better balance. I therefore support those processes and institutions that explicitly embrace the common good as their mandate, as well as measures that can indicate whether they have contributed to greater common good. Just as war is too important to be left to the generals, the common good is too precious to be left to the vagaries of human biology, historical trends, or the appearance of the occasional saint. Conscientious efforts by ethical workers and ethical citizens to serve the common good deserve all the support that society and government can muster.

ENDNOTES

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The Democratic Spirit

Kwame Anthony Appiah

Abstract: There is a famous paradox about democracy: most forms of participation make no obvious difference to political outcomes and yet people act anyway. I argue that they are more likely to act politically if they have certain attitudes and commitments; and that productive attitudes of the right kind can be sustained by a culture in which two kinds of honor are central. One kind of honor is collective: it is the honor of nations, which is the concern of the patriot. Another is the honor of citizens, who are worthy of respect because they contribute to the practices that serve the republic. I suggest some practices we Americans might want to take up and honor for the sake of our own republic today, drawing attention to two discoveries in social psychology that could be productively brought to bear in our political life: namely, the Ben Franklin effect and the Contact Hypothesis.

> [H]ow much more profitable it is prudently to remove, than to resent, return, and continue inimical proceedings.
>
> –Benjamin Franklin, from his *Autobiography*

America acts. It starts – and ends – wars, accedes to treaties, gives foreign aid, raises taxes, authorizes corporations, creates patents, defines and punishes crimes. It does these things in the name of the American people, and we, the people, by way of elections, choose the legislators and executives who manage the doing of them. But we are supposed to be involved in the processes of government in more ways than simply by voting. All governments are of the people; all usually claim to be for the people. In our democracy, we aim to be a government by the people as well.

In this essay, I attempt to explain the relationship between our individual acts as citizens, on the one hand, and what our country does on the other. I assume that, in some sense, we can act as a people, literal or metaphorical.[1] So I want to develop a picture of the ways in which we individuals participate in those collective acts. Then, with that understanding in place, I will argue that doing this properly

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requires us to develop a certain political psychology: a way of thinking and feeling and acting as citizens. As you will see, it is a political psychology that is by no means standard in our country today; and I conclude by suggesting some practices and institutions that might lead to its becoming more common.

This volume explores how various institutions of our society help sustain democracy. In every domain there is a form of democratic stewardship that contributes to this task. It involves following norms, some of which are specific to institutional roles and particular professions. I focus here on the ways in which citizens contribute *as citizens* to the sustenance of democracy and on how institutions can help in this task.

Aristotle said in his *Politics* that the ideal political community, his city-state, should be small enough that its citizens could "know each other's personal characters" but big enough to be self-sufficient, and so he recommended that it should have a population "that can well be taken in at one view."[2] Today, however, self-sufficiency seems inconsistent with knowing each other's characters. While there are tiny political units, like the New England town, where it is plausible that people really could know one another, and where a meeting of the people really could govern, every American state and city – let alone the United States as a whole – is bound to be a political community of strangers. The challenge of modern politics (a challenge that Aristotle did not contemplate) is for strangers – people who know very little, if anything, about each other – to cooperate in the collective task of running the republic.

Our social psychologies evolved in prehistoric times in the context of a social life with a few score people. Aristotle's city-state already required interactions on a larger scale; but the government of a group that size could perhaps be conducted by people meeting face to face, hearing each other's arguments (at least if you had the voice, as Aristotle puts it, of Stentor, the herald "whose cry," Homer said, "was as loud as that of fifty men together"[3]). Even with the invention of the microphone, this is evidently inconceivable for the political interactions necessary on our modern scale of millions. How, then, to take the social psychology of a creature evolved for life in minuscule communities and transfer it to the multitudinous life of a modern nation?

Political scientist Benedict Anderson's well-known account of modern nationalism focuses on a central mechanism by which the nation-state takes hold of the lives of ordinary people around the world: namely, by allowing them to think of themselves as participating, through their shared identities as citizens, in the ongoing *story* of a vast group of strangers.[4] As Ernest Renan, that great French historian and nationalist, put it succinctly well over a century ago: "An heroic past, great men, glory – I mean real glory – this is the social capital on which the national idea is based."[5] What he had in mind was the fact that stories of this glorious past were part of what linked individuals in national fraternity and sorority: nations are narrative communities.

But there is another kind of connection among those who share identities that has been less remarked upon recently. It is implied when Renan talks not just about the past but about "an heroic past," about "great men, glory." For what patriotic citizens feel when they hear and tell those stories is *pride*. You can understand how that sentiment works only if you recognize that each of us shares, through our common national identity, in the honor of our nation . . . a privilege that comes with the burden of sharing in our country's shame as well. To have honor is to be entitled to respect.[6] If you care for your honor, you will want to be entitled to the respect of others. (Shame comes when you lose your right to respect: in caring for gaining and maintaining honor, you are bound to be concerned about losing it.)

The psychology of collective honor can be made to seem very mysterious. How can *I* gain or lose honor when somebody *else* does something, unless I was somehow responsible for their doing it? America protects vulnerable people in Somalia. I feel pride. But why? I didn't do anything, some other Americans did. America does something dishonorable at Abu Ghraib. I feel shame. I feel it even though I didn't do anything, even though I didn't support it, even though it was something I have always known was wrong. Why?

Questions like these are better not answered in the abstract. In John Coetzee's recent novel, *A Diary of a Bad Year*, the South African protagonist writes in response to the evidence, published in *The New Yorker*, that the U.S. administration sanctions torture and subverts conventions proscribing torture:

> If we grant the truth of what the *New Yorker* claims, then the issue for individual Americans becomes a moral one: how, in the face of this shame to which I am subjected, do I behave? How do I save my honor?

Here is a reminder of how national honor works . . . and of why we should be glad that it exists. It can motivate us to see if, together, we can do what is right. The issue of torture is moral, of course; but what engages each patriotic American is not just the morality of torture but also the honor of a country that tortures. And honor, unlike moral responsibility, is something you may need to recover whether or not it was your act (or culpable omission) that led to disaster.

Patriotism is often identified with love of country. That can't be right: many of my friends love Italy, but not being Italian citizens, they can't be Italian patriots. Love is a sentiment you can feel for what is not already yours. But you cannot share in the honor of a country – or of anything else – unless it *is* yours. My family, my church, my town, and my profession: each can bring me honor (and, alas, shame). But *your* family is, from honor's point of view, not my business. Patriotism is better understood as a concern for the honor of your country, your nation. This concern gives you a serious investment in its doings, even when, like most of us, you do not control them. National honor can engage citizens even when they know, as policy expert Anthony Downs has insisted, that they do not individually make the nation do or stop doing *anything*.[7] They can participate emotionally and symbolically with a great mass of others nevertheless, because their patriotism draws them into a shared experience. (The armed services, as the essay in this issue by Andrew A. Hill, Leonard Wong, and Stephen J. Gerras reminds us, are one of the great molders of this spirit.)

But just as I cannot, on my own, affect a political outcome in most cases, so I cannot steer the nation to the path of honor on my own. We have to ask why someone, even someone engaged with the nation's honor, should participate if, in this sense, it makes no difference. Collective honor defines one of the stakes in our common life. We are bound to care about it if we think of ourselves as Americans at all. But how can it move us to action? We can be engaged to participate by our wish to maintain our *individual* honor as citizens: to maintain, that is, a right to the respect of our fellows.

We are governing the republic together. The successful functioning of the republic depends on many citizens playing many roles. Some will serve as soldiers, police officers, civil servants, judges, or elected officials, employed to do the work that is required if America is to do anything at all. Others will serve the republic from time to time as unpaid jurors or as election officials. The republic will work as it should only if most of the citizens who do these things think about what they are doing in certain ways.

Public officials must, for one thing, avoid using – or, ideally, even appearing to use – the powers they are granted by their public role to their private advantage. For another, they must obey norms of nondiscrimination. The republic can flourish with less than perfect conformity to such ideals, but certain basic standards – the rules against nepotism and bribe-taking, for example – are rightly enforced by the criminal law; and others – such as persistent or egregious racism or sexism in the exercise of one's duties – are properly grounds for removal. If we do not demand absolute conformity, we can insist on certain basic standards. And we must, or the republic will not be able to do its job: indeed, it may degenerate into something that is no better for some than tyranny.

But there is a further task that has to be performed if the republic is to work. Some of us must vote. One of the major reasons why democracies are better places to live than tyrannies is because we change our rulers from time to time. That disciplines those who are, for the time being, exercising authority. An effective lifetime guarantee for incumbents – able, once they arrive, to steer the state's resources to those who will continue to vote for them in return – exposes them to temptations that are hard to resist.

As Norman Ornstein and Thomas Mann point out in their essay for this issue, other conditions must be met if there is to be a reasonable sense of accountability. Voting districts need to be designed so that there is a reasonable chance of incumbents being removed if enough voters are dissatisfied, for example. And replacing them has to have a prospect of leading to a change in actual policies. Our current system, with its partisan districting and divided government operating with parliamentary-style parties, often does not meet these two conditions.

Even if they were met, however, the discipline of the threat of removal works only if voters' choices are responsive to what elected officials actually do for the republic. And that requires both:

1) that there be reliable sources of information about their activities; and

2) that enough of the voters pay attention to the information.

The first of these conditions means that someone has to be engaged in investigating and reporting on public affairs, paying attention to what is happening, deciding what is important, and making it known. So we need the free press that the First Amendment promises us, and we need it to take its function seriously. But the second condition requires that some citizens aim to vote in ways that are guided by that information.

We can survive if some journalists don't care about the truth or are toadies to those currently in office. (We know we can because we have.) We can survive if some voters don't bother to vote or vote without knowing what the governors are doing. (This we know, too, for the same reason.) But without a lively world of journalism governed by respect for the truth, the electorate cannot do its job; and even with it, only an electorate that takes notice of that journalism will be able to act together to discipline those who rule.

There are, thus, many different ways in which citizens can participate in the activity of the republic, and if enough of us do it well enough we will gain the advantages of democratic elections. This kind of participation by ordinary citizens is what makes it true that the people govern. The workings of the republic are, in complex ways, the outcome of all these citizen acts. But that means that those who do not participate in any of these ways are free riders on the contributions of those who do. They gain the advantages of a shared practice without contributing to the burdens, like a rider on a public bus who has not paid his fare. Free riding of this sort is, generally speaking, wrong. And it wrongs particularly those who *are* contributing their fair share. Acts of this kind tear at the delicate fabric of the political bond, which is, as I have already remarked, a bond between strangers. When members of a community fail to contribute in this way they lose the right to the respect of their fellows. And since, as I have said, honor is basically a system of rights to respect and shame is the loss of such a right, it is shameful.

We can demand morally that citizens who have the capacity participate in certain ways; and in requiring jury participation or enrollment in selective service on pain of penalty, we do. These legal demands are different in important ways from many others. The demands of the criminal law or the laws of torts and contracts are not demands made on us as citizens, they apply to all within our jurisdiction; obeying the law is not part of the business of self-government in the way that helping to make the law, through politics, or administer it, as jurors, or defend it, as police officers or soldiers, is.

The question, what forms of participation in the life of the people can we demand, is harder than the question, why can we ask individuals to obey just laws. And so it is a delicate issue whether a law-abiding citizen who is not participating in the life of the republic in some particular way is doing something that is morally wrong; it is, therefore, a delicate issue to identify which forms of participation, such as jury service, we have the right to demand, on pain of penalty.

But honor comes to our rescue here. For citizen honor is not something we owe to all. What we owe morally to all people is the respect due to their humanity, their human dignity. But how we honor each other *as citizens* is, in good measure, up to us. The rewards of honor can be reserved for those who do more than what is morally required; and we are free, looking at it the other way round, to impose the penalties of dishonor on those who have not done anything morally wrong, provided they have fallen below the standard we have set for good citizenship. We may not have the moral right to punish bad citizenship with the coercive power of the state; but honor has its own logic, and we can shame those whose lapses are not moral but civic.[8]

In order to decide what kinds of behavior fall below the level that entitles you to citizen honor – the political respect of your fellow citizens – we need some ideas about which of the many things a person can do as a citizen are required to earn citizens their due respect. What is the fair share of the burdens of maintaining democracy that each of us owes for this purpose? Once we decided this, we could cry shame against those who were not doing at least their fair share. We should also cry shame against those who do participate, but do so in ways that are inconsistent with the norms that govern our shared life: impartiality for public officials, truthfulness for those in the media, and so on. Honor can operate in the life of citizens not only through their concern for the national honor, but also through their concern for their own individual honor as citizens.

Some defections from our citizen obligations are dishonorable because they are morally wrong, of course. They are wrong because they involve a failure to contribute our fair share to the common good. So those who are sufficiently motivated by the thought that these defections are wrong will not need the apparatus of honor to keep them doing what they should. Some defections are not morally wrong but are undesirable nevertheless, because without certain contributions, the good that democracy brings will be hard to achieve.[9] What a culture of citizen honor allows us to do is to shape both the behavior of those who are motivated solely by morality and the behavior of those who are motivated not even by that, using what political theorists Geoffrey Brennan and Philip Pettit have dubbed the "intangible hand" of social esteem and contempt.[10]

There are places – Australia, famously – where voting is a legal duty. For nearly seventy years, Australia has achieved a voter turnout rate over 95 percent by imposing a small fine for failure to show up at the polls. (This is not so much mandatory voting as mandatory appearance at the voting booth; you can simply record your presence by voting for "none of the above.") The penalty is so small – $20 (AUD) if you cannot provide a reasonable excuse for failing to vote – that we might in fact see this as a case where the law's function is largely to express disapproval of, rather than punish, those who do not vote. And so the society has effectively inculcated a sense that voting is a civic duty.[11]

This practice is thoroughly alien to our American traditions. The response to the moderate mandates of President Obama's health care reform bill, for instance, suggests that there continues to be a deep resistance here to individual mandates aimed at public goods. But in many states, jury service, that other great form of citizen participation in government, is enforced by penalties about as mild and almost as effective as the Australian requirement that citizens vote. So there must be other reasons why the Australian plan is a nonstarter here: one is that politicians will probably agree only on reforms that do not disadvantage them, and they have reasons both qua partisans and qua incumbents to fear that such a reform might make an undesirable difference (to their minds, at least) in the outcomes. Another is that those Americans who do vote think of it not just as a duty but also as a privilege: one that you earn by choosing to exercise it. They would likely feel that voting alongside people who were there merely because they had to be diminished the meaning of participation.

Indeed, from a legal point of view, the vote is a privilege in our society: it is a right you are granted, one you are permitted to exercise if you choose. Since we should participate as citizens for non-instrumental reasons, adding instrumental reasons – the avoidance of punishment or a monetary reward – may stop us recognizing the non-instrumental reasons it would be better for us to act on. Better, perhaps, to avoid imposing legal penalties for not voting, because there are reasons to think that people will take these duties more seriously if they are a matter of honor, rather than things they must do to avoid punishment (or, for that matter, to gain an economic reward).

So there are norms of three kinds governing our life as citizens. First, there are moral norms requiring participation, where nonparticipation is free-riding. Second, there are norms governing how we participate (if we do), which we can call *norms of participation*: they rule out corruption in public officials, inattention in jurors, ignorance in voters, and the like. Third, there are norms of citizen honor, which assign rights to respect to citizens who do more than is morally required in the life of the republic.

It is easier to give examples of citizens who fail to live up to the norms of participation than to say in general what degree of participation is required. This is in part because there are so many different ways of participating in the life of the republic as citizens. On the one hand, it is obvious that many in our news media today are shamefully uninterested in the truth; but on the other hand, those editors and journalists who are doing their work conscientiously might reasonably say that they will not vote. We know that we tend to become "invested" in people we vote for, thus making it harder to see their faults. Maybe, then, an editor of a website that covers politics might refuse to vote as an act of citizenship, in order to protect his or her mental independence. In this case, a citizen deserves to be honored for refraining from voting. Thoughtful abstention can be one honorable way of participating in the life of the republic.

There are other cases. I think, for example, we should respect citizens who fail to vote because they genuinely cannot see, after looking into the matter, which candidate (or, in a referendum, which position) is right. More generally, because there are so many forms of citizen participation and because citizens differ in what they have to contribute, there is a great variety of ways of contributing responsibly, as a citizen, to government by the people.

Even if you are well informed about what the government is doing, you will not vote as a good citizen unless you use that information responsibly. And the same ideals of equality and mutual respect that govern the behavior of citizen-officials ought to play a role there, too. The republic is supposed to be a pact for the common good. When I vote, I am not supposed to be looking only after my own interest. In the economy, it is possible that a hidden hand produces the best results if we each aim only for our own interests (under the legally enforceable constraint that we must avoid force, fraud, monopoly, and so on). There is simply no reason, though, to think that that is so in the political realm. Members of racial and religious majorities will often be able to combine to allocate public goods in biased ways. It will be in their individual self-interest to do so. But in our system of government we are committed, through the Bill of Rights and the Civil War amendments, to the federal government's not doing that. This means that the courts are empowered to reject legislation that is biased in these ways. But it also means that citizens committed to these values will not vote for officials who want to pass such legislation or execute it. We ought to be protected from religious or racial discrimination not just by the courts but also by each other.

Citizens ought to vote for people and policies they believe to be just. There is nothing wrong in considering your own interest, where justice permits it. But because there is no hidden hand argument for politics as there may be for the economy, a society of people who vote only their own interest will be extremely lucky if it flourishes. Morality requires that you act in ways that contribute your fair share to the functioning of the republic. We decide "fair share" by asking whether, if everyone did only what you are doing, the republic would work. If not, you are not doing your fair share.

But how should citizen voters conduct themselves when they are not voting, when they undertake those acts that prepare them to vote and that contribute to the social and cultural conditions that allow our democracy to work well? That, at least, is the behavior we should honor; we can only *require* the behavior that we need of everyone if the system is to work at all.

What is needed will depend on the nature of the republic and its situation. Our republic, for example, is religiously, ethnically, and politically diverse.[12] One psychological resource amid a diversity of political views is to remind yourself of an important truth: it is just possible that sometimes the other person is right. Intellectual humility – what philosophers call *fallibilism* – is grounded in the fact that it is unlikely that God (or the Universe) showed a special preference for me and mine in portioning out the capacity to make sense of the world.[13] Time and again, people are utterly confident that they have the right view. In retrospect, we often see that they were wrong. There is no reason to think that we will prove infallible when our grandchildren look back at us.[14]

Not only is it hard to make sense of the world in general, we are likely to have especial difficulty in comprehending the world of politics in particular, where good policy depends on a multitude of facts, many of them hard to discern, and on values that are hard to weigh against each other. In these circumstances, it seems only wise to listen carefully to the views of other citizens who disagree with us. If we do so, we may learn of our own errors, just as they could share in our insights if they listened to us.

Fallibilism has its enemies. Robert Frost once said that a liberal is "someone who can't take his own side in a quarrel."[15] This is the critique of someone worried about too great a willingness to hear the other side. But it is a mistake to think that you cannot have the intellectual humility that fallibilism teaches, with its willingness to entertain the possibility that you are wrong, and still proceed seriously with the commitments that survive the test of argument. To recognize that I *might* be wrong is not to declare that I *am*.

In any case, there are reasons for listening carefully to the views of our fellow citizens that go beyond the fact that we are likely to learn from them. One is that our shared participation in the life of the republic will go better if we treat each other with respect. (Morality commends treating each other with respect, too. But I want to draw attention to a *civic* argument for respectful conversation.) An uncivil atmosphere makes deliberation, compromise, and the development of consensus – all of which are necessary in a diverse polity – extremely hard.

A second reason for civil discourse is that in politics, what is best depends on what people happen to want; the bond for the football stadium is good only in a world where enough people in my city care about football. The best way to learn that is to hear what they have to say. People may not know what they really want, and they may have reason to mislead us about what they want. But hearing them say what they want and why is the beginning of understanding their desires.

The need for respect suggests a habit of mind in which we assume the best of one another – not, as is so common today, the worst. Someone believes that the state should continue to recognize heterosexual marriages but not same-sex ones. I think this is a mistake. How should I respond? It is, of course, possible that this individual is motivated by simple bigotry. But it is also possible that he has reasons and that if I attend to these reasons, I will change my mind or may be able to respond to the arguments in ways that will change his mind. None of that can happen if each of us starts with the assumption that the other is bigoted, or evil, or foolish.

This discussion must involve more than rigorous argumentation, the assembling of evidence and the gathering of reasons. It requires take as well as give. My mother taught me this when I was young. "Your grandfather," she said, "thought that if he made a convincing argument, the other party would come round to his view. But what usually happened was they just wondered what had hit them." People care to be heard as well as lectured to. And they care about the attitude with which we address and listen to them as well as about what we say. It is an old discovery in politics that people who have been heard – those who have been given voice – will accept outcomes that they do not prefer.[16] That the granting of voice shows respect is one reason. But so is the fact that seeing your opponents as reasonable, even if mistaken, human beings makes it easier to accept (what you think of as) their errors.

Political scientist Diana Mutz has reviewed a great deal of evidence showing that "exposure to oppositional viewpoints"

> increases awareness of the rationale for oppositional views, enriches awareness of one's own rationales for positions, and enhances individuals' tolerance; those with more positive views toward conflict – a sense that disagreement is an important and acceptable part of democratic dialogue – learn even more.[17]

Unfortunately, as she also argues, people who regularly discuss politics with those they disagree with tend to be less inclined to participate in political life. In order to avoid discourtesy to those we disagree with, we tend to withdraw from political engagement. It looks as though preparing yourself for responsible political participation will make any kind of participation less likely.

When we notice problems of political psychology such as these, we can respond in two ways. First, we can try to imagine institutions that reshape our responses; second, we may use the very facts about ourselves that we have learned to try to motivate ourselves. I commend the second strategy to each of my readers. Remember that as you enrich your understanding of others you may be tempted to withdraw from participation. Resist. But I want to end by considering some of the possible institutional responses.

Benjamin Franklin, in his *Autobiography*, tells the story of how he gained the favor of "a gentleman of fortune and education," not by paying him "any servile respect," but by asking him a small favor. He ends with a maxim: "He that has once done you a kindness will be more ready to do you another, than he whom you yourself have obliged."[18] (More than a century earlier, the French writer Rochefoucauld, in his *Maxims*, notes a sort of negative corollary of this: "We may forgive those who bore us," he said, "we cannot forgive those whom we bore."[19]) These thoughts reflect the fact that what we feel about people depends on how we behave toward them, just as often as the other way round.[20] Social practices that encourage fellow-feeling begin by treating others well.

Another piece of social psychological wisdom reflects a connected point. The Contact Hypothesis, proposed by Gordon Allport in the 1950s, tells us under what conditions contact between members of two groups will create positive or negative attitudes. Allport offered a long list of factors that could make a difference, but one general conclusion was that regular contact in collaborative activities, on terms of rough equality, tended to make for better attitudes. This is surely one of the mechanisms that have produced a new generation of young people in our country who do not share the older prejudices against lesbian and gay people. They have grown up sharing their world with openly gay people. It is the reason why white politicians otherwise as different as Bill Bradley and Jack Kemp, who engaged in professional sports when they were young, are active advocates of racial justice. Their collaboration with their black teammates on terms of rough equality shaped their attitudes when young.[21]

The Ben Franklin effect and the Contact Hypothesis suggest ways of interacting with fellow citizens of diverse identities – including the political identities of conservative, liberal, moderate, independent, Democrat, Republican – that are very different from those that actually obtain in many places in our country today. If we are to have the positive attitudes toward our fellow citizens that are necessary to make our institutions work best, we need to work and play together across the boundaries of our identities. A rich associational life in our communities, binding us together across political identities, is something that we know is a powerful civic resource.[22] The soccer league, the choral society, and the drama club turn out to be worth participating in for reasons beyond their intrinsic satisfactions.

We need to recognize the merits of developing these attitudes and taking part in these activities. But how can we reinforce our commitment to them and teach them to the young? I suggest we heed Franklin's great insight: we should treat each other better so we can feel better about one another. We should begin by developing a civil public culture in which we address both those we agree with and those we disagree with in a more courteous way. *Civis*, in Latin, means citizen: civility is the demeanor citizens owe one another. We should not only engage in the exercise of trying to make the best sense of the opinions of our opponents, we should actually spend time with people of different political identities, doing nonpolitical things and taking advantage of the truth of the Contact Hypothesis. We have spent a half-century learning to escape from the bigotries of race, gender, religion, and nationality; political bigotry – irrational hatred or contempt for those on other parts of the political map from ourselves – is no more creditable or helpful than bigotry of other kinds. As Franklin says in the passage that provides my epigraph, "[H]ow much more profitable it is prudently to remove, than to resent, return, and continue inimical proceedings."

If this is the political temperament that will make the republic work, we need to encourage it through a culture of citizen honor that displays its esteem for productive participation. We can begin by thanking our fellow citizens who do these things. We can hope for media that provide a forum for civil deliberation, respectful of the truth. And we can raise our children, in schools both public and private as well as at home, to understand the value of civic engagement and to undertake it in the right spirit. This is more than a matter of what we say to them in class or around the dinner table. It is a matter of what we get them to do. The habit of respectful attention to others can be taught through exercises (like high school debate) in which students are required to mount defenses of positions they do not share; to give an account of arguments made by others; and to imagine the world from points of view other than their own. As Andy Stern shows in his essay in this volume, unions can be another site of such civic education. Religious institutions, too – church, meetinghouse, mosque, synagogue, and temple – can also practice and endorse the democratic spirit.

To engage with one another as fellow citizens we also need a shared knowledge of the institutions of the republic and their history, as well as an ability to understand discussions of the economy. And since the conduct of foreign policy requires judgments about the whole world, it seems reasonable to ask those who participate in political deliberation to have a basic familiarity with global history and geography, too.[23] This knowledge will come only from a proper education in history and civics; but the habits of mind that I have sketched are exactly those that are taught through education in the humanities and the social sciences. Interpreting texts, analyzing arguments, engaging imaginatively with fictional worlds and with other places and times, and reflecting together on our moral responsibilities: these are the methods of anthropology, history, literature, and philosophy. And though we should learn these things in school, and deepen our understanding of them if we go to college, both the knowledge and the habits of mind can be reinforced through the media and in our practices of public deliberation.

The proliferation of Web-based media that gather the like-minded into circles of mutual admiration is an obstacle to developing the habits of thought that I have in mind. But it also provides opportunities. While it is often painful to listen in on the conversations in these online enclaves – even when they purport to represent the part of the political spectrum where you yourself think you lie – they do offer us a chance to learn how the world looks from elsewhere. Understanding even those who will not engage with us is part of the challenge of managing the republic together. A commitment to spend some of the time we devote to thinking about politics in the virtual, if not the actual, company of fellow citizens we disagree with is part of the equipment of a modern citizen.

One of the great benefits of a stable political system is that citizens do not have to spend all their time worrying about politics.[24] A free society leaves you time for private pursuits. These ideals of participation and engagement may seem to ignore that important point. But most Americans spend some time everyday watching television or reading blogs; most have discussions sometimes, at work or recreation, about political life. Many of us are already committed to these minimal forms of participation. I have only been commending ways of improving that participation. And all our citizens should be given a high school education that offers them the knowledge and helps develop the temperament I have described.

One final thought: these remarks about the practices and attitudes that I believe offer hope for our lives as a people managing a democratic republic together are offered in the modest, fallibilist spirit that I have urged on all of us. In our shared life as a political people, our citizen conversation is ongoing. No one has the last word.

ENDNOTES

1 For an interesting exploration of these issues, see Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

2 "The activities of the state are those of the rulers and those of the persons ruled, and the work of a ruler is to direct the administration and to judge law-suits; but in order to decide questions of justice and in order to distribute the offices according to merit it is necessary for the citizens to know each other's personal characters, since where this does not happen to be the case the business of electing officials and trying law-suits is bound to go badly; haphazard decision is unjust in both matters, and this must obviously prevail in an excessively numerous community.…It is clear therefore that the best limiting principle for a state is the largest expansion of the population, with a view to self-sufficiency that can well be taken in at one view"; Aristotle, *Politics*, Book 7, chap. 4, trans. Harris Rackham; available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook=7%3Asection=1326b.

3 Homer, *The Iliad*, Book V, trans. Samuel Butler; available at http://classics.mit.edu/Homer/iliad.5.v.html.

4 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London & New York: Verso, 2006).

5 Ernest Renan, *Qu'est-ce qu'une nation?: Conférence faite en Sorbonne, le 11 mars 1882*, 2nd ed. (Paris: Calmann-Lévy, 1882), 26.

6 Kwame Anthony Appiah, *The Honor Code: How Moral Revolutions Happen* (New York: W.W. Norton, 2010).

7 Thus "Downs's Paradox": even if you have taken the time to decide which candidate or party will better serve the public interest, because voting takes time and effort, a person concerned to act to maximize the expected value of what she does has no reason to do it. See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957).

8 See Appiah, *The Honor Code*, chap. 5.

9 You could say that the fair share of non-contributors is nothing when things are going well. What is needed is enough participation and no more. If that is right, then there is nothing wrong with jumping the subway turnstile. But it is not obvious that our democracy is working as well as it could if more people participated in the right ways. So even if you are tempted by this thought, you ought to want people to be doing more than they are.

10 Geoffrey Brennan and Philip Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (New York: Oxford University Press, 2004).

11 I'm grateful to Norm Ornstein for helping me frame this point. The Australian Electoral Commission website states: "What happens if I do not vote? Initially the Australian Electoral Commission will write to all apparent non-voters requesting that they either provide a reason for their failure to vote or pay a $20 penalty. If, within 21 days, the apparent non-voter fails to reply, cannot provide a valid and sufficient reason or declines to pay the penalty, then prosecution proceedings may be instigated. If the matter is dealt with in court and the person is found guilty, he or she may be fined up to $50 plus court costs"; http://www.aec.gov.au/faqs/voting_australia.htm#not-vote.

12 It is, I think, less diverse in these ways than we sometimes imagine: there is more agreement in the background than we notice when we focus on our disagreements. But it is diverse nevertheless. See my discussion of this issue in Kwame Anthony Appiah, "The Multiculturalist Misunderstanding," *The New York Review of Books*, October 9, 1997, 30–36.

13 Many Americans have a thought like this in those moments when others ask God to bless America: they recall that God is the God of the universe and is unlikely to care more for us than for everyone else. So blessing America cannot mean denying blessings to others.

14 Kwame Anthony Appiah, "What will future generations condemn us for?" *The Washington Post*, September 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092404113.html.

15 Quoted in Harvey Shapiro, "Story of the Poem," *The New York Times Magazine*, January 15, 1961. Frost continued: "and I am not like that."

16 Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970).

17 Diana C. Mutz, *Hearing the Other Side: Deliberative versus Participatory Democracy* (New York: Cambridge University Press, 2006). This summary is from Jan E. Leighley, "Review of *Hearing the Other Side: Deliberative versus Participatory Democracy* by Diana C. Mutz," *Political Psychology* 28 (4) (August 2007): 499–500.

18 Benjamin Franklin, *The Autobiography of Benjamin Franklin* (New York: Bantam, 1982), 125. As a result, this phenomenon is known to social psychologists as the Ben Franklin effect.

19 "Nous pardonnons souvent à ceux qui ennuient ; mais nous ne pouvons pardonner à ceux que nous ennuyons" ; François duc de La Rochefoucauld, *Réflexions ou sentences et maximes morales*, Maxime 304 (Kindle edition).

20 This is a prediction of cognitive dissonance theory, as first proposed in 1956 in Leon Festinger, Henry W. Riecken, and Stanley Schachter, *When Prophecy Fails : A Social and Psychological Study of a Modern Group that Predicted the Destruction of the World* (London : Pinter & Martin, 2008).

21 Gordon W. Allport, *The Nature of Prejudice : 25th Anniversary Edition* (New York : Basic Books, 1979), 261 et seq.

22 Robert D. Putnam, Robert Leonardi, and Raffaella Y. Nanetti, *Making Democracy Work : Civic Traditions in Modern Italy* (Princeton, N.J. : Princeton University Press, 1994).

23 This essay is about democracy in America. In *Cosmopolitanism : Ethics in a World of Strangers* (New York : W.W. Norton, 2006), I defend the view that we can be good citizens both of our country and of our world – in other words, cosmopolitan patriots.

24 If you grew up, as I did, with a father who was imprisoned for his political beliefs, you cannot help but be conscious of this fact.