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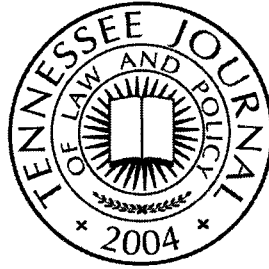
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**TAKING RESPONSIBILITY**

*Robert M. Ackerman*

**REFORMING EMINENT DOMAIN IN TENNESSEE AFTER *KELO*:  
SAFEGUARDING THE FAMILY FARM**

*Beau Pemberton*

**FACT-BASED DEATH PENALTY RESEARCH**

*Lewis L. Laska*

**NOTES**

**STRIPPED BARE: STUDENTS' FOURTH AMENDMENT RIGHTS,  
SCHOOL SEARCHES, AND THE REASONABLENESS STANDARD**

*Erin P. Davenport*

**A VICTORY IN DEFEAT: THE IMPLICATIONS OF *RUMSFELD V.*  
*FAIR* ON "DON'T ASK, DON'T TELL"**

*Jill Shotzberger*

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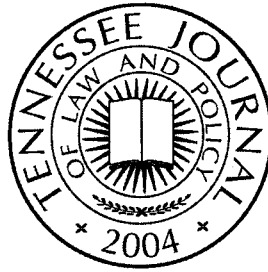
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OPINION PIECE

TAKING RESPONSIBILITY

Robert M. Ackerman\*

*Communitarians have suggested that a balance must be struck between individual rights and the public welfare, and that our self-seeking tendencies must sometimes be set aside in pursuit of the common good. Government is often (although not always) the mechanism through which common interests are advanced. An abdication of government responsibility may result in disaster, as was the case with respect to Hurricane Katrina and its aftermath. At the other extreme, the accumulation of too much power in government can also bring about catastrophic consequences, as in the case of the 1986 Chernobyl nuclear plant disaster in the Soviet Union. A balance must be struck between the extremes of government passivity and "all government, all the time." Traditionally, this tension has been framed as one of libertarianism versus collectivism; in current American political parlance, that of liberalism versus conservatism. But communitarians are more likely to view these issues in terms of an adjustment of interests, to be determined in the political arena, than as a clash of rights, to be adjudicated in the courtroom. This essay sug-*

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\* Professor of Law, The Dickinson School of Law of The Pennsylvania State University; B.A., Colgate University; J.D., Harvard Law School. The author wishes to thank Kathryn Mason and Joel Samuels for their invaluable research assistance. The author also wishes to thank Amitai Etzioni, Hans Joas, Bodo von Greiff, Wolfgang Muller, and Wibren van der Burg for their comments and encouragement. Earlier versions of this essay appeared on the Communitarian Network webpage *available at* <http://www.gwu.edu/~ccps/WinnerofCommunitarianEssayContest.htm> and in German translation *sub nom Verantwortung übernehmen*, 2/2007 *Leviathan* 143.

*gests a communitarian framework for analyzing the boundaries of government power and responsibility.*

*Part I of the essay focuses on the Katrina disaster and the abdication of government responsibility on the local, state, and national levels both before and after the hurricane.*

*Part II suggests the Chernobyl experience as a counterpoint, cautioning us regarding the dangers of too much government control.*

*Part III explores the underlying attitudes toward government in the United States, suggesting that hostility toward government has resulted in a “tragedy of the commons” that undermines the public welfare.*

*Part IV outlines a series of communitarian guidelines for principled consideration of the proper role of government.*

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## I. DELUGE AND DELUSION.

### A. *Do you know what it means to miss New Orleans?*<sup>1</sup>

On Monday, August 29, 2005, at 6:10 a.m. Central Daylight Time, Hurricane Katrina struck the Gulf Coast of the United States, with the center of the storm making landfall a few miles east of New Orleans, Louisiana. Katrina had been a Category 5 hurricane while in the Gulf.<sup>2</sup> Its intensity had diminished to Category 4 and then to a strong Category 3 hurricane (with maximum sustained winds of 175 miles per hour) by the time it reached Louisiana and Mississippi.<sup>3</sup> But Katrina's wind speed (the basis of its numerical classification) told only part of the story. By any measure, Hurricane Katrina was an exceptionally large storm. Hurricane-force winds extended about 100 statute miles away from her center, and tropical storm-force winds extended about 230 miles away.<sup>4</sup>

The residents of the Gulf States had been warned for several days about Katrina's imminent landfall, but it was not until 10:00 a.m. on Sunday, August 28, that New Orleans Mayor Ray Nagin saw fit to order the first-ever mandatory evacuation of the city. As a consequence, when the hurricane struck, "[a]pproximately one-fifth of New Orleans's 460,000 residents were still in the city, and a similar proportion were left in each of the surrounding parishes (approximately 900,000 people lived in these suburbs)."<sup>5</sup> Katrina's winds caused some destruction (including tearing a hole in the roof of the Louisiana Superdome,

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<sup>1</sup> LOUIS ARMSTRONG, *DO YOU KNOW WHAT IT MEANS TO MISS NEW ORLEANS?* (Bluebird RCA 1946).

<sup>2</sup> RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL REPORT: HURRICANE KATRINA 1 (Aug. 2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1-4, 23-30.

<sup>5</sup> DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 89-90 (2006).

where thousands of residents had taken shelter), but the greatest devastation in New Orleans and elsewhere was a consequence of the storm surge caused by the hurricane. The Gulf of Mexico, Lake Pontchartrain, and a system of rivers and connecting canals overflowed their banks and breached the levees protecting New Orleans (much of which lies below sea-level) and the surrounding communities from their waters. Low-lying neighborhoods in New Orleans, the surrounding communities, and coastal areas in Mississippi and Alabama were inundated and remained underwater for several days. Thousands of citizens were left stranded, or worse, drowned in the floodwaters. Their desperation was exacerbated by what appeared to be an utter breakdown of emergency rescue operations. State, local, and national officials lacked organization, supplies failed to reach their destinations, and public transportation out of the city failed to materialize until several days after the storm. New Orleans' predicament took on racial overtones, as a disproportionately large number of its stranded residents were African-American. The loss of life, damage to property, and overall devastation of New Orleans and other parts of the Central Gulf Coast amounted to the worst natural catastrophe in the history of the United States. The tragedy painted a disturbing picture of disparity between rich and poor, white and black, and a governing apparatus that was too paralyzed to provide effective relief to beleaguered citizens.

The floodwaters had not receded before the finger-pointing began. Katrina was a natural disaster, but there was a pervasive sense that the tragedy was unnecessarily compounded by human failure. Hurricane Katrina would raise anew questions about the role of government and civic responsibility in America, issues of ongoing interest to communitarians. The events surrounding Katrina suggested serious lapses in areas of official responsibility at several junctures, both before and after the storm. A few prominent examples are as follows:



- Years of dredging by the United States Army Corps of Engineers had kept the Mississippi River open for shipping. It had also removed millions of tons of silt necessary to replenish the wetlands of the Mississippi River Delta. Petroleum exploration had caused more subsidence, further compromising the wetlands. As a consequence, Louisiana lost 1900 square miles of wetlands between 1930 and 2004.<sup>6</sup> The wetlands had acted as a natural sponge, absorbing storm surges and protecting New Orleans and other populated areas. With this natural sponge severely eroded, almost nothing could absorb Katrina's storm surge before it struck the populated areas of the Gulf Coast. Additionally, subsidence reduced the heights of the levees by as much as three feet below their original design.<sup>7</sup>
- Further damage to the wetlands was caused by the Mississippi River Gulf Outlet (MR. GO), a canal completed by the Corps of Engineers in the 1960s.<sup>8</sup> MR. GO also acted as a funnel for water being forced up toward the city, leading to the breaches that would cause massive flooding in New Orleans' Lower Ninth Ward.<sup>9</sup>
- Levees constructed by the Corps of Engineers to protect New Orleans from flooding were reinforced by sheet piles consisting of interlocking steel sup-

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<sup>6</sup> Joel K. Bourne, Jr., *Gone with the Water*, NAT'L GEOGRAPHIC, Oct. 2004, at 88.

<sup>7</sup> U.S. ARMY CORPS OF ENGINEERS, PERFORMANCE EVALUATION OF THE NEW ORLEANS AND SOUTHEAST LOUISIANA HURRICANE PROTECTION SYSTEM, EXECUTIVE SUMMARY 1-4 (June 1, 2006).

<sup>8</sup> Joel K. Bourne, Jr., *New Orleans: A Perilous Future*, NAT'L GEOGRAPHIC, Aug. 2007, available at <http://ngm.nationalgeographic.com/ngm/0708/feature1/index.html>.

<sup>9</sup> *Id.*

ports.<sup>10</sup> An investigation subsequent to Katrina has shown that the sheet piles “were too shallow to prevent [a] flow” of water underneath them.<sup>11</sup> “Tests . . . found that sheet piles reached only 10 feet below sea level in some spots, far less than would protect the city.”<sup>12</sup> The Corps’ designs had called “for a depth of 17½ feet, but even that, the investigators say, would have been too shallow.”<sup>13</sup> “[I]n spots where the levees” were subsequently repaired, the Corps of Engineers called “for sheet piles to be driven to depths of 51 to 65 feet.”<sup>14</sup> Soil material incorporated into the levees was also found inadequate for the circumstances.<sup>15</sup> The levees therefore lacked adequate foundation support. While Katrina’s storm surge would have crested the levees in any event, the waters would have likely receded without serious flooding had the levees remained intact. Lacking adequate support, however, the levees gave way, causing several New Orleans neighborhoods (in particular, the predominately African-American Lower Ninth Ward) to be inundated with water. Not long before the storm, a request for \$105 million to improve the levee system had been reduced by the administration of President George W. Bush to \$40 million, despite repeated warnings regarding the region’s vulnerability.<sup>16</sup>

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<sup>10</sup> John Schwartz & Christopher Drew, *Louisiana's Levee Inquiry Faults Army Corps*, N.Y. TIMES, Dec. 1, 2005, at A28.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> INDEPENDENT LEVEE INVESTIGATION TEAM, UNIV. OF CALIFORNIA AT BERKELEY, NEW ORLEANS SYSTEMS HURRICANE KATRINA XVIII APP. AT I-7 (2006).

<sup>16</sup> Maureen Dowd, Op-Ed., *United States of Shame*, N.Y. TIMES, Sept. 3, 2005, at A21.

- The levees were subject to a confusing and inefficient administrative structure. A tangled web of local authorities, often preoccupied with unrelated projects, shared authority over the levees with the Corps of Engineers. Responsibility was fragmented and unclear. With so many in charge, nobody was really in charge. The various structures built to contain hurricanes did not function as a system and lacked redundancy. Compromises in one part of the “system” produced by political forces or environmental concerns were not compensated for elsewhere, where other agencies might be in control.
- Global warming may have played a role in Katrina’s having become such a powerful storm. “[S]ea surface temperature records show that the oceans [and other large bodies of water (like the Gulf of Mexico)] are more than 1 degree F[ahrenheit] warmer on average today to a century ago.”<sup>17</sup> “Because hurricanes draw strength from heat in ocean surface waters,” warmer water potentially “generate[s] more powerful hurricanes.”<sup>18</sup> Water temperatures fluctuate in any event, “[b]ut the higher the average [temperature,] the more likely the water will be warm enough to produce a strong storm on any given day during the hurricane season.”<sup>19</sup> So while we cannot say with any assurance that global warming caused Katrina, the probability of severe hurricanes like Katrina was significantly enhanced by global warming. This idea may help explain why, for the first time, the Tropical Prediction Center (the agen-

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<sup>17</sup> Pew Center on Global Climate Change, *Katrina and Global Warming: Was Katrina’s Power a Product of Global Warming?*, available at <http://www.pewclimate.org/specialreports/katrina.cfm> (last visited Aug. 23, 2007).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

cy that assigns names to hurricanes) ran all the way through the alphabet in 2005.<sup>20</sup>

- While public authorities had ample warning of Hurricane Katrina, they failed to mobilize a transport system equal to the need for evacuation. Many of the poor residents of the region (and in particular the poor African-American residents of the region) lacked automobiles of their own. These people were dependent upon public transportation to leave the city.<sup>21</sup> Little, if any such transportation materialized. Two days before the hurricane, Amtrak routes that normally serve New Orleans were terminated in Memphis and Atlanta.<sup>22</sup> (French tourists stranded in New Orleans before the storm went instinctively to the railroad station and were bewil-

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<sup>20</sup> Hurricane names are agreed upon at international meetings of the World Meteorological Organization (WMO), and once a storm system with counterclockwise circulation reaches wind speeds of thirty-nine miles per hour or greater, the Tropical Prediction Center (TPC) in Miami, Florida, assigns the system one of the pre-determined names. National Hurricane Center, *Naming Hurricanes*, available at <http://www.nhc.noaa.gov/HAW2/english/basics/naming.shtml> (last visited June 26, 2007). The most active hurricane season, prior to 2005, was in 1933 when the season produced twenty-one named tropical cyclones; in 2005, the season produced twenty-eight named systems, running the TPC completely through the WMO's alphabetized list of names and making 2005 the most active season to date. ERIC S. BLAKE, ET AL., *THE DEADLIEST, COSTLIEST, AND MOST INTENSE UNITED STATES TROPICAL CYCLONES FROM 1851 TO 2006* 14 (Apr. 2007), available at [http://www.nhc.noaa.gov/Deadliest\\_Costliest.shtml](http://www.nhc.noaa.gov/Deadliest_Costliest.shtml).

<sup>21</sup> Jason DeParle, *What Happens to a Race Deferred*, N.Y. TIMES, Sept. 4, 2005, § 4 at 1 (reporting that even among the poor in New Orleans, African-Americans were less likely than whites to own automobiles) available at <http://www.nytimes.com/2005/09/04/weekinreview/04depa.html> (last visited Feb. 4, 2008).

<sup>22</sup> Amtrak, Service Alert: Hurricane Katrina Update, available at [http://www.amtrak.com/servlet/ContentServer?pagename=Amtrak/am2Copy/Simple\\_Copy\\_Popup&c=am2Copy&cid=1093554014709](http://www.amtrak.com/servlet/ContentServer?pagename=Amtrak/am2Copy/Simple_Copy_Popup&c=am2Copy&cid=1093554014709) (last visited Jan. 10, 2008).

dered to find it closed.<sup>23</sup>) Hundreds of the city's school buses remained in their parking lots; these buses became disabled when the lots were flooded.<sup>24</sup> The City ordered an evacuation, but made no provision to assist residents in evacuation efforts. Indeed, buses out of the city did not materialize for several days after the hurricane struck.<sup>25</sup> With 30% of National Guard units tied up in Iraq and Afghanistan, and the White House claiming ignorance of severe flooding until several days after the storm, the federal government was slow to mobilize for an evacuation.<sup>26</sup>

- Government on all levels (i.e., the city, the state, and the federal government) was particularly impotent when it came to providing aid to people in the beleaguered area after the hurricane hit. Those stranded in New Orleans were told to report to the Louisiana Superdome, where they would find provisions. As many as 50,000 people heeded that call, only to find a facility that was ill-prepared to accommodate them.<sup>27</sup> The hurricane caused a power outage, and with it, the absence of air-conditioning, leaving people to bake in the Louisiana heat while trapped inside the indoor stadium.<sup>28</sup> Basic sanitation soon broke down in the huge facility. Reports

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<sup>23</sup> Dan Baum, *New Orleans Postcard: Consulat D'Influence*, THE NEW YORKER, Mar. 6, 2006, at 30. This episode illustrates a major difference between American and European expectations regarding public transportation.

<sup>24</sup> BRINKLEY, *supra* note 5, at 359.

<sup>25</sup> *Id.* at 386.

<sup>26</sup> Julian Borger & Duncan Campbell, *Why Did Help Take So Long to Arrive?*, THE GUARDIAN (London), Sept. 3, 2005, at 4.

<sup>27</sup> See Robert Tanner, *Thousands Evacuated from New Orleans Saturday*, ASSOCIATED PRESS, Sept. 3, 2005, available at <http://www.wwltv.com/sharedcontent/nationworld/katrina/stories/090305ccKatrinawcMainstory.1f76bb86.html>.

<sup>28</sup> BRINKLEY, *supra* note 5, at 191-93.

of assaults, rapes, and even murders were rampant; while most of these reports were later discredited, a sense of anarchy was prevalent.<sup>29</sup> Several thousand additional victims sought refuge in New Orleans' Ernest N. Morial Convention Center, from which reports of anarchy surpassed those coming from the Superdome. (At least one confirmed murder did occur at the Convention Center.<sup>30</sup>) Anarchy was also evident in the streets of New Orleans, where many business establishments fell victim to looters.<sup>31</sup> Some of these "looters" could hardly be blamed, as they were procuring food, water, and other supplies necessary to sustain the stranded population.<sup>32</sup>

- Other aspects of the rescue, such as relief for victims stranded in the floodwaters, were similarly disorganized. Approximately one-third of the members of the New Orleans Police Department deserted their posts.<sup>33</sup> National Guard units were slow in coming; the efforts of these and other law enforcement officials who arrived from as far away as Oregon and Puerto Rico were uncoordinated, lacking any central command.<sup>34</sup> Some of the law enforcement units seemed more intent on quelling non-existent rioting than on providing relief to flood victims.<sup>35</sup>
- In at least one instance, citizens of New Orleans found themselves to be victims of bad neighbors.

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<sup>29</sup> *Id.* at 193, 240, 476.

<sup>30</sup> Brian Thevenot & Gordon Russell, *Reports of Anarchy at Superdome Overstated*, SEATTLE TIMES, Sept. 26, 2005, at A1.

<sup>31</sup> BRINKLEY, *supra* note 5, at 200-05, 276.

<sup>32</sup> *Id. passim*; Tanner, *supra* note 27.

<sup>33</sup> Dan Baum, *Deluged: When Katrina Hit, Where Were the Police?*, THE NEW YORKER, Jan. 9, 2006, at 50, 60.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Attempting to leave the stricken city and looking for high ground, several hundred New Orleans residents tried crossing the Mississippi to Gretna, Louisiana, where they were met by a sheriff's department intent on turning them back.<sup>36</sup> Escape from the devastated city, even for those willing and able to walk, was thereby blocked.

**B. "It ain't my fault."<sup>37</sup>**

The devastation of Hurricane Katrina and its aftermath suggest a natural disaster the consequences of which were severely exacerbated by an abdication of governmental responsibility on all levels. That the human failure was primarily one of government is hard to deny. While individuals had, to be sure, taken it upon themselves to live in New Orleans and elsewhere on the Gulf Coast, they did so in reliance on a system of levees, canals, navigation, and transportation engineered, built, and maintained primarily by government. Indeed, only government could have constructed and maintained a system of such scale. Yet the American government, which had, only a few months earlier, raced halfway around the world to provide aid for victims of a giant tsunami, was now found seriously wanting when faced with a natural disaster at home.

The immediate target of public wrath was Michael D. Brown, Director of the Federal Emergency Management Agency and a man clearly in over his head. In the days following Katrina's onslaught, Brown was depicted as studiously ignorant about the conditions in New Orleans, more concerned about his attire and dinner schedule than

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<sup>36</sup> Chip Johnson, *Police Made Their Storm Misery Worse*, S.F. CHRON, Sept. 9, 2005, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/09/09/BAGL1EL1KH1.DTL>.

<sup>37</sup> SMOKEY JOHNSON, *IT AIN'T MY FAULT* (Night Train International 2000).

the coordination of relief for the stricken region. Nevertheless, President Bush, in cheerleader mode, proclaimed, "Brownie, you're doing a heck of a job[!]" as New Orleans sank into the mire.<sup>38</sup> Shortly thereafter, Brown would find himself in the position of scapegoat for the muffed operation, becoming comic fodder for late-night television hosts in a Warholian moment of infamy. He would resign later in September, only to establish a business as a disaster preparedness consultant.<sup>39</sup>

But to blame a single individual for the disaster was to miss the point. Brown was representative of two much larger phenomena: a diffusion of responsibility among a patchwork quilt of federal, state, and local authorities; and an administration in Washington that appeared to be less than fully committed to some of the most essential functions of government.<sup>40</sup> Evidence of the latter problem had previously surfaced in connection with the war in Iraq. While many would come to dispute the need to invade Iraq in 2003 and to deplore the manipulation of intelligence used to justify the invasion, few would argue that national defense is not an essential function of government. Yet even as it schemed to carry on a war against Iraq, the administration failed to adequately equip the military to proceed with its mission. Military experts lamented the inadequate number of troops deployed for the mission; the understaffing violated a core principle of the "Powell Doctrine," which espoused the use of force that is "overwhelm-

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<sup>38</sup> Press Release, White House Office of the Press Secretary, President Arrives in Alabama, Briefed on Hurricane Katrina (Sept. 2, 2005), available at

<http://www.whitehouse.gov/news/releases/2005/09/20050902-2.html>.

<sup>39</sup> Mark Leibovich, *A Punch Line Who Refuses to Fade Away*, N.Y. TIMES, Aug. 26, 2006, at A11.

<sup>40</sup> Paul Krugman, Op-Ed., *Killed By Contempt*, N.Y. TIMES, Sept. 5, 2005, at A21.



ing and disproportionate to the force used by the enemy.”<sup>41</sup> Despite months of planning, soldiers lacked body armor and other essential equipment.<sup>42</sup> Events suggested the absence of any plan to secure either Iraq’s munitions or its national treasures from looting as the conquest of that country was completed. The looting in turn helped supply a protracted insurgency about which the administration had been warned, but which did not figure into its plans.<sup>43</sup> Even the administration’s highest priorities seemed thwarted by either a lack of foresight or a fundamental unwillingness to commit public resources to essential functions.

The “less government the better” philosophy of the Bush Administration—a recurring theme of Republican Party rhetoric since 1980<sup>44</sup>—resulted in a lack of serious-

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<sup>41</sup> The Powell Doctrine was espoused by General Colin Powell, while serving as Chairman of the Joint Chiefs of Staff in 1991. Other elements of the Powell Doctrine: that military action should be used only as a last resort and only where there was a clear risk to national security by the intended target; that there must be strong support for the campaign by the general public; and that there must be a clear exit strategy from the conflict. See Colin Powell, *U.S. Forces: Challenges Ahead*, 71 FOREIGN AFF. 32 (1992).

<sup>42</sup> When the Secretary of Defense was called to account for this, his response was “You go to war with the Army you have, not the Army you might want or wish to have at a later time.” Eric Schmitt, *Troops’ Queries Leave Rumsfeld on the Defensive*, N.Y. TIMES, Dec. 9, 2004, at A1 (quoting Secretary Rumsfeld).

<sup>43</sup> Prewar intelligence assessments about postwar Iraq predicted insurgency in the wake of the conquest of Iraq. STAFF OF S. SELECT COMM. ON INTELLIGENCE, 110TH CONG., REPORT ON PREWAR INTELLIGENCE ASSESSMENTS ABOUT POSTWAR IRAQ (Comm. Print 2007), available at <http://intelligence.senate.gov/prewar.pdf>.

<sup>44</sup> The Republican administration of President Ronald Reagan, elected in 1980, reduced non-military governmental expenditures, but continued the military buildup begun by its predecessor. This buildup is widely credited with ending the Cold War with a Soviet government that was unable to compete. Jeffrey W. Knopf, *Did Reagan Win the Cold War?*, STRATEGIC INSIGHTS, Aug. 2004, available at

ness about the responsibilities of government and the staffing of the administration by those, like Mr. Brown, for whom a government post was a reward for party loyalty rather than competence, a path to power but not public service.<sup>45</sup> In the conservative catechism, “good government” was an oxymoron, so government might as well serve as an object of plunder, rather than as a form of public service.

None of this, however, was likely to surprise proponents of social choice theory. As Professor Frank Michelman has explained, social choice theorists explain public policy choices as manifestations of “no public or general or social interest, . . . only concatenations of particular interests or private preferences.”<sup>46</sup> If government was to be viewed not as an instrument to serve the people, but rather as an opportunity to advance one’s personal interests, it was easy to see how an agency like FEMA could be transformed into a fiefdom bereft of a long-term plan for disaster response, or for it to engage in what *New York Times*

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<http://www.ccc.nps.navy.mil/si/2004/aug/knopfAUG04.pdf>. For a discussion of Soviet failures, see *infra* text accompanying notes 76-83.

<sup>45</sup> The practice was repeated in other sectors of government. Most notably, staffing at the Justice Department, which traditionally had been the bailiwick of career professionals, took on a partisan edge during the administration of George W. Bush. See CQ Transcripts Wire, *Goodling Testifies Before the House Judiciary Committee*, THE WASH. POST, May 23, 2007, available at [http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling\\_testimony\\_052307.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html); Margaret Talev & Marisa Taylor, *U.S. Attorneys Saga Exposes Weakened Justice Department Independence*, THE NEWS-SENTINEL, June 18, 2007, available at <http://www.fortwayne.com/mld/newssentinel/news/editorial/17386647.htm>. Federal legislation prohibits appointment of certain federal employees on the basis of political affiliation. 5 U.S.C. § 2302(b)(1)(E) (2007).

<sup>46</sup> Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148 (1977).

columnist Maureen Dowd called “a chilling lack of empathy combined with a stunning lack of efficiency.”<sup>47</sup> Indeed, the entire Homeland Security apparatus of which FEMA was a part, conceived as a necessary device to avert future September 11-type disasters, had become, in short order, a repository for congressional pork barrels, with rural police and fire departments in favored districts awash in funds while their urban counterparts (the more likely targets of future terrorist attacks) struggled to make-do.<sup>48</sup> Meanwhile, the federal government, rather than shrinking in size (a modest accomplishment of the Clinton Administration) actually grew, as domestic expenditures,<sup>49</sup> and along with them, the budget deficit,<sup>50</sup> soared during the first five years of the George W. Bush presidency.<sup>51</sup> As more than one

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<sup>47</sup> Maureen Dowd, *supra* note 16, at A21.

<sup>48</sup> Dean E. Murphy, *Security Grants Still Streaming to Rural States*, N.Y. TIMES, Oct. 12, 2004, at A1. In Katrina’s wake, Republican-governed Mississippi received a disproportionately larger amount of federal relief than Democratically-governed Louisiana. See Larry Copeland, *In Mississippi, Katrina Recovery Gaining Steam*, USA TODAY, July 24, 2006, available at [http://www.usatoday.com/news/nation/2006-07-24-miss-rebuilds\\_x.htm](http://www.usatoday.com/news/nation/2006-07-24-miss-rebuilds_x.htm); Adam Nossiter, *Senators at Louisiana Hearing Criticize Federal Recovery Aid*, N.Y. TIMES, Jan. 30, 2007, at A16.

<sup>49</sup> See CONG. BUDGET OFFICE, HISTORICAL BUDGET DATA, 8 TABLE 7 (2006) available at <http://www.cbo.gov/budget/data/historical.pdf> (last visited Feb. 3, 2008).

<sup>50</sup> See Office of Mgmt. & Budget, Budget of the United States Government, Fiscal Year 2007: Summary of Tables 315, Table S-3 (2006) available at <http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/tables.pdf> (last visited Feb. 4, 2008).

<sup>51</sup> Belatedly, some Republicans came to lament the Bush Administration’s enlargement of government and Congressional use of budgetary earmarks. In explaining how the conservative movement has been undermined, conservative activist Richard Viguerie states,

[W]hen you add everything up, what you have is a massive overreach of executive powers, and massive overspending by people who claim they’re conservatives. Every President, with hardly any exceptions, will take as

wag has noted, "For years, Republicans had told us that government was bad; when they came to power, they proved it." As a consequence Americans, who had raced halfway around the world to aid victims of an Asian tsunami eight months prior to Katrina, seemed incapable of taking care of their own when disaster struck the Gulf Coast.

At a Congressional hearing following the Katrina disaster, FEMA Director Brown alleged that Louisiana Governor Kathleen Blanco and New Orleans Mayor Ray Nagin (both Democrats) bore most, if not all the blame, for the failures in the response to Katrina, and that Brown's own only mistake had been not to realize sooner the inability of Blanco and Nagin to perform their duties.<sup>52</sup> In subsequent testimony, Brown blamed the Department of Homeland Security and his White House patrons—but not himself—for the federal government's lack of preparation and its delay in providing relief and rescue.<sup>53</sup> A Congressional committee, composed entirely of Republicans, would focus its blame on Homeland Security Secretary Michael Chertoff.<sup>54</sup> According to the panel's chairman, Mr. Chertoff had "primary responsibility for

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much power as he gets. That's what Presidents do. Bush has tried more than most. And it was supposed to be the Republicans in Congress who would do oversight of the President, so that he wouldn't get away with too much abuse of power. But they abdicated that role. It was all about the maintenance of power, and now look where they are.

Jeffrey Goldberg, *Party Unfaithful: The Republican Implosion*, THE NEW YORKER, June 4, 2007, at 40, 45.

<sup>52</sup> *Hurricane Katrina: The Role of the Federal Emergency Management Agency: H. Select Bipartisan Comm. to Investigate the Preparation for & Response to Hurricane Katrina*, 109th Cong. (Sept. 27, 2005) (testimony of Michael D. Brown, former FEMA Director).

<sup>53</sup> *Hurricane Katrina: The Roles of DHS and FEMA Leadership: S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. (Feb. 10, 2006) (testimony of Michael D. Brown, former FEMA Director).

<sup>54</sup> See Spencer S. Hsu, *Katrina Report Spreads Blame: Homeland Security, Chertoff Singled Out*, THE WASH. POST, Feb. 12, 2006, at A1.

managing the national response to a catastrophic disaster,"<sup>55</sup> yet, as the committee reported, he had handled his decision-making responsibilities "late, ineffectively, or not at all."<sup>56</sup> A Bush Administration report focused on a need for administrative reorganization that would divide various functions among several government agencies, some in different departments—this only a few short years after a major government reorganization through which the Department of Homeland Security was created.<sup>57</sup> A Senate report subsequent to Katrina recommended abolishing FEMA and creating another Homeland Security unit, a "National Preparedness and Response Authority."<sup>58</sup> Apparently, performance would be improved by rearranging the deck chairs on the Titanic.

Government lapses in connection with Hurricane Katrina were by no means the exclusive domain of the Republican Party. Under both major parties, the Corps of Engineers had developed a reputation for heavy-handedness, enjoying hegemony over flood control and paying little heed to the environmental consequences of its actions, while feeding off pork-barrel appropriations from Democratic, as well as Republican, Congresses.<sup>59</sup> Katrina

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<sup>55</sup> *Hurricane Katrina: The Role of the Department of Homeland Security: Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Oct. 19, 2005) (opening statement of Tom Davis, chairman).

<sup>56</sup> A FAILURE OF INITIATIVE: FINAL REPORT ON THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H. REP. NO. 109-377, at 2-3 *passim* (2nd Sess. 2006); see Hsu, *supra* note 54 at A1.

<sup>57</sup> George W. Bush Administration, *The Federal Response to Hurricane Katrina: Lessons Learned*, 65-82 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>.

<sup>58</sup> S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, RECOMMENDATIONS 607 (2006).

<sup>59</sup> TAXPAYERS FOR COMMON SENSE & NAT'L WILDLIFE FED'N, CROS-ROADS: CONGRESS, THE CORPS OF ENGINEERS, AND WASTEFUL WA-

found Democrats in state and city governments in Louisiana and New Orleans dropping the ball in planning, execution, and emergency response. Nevertheless, the inept Ray Nagin would be re-elected as New Orleans' mayor in May 2006, demonstrating the tendency of the electorate to close ranks around homegrown incompetence.

### C. *Photo-op politics.*

American politicians tend to deal with squeaky-wheel, crisis-of-the-moment issues that are conducive to "photo opportunities" and other media coverage, but not to engage in long-term planning or quiet reflection. Much like corporate officers whose visions runs only to the end of the current quarter, politicians tend to address the hot-button issue of the day, with their responses tailored to exploit whatever momentary political advantage can be obtained, rather than taking a long view of the public interest. Be it the devastation of Katrina, a coal mine disaster that takes a dozen lives,<sup>60</sup> or even a professional quarter-

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TER PROJECTS 2-3 (2000), *available at* <http://www.nwf.org/wildlife/pdfs/Crossroads.pdf> (last visited Feb. 3, 2008).

<sup>60</sup> Representative of this behavior was the response to the Sago Mine disaster in January 2006, which took the lives of twelve miners. Ian Urbina & Andrew W. Lehren, *U.S. Is Reducing Safety Penalties for Mine Flaws*, N.Y. TIMES, Mar. 2, 2006, at A1 "[T]he operator [of the Sago Mine] had been cited 273 times since 2004. None of the fines, [however,] exceeded \$460." *Id.* The *New York Times* reported that this was typical of the pattern of reduced mine safety enforcement by the Bush Administration, which, even after imposing fines far smaller than the maximum allowable, was lax in their collection. *Id.* The Congressional response was to introduce legislation to increase the maximum fines allowable, not to demand better enforcement of existing law. *Id.* Lest one surmise that the Bush Administration's tendency to compromise with mine operators reflected the needs of a struggling industry, one should note that the International Coal Group, which operates the Sago Mine, reported \$110 million in net profits during 2005. *Id.*

back's involvement in a dog fighting ring,<sup>61</sup> the typical legislative response is a predictable one: press conferences, legislative hearings, grandstanding, and still more legislation, rather than effective oversight regarding implementation of legislation already in effect. The Bush Administration may have been derelict in attending to disaster relief after Katrina, but it retained enough media savvy to stage a dramatically-lit and heavily scripted Presidential television address from Jackson Square in New Orleans a few days after the storm.

That publicity-mongering and point-scoring is a bipartisan affair that can be demonstrated by the grandstanding that attended the arrival of \$3 per gallon gasoline prices in the spring of 2006. Democrats were eager to blame the cost of gas (still substantially less than what Europeans were accustomed to paying) on price-gouging by the oil companies and the short-sightedness of the Bush Administration and to urge adoption of deficit enhancement measures such as "a sixty-day halt on collecting federal gasoline taxes."<sup>62</sup> The Bush Administration, in a conspiracy with Big Oil, was depriving Americans of their God-given right to drive, and there were political points to be scored. Meanwhile, Republican leaders proposed a \$100-per-driver tax rebate,<sup>63</sup> presumably to be financed by more federal

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<sup>61</sup> A more recent example of Congressional grandstanding was Senator John Kerry's pledge to introduce tougher federal legislation to ban dog fighting. Senator Kerry's pledge came in the wake of revelations of a dog-fighting ring that included Atlanta Falcons quarterback Michael Vick, who eventually pled guilty to federal charges. See Senator John Kerry's Online Office, *Kerry Asks NFL Commissioner to Immediately Suspend Vick Over "Sickening" Dogfighting Case*, July 20, 2007, <http://kerry.senate.gov/cfm/record.cfm?id=279464>.

<sup>62</sup> Edmund L. Andrews & Michael Janofsky, *Second Thoughts in Congress on Oil Tax Breaks*, N.Y. TIMES, Apr. 27, 2006, at A1.

<sup>63</sup> Press Release, United States Senate Committee on Energy and Natural Resources, *Domenici Introduces the Gas Price and Rebate Act of 2006* (Apr. 27, 2006) available at <http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases>.

borrowing from East Asian banks.<sup>64</sup> "‘Political anxiety in an election year is to blame for a lot of the bad bills Congress passes,’ said Representative Jeff Flake,” an Arizona Republican who opposed this short-lived proposal.<sup>65</sup> Leaders of neither major party took pains to point out the need to develop a real national energy policy, to promote conservation (and with it, public transportation), and to invest in alternative sources of energy—in other words, anything requiring planning or sacrifice on the part of the American people.<sup>66</sup>

This infantile attitude toward governance seeks refuge in “painless” solutions, in which constituents are treated not as citizens, but consumers; not as responsible participants in a common enterprise, but as supplicants hoping to feed from a public trough. Rather than demand of the American public, as President Kennedy did, that we “ask not what [our] country can do for [us], but what [we] can do for [our] country,”<sup>67</sup> present-day politicians ask Americans to consider whether we are “better off now than

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Detail&PressRelease\_id=234941&Month=4&Year=2006&Party=1  
(last visited Feb. 4, 2008).

<sup>64</sup> See U.S. Treasury Department, *Major Foreign Holders of Treasury Securities* (May. 15, 2006), available at <http://www.ustreas.gov/tic/mfh.txt>. (charting major foreign holders of treasury securities from November 2006 to November 2007).

<sup>65</sup> Carl Hulse et al., *Republicans Drop a Tax Plan After Business Leaders Protest*, N.Y. TIMES, May 2, 2006, at A1.

<sup>66</sup> Lamenting the “utterly shameless, utterly over-the-top Republican pandering and Democratic point-scoring that have been masquerading as governing in response to this energy crisis,” *New York Times* columnist Thomas Friedman called for the creation of a third political party because neither major party is willing to tell Americans what they need to hear: that a solution “requires sacrifice today for gain tomorrow.” Thomas L. Friedman, *Let's (Third) Party*, N.Y. TIMES, May 3, 2006, at A25.

<sup>67</sup> President John F. Kennedy, Inaugural Address (Jan. 20, 1961).



we were four years ago.”<sup>68</sup> War is waged in Iraq, for a number of reasons, some justified, some contrived, but instead of urging us to shared sacrifice, the administration and Congress rewards us (or at least the most affluent among us) with tax reductions. Pork barrel expenditures—not for improved levees in New Orleans, but for bridges to nowhere in Alaska—grow to budget-busting proportions through an undemocratic “earmarking” process, all to be financed not through user fees or taxes, but through the blue smoke and mirrors of supply-side economics and fanciful growth projections. In the days following Katrina’s onslaught, Thomas Friedman observed,

Besides ripping away the roofs of New Orleans, Katrina ripped away the argument that we can cut taxes, properly educate our kids, compete with India and China, succeed in Iraq, keep improving the U.S. infrastructure, and take care of a catastrophic emergency – without putting ourselves totally into the debt of Beijing.

So many of the things the Bush team has ignored or distorted under the guise of fighting Osama were exposed by Katrina: its refusal to impose a gasoline tax after 9/11, which would have begun to shift our economy much sooner to more fuel-efficient cars, helped raise money for a rainy day and eased our dependence on the world’s worst regimes for energy; its refusal to develop some form of national health care to cover the 40 million uninsured; and its insistence on cutting more taxes, even when that has contributed to incomplete

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<sup>68</sup> Soon to be President, Ronald Reagan, asked Americans to consider, “whether you are better off today than four years ago.” President Ronald Reagan, Reagan-Carter Presidential Debate (Oct. 28, 1980).

levees and too small an Army to deal with Katrina, Osama and Saddam at the same time.<sup>69</sup>

Critics of the war in Iraq have complained that it has left the American military stretched too thin.<sup>70</sup> But the stretch is not beyond that which we are capable; it is simply beyond that which we have been willing to commit.<sup>71</sup> Today's global military commitments are fulfilled not by sons and daughters drafted from the citizenry-at-large, but by an "all-volunteer" army, consisting primarily of low-income people with few economic alternatives, gleaned from America's urban ghettos and rural communities.<sup>72</sup> A less populous, less affluent United States of America was able to stretch its military around the globe during World War II, but that was an enterprise to which the nation was fully committed, for which the administration in power had prepared the American people to sacrifice, and in which most American families had a direct stake, often through one or more of its members in military service. Americans would have been similarly disposed to sacrifice after the terrorist attacks of September 11, 2001. But instead of imploring us to shared sacrifice, the President told Americans to "live your lives and hug your children."<sup>73</sup> The tax breaks and pork-barrel expenditures continued. A critic of

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<sup>69</sup> Thomas L. Friedman, *Osama and Katrina*, N.Y. TIMES, Sept. 7, 2005, at A25.

<sup>70</sup> See generally LYNN E. DAVIS, ET AL., STRETCHED THIN: ARMY FORCES FOR SUSTAINED OPERATIONS (2005) (prepared for the United States Army).

<sup>71</sup> This lack of commitment may find its roots in the omission of Powell Doctrine principles from war planning. See generally Powell, *supra* note 41.

<sup>72</sup> The army's current recruiting slogan, *An Army of One*, hardly brings to mind the more communitarian, brothers-in-arms philosophy of what Tom Brokaw and others have called "the Greatest Generation."

<sup>73</sup> George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).

the Bush Administration captured its post-September 11 attitude with the words, “We’re at war. Let’s party!”<sup>74</sup>

Granted, it is difficult for a president to tell the American people that it is time for us to eat our vegetables. But we have gorged on a diet of sweets and fats for too long. Indeed, the recent upswing in obesity among Americans, young and old—and with it, the growth in related maladies such as diabetes and heart disease—is an apt metaphor for our debt-plagued government and society.<sup>75</sup> The time has come for all of us to take responsibility.

## II. COUNTERPOINT: THE CHERNOBYL DISASTER.

### A. *A nuclear whirlwind.*

In the context of responsible governing, Katrina was, both literally and figuratively, a reaping of the whirlwind. Poor planning and neglect had come home to roost in the flooded streets of New Orleans in a visible, demon-

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<sup>74</sup> Friedman, *supra* note 66 (referring to a statement by Joel Hyatt). Conservative activist Richard Viguerie has pointed out that Bush has followed in the “guns-and-butter” footsteps of President Lyndon B. Johnson, abjuring the approach of Presidents Franklin D. Roosevelt, Harry S. Truman, and Ronald Reagan, who cut discretionary domestic spending as they increased defense spending. RICHARD A. VIGUERIE, *CONSERVATIVES BETRAYED* 25 (2006).

<sup>75</sup> An article by Jackson Lears espouses this concept.

Americans are awash in red ink. Consumer indebtedness is soaring, the savings rate is down to zero and people are filing for bankruptcy at record rates. To many observers, these are symptoms of cultural decline, from sturdy thrift to flabby self-gratification—embodied in the current obesity epidemic. The fattest nation on earth is also the greediest consumer of global resources and now is borrowing more than ever to satisfy its appetites.

Jackson Lears, *The Way We Live Now: The American Way of Debt*, N.Y. TIMES MAG., June 11, 2006, at 13. The article goes on to suggest that commentators have historically lamented Americans’ tendency toward indebtedness. *Id.* at 13-16.

strable way. Were the solution to dysfunctional government simply more government, or the consolidation of power in a single, central government, the remedy could be derived fairly easily, but solutions to complex problems are seldom this facile. The past century has provided many lessons regarding the danger of imposing an all-powerful government as alpha and omega of all matters. Few were as vivid as the Chernobyl nuclear plant disaster, which rocked the Soviet Union in April 1986. The explosion at the nuclear facility near the Ukrainian city of Chernobyl immediately killed thirty-one people, required the evacuation of 135,000 others, and contaminated an area roughly the size of England.<sup>76</sup> The precise number of cancers and other illnesses attributable to the disaster will never be ascertained, but the numbers are probably in the thousands, with genetic damage possibly being passed down through several generations. A United Nations report issued in the fall of 2005 suggested that 4,000 people would, in the end, die from diseases caused by direct exposure to the radiation.<sup>77</sup> Greenpeace, an environmental group not immune from the use of hyperbole, released its own response in April 2006 (twenty years after the explosion), claiming that in the final analysis Chernobyl would kill at least 90,000.<sup>78</sup>

Chernobyl was the product of a centrally planned economy in which the government based in Moscow was the first and last authority. Without private enterprise, a free press, or internal checks and balances to constrain it, there was nothing to prevent the Soviet state from engaging

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<sup>76</sup> NEA COMMITTEE ON RADIATION AND PUBLIC HEALTH, *CHERNOBYL TEN YEARS ON RADIOLOGICAL AND HEALTH IMPACT* 18, 27-28 (1995), available at <http://www.nea.fr/html/rp/chernobyl/vrml/chernobyl.html>.

<sup>77</sup> Press Release, World Health Org., et al., *Chernobyl: The True Scale of the Accident* (Sept. 5, 2005).

<sup>78</sup> GREENPEACE, *THE CHERNOBYL CATASTROPHE: CONSEQUENCES ON HUMAN HEALTH* 23 (I. Blokov et al. eds., 2006), available at <http://www.greenpeace.org/raw/content/international/press/reports/chernobylhealthreport.pdf>.

in a reckless course of action. The state could do no wrong; there was nobody to compete with it, nobody to criticize it, no mechanism to check its excesses.<sup>79</sup> Marx and Engels had instructed us that in time, the state would just wither away; in the meantime, it imposed a structure that dominated human endeavor to a greater degree than anything mankind had previously seen, with a death grip that stifled initiative, ambition, and progress.

To be sure, Chernobyl was not the only disaster caused by Soviet-style totalitarianism. The Soviet invasions of Hungary (1956) and Czechoslovakia (1968), Stalin's massacre of the kulaks, and the repression of the Gulag were among hundreds of examples of the excesses of the Soviet state. But Chernobyl demonstrated that Soviet-style totalitarianism was not even technically competent. Military parity with the West would, for a time, mask the Soviet Empire's economic weakness, but the Chernobyl disaster revealed that even the vaunted Soviet nuclear program was a façade covering a flawed and creaky infrastructure. The "workers' paradise" promised by Lenin and Stalin spewed forth not only the devastation of Chernobyl but also the environmental wasteland that covered much of Eastern Europe and Russia by the time of the Soviet Empire's demise circa 1990. If the Katrina disaster presents a sorry case of abdication of government responsibility, the Chernobyl catastrophe stands as a harsh illustration of what can occur when a society and its economy are characterized by "all government, all the time."

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<sup>79</sup> The regulatory process in the United States is not without its critics. But the worst American nuclear plant mishap, Three Mile Island in 1979, paled in comparison to the Chernobyl disaster. Just one year after the Three Mile Island incident, the author moved to a location just twenty-five miles upwind of Three Mile Island, where he and his family have enjoyed a healthy portion of their lives. For all its shortcomings, a combination of private enterprise and government regulation appears to have averted more serious nuclear disasters.

In Soviet-dominated Eastern Europe, contemporary observers saw Chernobyl as a clear signal that the Soviet Union was not the technological powerhouse it had been assumed to be. The nuclear plant disaster humbled the Kremlin and emboldened those who would challenge the Soviet Empire, causing it to topple within a few short years. Similarly, in the aftermath of Katrina, people in the United States and abroad came to wonder whether the world's only remaining global superpower had the will as well as the wherewithal to confront serious domestic challenges. Chernobyl exposed raw the shortcomings of a "people's dictatorship" that was more bluff than substance; in Katrina's aftermath, Americans could not help but wonder whether we had lost the ability to take care of our own. The Soviet experience demonstrated the danger of too much government; the American that of not enough. In both cases, disaster revealed underlying flaws in governing philosophy. In both Moscow and Washington, the same truth was exposed: the emperor had no clothes.

We hesitate to paint with too broad a brush. There are nuances that work against our grand theory. Critics of the United States Army Corps of Engineers have long complained about that agency's unfettered hegemony over flood control.<sup>80</sup> The single-mindedness of the Corps' undertakings, often oblivious to environmental consequences, was more reminiscent of the blinders-on mentality of the Soviet management philosophy than the chaotic mismanagement displayed by other American government agencies in Katrina's immediate aftermath. And while the governments of New Orleans, Louisiana, and the United States may have failed Katrina's victims, they were generously assisted by governments in other states, most notably Texas, which housed thousands of homeless people and opened the schoolhouse doors to their children. Americans

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<sup>80</sup> TAXPAYERS FOR COMMON SENSE & NAT'L WILDLIFE FED'N, *supra* note 59.

also responded admirably to Katrina through *non-governmental* efforts, raising disaster relief funds and volunteering in large numbers to aid the victims and rebuild the Gulf Coast.<sup>81</sup> Indeed, the very existence of several layers of responders, some public, some private, assured that *some* relief would arrive for Katrina's beleaguered victims. Two centuries ago, Alexis DeToqueville observed that Americans had constructed a strong civil society to compensate for the weakness of their government.<sup>82</sup> That structure has provided a measure of salvation in the wake of Katrina and other demands to which our governments, federal, state, and local, have been slow to respond.

While the Soviet government's initial reaction to Chernobyl was the sort of tight-lipped non-disclosure characteristic of a totalitarian regime, Moscow's long-term response was somewhat more enlightened and humane than that which one might expect from an "evil empire." Within a few days after the explosion, the Soviet government ordered and conducted mass evacuations and provided the means for people to leave the contaminated area and to sustain their lives thereafter. In so doing, it undertook a

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<sup>81</sup> Particularly noteworthy were the efforts of the Mormon Church, which quickly sped supplies and relief workers to the beleaguered Gulf Coast. The Mormon Church—in its ability to mobilize its members for the common good—demonstrates some of the finest aspects of civil society. See *All About Mormons, Mormon Humanitarian Efforts*, available at [http://www.allaboutmormons.com/mormon\\_humanitarian\\_service.php](http://www.allaboutmormons.com/mormon_humanitarian_service.php) (last visited June 26, 2007). The church's critics would say that it also displays communitarian's darker side, with evidence of strong out-group antagonisms. That is far more likely to have been true in the past than the present. See Douglas O. Linder, *The Mountain Meadows Massacre of 1857 and the Trials of John D. Lee: An Account* (2006), available at [http://www.law.umkc.edu/faculty/projects/ftrials/mountainmeadows/lee\\_account.html](http://www.law.umkc.edu/faculty/projects/ftrials/mountainmeadows/lee_account.html).

<sup>82</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* *passim* (Gerald Bevan trans., Penguin Books Ltd. 2003).

role not regarded as extraordinary for a socialist state. In the cases of both Katrina and Chernobyl, problems resulting, at least in part, from either an excess or lack of government involvement were ameliorated through more communitarian solutions: in one case, the compassionate ministries of civil society and private charity; in the other, the distributive justice philosophy of a socialist state. In the end, our salvation lies in neither over-dependency on government nor the abandonment of government responsibility, but rather somewhere in the middle.<sup>83</sup>

### *B. Averting Collapse.*

In his excellent book, *Collapse*, Jared Diamond describes the sad fate of several of the world's civilizations, each of which ultimately failed to thrive because of an unwise allocation of limited resources.<sup>84</sup> Diamond attributes societal collapse to a number of factors, including environmental damage, climate change, hostile neighbors, decreased support by friendly neighbors, and society's response to environmental problems.<sup>85</sup> He acknowledges that much environmental degradation is natural or inadvertent, but that it is the variable of human response that can spell the difference between a society that disintegrates and one that continues to thrive.<sup>86</sup> Diamond documents how in environments as diverse as Easter Island and Norse Green-

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<sup>83</sup> Indeed, by the mid-1980s the Soviet Empire was neither as monolithic nor as autocratic as it had once seemed. Nikita Khrushchev's "goulash communism" was evolving into Mikhail Gorbachev's *glasnost* and, ultimately *perestroika*. The meltdown of autocracy had begun prior to the nuclear meltdown at Chernobyl, although the potency of civil society in opposition to totalitarian government was more evident in Warsaw Pact states such as Hungary and Poland than in the Soviet Union itself.

<sup>84</sup> JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* *passim* (2005).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



land, ruling elites commandeered scarce resources for themselves, neglecting the people without whose labor and support the enterprise was doomed.<sup>87</sup> As a consequence, it was only a matter of time before resources ran dry and the civilization collapsed.<sup>88</sup> The theory that collapse (or, in less extreme cases, major economic deprivation) was not an inevitable consequence of natural conditions is demonstrated by the differing fortunes of two peoples or political systems inhabiting the same environment, such as the Norse and Inuit in Greenland, or the Dominican Republic and Haiti on the Caribbean island of Hispaniola.<sup>89</sup>

A relatively small, elite group might temporarily thrive by hoarding resources and exploiting the populace. For a time, less fortunate people will perform menial jobs, serve in an "all volunteer" army, pledge fealty to a "worker's paradise," and pay taxes in the forlorn hope that they, too, will someday share in the community's wealth. But faith in the community and participation in the common enterprise ultimately collapses unless the community is reasonably responsive to the needs of all. Even Machiavelli recognized that "[a] wise prince will establish institutions that can protect lives and property, respect different spheres of social organization, and help his subjects pursue their livelihoods."<sup>90</sup> Benjamin Franklin put it more colloquially during the American Revolution: "We must indeed all hang together, or, most assuredly, we shall all hang separately."<sup>91</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> JOHN EHRENBERG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* 58 (1999). Ehrenberg offers the following quotation from Machiavelli's *The Prince*: "A prince should also show his esteem for talent, actively encouraging able men, and honoring those who excel in their profession." *Id.*

<sup>91</sup> Benjamin Franklin, Remarks at the signing of the Declaration of Independence (July 4, 1776). See THE OXFORD DICTIONARY OF QUOTATIONS 323 (Elizabeth Knowles ed. 1999).

Ultimately, we are all in the same boat. Better for us to all row together to safety than to drop our oars and cannibalize the weakest among us.<sup>92</sup>

That is not to say that we all should be strapped into our seats, beating out a cadence of strokes called out by a single coxswain seated up front. The failure of communism has demonstrated how a centrally-controlled economy, answering to the beat of a single drummer, stifles individual initiative and sucks the oxygen out of community. We seek other models. Diamond calls our attention to the Netherlands, where rich and poor alike realized over the years that they would have to collaborate on an extensive system of dikes and pumps in order to reclaim the land from the sea.<sup>93</sup> A large storm that took 2,000 lives in 1953 prompted the Dutch to redouble their efforts; a Dutch academician-friend of mine explains that the *Deltawerken* (the massive reinforcement of the dykes and the damming of some estuaries) stemmed in part from a “Churchillian feeling that there was a war against the water, which required sacrifices from all for a major effort to prevent any disaster like that in the future.”<sup>94</sup> Diamond quotes *his* Dutch friend’s description of life in the reclaimed lands, or “polders”:

In the Netherlands, we have [an] expression, ‘You have to be able to get along with your enemy, because he may be the person operating the neighboring pump in your polder.’ And

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<sup>92</sup> For the legal consequences of the latter, see *Her Majesty the Queen v. Dudley*, (1884) 14 Q.B.D 273 (D.C.).

<sup>93</sup> DIAMOND, *supra* note 84.

<sup>94</sup> E-mail from Wibren Van der Burg, Tilburg Univ., to author, (Feb. 11, 2007) (in author’s files). The legendary British Prime Minister’s name was invoked to signify the gravity of this immense national effort, led by “a reasonably effective government that saw itself as the leading agency in rebuilding the country and a minimally just and solidaristic society after WWII.” *Id.*

we're all down in the polders together. It's not the case that rich people live safely up on tops of the dikes while poor people live down in the polder bottoms below sea level. If the dikes and pumps fail, we'll all drown together. . . . If global warming causes polar ice melting and a world rise in sea level, the consequences will be more severe for the Netherlands than for any other country in the world, because so much of our land is already under sea level. That's why we Dutch are so aware of our environment. We've learned through our history that we're all living in the same polder, and that our survival depends on each other's survival.<sup>95</sup>

Comments Diamond:

That acknowledged interdependence of all segments of Dutch society contrasts with current trends in the United States, where wealthy people increasingly seek to isolate themselves from the rest of society, aspire to create their own separate virtual polders, use their own money to buy services for themselves privately, and vote against taxes that would extend those amenities as public services to everyone else. Those private amenities include living inside gated communities, relying on private security guards instead of the police, sending one's children to well-funded private schools with small classes rather than to the under-funded crowded public schools, purchasing private health insurance or medical care, [and] drinking bottled water instead of municipal water. . . . Underlying such privatization is a misguided

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<sup>95</sup> DIAMOND, *supra* note 84, at 519-20.

belief that the elite can remain unaffected by the problems of society around them: the attitude of those Greenland Norse chiefs who found that they had merely bought themselves the privilege of being the last to starve.<sup>96</sup>

The collective effort in the Netherlands shaped an environmentally conscious community in which capitalism has nevertheless thrived more than in most places on earth.<sup>97</sup> That care for the collective good would be conducive to a thriving capitalist economy should not really come as a surprise. Indeed, no lesser proponent of capitalism than Adam Smith recognized long ago that

[n]o society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable. It is but equity, besides, that they who feed, clothe, and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, clothed, and lodged.<sup>98</sup>

As we shall see, however, those who would promote individual initiative *and* an equitable distribution of resources face special problems in the United States.

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<sup>96</sup> *Id.* at 520.

<sup>97</sup> My Dutch friend explains that the polder boards may have been the first democratic institutions in the Netherlands and account for the country's egalitarian and democratic culture. Van der Burg, *supra* note 94.

<sup>98</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 33 (1776).

### III. IN SEARCH OF A COHERENT GOVERNMENT ROLE.

#### A. *A nation of tax protestors.*

The United States of America is a nation founded by tax protestors. The cry of the American Revolution was “no taxation *without representation*”—a call for representative democracy at least as much as a revolt against taxes; a political protest as much as a tax revolt. Nevertheless, anti-tax, and with it, anti-government, sentiment is very much a part of the national DNA. King George III and his troops represented repressive government; ergo, government must be inherently repressive.<sup>99</sup> The centralization of power in particular was to be avoided. Hence, a loose confederacy of states was formed to succeed British imperial rule. When that proved ineffectual, a federal government was formed, in which constituent states would nevertheless remain sovereign and retain many important government powers. Government power was to be divided among governments with different competencies (i.e., the “division of powers” between the national government and the states); within each government, “separation of powers” was to keep any one branch from exercising too much power. A Bill of Rights, setting forth individual civil liberties in the form of limitations on government power (e.g., “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”<sup>100</sup>), became an important part of the constitution of the new republic. Government was a *necessary* evil, but an evil nevertheless, to be constrained and divided.

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<sup>99</sup> A variation on this type of thinking might be found in contemporary Russia. Under Soviet rule, Russians were told that capitalism was corrupt; capitalists were portrayed in caricature as greedy, dishonest, and underhanded. With the decline and fall of communism, Russians seem to have believed their propagandists and embraced the most corrupt form of capitalism. The caricature has become the fact.

<sup>100</sup> U.S. CONST. amend. I.

The result was a country in which criticism, suspicion, and even derision of government is regarded as *patriotic*. A special target of this derision is the central government in Washington. Politicians from Thomas Jefferson to George W. Bush have campaigned against Washington (the government, not the man, although there is reason to believe that Jefferson secretly schemed against the man as well<sup>101</sup>). Ronald Reagan built his political career on the following idea: the problem is not solved by government, the problem *is* government.

Anti-government sentiment is the exclusive domain of neither the left nor the right. Democrats, like Jefferson (author of the Kentucky Resolutions<sup>102</sup>), Madison (principal drafter of the limited-powers Constitution), Jackson (foe of the Bank of the United States), Bryan (the prairie populist), and Carter have dueled in anti-government rhetoric as have Republicans like the Tafts (three of them), Coolidge ("the chief business of the American people is ness"<sup>103</sup>), Reagan, and the Bushes (again, three of them). The rhetoric often takes on a populist, anti-lawyerly complexion. Peanut farmers (Jimmy Carter) and bodybuilders-cum-Hollywood celebrities (Arnold Schwarzenegger) repeatedly remind voters, during *political* campaigns that they are neither lawyers nor politicians, as if professional training in the law or a life of public service is a form of taint. But American lawyers, too, regard it as their sacred duty to protect citizens against government power. The

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<sup>101</sup> See DAVID MCCULLOUGH, JOHN ADAMS 482-83 (Touchstone 2001).

<sup>102</sup> The Kentucky Resolutions, like Madison's Virginia Resolutions, stated a case for nullification of acts of Congress deemed unconstitutional by the state legislatures. Thomas Jefferson, Kentucky Resolutions, in 30 THE PAPERS OF THOMAS JEFFERSON: 1 JANUARY 1798 TO 31 JANUARY 1799 550-56 (Princeton Univ. Press 2003); WILLIAM J. WATKINS, JR., RECLAIMING THE AMERICAN REVOLUTION: THE KENTUCKY AND VIRGINIA RESOLUTIONS AND THEIR LEGACY 170-71 (2004).

<sup>103</sup> President Calvin Coolidge, Address to the American Society of Newspaper Editors in Washington D.C. (Jan. 25, 1925).

crusading attorney, in both fact and fiction—Clarence Darrow, Atticus Finch, Thurgood Marshall—is seen at his heroic best when defending the criminally accused against an abusive government or challenging unfair or discriminatory government practices.

Even our national symbols have an anti-government, rugged individualist aura about them. The vigilant serpent of “Don’t Tread on Me” fame was succeeded by a solitary eagle, a free-flying bird of prey, not a pack animal like the wolf or a communitarian species like the beaver (although Oregonians favor the latter). The Father of Our Country, George Washington, is portrayed as a Cincinnatus, disdainful of high office, eager to return to the plow, accepting both a military commission and the Presidency only with great reluctance.<sup>104</sup>

Yet for all the bashing of government, we expect government to perform when the chips are down. At one time, apparently, it did. In the days following the San Francisco earthquake and fire of 1906, with the city in ruins and thousands left homeless, at least one citizen was moved

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<sup>104</sup> The myth is only partially correct. Washington did resist imperial trappings and titles as President and established the two-term tradition (ignored by Franklin Roosevelt, then codified in the Twenty-second Amendment). But he was a master politician, inventing several government institutions that survive to this day, successfully balancing off personalities as diverse and contentious as Hamilton, Jefferson, and Adams, and fending off all sorts of challenges. As for his military command, Washington showed up at the Continental Congress in 1775 dressed in full military officer regalia. DAVID MCCULLOUGH, 1776, 49-50 (Simon & Schuster 2005). What could he have been suggesting?

To his credit, Washington established the appropriate image for the general-cum-politician in America. Military leaders who have obtained high political office in this country have been the modest, self-effacing, peace-loving sorts who have seen war and wish not to revisit its horrors. We tend to elect and admire the Washingtons, Grants, Eisenhowers, and Powells, not the strutting, autocratic McClellands, MacArthurs, Pattons, and LeMays. We run (as we should) from the man-on-horseback, the Caesar, or Napoleon who will sweep us off our feet and lay waste to our liberties.

to write, "Everything's ruined. But don't worry; government is looking out."<sup>105</sup> The observation seems to have been accurate. Federal troops, after some initial blunders, soon thereafter brought relief to a homeless and stranded population. Within ten days, a new trolley line was up and running; the twenty-eight thousand buildings destroyed by the quake would be replaced by 20,500 new ones within three years.<sup>106</sup> Public and private resources combined to build a new City by the Bay. Even a corrupt municipal administration rose to the occasion.

The recent New Orleans experience stands in sharp contrast. Even now, two years after Katrina, deliverance seems almost as remote as in the days immediately following the storm. As of yet, no clear-cut game plan or consensus as to how to rebuild the city and its environs exists. Instead, the Big Easy seems to be adrift.<sup>107</sup> Part of the problem is a cacophony of interest groups unwilling to lay their respective demands aside for the common good. But a century of disillusionment has also driven American government from a "can do" to a "won't do" mentality.<sup>108</sup>

Americans spend 350 days a year bashing government, starving it of resources, at least in those areas in

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<sup>105</sup> *PBS American Experience: The Great San Francisco Earthquake* (produced and directed by Tom Weidlinger), transcript available at <http://www.pbs.org/wgbh/amex/earthquake/filmmore/pt.html> (Mar. 20, 2006).

<sup>106</sup> *Id.*

<sup>107</sup> A metaphor for this drift may be the shrimp boats washed ashore during Katrina, which remained tangled in the trees in Gulf Coast communities ten months later. Dan Barry, *100-Ton Symbols of a Recovery Still Suspended*, N.Y. TIMES, June 9, 2006, at A1.

<sup>108</sup> Perhaps we are just sadder but wiser. During the "can-do government" era of the New Deal, Americans from Franklin Roosevelt to Woody Guthrie extolled the virtues of massive federal reclamation and irrigation projects such as the Grand Coulee and Bonneville Dams. Today, we have come to recognize that an environmental price must be paid for such "progress." We may have become less sure-headed and more circumspect about such matters.



which intervention might matter most. We spend the remaining two weeks deploring government's inability to respond to the crisis of the moment: a hurricane in the Gulf, landslides in California, wildfires in the Rockies, floods in New England. Of course, few people really want the cessation of all government. Most societies have been formed by people who recognized the need to band together to protect common interests. Those societies quickly adopted some sort of governance system. It may have been more or less authoritarian in structure; it may have been more or less oppressive to individual citizens or outsiders who come into their midst; it may have been more or less tolerant of free thinking or non-conformity on the part of individuals. All too frequently, the broad common interests that created the governing instrument in the first place have been abandoned in the course of rent-seeking efforts of individuals and limited interest groups, or in selfish efforts to accumulate wealth or power on the part of individuals. Thus, in the Soviet Union, Marxist-Leninism, a flawed, authoritarian form of government that nevertheless had the welfare of the masses as its core principle, quickly gave way to Stalinism, a more oppressive form of Marxism whose chief aim seemed to be the preservation in power of a totalitarian leader.<sup>109</sup> In Africa, the promise of liberation from colonial rule frequently turned sour, as despotic rulers plundered national assets for personal gain. In America, the Republican Party, an organization formed with the noblest of aims—the curtailment of slavery and the enhancement of opportunity—has lately fallen into the hands of a coalition of corporate oligarchs and religious zealots, with adverse consequences for the Republic.<sup>110</sup>

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<sup>109</sup> These circumstances have been portrayed in an allegorical fashion in literature. *See generally* GEORGE ORWELL, *ANIMAL FARM* (Penguin Group 1945).

<sup>110</sup> For a detailed description of this phenomenon, *see generally* KEVIN PHILLIPS, *AMERICAN THEOCRACY* (2006).

A Hobbesian view of the world would suggest that this is the natural state of things. Under Thomas Hobbes' philosophy, power is accumulated in a governing authority because men would otherwise be at each other's throats. Life is "nasty, brutish and short," and people willingly cede whatever natural rights they possess in return for the protection of a leviathan who will shield them from external and internal threats.<sup>111</sup> Under this view, the pursuit of self-interest on the part of the ruling oligarchy is but a deal struck with the devil. Some crumbs might be thrown to the populace, but its claim to civil liberties is abandoned in favor of protection against the Hun, the Turk, the Bolsheviks, or Al-Qaeda. The more liberal Lockean view regards things differently. According to John Locke, individuals group together to serve their mutual interests, including self-protection, but in doing so they retain certain basic civil liberties.<sup>112</sup> These "natural rights" are not to be interfered with by the governing powers; to the extent intrusions are permitted, they must be balanced against civil liberties.<sup>113</sup> The bombing of Pearl Harbor may justify war on Japan, but it does not justify the internment of American citizens of Japanese ancestry. Taxes may be collected and people may be conscripted into military service, but the government may not arbitrarily drag us from our homes at night or beat confessions out of its citizens.

### ***B. Rights and responsibilities.***

Communitarians are apt to reject the authoritarianism implicit in the Hobbesian view and are therefore more likely to embrace the Lockean, "natural rights" view. But communitarians will be quick to add that with rights come

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<sup>111</sup> THOMAS HOBBS, LEVIATHAN pt. 1 ch. 13 (1651).

<sup>112</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690).

<sup>113</sup> *Id.*

responsibilities, and that the assertion of individual rights does not mean disregard for the needs of the community at large. In America, however, the impulse against invasive government power runs strong—so strong that we are reluctant to have government play the major role in promoting social welfare that is taken for granted in most economically advanced societies. Our health care system is a prominent example of this phenomenon. Resistance to a comprehensive national health care system has been articulated on a number of grounds: the right to choose one's own physician, the right of doctors to be independent contractors, the efficiencies and choices arguably provided by an array of competing health insurance plans. But communitarians are apt to downplay the "rights talk," recognizing, as Mary Ann Glendon does, that most public controversies are best resolved through an adjustment of competing interests.<sup>114</sup> Reframing the issue as an interests-based discussion frees us to consider whether nationally-guaranteed health coverage might benefit the nation as a whole and whether a single-payer (or even just a single-form) health insurance program might be more efficient than a system in which each doctor must employ a cadre of specialists just to process the forms required by a patchwork quilt of insurers. Our Canadian neighbors enjoy universal health care<sup>115</sup> and more—more extensive public transportation,<sup>116</sup> large subsidies for higher education,<sup>117</sup> and stacks of firewood free for the taking in national parks. Nevertheless, my occasional forays to the north have unearthed no sense of

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<sup>114</sup> MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 15 (1991).

<sup>115</sup> Judy Foreman, *Why Canadians Are Healthier*, THE BOSTON GLOBE, Feb. 10, 2004, at C2.

<sup>116</sup> Michael R. Baltes, *The Importance Customers Place on Specific Service Elements of Bus Rapid Transit*, 6 J. OF PUB. TRANSP. 1, 5, 18 (2003).

<sup>117</sup> Martin Trow, *From Mass Higher Education to Universal Access: The American Advantage*, 37 MINERVA 303, 304, 317-319 (1999).

oppression or restraint of freedom on the part of Canadian citizens. Perhaps the absence of the responsibilities of a superpower—and the hubris that goes with it—provides our Canadian neighbors with an air of freedom and a lighter step to their feet. Or perhaps it is a stronger sense of community that allows them to recognize that health care is a universal need, the availability of which should be dependent upon neither wealth nor employment status.

### C. *The tragedy of the commons.*

Communitarian theory suggests that when possible, government responsibility should be vested in the smallest units, as they are most likely to be responsive to the needs of the community.<sup>118</sup> But communitarianism sometimes requires broader government responsibility as to human needs. In America, the impulse against centralization of government power runs almost as strong as the antipathy toward government in general. Whether our federal system is the cause or the effect of resistance to central authority, there is great reluctance to place the federal government in charge of many aspects of public life that are entrusted to central authority in other countries. School finance is a prominent example of this phenomenon. In France (to cite just one case), public education is regarded as a major responsibility of the central government.<sup>119</sup> Approximately two-thirds of all school funding comes out of Paris, and the quality of one's education is not a by-product of the wealth of one's hometown.<sup>120</sup> In America, the regard for local control is strong. Control over and financing of schools is

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<sup>118</sup> AMITAI ETZIONI, *The Responsive Communitarian Platform: Rights and Responsibilities*, in *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 260 (1993).

<sup>119</sup> Embassy of France in the United States, *Education in France: The School System*, [http://www.ambafrance-us.org/atoz/edu\\_fr.asp](http://www.ambafrance-us.org/atoz/edu_fr.asp) (last visited Jan. 15, 2008).

<sup>120</sup> *Id.*

largely a local matter.<sup>121</sup> The state might take some interest, but Washington is banished to the far corners of public education.<sup>122</sup> The quality and type of education one receives in America thereby becomes largely a function of the wealth and attitudes of one's local community—and the results, of late, have been deplorable.<sup>123</sup>

They have been deplorable at least in part because many localities—even many that could not be considered “poor” by any means—starve their public school systems. This starvation subsists because while the greatest carping about government power, size, and expenditures is reserved for the *federal* government, people have the most direct influence over taxes and expenditures on the *local* level. In some states, like New York and New Jersey, voters must approve school budgets through direct referendum.<sup>124</sup> Elsewhere, a school board member is only a telephone call

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<sup>121</sup> Some exceptions exist. Hawaii, for example, finances all public education through the state treasury. *See* Haw. Const. art. 10, § 1. *See generally* HAW. REV. STAT. § 302A-1303 (Supp. 2006) (articulating how the school budget and general fund are estimated).

<sup>122</sup> Washington's primary involvement appears to be in the form of unfunded mandates: decrees that states and local school districts must comply with certain requirements as a condition for federal funding, then paltry appropriations with respect to such funding. One such example can be found in provisions for special education for students with disabilities. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004); *see also* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

<sup>123</sup> *See* JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 3-5* (1992) (detailing inequities in America's public schools). In Chile, students, who are painfully aware of such inequities, have recently taken to the streets in opposition to a Pinochet-era law that delegates education funding to local communities and private enterprise. *See* Larry Rohter, *Chileans Promised a New Deal: Now Striking Youth Demand It*, N.Y. TIMES, June 5, 2006, at A11. Thus, an avowedly socialist government has fallen short of the egalitarian ideal.

<sup>124</sup> *See* N.J. STAT. ANN. § 18A:13-17 (West 1999); N.Y. EDUC. LAW § 2022 -2023 (McKinney 2000).

away—and unlike the congressional representative, she is likely to answer the phone personally. The tragedy of the commons takes hold, as elderly and childless voters, not seeing a direct stake in the education of young people, rail against high taxes, “bloated” school budgets, and “overpaid” teachers.<sup>125</sup> Having little recourse over state and federal budgets, they use what leverage they can to control expenditures at the local level.

For decades, America’s public schools were subsidized by the practice of sex discrimination. Women, largely excluded from professions such as law and medicine, turned to nursing and teaching, for which they (and the smaller number of males who opted for these callings) accepted wages that would have been below market in a truly free market, i.e., a market free of discrimination. Now, with the more lucrative professions open to women, the private-sector nursing market has begun to pay competitive wages.<sup>126</sup> Teachers, most of whom work in a publicly-financed school system, continue to earn depressed wages. The profession is gradually depleted of its best talent, who seek more lucrative positions elsewhere. To extend the commons analogy, it now costs more to grow the grass, but the public is unwilling to recognize the scarcity of seed and foot the bill.

What is lacking here is a broad sense of community. Last year my new research assistant, recently exposed to communitarianism, asked me how broadly we can define community. A core question, to be sure. With respect to some interests, it might be altogether appropriate to define one’s community as narrowly as one’s immediate family,

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<sup>125</sup> The tragedy of the commons takes hold when a public resource (i.e., the commons) is depleted because individuals are unwilling to regulate their use or pay the price necessary to sustain the resource. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-45 (1968).

<sup>126</sup> Cheryl L. Mee, *Salary*, NURSING 2005, Oct. 2005, at 46, 48.

or one's church, or one's neighborhood.<sup>127</sup> But some functions (and I would contend that education is one of them) require the financial commitment of an entire nation. For still other purposes, such as the environment, our concerns are that of a global community. In matters such as education and the environment our interests are so interwoven that it is, in the long run, just as self-defeating to narrow one's perspective to one's family or even one's town as it was for the Norse chiefs described by Diamond to horde Greenland's scarce resources.<sup>128</sup>

The problems of health care and public education have together come to a head in my local school district. Our local teachers worked last year without a contract, and our little town endured a short strike, because the school board insisted that the teachers contribute more of their own funds to their health insurance plan.<sup>129</sup> While a contribution in the amount demanded by the board was unprecedented for our area's public schools, the squeeze is not unlike those faced by any number of employers, locally and nationally. General Motors, Delta Airlines, Wal-Mart, and our local grocer and automobile mechanic all must face rising health care premiums while selling goods and services in a competitive environment. In America, the mix of public and private resources has generally served us well, but an over-reliance on employers as the major source of health insurance has crippled them against international competition, subjected them (like our doctors) to increasing amounts of red tape, and exacerbated labor strife all over America. Greater recognition of public and national responsibility in this regard may not only make health care accessible to all; it might allow Americans to get on with

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<sup>127</sup> ROBERT F. COCHRAN, JR. & ROBERT M. ACKERMAN, *LAW AND COMMUNITY: THE CASE OF TORTS* 5 (2004).

<sup>128</sup> DIAMOND, *supra* note 84, at 248-76.

<sup>129</sup> Full disclosure requires me to note that my wife is one of our local school teachers.

business in a more globally competitive manner. Only our distaste for “big government” stands in the way.

#### D. “Painless” solutions.

Some of the rancor in our own school district is a product of uncertainty regarding the future of Pennsylvania’s system of public school finance. Recent experience in that area provides some contrasts of particular interest to communitarians. For the past several years, a Democratic governor and a Republican legislature have tangled over a funding scheme that would employ gambling proceeds from slot-machines to reduce the tax burden. This “painless” approach to public finance works as a regressive tax on the poor and hides the true cost of government services. Rarely mentioned is the moral question of whether we should finance our children’s education through a blue-smoke-and-mirrors scheme dependent upon gambling money drawn disproportionately from a low-income clientele.

A more communitarian approach to school finance is demonstrated by a program adopted by some fourteen Pennsylvania school districts. These districts accept in-kind services from senior citizens in lieu of taxes.<sup>130</sup> Seniors serve as teachers’ aides, lunchroom monitors, crossing guards, and tutors in exchange for tax forgiveness. The need for tax relief on the part of skilled, public-spirited citizens on fixed incomes is matched with the schools’ needs for a variety of services that might otherwise not be provided. And, as Robert Putnam suggests in *Bowling*

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<sup>130</sup> Madelyn Pennino, *Young and old, learning—Retirees tutor at school’s ‘lab’*, INTELLIGENCER J., Jan. 28, 2008, at B1; Dena Pauling, *Seniors Who Volunteer May Get \$500 Tax Break, Aging Homeowners Could be Paid for Work*, CENTRE DAILY TIMES, Sept. 16, 200, at 1.



*Alone*, the direct engagement of these citizens provides value in a way that mere check-writing cannot.<sup>131</sup>

#### IV. RECURRENT COMMUNITARIAN THEMES.

We can no longer delude ourselves with sugar-coated facts, “painless” solutions, or other blue-smoke-and-mirrors exercises, nor will the old partisan rhetoric or “left versus right” labels suffice. Instead, we must begin to consider the role of government with maturity and honesty. Throughout this essay, we have encountered a number of communitarian themes that can help us address this issue in a principled manner, unencumbered by conventional political rhetoric or alignments.<sup>132</sup> They may be summarized as follows:

##### A. *How much government?*

This essay opened with the sad examples of Katrina and Chernobyl, because they demonstrate the unfortunate results that can be obtained from two extreme philosophies of government: that of too much and of not enough government. We must ask: How much government is enough? To what purposes is government legitimately and most effectively employed? At what point does government intervention intrude too dearly on civil liberties? When is economic development and human progress best left to private enterprise?

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<sup>131</sup> See ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF THE AMERICAN COMMUNITY* 116 (2000).

<sup>132</sup> Using new language to confront problems can free us from doctrinal rhetoric and ancient commitments, but it can be disturbing to those who seek comfort in familiar labels. George Gershwin’s masterpiece, *Porgy and Bess*, confounded critics, because they did not know how to characterize a unique operatic composition for the Broadway stage about African-Americans by a Jewish-American composer of popular music and show tunes.

Traditionally, this inquiry has been framed as a tension between individual liberties and public welfare, with the implication that whatever balance we strike, we are dealing with a zero-sum game. Politically, this tension often reduces to a superficial left/right struggle, with those on the left generally arguing for greater government intervention to promote the general welfare and those on the right suggesting that overall welfare is best advanced by limiting state intervention and maximizing individual liberty and initiative. When the discussion turns to national defense and security issues, however, the roles are, more often than not, reversed in American political discourse, with conservatives tending to defer to government prerogatives to promote security for all and liberals suggesting, as Benjamin Franklin did, that “Tho[s]e who would give up ESSENTIAL LIBERTY to purcha[s]e a little TEMPORARY SAFETY, de[s]erve neither LIBERTY nor SAFETY.”<sup>133</sup>

As a general philosophy, communitarians reject both the extremes of radical individualism and repressive authoritarianism. In the words of Amitai Etzioni, the communitarian movement’s founder, “A Communitarian perspective recognizes both individual human dignity and the social dimension of human existence.”<sup>134</sup> Thus, while government power is to be constrained by individual civil liberties, government is nevertheless respected as a vehicle (but not the exclusive vehicle) for social organization, as is the need for some government intrusion in furtherance of the greater good, be it in the form of taxes, military conscription, economic regulation or, where warranted, searches of private persons and property. While government is neither the exclusive nor even necessarily the best means of promoting social welfare, communitarians recog-

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<sup>133</sup> See ROBERT JACKSON, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA (1759) (quotation appears on the title page and is widely attributed to Ben Franklin).

<sup>134</sup> AMITAI ETZIONI, *supra* note 118, at 253.

nize that it plays an essential role in this endeavor. In this regard, communitarians do not feel obliged to adhere to the political orthodoxies of the left or the right. And while most communitarians would assert that all persons possess certain natural rights, we recognize that most conflict situations call for a mutual adjustment of interests, rather than a contest as to whose rights trump those of others.<sup>135</sup>

A communitarian view calls for neither government abdication nor totalitarianism. At certain times and with respect to certain ventures, government plays a necessary and critical role, be it contending with a major hurricane, defending the nation against terrorism, or educating our young people. Sometimes it takes a village—or a state, or a nation—to perform tasks essential to sustained existence and development. The quandary is in determining just how much government intervention is necessary to create opportunities for individuals to thrive, without stifling the initiative of those same individuals. Across-the-board bromides and political sloganeering do us little good here. Rather, a healthy dose of pragmatism is in order. Delineating the limits of government intervention and responsibility, consistent with notions of communitarianism, is a core inquiry necessary to the resolution of a multitude of problems we face in a changing world.

### ***B. How much law?***

An issue closely related to that of the extent of government intervention is how much law is needed to describe the parameters of that intervention. Our agenda will sometimes require structural reforms or other legislation. Universal health insurance and environmental regulation (including even market-based regulation, such as a carbon tax) require statutory measures to take hold. Many such reforms, because of the complexity of the problems they

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<sup>135</sup> GLENDON, *supra* note 114, at 18-19.

seek to address, will additionally require administrative regulations for their implementation. Congress may enact a carbon tax and might even include in such legislation a rate of taxation, but it would remain for an administrative agency to determine how much carbon, subject to the tax, is emitted from any given activity (or at least determine a way of measuring it). Because many of our adjustments are subtle, the scalpel will sometimes be more effective than the meat cleaver. Garrett Hardin said several decades ago, "Prohibition is easy to legislate (though not necessarily to enforce); but how do we legislate temperance? Experience indicates that it can be accomplished best through the mediation of administrative law."<sup>136</sup>

But as Hardin acknowledged, administrative law "is rightly feared for an ancient reason—*Quis custodiet ipsos custodes?*—'Who shall watch the watchers themselves?'"<sup>137</sup> Indeed, more often than not, taking responsibility requires not more law, but more responsible administration of existing law. Hardin continued, "The great challenge facing us now is to invent the corrective feedbacks that are needed to keep custodians honest. We must find ways to legitimate the needed authority of both the custodians and the corrective feedbacks."<sup>138</sup>

Ultimately, more responsible administration of existing law will occur only through the active engagement of the citizenry. Congress can enact a ban on budgetary earmarks; it can just as easily revoke the ban.<sup>139</sup> Congress can create FEMA to respond to disasters; it can also continue to confirm the appointment of inept FEMA directors. A vigi-

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<sup>136</sup> Hardin, *supra* note 125, at 1246.

<sup>137</sup> *Id.* at 1245-46.

<sup>138</sup> *Id.* at 1246.

<sup>139</sup> Apparently, divided government in and of itself does not guaranty prudence. A supposedly reform-minded Democratic Congress, purportedly committed to eliminating earmarks, nevertheless managed to insert a few into its first budget in 2007. Robert Pear, *Select Hospitals Reap a Windfall Under Child Bill*, N.Y. TIMES, Aug. 12, 2007, at A1.

lant public, aided by the press, is the best insurance against lapses in official morality and competence. In this regard, the solution is more often political rather than legal.

A generation of Americans (and in particular, American lawyers) has seen how the courts in dramatic cases, such as *Brown v. Board of Education*,<sup>140</sup> have effected major transitions in society. As a consequence, many of us have adopted a post-*Brown* mentality, in which recourse to reformist litigation is seen as a cure-all for the nation's ills. We should continue to avail ourselves of the courts and the Constitution to preserve human rights. The rights secured under *Brown* were critical to a nation that needed to rid itself of the oppression of an apartheid system. But breakthrough cases like *Brown*, signaling a major reordering of society, come by about once in a lifetime. When the debate is more appropriately framed as an adjustment of interests, rather than as a competition among rights, the political process, rather than the judicial process, becomes the proper forum for decision-making. No writ of mandamus will make Michael Brown a competent FEMA Director; no judicial directive will craft a wise foreign policy. The Supreme Court might declare the regulation of greenhouse gases within EPA jurisdiction,<sup>141</sup> but the EPA must still carry out the Court's mandate. Judicial and legislative remedies can take us only so far. The body politic must demand more of its elected and appointed employees.

### C. *The role of civil society.*

Perhaps equally important as government to the building and sustaining of community is the role of private organizations and institutions. What political scientists call "civil society"—a tapestry of voluntary associations such as civic clubs, neighborhood organizations, corporations,

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<sup>140</sup> 347 U.S. 483 (1954).

<sup>141</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007).

labor unions, religious institutions, charitable organizations, educational institutions, and even Putnam's bowling leagues—plays a vital role in creating and maintaining the social capital that allows societies to thrive. Sometimes (and in some societies), these organizations stand in opposition to government authority, but in democracies, these organizations usually act in tandem with government, as mediating elements through which individuals join together for social or economic action. “[C]ivil society [is] the space between the individual and the state, the area where private institutions, voluntary associations, free markets, the free expression of ideas, and the free exercise of religion can be imagined or realized.”<sup>142</sup> Voluntary and autonomous organizations “not only mediate between the individual and the state, . . . they also help make the ‘life of a society more full, rich, and varied.’”<sup>143</sup>

In his book, *Better Together*, Robert Putnam documents the efforts of a variety of community organizations to improve the lot of the citizenry.<sup>144</sup> The organizations are engaged in a variety of efforts: economic development, neighborhood improvement, and literacy, to name a few. For the most part, they involve grass-roots structures, organizations built from the ground up to deal with an identified problem or serve an identified clientele. While few of these organizations are government agencies *per se*, almost all of them use government as a means of advancing their mission. While in some regimes, civil society must act as a “parallel polis,” in opposition to the state (e.g., the Solidarity movement in Communist Poland), that need not be the case in a democracy. “The civil society does not act in opposition to the democratic state, but cooperates with

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<sup>142</sup> W. Robert Connor, *The Idea of a Civil Society*, Conference Introduction 2 (National Humanities Center 1992).

<sup>143</sup> *Id.* at 2-3 (quoting Anne Firor Scott).

<sup>144</sup> ROBERT PUTNAM, *BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY* (2003).

it.”<sup>145</sup> Even in a democracy, however, civil society can play a useful monitoring function. We should consider how civil society may complement or supplant government with respect to certain activities, recognizing that many functions are best performed by voluntary associations that lack some of the constraints, as well as the coercive power, of government.

#### **D. What level of government should intervene?**

When government intervention is appropriate, at what level should it intervene? As a general proposition, communitarians would advocate government intervention and regulation by the smallest governmental unit and at the most local level possible.<sup>146</sup> The smallest governmental units are most likely to be most responsive to immediate needs and most likely to invoke the direct participation of the individuals involved, thus wedding responsive government to individual responsibility. We should be wary of those projects (like Alaska’s Bridge to Nowhere) conceived to meet purely local “needs” but which the locals are unwilling to fund on their own.<sup>147</sup> But some needs (the most obvious of which is national defense) are so overwhelming and universal so as to require governmental response on a larger, more national scale. Some needs are intermediate in nature. Should the federal government respond to a hurricane that has displaced thousands, or should the people of New Orleans, or St. Charles Parish, or Louisiana, or Mississippi be left to respond on their own? What are the geo-

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<sup>145</sup> Bronislaw Geremek, *Civil Society and the Present Age*, in THE IDEA OF A CIVIL SOCIETY 11, 18 (1992), available at <http://nationalhumanitiescenter.org/publications/civilsoc/geremek.htm> (last visited Feb. 3, 2008).

<sup>146</sup> ETZIONI, *supra* note 118.

<sup>147</sup> We should differentiate between such projects and those essential functions such as education that address national needs but which some localities are *unable* to fully fund.

graphic dimensions of our “community”? Do they change depending upon the circumstances addressed and the type of intervention required? Does geography remain essential, or is it even relevant to our definition of community in an age of jet travel and electronic communications?

In the United States and some other countries, the issue of the appropriate level of government response is complicated by the principle of federalism, in which certain entities (most notably, states and Indian tribes) are sovereigns with powers derived from sources other than the central government. An American state or (to cite another federal republic) German *Land* stands in a different relationship to the central authority in Washington or Berlin than a French *department* or Chinese province has with respect to Paris or Beijing. Does it make sense to regard political subdivisions as sovereign units, or is this a matter that should have been resolved definitively in the American Civil War? Is a matter like public education (to cite just one important example) a responsibility of each locality (as in most of the United States), or is it regarded as a responsibility of the much larger community embodied in the state (as in France)?

### *E. Individual responsibility.*

A fifth communitarian theme of interest to us is that of personal versus institutional responsibility. Some activities justify government intervention and regulation; with respect to others, we are better off taking responsibility for ourselves. Should the government regulate, for example, the extraction of natural resources from environmentally fragile lands, or should we leave it to the judgment and altruism of corporations engaged in the exploitation of non-renewable mineral resources to serve as stewards of the environment? Should the government regulate the marketing of junk food to toddlers (as the *New York Times* advo-



cated in a 2006 editorial<sup>148</sup>), or should we leave it to parents to act responsibly and monitor the dietary intake of their children? Must the State of California subsidize protection from mudslides for coastal communities, or should people be left to decide whether they will themselves pay the price of living in a dangerous environment (through exposure to danger or the cost of protection), while enjoying the benefits of an ocean view? Reasonable people will disagree about these issues; in the very least, we should try to develop a framework for their principled consideration, rather than defaulting to “squeaky-wheel-gets-the-grease” no-strums.

As a point of departure, I would suggest that the case for individual, rather than collective, responsibility is inversely correlated to the impact of one’s conduct on others. The dietary intake of one’s children, for example, has an impact that is far more localized than that of drilling for oil in the Arctic National Wildlife Refuge. Common sense, as well as respect for individual liberties, suggests that certain decisions—and the responsibility that goes with them—should be the province of the smallest community unit, the family. But that does not grant us license to ignore the sufferings of others or the interconnectedness of humanity. A broad range of human concerns demands our engagement. We can isolate ourselves from neither genocide in Darfur nor the implications of global climate change.

#### ***F. Responsible intervention.***

A related theme is the government’s need to act *responsibly* on our collective behalf. I have alluded earlier to the problem of resorting to “painless” solutions to public problems, like the accumulation of a growing amount of

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<sup>148</sup> Editorial, *Selling Junk Food to Toddlers*, N.Y. TIMES, Feb. 23, 2006, at A26.

public debt in lieu of raising taxes. These solutions are really not painless at all, as they merely postpone the day of reckoning and force members of the next generation to pay for commitments their parents have made. Even those of us who are so cautious as to minimize our personal debt (more and more a rarity in our debt-obsessed culture) are forced to take on our share of the public debt. Pay-as-you-go strategies, on the other hand, have the additional benefit of requiring the decision-maker to count the cost.<sup>149</sup> If a war (on Iraq or on poverty) is not worth paying for, is it really worth fighting?<sup>150</sup>

Related to this inquiry is that of internalization of costs. With respect to both public and private courses of action, is it possible to internalize costs in such a way that the actors pay the full price of their activities, including the costs they might impose on others in the absence of regulation? For example, might Americans become more prudent in their consumption of non-renewable, carbon-based fuels, and more frequently avail themselves of public transportation, if the environmental costs of driving were fully incorporated into the cost of gasoline? Market-based solutions, such as the carbon tax, promote responsible decision-making by making actors—be they individuals, corporate bodies, or governments—count the costs. The role of government here becomes the proper assessment and enforcement of the true costs of carbon use and emissions, so as to eliminate the freeloader phenomenon that occurs when

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<sup>149</sup> The same case can be made for localization of decision making, and the funding necessary to support it. If the potential users of an Alaskan bridge-to-nowhere are unwilling to pay for it, why should Washington?

<sup>150</sup> The “other people’s money” problem discussed in the preceding note finds its analogy in the war-making context, specifically the expenditure of other people’s lives. If we make war, we should be willing to place our own lives at risk, not just those of the poor.

people are allowed to impose costs on others without paying the freight.<sup>151</sup>

**G. *Regard for long-term consequences.***

A corollary to the theme of responsibility is due regard for the long-term consequences of one's actions, be they private or public. While little of the communitarian literature to date has focused on this theme, its relationship to communitarianism is apparent. The following acts are among those consistent with the theme of responsibility: to pay one's own debts, to clean up one's own messes, and to leave one's surroundings for the better, not the worse, for one's having been here. Annual federal budget deficits mean that someone else will have to pay for today's felt necessities. Economic stimulants and foreign adventures may be priorities, but previous generations fought two world wars and a depression during the first half of the twentieth century without encumbering us with a fraction of the debt we now propose to pass on to our heirs. Environmental responsibility may be of even greater importance, as the effects of environmental degradation can be permanent in ways that deficits need not be. We cannot dredge the Mississippi, mine the canyon lands of Utah, fill the air with hydrocarbons, or contribute to the demise of hundreds of other species without contemplating the consequences. The old Native American saying holds true: *The land is not a gift from our ancestors; it is a loan from our children.*

Al Gore (who has long warned about the peril of global warming) has suggested that "[w]hat changed in the

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<sup>151</sup> Government does this with regularity through the tort liability system by making the courts available to people for redress against those who have harmed them. A carbon tax is a superior device in that it carries with it a formulaic consistency and fairness not associated with jury verdicts. It should incorporate the cost of resource depletion as well as the cost of pollution.

U.S. with Hurricane Katrina was a feeling that we have entered a period of consequences.”<sup>152</sup> But public responsibility for large-scale consequences has always been a more difficult concept to embrace than that of individual responsibility. Perhaps the most distressing aspect of the politics of the day is the failure to account for the future consequences of present-day policy. We plunge trillions of dollars into debt, mortgaging our children’s future to the central banks of East Asia. We turn a blind eye toward global warming, ascribing the threat to “junk science.” We commence a war on Iraq, declaring “mission accomplished,” without contemplating the difficult occupation that lies ahead.

What the first President Bush derisively referred to as “the vision thing” may be the greatest deficit in current formulations of public policy. Critics of the second Bush Administration’s environmental policies suggest that its links to corporate America have caused it to place greed above the common good.<sup>153</sup> But it may not be so much that Bush and his loyalists are greedy; they may simply lack the foresight to comprehend the long-term consequences of their actions. During the Reagan Administration, Interior Secretary James Watt’s seeming disregard for the environment was attributed (probably unfairly) to an apocalyptic vision: the long-term prospects for the environment were thought to be of no consequence, because the physical environment was about to be destroyed by the hand of God.<sup>154</sup> An other-worldly view of things may similarly affect current policies.

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<sup>152</sup> AN INCONVENIENT TRUTH (Paramount Classics 2006).

<sup>153</sup> See ROBERT F. KENNEDY, JR., CRIMES AGAINST NATURE: HOW GEORGE W. BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY 190-99 (2004); PHILLIPS, *supra* note 110.

<sup>154</sup> See Phillips, *supra* note 110 at 63. Phillips suggests that Watt’s concern about an imminent Second Coming justified, in his mind,

Alternatively, the lack of vision may have more mundane explanations. The problem with the Katrina response may have been similar to the recurring complaint about the Pentagon—that our generals are always fighting the last battle. In the post-9/11 period, the government installed a vast and inconvenient security apparatus to protect the homeland from the *last* threat—that of terrorists flying airplanes into skyscrapers—and neglected the *next* one—an environmental calamity, caused by terrorists or natural causes. Mother Nature may have treated us to Katrina; the poisoning of urban drinking water or the unleashing of a “dirty bomb” in some major metropolitan area may be the next surprise Al-Qaeda has cooked up for us. Indeed, people are working on this critical issue, but it does not appear that our government has attached the urgency or resources to the issue that it deserves.<sup>155</sup>

It is not as if the party out of power excels at long-term planning. If the Republicans have a time horizon of about one month, the Democrats often seem to have a horizon of seventy-five years—into the past. But efforts to depart from this mind-set have produced mixed results. Over a decade ago, in an effort to fashion a “third way,” Clinton-era Democrats joined market-minded Republicans in rejecting protectionism and embracing free trade. But by failing to insist that our trading partners adopt measures to protect labor and the environment, we may have placed our own industries and workers at a disadvantage while exacerbating environmental degradation and exploitation of labor in other parts of the world.

The traditional liberal nostrums of redistribution and regulation have merit in some circumstances. Vast and

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*better* stewardship of natural resources in anticipation of that reckoning.

<sup>155</sup> See Steve Coll, *The Unthinkable: Can the United States Be Made Safe from Nuclear Terrorism?*, THE NEW YORKER, Mar. 12, 2007, at 48.

still-growing disparities in wealth (and access to it) may justify the former, and environmental imperatives may require the latter. Not all solutions can be market-based. But solutions that internalize externalities (e.g., by using a carbon tax to incorporate environmental costs into prices) may produce the most efficient results and remain largely untried. Such solutions combine the best elements of the conservative obsession with markets and the liberal infatuation with regulation.<sup>156</sup>

The Dutch polder experience in the years following World War II demonstrates how disparate political parties, religious groups, and economic interests can unite for the common good and address pressing needs. We must recognize that current security, environmental, and fiscal demands are, like those that demanded the Dutch polder effort, an existential matter. To confront these demands, a new politics of community and responsibility must replace the old partisan bickering. As Lincoln said in another era,

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think

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<sup>156</sup> Compare Clean Energy Act of 2007, H.R. 6, 110th Cong. (2007) (as passed by House), and Renewable Fuels, Consumer Protection, and Energy Efficiency Act of 2007, H.R. 6, 110th Cong. (2007) (as amended and passed by Senate) (encompassing a variety of regulatory measures, such as more stringent automobile mileage regulations), with Robert B. Reich, *The Best Idea for Reducing Global Warming*, THE AM. PROSPECT, June 20, 2007, available at [http://www.prospect.org/cs/articles?article=the\\_best\\_idea\\_for\\_reducing\\_global\\_warming](http://www.prospect.org/cs/articles?article=the_best_idea_for_reducing_global_warming) (advocating cap-and-trade approach), and Interview by Scott Jagow with Robert Reich, Professor of Public Policy at the University of California at Berkeley (June 20, 2007) (advocating carbon tax).

anew and act anew. We must disenthral ourselves, and then we shall save our country.<sup>157</sup>

### *H. Being a good neighbor.*

The final communitarian theme we should address is the importance of behaving as good neighbors. Being a good neighbor means more than conforming to that which is legally required. A focus on legal rights alone ignores the informal relationships and voluntary undertakings that are essential to the societal fabric. “Buried deep in our rights dialect,” writes communitarian Mary Ann Glendon, “is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.”<sup>158</sup> It would be a sad land indeed if we regarded our obligations to others as merely congruent with our *legal* obligations and failed to recognize our interdependence. Compare, if you will, the defensive, fearful post-Katrina response of the officials of Gretna, Louisiana (who barred dislocated New Orleans residents from their streets) with that of their counterparts in Houston, Texas. By opening their public facilities, their schools, and their arms to those displaced by Katrina, Houston’s citizens may have momentarily diluted their material resources, but they built a priceless store of social capital from which they are likely to reap returns for years to come.

The same notion of “neighborliness” may be attached to international affairs. In his recent book, *From Empire to Community*, Amitai Etzioni envisions a transition from a “might makes right” philosophy in foreign relations to the development of institutions and communal bonds to

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<sup>157</sup> Abraham Lincoln, The President’s State of the Union Address to Congress (Dec. 1, 1862).

<sup>158</sup> GLENDON, *supra* note 114, at 77.

establish human primacy.<sup>159</sup> Gunboat diplomacy and bombing raids may provide temporary gains, but in an age of global terrorism, real security is obtained only through collaboration.

Determining the parameters of effective government action, recognizing both the potency and limitations of law, delineating the boundary between public and private, defining the role of civil society, discerning the respective roles of governments at different levels, acting responsibly, planning for the future, and caring for our neighbors: these are considerations that can frame principled discussion. As events from Chernobyl to Katrina have demonstrated, these issues are too important to be dispatched with familiar labels or partisan rhetoric. We must honestly acknowledge inconvenient facts, engage in principled discourse, and recognize that our future depends on a web of relationships and the enlightened employment of governance mechanisms.

To some, the principles suggested in this essay will appear naïve. Self-interest dominates human endeavor, the public-choice theorists would say, and to profess otherwise is wishful thinking worthy only of Pollyanna or *Candide*. Government can never be trusted, the cynics warn us. But disaster lies in the unmitigated pursuit of self-interest, just as surely as it lies in the unfettered power of government. The consequences of heedless pursuit of selfish ends at one extreme, or of forfeiture of all initiative to government at the other, are too dire, and furnish no realistic vision of a livable future. Better for us to seek a proper balance, to build community, and to trust what Lincoln called “the better angels of our nature.”<sup>160</sup>

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<sup>159</sup> AMITAI ETZIONI, *FROM EMPIRE TO COMMUNITY passim* (2004).

<sup>160</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).



*Publication of contributions does not signify adoption of the views expressed therein by the TENNESSEE JOURNAL OF LAW AND POLICY, its editors, faculty advisors, or The University of Tennessee.*

OPINION PIECE

**REFORMING EMINENT DOMAIN IN TENNESSEE  
AFTER *KELO*: SAFEGUARDING THE FAMILY FARM**

Beau Pemberton\*

**Introduction**

Take a journey back in time to the summer of 2005. Visualize a seventy-five year old, widowed grandmother living on her farm in rural Middle Tennessee. This thirty-acre farm in the middle of the county is all that she has left to call her own. The world has grown around her farm for many years, inviting mini-malls, restaurants, condominiums, and interstate ramps on all sides of this picturesque setting. Now, imagine the grandmother's shock when she receives a letter from the local Economic Development Board notifying her that it is going to condemn her property via eminent domain as part of the county's Master Economic Redevelopment Plan.

The letter states that her land will serve as the relocation site for a major automobile manufacturer, which will bring eight hundred new jobs and nearly \$2 million a year in new tax revenues to the economically distressed county. This redevelopment plan provides the public purpose that justifies taking the land by eminent domain. Developers' attractive monetary offers caused her former neighbors to sell out and move away, but because the grandmother had

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emotional ties to the property, she was determined to spend the rest of her life on her farm. She was hardly reassured by the promise that she would receive just compensation for her taken property.

After recovering from the initial shock of the letter, she visits her lawyer to determine her options. The lawyer tells her that little can be done to stop the taking of her land for this economic redevelopment plan or to stop the bulldozers that will make way for the new automobile factory. Her only realistic recourse is to litigate over the amount of money she will receive for her land and for the resulting displacement from her home. This news is cold comfort to her because it means that she will be forced to live out her days somewhere else.

The above described scenario is similar to the experience of property owners in New London, Connecticut. Their challenge to the taking of their property for economic redevelopment purposes led to the 2005 landmark decision, *Kelo v. City of New London*, 545 U.S. 469 (2005), and resulted in a ripple effect that is currently reforming eminent domain law throughout the United States. To appreciate how *Kelo* has affected Tennessee's eminent domain law, the decision must be examined in detail.

### ***Kelo v. City of New London's Facts***

The *Kelo* litigation began when Susette Kelo, as well as several of her neighbors in the Fort Trumbull area of New London, Connecticut, challenged the taking of their property under an economic redevelopment plan (Plan) implemented by New London Development Corporation (NLDC) and the City of New London (City).<sup>1</sup> The Plan's original purposes were "to create in excess of 1,000 jobs, to increase tax . . . revenues, and to revitalize an economically

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<sup>1</sup> *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

distressed city.”<sup>2</sup> Several factors encouraged this Plan including (1) the 1996 closing of the United States Government’s Naval Undersea Warfare Center, located in the Fort Trumbull area; (2) a city unemployment rate double of that for all of Connecticut; and (3) a decreased city population.<sup>3</sup> The Plan intended to use the taken property for “the creation of a Fort Trumbull State Park” on the former site of the Naval Undersea Warfare Center; a \$300 million research facility for Pfizer, Inc., adjacent to the park; land for a new Coast Guard Museum; and property set aside for residential, commercial, retail, parking, and other purposes.<sup>4</sup>

During the Plan’s initial stages, NLDC hosted a “series of neighborhood meetings to educate the public about the process”<sup>5</sup> and eventually won approval from state officials who determined that the plan “was consistent with relevant state and municipal development policies.”<sup>6</sup> After state approval, NLDC finalized the Plan by focusing on a ninety-acre tract in the Fort Trumbull area of New London.<sup>7</sup> In January 2000, New London’s city council approved the Plan’s final version and authorized NLDC to acquire the Fort Trumbull property by purchase or by eminent domain.<sup>8</sup> After purchase negotiations with Susette

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<sup>2</sup> *Id.* at 472.

<sup>3</sup> *Id.* at 473.

<sup>4</sup> *Id.* at 473-74. The Court notes that NLDC was attempting to capitalize on Pfizer’s new research facility as a catalyst to meet the redevelopment plan’s original purposes of creating new jobs, tax revenues, and New London’s eventual revitalization. *Id.* at 473.

<sup>5</sup> *Id.* at 473.

<sup>6</sup> *Id.* at 473-74 n.2. Given the nature of this case, I wonder just how effective the public meetings held by NLDC were at addressing concerns of the affected landowners.

<sup>7</sup> *Id.* at 474.

<sup>8</sup> *Id.* at 475.

Kelo and her neighbors failed, NLDC initiated proceedings to take their property by eminent domain.<sup>9</sup>

After the eminent domain declaration by NLDC, Kelo and several of her neighbors filed an action against NLDC in state court and alleged that the taking was unconstitutional under the Fifth Amendment of the United States Constitution because the taking violated the Fifth Amendment's "'public use' restriction."<sup>10</sup> NLDC then announced that it would enter into leasing agreements with private companies, including Corcoran Jennison, to develop the property.<sup>11</sup> This arrangement appeared to be a harmless way to meet the Plan's goals, but it essentially condemned private land for the benefit of private individuals and developers. This arrangement strengthened the petitioner's argument because the authors of the Fifth Amendment presumably did not envision the taking of private land for private use.

After a bench trial before the New London Superior Court, the petitioners obtained a permanent restraining order to prevent the taking of Parcel 4-A, but they lost regarding Parcel 3.<sup>12</sup> The petitioners appealed this incomplete victory to the Connecticut Supreme Court, which sustained *all* the takings at issue.<sup>13</sup> First, the court upheld the takings on statutory grounds, noting that the state's

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<sup>9</sup> *Id.* Specifically, petitioners owned a total of fifteen properties in the Fort Trumbull area, with four of the properties located in Parcel 3 of the Plan, immediately north of the proposed Pfizer facility and eleven of the properties located in Parcel 4-A of the Plan. *Id.* at 474. Parcel 3 was slated for office space, and Parcel 4-A was slated for a park or marina usage. *Id.* at 476.

<sup>10</sup> *Id.* at 475.

<sup>11</sup> *Id.* at 476 n.4.

<sup>12</sup> *Id.* at 475-76. The Court notes that this trial on the proposed takings was a bench trial, which raises the question: Why did the petitioners not demand a jury trial regarding the proposed takings because a jury would likely have been more sympathetic to a landowner's concerns than a governmental agency's plan? *See id.* at 475.

<sup>13</sup> *Id.* at 476.

municipal development code expressed a clear legislative determination that land taken for economic redevelopment, regardless of whether it is developed, is still "a 'public use' and in the 'public interest.'"<sup>14</sup> Next, the court, adhering to federal precedent, sustained the takings for the Plan's pronounced public use.<sup>15</sup> Finally, the court analyzed whether the takings were "'reasonably necessary' to achieving the City's intended public use" and "whether the takings were for 'reasonably foreseeable needs.'"<sup>16</sup> This analysis produced a mixed result.

The three dissenting justices discussed the City's failure to adduce evidence of future economic benefits flowing from the Plan and the proposed takings.<sup>17</sup> The dissent maintained that this lack of evidence should have invalidated all of NLDC's takings as unconstitutional, despite the Plan's intent "to serve a valid public use."<sup>18</sup> The dissenting justices stated that a "'heightened' standard of . . . review" was needed to evaluate these takings because they were purely for economic redevelopment instead of the typical eminent domain purposes (e.g. roads or parks).<sup>19</sup> Upon granting certiorari, the United States Supreme Court observed that the main issue was "whether a city's decision to take property for . . . economic development satisfies" the Fifth Amendment's public use requirement.<sup>20</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954)).

<sup>16</sup> *See id.*

<sup>17</sup> *Id.* at 477.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see also U.S. CONST. amend. V, § 1 ("[N]or shall private property be taken for public use, without just compensation.").

## The State of the Law before *Kelo v. City of New London*

The United States Supreme Court's decision in *Kelo* is by no means a groundbreaking decision. For several decades, the Court has maintained that whether a taking satisfies the Fifth Amendment's public purpose requirement requires deference to legislative judgments governing this area.<sup>21</sup> The first landmark case in this area was *Berman v. Parker*, 348 U.S. 26 (1954), which the Court handed down over fifty years ago.<sup>22</sup> *Berman* dealt with a redevelopment plan in Washington, D.C., and the plan for this "blighted area" condemned the existing structures, including Berman's department store, to make way for roads, schools, and other public structures.<sup>23</sup> The rest of the condemned property was leased back to private parties for further development, including low-income housing.<sup>24</sup> *Berman* parallels *Kelo* in that the petitioner challenged the taking as inconsistent with the Fifth Amendment's public use clause because another private party would eventually control and redevelop the taken property.<sup>25</sup>

The Court's unanimous decision deferred to legislative determinations on what constituted a valid public use under the Fifth Amendment.<sup>26</sup> The Court, speaking through Justice William O. Douglas, stated that it had no right to overrule a public use determination because "Con-

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<sup>21</sup> *Kelo*, 545 U.S. at 483.

<sup>22</sup> *Berman v. Parker*, 348 U.S. 26, 26 (1954).

<sup>23</sup> *Id.* at 28-31.

<sup>24</sup> *Id.* This redevelopment plan arose "under the District of Columbia Redevelopment Act of 1945," which sought to eliminate blighted and slum residential areas of the District as a way of fostering new and publicly acceptable development. *Id.* at 28.

<sup>25</sup> *Id.* at 31. Petitioner contended that taking his purely commercial property (i.e. a department store) was inconsistent with the plan's stated purpose of "ridding the area" of residential slum property and that creating a "better balanced, more attractive community" is not a valid public purpose to sustain the Act. *Id.*

<sup>26</sup> *Id.* at 33.

gress and its authorized agencies” had decided that this redevelopment plan met several, well-established public purposes, consistent with its police power function.<sup>27</sup> Furthermore, the Court refused to dictate “the means of executing the [plan]” and noted that the plan’s execution was within the sole discretion of the legislature, including the use of private enterprise for implementing the plan.<sup>28</sup> *Berman* should have been instructive to the *Kelo* petitioners because both cases involved takings for public uses that were less concrete than in a typical takings case.<sup>29</sup>

Next, the Court discussed *Hawaii Housing Authority v. Midkiff*, 469 U.S. 229 (1984), a landmark takings decision. *Midkiff* focused on the constitutionality of the Hawaiian government condemning and taking residential rental property from private landlords and transferring fee simple title to the existing lessee living on the property.<sup>30</sup> The public purpose of Hawaii’s law, titled the Land Reform Act of 1967, was to break up the property oligopoly of a relatively small number of individual landowners in Hawaii.<sup>31</sup> The Supreme Court reversed the Ninth Circuit’s holding that the statute was “a naked attempt . . . of Hawaii

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<sup>27</sup> *Id.* at 32-35.

<sup>28</sup> *Id.* at 33-34 (“We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”).

<sup>29</sup> For example, a typical takings case would likely involve the appropriation of private land for a tangible public good, such as an interstate or a post office. *Berman*’s redevelopment plan, which included concrete elements such as streets and parks as part of its public purpose, also included less tangible and arguably more abstract elements such as “prevent[ing], reduce[ing], or eliminate[ing] . . . blight.” *Id.* at 29. *Kelo*’s Plan followed a similar path because its public purposes included parks and other public facilities and increased tax revenues and economic revitalization. See *Kelo v. City of New London*, 545 U.S. 469, 474 (2005).

<sup>30</sup> *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233 (1984).

<sup>31</sup> *Id.* at 232-33.



to take the private property of A and transfer it to B solely for B's private use and benefit."<sup>32</sup>

Justice O'Connor, writing for the Court, stated that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers" and that redistributing land and effectively eliminating an undesirable land oligopoly via a compensated taking is clearly within a state's police power justifying the use of eminent domain.<sup>33</sup> The Court maintained that its role of reviewing legislative determinations of public use was "'an extremely narrow' one."<sup>34</sup> Reaffirming prior decisions, the Court stated that it would not substitute its judgment for legislative determinations of a public use "'unless the use [is] palpably without reasonable foundation.'"<sup>35</sup> The Court asserted that its focus was not on the end-result behind the taking, but strictly on the plan's public purpose for the takings and whether the means for the plan's execution were rational.<sup>36</sup>

In closing, the Court reiterated its position that the Fifth Amendment does not impose "any literal requirement that condemned property be put into use for the general public."<sup>37</sup> Specifically, the Court stated, "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use."<sup>38</sup> In short, the Court determined that the Hawaii statute, which utilized

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<sup>32</sup> *Id.* at 235.

<sup>33</sup> *Id.* at 240-42.

<sup>34</sup> *Id.* at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

<sup>35</sup> *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)); *see also Berman*, 348 U.S. at 32-35.

<sup>36</sup> *Midkiff*, 467 U.S. at 242-43. In addition, the Court stated that debating the wisdom of takings legislation and its attending public purposes is improper in the federal courts.

<sup>37</sup> *Id.* at 244.

<sup>38</sup> *Id.* (quoting *Rindge Co. v. L.A.*, 262 U.S. 700, 707 (1923)).

eminent domain, “pass[es] scrutiny of the Public Use Clause.”<sup>39</sup>

In essence, both *Berman* and *Midkiff* set a deferential tone for the Court’s review in takings cases when examining what constitutes a valid public use. The *Kelo* Court, following this deferential tone, abandoned any idea that the stated legislative purposes behind eminent domain takings are simply *post hoc* rationalizations of the taking.<sup>40</sup> Interestingly, both *Berman* and *Midkiff* provide considerable latitude to the possibility of private owners becoming both the end-users and owners of property taken from their neighbors by eminent domain.

These cases demonstrate that *Kelo* is not earth-shattering takings jurisprudence, despite two decades separating *Midkiff* and *Kelo* and over fifty years dividing *Berman* and *Kelo*. The effects of *Kelo* have been aggrandized because of an age in which newspapers, twenty-four hour news channels, and internet news websites report and often sensationalize stories, including United States Supreme Court decisions.<sup>41</sup> The majority opinion in *Kelo*, while not jurisprudentially novel, follows the past decisions of *Berman* and *Midkiff* by holding that the taking of the petition-

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<sup>39</sup> *Id.* at 243.

<sup>40</sup> See Brief for the States of Vermont et. al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108) (highlighting several states’ positions, including Tennessee, that the courts should give deferential treatment to state determinations of public use in takings cases and limit interference in this area by the federal courts. This limited influence prevents unnecessary judicial entanglement and is established precedent in the Court’s takings jurisprudence).

<sup>41</sup> See e.g., Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1; Assoc. Press, *High Court Expands Reach of Eminent Domain*, FOX NEWS, June 23, 2005, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,160479,00.htm](http://www.foxnews.com/printer_friendly_story/0,3566,160479,00.htm) 1.

ers' land under an economic redevelopment plan was constitutional under the Fifth Amendment.<sup>42</sup>

### Analyzing the *Kelo* Decision

After writing the majority opinion in *Kelo*, Justice John Paul Stevens attempted to set himself apart from the decision, calling the outcome "unwise," but qualifying his statement by adding that "the law compelled a result that [he] would have opposed if [he] were a legislator."<sup>43</sup> Despite Justice Stevens' misgivings, his majority opinion began by emphasizing the Court's limited scope of review and deference to legislative determinations of public use for eminent domain.<sup>44</sup> The Court determined that the Plan at issue "unquestionably serves a public purpose," thereby meeting the Fifth Amendment's public use requirement.<sup>45</sup> Specifically, the Court stated that "[p]romoting economic development is a [longstanding objective] of government" and that "there is . . . no other principled way of distinguishing economic development from . . . other public purposes."<sup>46</sup> The Court explained that holding the benefits derived from NLDC's Plan as an invalid public use would be "incongruous" from its prior takings jurisprudence.<sup>47</sup>

Aside from sustaining NLDC's takings as constitutional, the Court refused to adopt the petitioner's proposed bright-line rule that would automatically invalidate eco-

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<sup>42</sup> See *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005). The majority included Justices Stevens, Souter, Ginsburg, Breyer, and Kennedy. *Id.* at 470.

<sup>43</sup> Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

<sup>44</sup> *Kelo*, 545 U.S. at 482-83.

<sup>45</sup> *Id.* at 484. (noting that other factors justifying the validity of their result, including extensive deliberation prior to the Plan's adoption and statutory authorization for this Plan in Connecticut).

<sup>46</sup> *Id.* at 484.

<sup>47</sup> *Id.* at 485; see, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954).

conomic development as a public use.<sup>48</sup> Thus, the *Kelo* majority rejected the petitioner's contention that "eminent domain for economic development impermissibly blurs the boundary between public and private takings."<sup>49</sup> Again, the Court deferred to its past jurisprudence and noted that it "cannot say . . . public ownership is the *sole* method of promoting the public purposes of . . . redevelopment projects."<sup>50</sup> The majority's decision focused solely on the Plan's purpose and its attendant takings, not the mechanics required to implement the Plan or the takings.<sup>51</sup>

Essentially, the Court, through a five-person majority, openly sanctioned the ancillary private use of property taken by eminent domain, if the public purpose behind the taking is constitutional and if the property's development occurs within the parameters of a redevelopment plan.<sup>52</sup> The Framers of the Constitution likely never intended eminent domain as a mechanism to take private land for a purported (even incidental) public purpose and later allow another private party to benefit directly from the taking. The Fifth Amendment of the Constitution prohibits the deprivation of private property without due process of law or without just compensation.<sup>53</sup> This opinion militates against the Framers' intent of the Fifth Amendment, specif-

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<sup>48</sup> *Kelo*, 545 U.S. at 485; *see also Berman*, 348 U.S. at 35-36 (noting that economic redevelopment can be a valid public use).

<sup>49</sup> *Kelo*, 545 U.S. at 485.

<sup>50</sup> *Id.* at 486 (quoting *Berman*, 348 U.S. at 33-34) (emphasis added).

<sup>51</sup> *See id.* at 489 ("Once the question of . . . purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract . . . rests in the discretion of the legislative branch.").

<sup>52</sup> *Id.* at 486-87 (noting that the Court will not examine any hypothetical case in which a condemning authority transfers land from one private citizen to another for the purpose of increasing the property's productivity, even though they would substantiate the petitioner's bright-line rule prohibiting economic development as a public use).

<sup>53</sup> *See* U.S. CONST. amend. V, § 1 (prohibiting deprivation of a person's property without due process of law or just compensation).

ically the Takings Clause, and runs contrary to the idea that eminent domain takings should benefit all citizens.

The remainder of *Kelo*'s majority opinion continued the litany of deference by reiterating that legislative decisions on public use are paramount, and that the Court is an improper forum to debate the wisdom of a taking or the plan behind it.<sup>54</sup> In sum, the Court's majority validated NLDC's Plan, the takings, and the stated public purposes through a form of rational-basis review.<sup>55</sup> Not surprisingly, Justice Stevens would be eager to distance himself from such a broad pronouncement of power under the Takings Clause, especially if he was a legislator.<sup>56</sup>

Compared to the majority opinion, Justice Kennedy's concurrence and the dissenting opinions in *Kelo* are more realistic.<sup>57</sup> Justice Kennedy strongly criticized the majority's deferential treatment of NLDC's takings and the stated public purposes behind them, calling them "incidental or pretextual."<sup>58</sup> Validating takings based on "incidental or pretextual public benefits," he writes, is expressly forbidden by the Constitution.<sup>59</sup> Accordingly, Justice Kennedy determined that a proactive inquiry into an economic development plan's public purpose is needed to discover whether the benefits conferred on the private parties are *merely incidental*, contrary to the usual standard of rational-basis deference.<sup>60</sup> Justice Kennedy concurred with the majority that a presumptive invalidity of public purpose for

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<sup>54</sup> See *Kelo*, 545 U.S. at 488-90.

<sup>55</sup> *Id.* at 490 (Kennedy, J., concurring) ("This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses . . .").

<sup>56</sup> See *Greenhouse*, *supra* note 43, at A1.

<sup>57</sup> Justice Kennedy's concurrence in *Kelo* highlights his significance as a "swing-vote" because he voted with the majority to sustain NLDC's taking as constitutional but also filed a separate concurrence justifying his decision.

<sup>58</sup> *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 491 (emphasis added).

economic development plans is unwarranted; however, his opinion was sage enough to advocate against a standard that could allow for widespread takings of private land under pretextual or incidental public purposes.<sup>61</sup> Kennedy's opinion demonstrated an apparent understanding that legislative pronouncements on public uses often occur with little public input or meaningful thought.<sup>62</sup>

The *Kelo* decision yielded two strong dissenting opinions by Justices O'Connor<sup>63</sup> and Thomas,<sup>64</sup> respectively. First, the O'Connor dissent, joined by Justices Scalia, Thomas, and Chief Justice Rehnquist, focused on the majority's essential obliteration of "any distinction between private and public use" under the Fifth Amendment.<sup>65</sup> Essentially, Justice O'Connor determined that the majority opinion allows "incidental public benefits" derived from economic redevelopment to serve the same function as a direct public use, contrary to the Fifth Amendment's public use clause.<sup>66</sup> Specifically, Justice O'Connor noted that *Berman* and *Midkiff*, which the majority relied on, involved a taking that conferred a *direct* public benefit.<sup>67</sup> Since direct public benefits resulted from those takings, returning the taken property to private individuals was inconsequential.<sup>68</sup> The Court correctly sustained the takings and their public purposes in those direct benefit cases.<sup>69</sup> With the *Kelo* takings, the lack of a direct relationship between the public purpose of NLDC's Plan and public benefit conferred consternated the dissenting justices. As a property rights advo-

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<sup>61</sup> *Id.* at 493.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 494 (O'Connor, J., dissenting).

<sup>64</sup> *Id.* at 505 (Thomas, J., dissenting). The dissenters were Justices O'Connor, Thomas, Scalia, and Chief Justice Rehnquist.

<sup>65</sup> *Id.* at 494 (O'Connor, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 500.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

cate, this author joins Justice O'Connor's condemnation of the majority's permissive posture of allowing an *indirect* public purpose to serve the textual and direct public purpose required by the Fifth Amendment for takings.

Justice Thomas's dissent complements Justice O'Connor's dissent by addressing a strictly textual and historical interpretation of the Fifth Amendment.<sup>70</sup> This dissent used a detailed overview of the extensive judicial history and precedents underlying takings cases and explained how the Court's prior takings jurisprudence has led it to the current (and arguably incorrect) result in *Kelo*.<sup>71</sup> Interestingly, both dissenting opinions noted that the economically poor of society will shoulder the constant threat of having their property taken and redistributed to more affluent and politically astute persons for redevelopment under a likely incidental or pretextual "public purpose."<sup>72</sup>

In short, the *Kelo* dissenters highlighted the majority opinion's shortcomings and warned those who read *Kelo* that the Court's most recent pronouncement on takings will impact landowners in a way never contemplated by the Fifth Amendment. The effect of *Kelo* is akin to the erosion of a hillside that will eventually cause a landslide on unsuspecting landowners. This author agrees with the dissenting justices in using eminent domain to obtain a direct public

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<sup>70</sup> See *id.* at 506, 511, 521 (Thomas, J., dissenting) (noting that the public use restriction in the Fifth Amendment means that the taken private property is actually employed for a direct public good instead of some merely conceivable public benefit (e.g. increased taxes)). This dissent advocates a return to the plain textual meaning of the Takings Clause, which is evidenced by Justice Thomas's dedication to strictly construing the text, in a manner similar to Justice Hugo Black. See *id.* at 523.

<sup>71</sup> *Id.* at 512-18.

<sup>72</sup> *Id.* at 505 (O'Connor, J., dissenting); *id.* at 521-22 (Thomas, J., dissenting) (specifically noting Justice Thomas's reference to the "'discrete and insular minorities'" of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), that would be directly affected by the majority's holding in *Kelo*).

benefit and with Justice Kennedy insofar that a more in-depth inquiry is needed for economic redevelopment plans and their alleged direct public purposes under the Fifth Amendment. Tennessee, like many other states, understood *Kelo*'s potential impact on eminent domain and the concerns of the dissenting justices. Under intense electoral pressure, Tennessee changed its takings law to counteract *Kelo* and its future implications.

### **Tennessee's Legislative Response to *Kelo v. City of New London***

During the 2006 legislative session, the Tennessee General Assembly enacted Public Chapter 863 to revise Tennessee's eminent domain statutes.<sup>73</sup> In changing the law, the General Assembly responded to constituents' demands that Tennessee revise its antiquated eminent domain law to prevent a *Kelo*-type scenario from occurring.<sup>74</sup> Public Chapter 863 addressed several different areas, including the legislative intent for eminent domain, the definition of public purpose, and the revision of specific eminent domain procedures.<sup>75</sup>

The Tennessee General Assembly began its statutory revisions by declaring that eminent domain should "be used sparingly" and that a narrow construction of the eminent domain statutes was required to prevent any uninten-

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<sup>73</sup> See Scott Griswold, *Property Rights vs. Public Use*, TENN. B.J., Feb. 2007, at 14, 15.

<sup>74</sup> For ease of reference, I will reference the Tennessee Code Annotated section affected by Public Chapter 863 when discussing the changes to Tennessee's eminent domain law.

<sup>75</sup> See TENN. CODE ANN. § 29-17-101 (Supp. 2007) (stating the General Assembly's intent on the appropriate use of eminent domain); TENN. CODE ANN. § 29-17-102 (Supp. 2007) (defining both eminent domain and public use for the purposes of eminent domain); See e.g., TENN. CODE ANN. § 29-17-903(c) (Supp. 2007) (amending the time period for the "quick-take" procedure from five days to thirty days, among other procedural changes enacted by Public Chapter 863).



tional enlargement of the state's ability to take private land for public purposes.<sup>76</sup> This statute is the General Assembly's statement of legislative intent for eminent domain. In an interview with State Senator Doug Jackson, he explained that the recent changes were a reactionary response that attempted to balance the concerns of those who feared that *Kelo* would occur in Tennessee, such as the Tennessee Farm Bureau, and those fearing that the General Assembly's response to *Kelo* would unduly narrow eminent domain, such as local governments.<sup>77</sup> Senator Jackson estimated that Public Chapter 863 represents the final compromise between several dozen bills filed immediately after *Kelo* and should effectively prevent any *Kelo*-type scenarios from occurring in Tennessee.<sup>78</sup>

Next, Public Chapter 863 attempted to define both eminent domain and what constitutes public use for eminent domain purposes.<sup>79</sup> Interestingly, this aspect of Tennessee's eminent domain law was notably absent for many years.<sup>80</sup> The statute first defines eminent domain as "the authority conferred upon the government . . . to condemn and take . . . private property . . . so long as the property is taken for a legitimate public use."<sup>81</sup> Public use is then

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<sup>76</sup> TENN. CODE ANN. § 29-17-101 (Supp. 2007).

<sup>77</sup> Telephone Interview with State Sen. Doug Jackson, representing the 25<sup>th</sup> Senatorial District and sponsor of S.B. 3296, the parent legislation of Public Chapter 863 (Mar. 19, 2007).

<sup>78</sup> *Id.*

<sup>79</sup> TENN. CODE ANN. § 29-17-102 (Supp. 2007); *see also* Griswold, *supra* note 73, at 15-16.

<sup>80</sup> *See* Griswold, *supra* note 73, at 15.

<sup>81</sup> TENN. CODE ANN. § 29-17-102(1) (Supp. 2007); *see* TENN. CONST. art. I, § 21 ("[N]o man's particular . . . property taken, or applied to public use . . . without just compensation . . ."). Interestingly, Section 102 states that a legitimate public use must be "in accordance with the fifth and fourteenth amendments to the United States Constitution, the Constitution of Tennessee, Art. 1, §21, and the provisions of chapter 863 of the Public Acts of 2006," as codified in the Tennessee Code Annotated. TENN. CODE ANN. § 29-17-102(1) (Supp. 2007).

defined broadly and negatively as follows: “[direct] private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity” are *not* public uses for eminent domain.<sup>82</sup> Through this language, the General Assembly responded directly to *Kelo* by defining public use for eminent domain in terms of the Court’s most recent pronouncement of what is acceptable as a public purpose for taking private land.<sup>83</sup>

Aside from the public use definition, the revisions included exceptions that permitted takings for traditional public purposes (e.g. roads and highways); common carriers and other utilities; housing authorities or community development agencies; and industrial parks.<sup>84</sup> Another revision in this statute provided that private property taken pursuant to an urban renewal or redevelopment plan must occur to eliminate a “blighted area.”<sup>85</sup> “Blighted area” is defined under Tennessee Code Annotated section 13-20-201(a) as an “[area] (including slum areas) with buildings or other improvements” that are detrimental to, *inter alia*, the overall “welfare of the community” because of the statutory reasons therein.<sup>86</sup> The statute also exempted

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<sup>82</sup> TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

<sup>83</sup> See generally *Kelo v. City of New London*, 545 U.S. 469 (2005) (defining acceptable public uses for eminent domain).

<sup>84</sup> TENN. CODE ANN. § 29-17-102(2)(A)-(C), (E) (Supp. 2007).

<sup>85</sup> *Id.* at (2)(C).

<sup>86</sup> Compare TENN. CODE ANN. § 13-20-201(a) (Supp. 2007) (stating that “[w]elfare of the community does not include solely a loss of property value to surrounding properties . . . [or] the need for increased tax revenues” as sufficient justifications to deem the property blighted), with *Kelo*, 545 U.S. at 494, 501 (O’Connor, J., dissenting) (noting Justice O’Connor’s concern of taking property so that government can upgrade the property and get more revenue from it via taxes).

farmland used in agricultural production from the definition of blight.<sup>87</sup>

Despite the General Assembly's best efforts, only judicial interpretation of this broad and vague standard of public use will dictate its effectiveness for preventing *Kelo*-type takings.<sup>88</sup> Litigious landowners can litigate the true meaning of the broad and vague definition of blighted area,<sup>89</sup> or whether a government project causing a taking is actually conferring a direct public benefit.<sup>90</sup> Adverse effects on poorer neighborhoods and less affluent property owners are likely thanks to these recent changes in the law because they are often subjected to redevelopment plans similar to those in *Kelo* and *Berman*.<sup>91</sup>

In addition to the obvious effects discussed above, a concern exists that the recent changes still permit the very mechanisms that caused *Kelo*: takings by economic redevelopment agencies conferring only indirect public benefits.<sup>92</sup> The statute prohibits taking for *private* development that has indirect public benefits as their public use justification; however, takings by redevelopment agencies are still accepted by the revised statute.<sup>93</sup> These plans often include private developers as the catalyst to fulfill the plan. This issue causes consternation because a close reading of the revised statute appears to leave open a possibility for another *Kelo* type taking in Tennessee, despite the General

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<sup>87</sup> TENN. CODE ANN. § 1-3-105(2)(A) (Supp. 2007) (defining agriculture and agricultural uses); TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

<sup>88</sup> See Griswold, *supra* note 73, at 17 (reaching the same prediction as the author for these recent legislative changes).

<sup>89</sup> TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

<sup>90</sup> TENN. CODE ANN. § 29-17-102 (Supp. 2007).

<sup>91</sup> See *Kelo*, 545 U.S. at 505, 521-22 (O'Connor and Thomas, JJ., dissenting) (mirroring the same arguments of a disproportionate impact on less affluent and prosperous people through the majority's opinion in the case); Griswold, *supra* note 73, at 16-17.

<sup>92</sup> TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

<sup>93</sup> *Id.* at (2)(C).

Assembly's efforts to "cure" the problems caused by *Kelo* and rendering the new public use definition ineffective.

Another concern arises out of the statutory revisions. Putting aside the issue of whether a taking confers a direct public benefit, one of the public use exceptions states that "private use that is merely *incidental* to a public use" is a permissible public use, as long as the land condemned is *not* "primarily . . . [for] the incidental private use."<sup>94</sup> This exception appears to impute an intent requirement into takings law that was previously unknown (and likely never intended) in eminent domain.

For example, suppose a city takes thirty acres of land for a new park. This city is economically impoverished and often lacks tax revenues. When the city takes the property through eminent domain, the city *intends* to develop the park, as its stated public purpose for the taking. Everyone knows, however, that the money will never be there to fulfill the project. The land is held for several years with no progress made towards the park (i.e. the public purpose for the taking). Eventually, the county sells the condemned property to a private company that later develops the land into a new car factory, which generates new jobs and added tax revenues.<sup>95</sup> The park never materializes, but the city has a new employer and revenue source.

The preceding example demonstrates that private property can be taken for a (purported) public purpose and later turned over to a private developer as an "incidental" use because the primary purpose for taking the land initial-

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<sup>94</sup> TENN. CODE ANN. § 29-17-102(2)(D) (Supp. 2007).

<sup>95</sup> Compare TENN. CODE ANN. § 29-17-1003(a) (Supp. 2007) (stating that when "land acquired by eminent domain" is subsequently disposed of by a condemning authority "to another public or quasi-public entity or to a *private person, corporation, or other entity*," fair market value for the property or better must be received by the transferor), with GA. CODE ANN. § 22-1-2(b) (Supp. 2007) (providing that no conversion of property "for any use other than a public use" shall take place until twenty years after the initial taking).

ly was a permissible public use. The private use for the property did not arise until several years later and is merely incidental to changing times, economics, and political priorities. Essentially, the exception could gut the newly enacted public use definition because an intent requirement is superimposed on the public use definition. A governmental body can potentially take land intending it for a public use, only to never have the means to fulfill the purpose and later sell the property off to private individuals as an “incidental” occurrence to the taking. The transfer would fulfill the statute’s literal requirements for public use, but would circumvent the legislative intent behind eminent domain. Thus, this process would render the public use definition meaningless because the actual events would run totally contrary to the statutory language.<sup>96</sup> Challenging takings based on this scenario would require a showing of bad faith regarding the government’s intent behind the initial taking and subsequent property transfer to a private individual (i.e. the proof would require that the governmental body took private land by eminent domain and then transferred it to another private party, *knowing* that the taking’s public purpose would never materialize at the time of the original taking).<sup>97</sup>

An example of how Public Chapter 863 revised specific eminent domain procedures is evidenced by the revision of the “quick-take” procedure for public agency takings. Prior to 2006, a condemning authority in Tennessee, such as the Department of Transportation, could give a

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<sup>96</sup> See TENN. CODE ANN. § 29-17-102 (Supp. 2007) (noting that these takings of land for an intended public use, selling to a private party, and then enjoying the indirect public benefits derived from the private development run directly contrary to the language of indirect public benefits caused by private developments and shall not be a public use for eminent domain).

<sup>97</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (noting that the petitioner’s failure to demonstrate intent on the part of the government by concrete evidence proved fatal to their case).

landowner only *five* days notice before being entitled to physical possession of the property pursuant to its power of condemnation.<sup>98</sup> The revised law now requires the condemning authority to give the landowner a thirty-day notice before taking possession of the property.<sup>99</sup> Based on personal work experience, the thirty-day notice requirement benefits landowners by giving them time to plan for the imminent condemnation and devise an appropriate response. The condemning authority also benefits because it litigates dozens of other condemnation actions concurrently that require an equal amount of attention.<sup>100</sup> Despite contentions that this added time will only delay eminent domain litigation, practitioners on both sides will likely agree that the marginal cost is outweighed by the added benefits of the extra time in the interest of fairness and justice.

In closing, the recent changes to Tennessee's eminent domain law will have far-reaching implications for Tennessee practitioners. Aside from litigation over specific procedural issues, such as how to correctly value the condemned property, broader issues dealing with a taking's constitutionality will likely occur due to the formulation of a more narrow and vague public use definition, including

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<sup>98</sup> TENN. CODE ANN. § 29-17-803(b) (2005). The "quick-take" procedure most often involves land acquisitions for highway right-of-ways; however, this type of taking is one of the most common uses of eminent domain in Tennessee.

<sup>99</sup> TENN. CODE ANN. § 29-17-903(c) (Supp. 2007). This statute applies to situations in which the private landowners are not contesting condemnation and the private landowners contest either the condemnation itself or the amount of just compensation due to them for the taking. Note that Part 8 of the statute, dealing with the "quick-take" procedure was moved to Part 9 of the Tennessee Code following the 2006 statutory revisions.

<sup>100</sup> The author has clerked for two summers for the Tennessee Attorney General's Office in the Real Property Division and has handled condemnation litigation for the State of Tennessee.

what constitutes “incidental private use” or a “blighted area.”<sup>101</sup>

### **Tennessee’s Sister States Follow the *Kelo* Revision Movement**

After the Court’s decision in *Kelo*, states bordering Tennessee have reformed their eminent domain laws in a similar fashion. This section of this essay will briefly discuss the efforts of Kentucky, Georgia, and Alabama in reforming eminent domain as a comparison of how Tennessee’s sister states are counteracting *Kelo*.<sup>102</sup> This section will compare each examined sister-state’s definition of public use, blight, legislative intent, and other notable innovations in their laws to Tennessee’s eminent domain revisions.<sup>103</sup>

#### **Kentucky**

Kentucky is the first sister state examined regarding its post-*Kelo* eminent domain changes. During the 2006 legislative session, Kentucky revised its eminent domain statute to specifically define public use and prohibit emi-

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<sup>101</sup> See TENN. CODE ANN. § 29-17-102(2) (Supp. 2007) (defining acceptable public uses for eminent domain); TENN. CODE ANN. § 13-20-201(a) (Supp. 2007) (dealing with the definition of blight).

<sup>102</sup> See generally National Conference of State Legislatures, 2006 State Legislation, <http://www.ncsl.org/programs/natres/emindomainleg06.htm> (last visited Sept. 18, 2007) (highlighting the recent efforts among various states to change their respective eminent domain statutes in light of *Kelo*).

<sup>103</sup> See also Carol J. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43, 43 (2006) (discussing Arkansas’s revisions to eminent domain after *Kelo*); Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 721 (2006) (discussing Missouri’s statutory revisions after *Kelo*).

ment domain for economic development projects providing only an *incidental* public benefit as the validating public purpose.<sup>104</sup> Kentucky and Tennessee's eminent domain statutes are similar, in that both statutes define acceptable public uses justifying eminent domain and limit incidental private uses of taken land to those that do not result in taking private land *solely* for incidental private use.<sup>105</sup> Kentucky, like Tennessee, declared that the legislative intent for eminent domain is that it should "be used sparingly" and only for the benefit of all the citizens within the state.<sup>106</sup> One interesting point concerning Kentucky's recent eminent domain revisions is the exemption for land acquisitions financed by state or federal road funds.<sup>107</sup> The constitutionality of taking land for a plainly public purpose, such as a road, would not likely be questioned, but a few situations exist in which takings for roads and highways would cause a *Kelo* type problem for a condemning authority.<sup>108</sup>

### Georgia

The next state examined is Georgia and its 2006 Landowner's Bill of Rights and Private Property Protection Act.<sup>109</sup> Georgia, like Tennessee, enacted both specific procedural changes for eminent domain takings and specific definitions for acceptable public uses justifying eminent

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<sup>104</sup> See KY. REV. STAT. ANN. § 416.675 (LexisNexis Supp. 2007).

<sup>105</sup> Compare KY. REV. STAT. ANN. § 416.675(2) (LexisNexis Supp. 2007), with TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

<sup>106</sup> Compare KY. REV. STAT. ANN. § 416.675 (LexisNexis Supp. 2007), with TENN. CODE ANN. § 29-17-101 (Supp. 2007).

<sup>107</sup> KY. REV. STAT. ANN. § 416.675(4) (LexisNexis Supp. 2007).

<sup>108</sup> One conceivable situation that could trigger this exemption in Kentucky is when a highway project is funded but never completed, and the property is used later for a private development.

<sup>109</sup> See 2006 Ga. Laws, Ch. 444 (serving as Georgia's form of comprehensive statutory eminent domain reform).



domain.<sup>110</sup> However, Georgia's statutory revisions differ from Tennessee's in two respects. First, Tennessee's public use definition is more straightforward than Georgia's definition. Tennessee's definition for public use is contained in one straightforward provision, whereas Georgia's definition is scattered over several different code provisions.<sup>111</sup> In addition, Georgia included both private benefit and indirect public benefit in the definition of economic development and summarily stated that "[t]he public benefit of economic development shall not constitute a public use."<sup>112</sup> Tennessee took the opposite approach and clearly stated what constitutes an acceptable public use for eminent domain, albeit negatively, and notwithstanding exceptions.<sup>113</sup>

Second, Georgia's definition of blight is more restrictive than Tennessee's because Georgia requires that two or more of the statutorily enumerated conditions exist before a property is termed "blighted" for eminent domain purposes.<sup>114</sup> Tennessee has a more inclusive standard for blight, where a property meeting just one of the requirements is determined blighted, including the overly broad "welfare of the community" standard.<sup>115</sup> Interestingly, both states prohibited a finding of blight for eminent domain purposes solely because a property causes the surrounding property values to decline because of its aesthetic condition.<sup>116</sup> Arguably, both states have equally strong defini-

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<sup>110</sup> *Id.*

<sup>111</sup> Compare GA. CODE ANN. § 22-1-1(9)(A) (Supp. 2007), and GA. CODE ANN. § 22-1-2 (Supp. 2007), with TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

<sup>112</sup> GA. CODE ANN. § 22-1-1(4), (9)(B) (Supp. 2007).

<sup>113</sup> TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

<sup>114</sup> GA. CODE ANN. § 22-1-1(1) (Supp. 2007) (noting the conditions for findings of blight on the property being uninhabitable, abandoned, environmentally hazardous, or conducive to ill health or disease).

<sup>115</sup> TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

<sup>116</sup> Compare GA. CODE ANN. § 22-1-1(1) (Supp. 2007), with TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

tions of blight and public use; however, the outcome of litigation will determine their effectiveness.

Georgia, like Tennessee, takes a comparable position on the legislative intent behind eminent domain because both states declare that eminent domain is solely for public usages.<sup>117</sup> Georgia's recent revisions included language allowing a landowner to reclaim his property (i.e. right of first refusal) or receive additional compensation if the "property acquired through the power of eminent domain from an owner fails to be put to a public use within five years."<sup>118</sup> Tennessee has a similar provision; however, the procedure is quite complex.<sup>119</sup>

In sum, Georgia has enacted equally forceful eminent domain revisions to curb *Kelo*'s negative effects. Tennessee could easily duplicate some of Georgia's innovative revisions to eminent domain, such as defining blight based on a specific condition/factor test.

### Alabama

Alabama is the last of Tennessee's sister-states that this paper examines regarding recent eminent domain changes after *Kelo*. Alabama's reforms parallel Tennessee's revisions in defining public use and legislative intent

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<sup>117</sup> Compare GA. CODE ANN. § 22-1-2(a) (Supp. 2007) ("[N]either this state nor any political subdivision . . . shall use eminent domain unless it is for public use . . ."), with TENN. CODE ANN. § 29-17-101 (Supp. 2006).

<sup>118</sup> See GA. CODE ANN. § 22-1-2(c)(1) (Supp. 2007). Specifically, the property is considered put to a public use when a "substantial good faith effort has been expended . . . to put the property to public use," regardless of whether the project is completed. While a very worthwhile provision for landowners, the provision is flexible and could prove to be heavily litigated.

<sup>119</sup> See TENN. CODE ANN. § 29-17-1003 (Supp. 2007) (dealing with the disposal of land acquired by eminent domain); TENN. CODE ANN. § 12-2-112 (2005) (dealing with the disposal of surplus interests in real property held by the state).

governing eminent domain.<sup>120</sup> First, Alabama's statutory revisions prohibited the use of "eminent domain to transfer private property for 'purposes of private retail, office, commercial, industrial, or residential development.'"<sup>121</sup> The revisions further prohibited local condemning authorities from using eminent domain to increase tax revenues or from transferring taken private property to anyone except purely governmental entities.<sup>122</sup> Thus, Alabama's legislative intent, though not explicitly defined, appears to be that eminent domain is a tool to be used strictly for the public welfare. Both Tennessee and Alabama have public use definitions that are comparable in their effect; however, Alabama used more explicit language to define an acceptable public use under eminent domain.<sup>123</sup>

In addition, Alabama's statutory revisions, like Tennessee's, permit the taking and transferring of private property that is termed blighted, under statutory formulations, to private entities under a redevelopment plan.<sup>124</sup> Alabama's revisions also include a buyback provision for landowners who lose their property via eminent domain if the property never materializes into a public use.<sup>125</sup> This

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<sup>120</sup> See Anastasia C. Sheffler-Wood, *Where Do We Go from Here? States Revise Eminent Domain Legislation in Response to Kelo*, 79 TEMP. L. REV. 617, 631-32 (2006) (evaluating Alabama's changes to its eminent domain laws). Compare ALA. CODE §§ 18-1B-1-2 (LexisNexis 2006), with TENN. CODE ANN. §§ 29-17-101-102 (Supp. 2006) (determining legislative purpose and defining public use for eminent domain).

<sup>121</sup> See Sheffler-Wood, *supra* note 120, at 631.

<sup>122</sup> *Id.*

<sup>123</sup> Compare ALA. CODE § 18-1B-2 (LexisNexis 2007), with TENN. CODE ANN. § 29-17-102 (Supp. 2007).

<sup>124</sup> See ALA. CODE § 24-2-2(c) (LexisNexis 2007). Compare ALA. CODE § 18-1B-2 (LexisNexis 2007), with TENN. CODE ANN. § 29-17-102 (Supp. 2007).

<sup>125</sup> Compare ALA. CODE § 18-1B-2(b) (LexisNexis 2007) (stating that the right of first refusal in the buyback provision goes to the landowner whom the condemning authority acquired the property from via eminent domain), with GA. CODE ANN. § 22-1-2(c)(1) (Supp. 2007) (stat-

provision is similar to Georgia's right of first refusal and Tennessee's buyback provisions; however, Alabama does not appear have a time limitation on this buyback provision.<sup>126</sup>

In sum, Alabama, like Tennessee, appears to have revised its eminent domain law to prevent a *Kelo*-type situation from occurring, but testing the effectiveness of the revisions will occur only through future eminent domain litigation, as is the case in every other state currently revising its eminent domain statutes.

### Conclusion

Aside from the critical look at *Kelo* and the comparison of eminent domain revisions between Tennessee and its sister states, the recent revisions to Tennessee's eminent domain law yield several conclusions. First, adding specific definitions for public use, blight, and eminent domain afford Tennessee landowners some certainty for understanding what purposes the government can take their land under the power of eminent domain. Until recently, local governments could determine what constituted a valid public purpose for taking land under eminent domain *sua sponte*.<sup>127</sup> The addition of a quasi-specific public use definition should aid both condemning authorities and landowners in determining when eminent domain takings are appropriate and prevent the possibility of another *Kelo* occurrence. The criticism is that the public use definition is still sufficiently vague and unascertainable, thereby affording the government flexibility in taking property in many

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ing that the former landowner can apply to condemning authority to regain property taken by eminent domain if property is not put to a public use within five years of its taking).

<sup>126</sup> ALA. CODE § 18-1B-2(b) (LexisNexis 2007).

<sup>127</sup> See Griswold, *supra* note 73, at 16 (noting that prior to the 2006 revisions, "counties could use eminent domain 'for any county purpose'" deemed appropriate).

cases. This flexibility in takings could be shown when an intended public use eventually yields to an “incidental” private use after the taking or when an economic redevelopment plan uses eminent domain and private development to achieve some indirect public use essentially sanctioned by the statute.

Second, the revision of the “quick-take” procedure affords a greater degree of fairness to landowners and condemning authorities alike. By increasing the notice of a proposed taking to thirty days, both sides have a better opportunity to evaluate the facts and handle the dispute in a mutually beneficial manner. This broadened time frame will hopefully alleviate litigation and encourage settlements of takings cases outside of court.<sup>128</sup>

Finally, the eminent domain revisions are far from complete. Changes will likely be forthcoming to the eminent domain laws in the future, as time passes and circumstances change with litigation. Overall, the recent changes enacted by Tennessee to its eminent domain law in 2006 have likely offset any potential adverse effect created by the *Kelo* decision, if just by the simple fact that the changes to the law have put the electorate on notice that eminent domain is regarded for strictly public purposes.

The recent changes to our eminent domain law would help protect our hypothetical grandmother, introduced at the beginning of this paper, and prevent her land from becoming another *Kelo* type taking. These changes represent progress towards a balance between the government’s need and right to take private land for public use and a landowner’s right to enjoy property without the threat of unwarranted government seizure.

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<sup>128</sup> In this author’s experience with eminent domain cases, many condemnation actions are eventually settled out of court, but this increase notice period of thirty days will hopefully facilitate a greater number of settlements. Many landowners, when confronted with losing their property, often become upset easily or become irrational if forced into a quick decision on compensation or other matters related to the taking.



*Publication of contributions does not signify adoption of the views expressed therein by the TENNESSEE JOURNAL OF LAW AND POLICY, its editors, faculty advisors, or The University of Tennessee.*

OPINION PIECE

**FACT-BASED DEATH PENALTY RESEARCH**

Lewis L. Laska\*

***"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence: nor is the law less stable than the fact."***<sup>1</sup>

**I. What is Fact-Based Death Penalty Research?**

The goal of fact-based death penalty research is, simply put, to capture and document as many facts surrounding legal executions as possible, organize them in a clear and logical manner, and present them without bias, cant, or sentiment. This compilation of facts is then made available for an analysis of whether patterns appear suggesting which facts were and possibly still remain the lead-

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<sup>1</sup> John Adams, Defense of the British Soldiers in the Boston Massacre Trials (Dec. 3, 1770). John Adams' famous defense of the soldiers charged in the Boston Massacre resulted in the acquittal of the officer in charge. 3 GEORGE BANCROFT, HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE CONTINENT 390 (D. Appleton and Co. 1896) (1882). It could not be shown that the officer, rather than some other person, had told the soldiers to fire. *Id.* The jury returned manslaughter convictions on two of the eight soldiers who fired on the rabble. *Id.* at 391. The jury "acquitted the other six; choosing that five guilty should escape rather than one innocent be convicted." *Id.*



ing factors influencing legal death. The focus of fact-based research is clear and orderly facts. Indeed, publications that grow out of fact-based death penalty research document executions in chronological order, and each entry includes the executed person's name, age, gender, race, a detailed account in narrative form of the crime for which the accused was sentenced to death, and information on the place and method of execution. Regardless of the legal issue, the first place to begin death penalty research is with a list of those known to have suffered irrevocable punishment.

## II. The History of Fact-Based Death Penalty Research

Like many other forms of social science research, fact-based death penalty research had an unlikely origin, an Alabama gentleman by the name of M. Watt Espy. The story is well known. In 1970, Espy, an unalterable abolitionist of the death penalty, undertook the solitary task of attempting to capture information about all legal executions in the United States. By speaking to county clerks and librarians and referencing newspapers, official sources, and even “true crime” magazines,<sup>2</sup> Espy captured information regarding well over 15,000 executions that were carried out in the United States from 1608 to 2002.<sup>3</sup>

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<sup>2</sup> The best quality “true crime” magazines were published by Bernarr McFadden in the 1920s and 1930s. Bernarr McFadden (1868-1955), “The Father of Physical Culture,” <http://www.bernarrmacfadden.com/> (follow “A Publishing Empire”) (last visited Feb. 12, 2008). These included, among others, *True Detective* and *Master Detective*. *Id.*

<sup>3</sup> M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File*, app. B (Inter-University Consortium for Political and Social Research 2004) available at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/08451.xml> (last visited Feb. 16, 2008); see also M. Watt Espy, *American Gothic*, in A

The famous Espy inventory has spawned several books addressing America's death penalty including the works of Daniel Allen Hearn. Hearn steadfastly refuses to state publicly his view of capital punishment. Rather, he is a death penalty historian, patiently gathering facts and declining to offer premature conclusions. Hearn's first book was entitled *Legal Executions in New York State: A Comprehensive Reference, 1639-1963* and appeared in 1997.<sup>4</sup> Hearn has since published two more books in the same fact-based model, *Legal Executions in New Jersey: A Comprehensive Registry, 1691-1963*<sup>5</sup> and *Legal Executions in New England: A Comprehensive Reference, 1623-1960*.<sup>6</sup>

One truth, largely unknown by those who acknowledge the value of the Espy list, is that numerous additions were made to the list through the assistance of Hearn.<sup>7</sup> In particular, Hearn captured and contributed additional facts from newspaper accounts—most notably *The New York Herald*—"true crime" magazines, and local government records.<sup>8</sup> Specifically, Hearn read microfilm of Memphis newspapers dating from 1866 to 1876 in order to capture information about executions in Tennessee, Mississippi, and Arkansas.<sup>9</sup> Even now, Hearn continues to expand on the Espy list, and he plans to publish an updated list of legal executions in the United States since 1866.<sup>10</sup> Hearn urges caution in using unrefined data in the Espy list be-

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PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY, 47-53 (Ian Gray & Moria Stanley eds., 1989).

<sup>4</sup> DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW YORK STATE: A COMPREHENSIVE REFERENCE, 1639-1963* (1997).

<sup>5</sup> DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963* (2005).

<sup>6</sup> DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW ENGLAND: A COMPREHENSIVE REFERENCE, 1623-1960* (1999).

<sup>7</sup> Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

cause it contains numerous omissions.<sup>11</sup> For example, the Espy list contains approximately 312 entries for Maryland.<sup>12</sup> Hearn, presently writing a comprehensive reference on Maryland's executions, has located over 755.<sup>13</sup>

### III. What Is the Value of Fact-Based Death Penalty Research?

Death penalty commentators often speak about the random nature of the death penalty. Indeed, the United States Supreme Court struck down the death penalty after determining that Georgia's death penalty statute afforded sentencing jurors unguided discretion which resulted in the arbitrary and capricious imposition of the death penalty.<sup>14</sup> It was only after passing legislative standards, in the form of aggravating and mitigating circumstances aimed at eliminating unbridled discretion, that states were again allowed to sentence defendants to death.<sup>15</sup>

Fact-based death penalty research questions the theory that the death penalty is or has ever been imposed randomly; it suggests, rather, that there may be untraditional macro-patterns to explain legal death that simply cannot be seen without a more complete nation-wide compilation of executions. Fact-based death penalty research asks, for example, "What patterns of jury conduct will be revealed if *all* executions in the United States are presented for examination by fair-minded people?" These patterns are akin, for

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<sup>11</sup> *Id.*

<sup>12</sup> See M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File*, app. B (Inter-University Consortium for Political and Social Research 2004) available at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/08451.xml> (last visited Feb. 16, 2008).

<sup>13</sup> Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007).

<sup>14</sup> *Furman v. Georgia*, 408 U.S. 238, 294-95 (1972).

<sup>15</sup> *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

example, to the discovery of large-scale pre-Columbian civilizations in South America—almost impossible to see close up, but evident from the air?<sup>16</sup>

Fact-based death penalty research has the potential to address more narrow issues of law as well. It might, for example, offer insights into one of the most intractable injustices encountered during death penalty trials, misidentification based on eyewitness testimony.<sup>17</sup> A basic rule of evidence holds that eyewitness testimony holds the greatest reliability. However, in the United States between 1989 and 2003, at least 219 defendants were exonerated in part on the basis of at least one eyewitness misidentification.<sup>18</sup> Could fact-based death penalty research reveal the fact patterns within which misidentification is most likely to occur?

#### IV. What Are the Bounds of Fact-Based Death Penalty Research?

Because Hearn steadfastly refuses to commit the bounds of his research to any fixed medium, they must be drawn from him in personal conversations. This is not a pleasant experience. Hearn, age fifty, has become the alter ego of M. Watt Espy in many ways: stubborn, sometimes helpful, always critical, and downright irascible. Without

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<sup>16</sup> See CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 3-27 (2005).

<sup>17</sup> See generally Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (discussing the modern debate regarding innocent persons convicted in capital cases). However, various authors have addressed the issue of factual innocence over the past century. See generally EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932); JUDGE JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957); EDWARD D. RADIN, *THE INNOCENTS* (1964).

<sup>18</sup> Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005).

the leavening influence of a wife and children, Hearn practices his science largely alone. Although sometimes distracted by a poker game with friends, most of his free time is spent capturing information about legal executions in the United States. Nevertheless, here are the bounds of fact-based death penalty research, as this author understands them.

It seems self-evident that only *legal* executions are contemplated within the ambit of fact-based death penalty research—discussions of extra-legal killings are not included. Extra-legal killings include but are not limited to the following: those who died by their own hand while awaiting execution, those who died while attempting to escape, those who were murdered while incarcerated, or any execution that was not directly administered by the state. These deaths were not the result of legal executions.

In the same vein, the fact-based death penalty researcher should always document the *fact* of the legal execution. Two sources demonstrate that this is, somewhat surprisingly, a common omission; the authors of both of the following books fail to confirm whether certain people sentenced to death were actually executed. The first source, which documents Tennessee executions, is a notable county history series published in the nineteenth century known as *Goodspeeds*.<sup>19</sup> *Goodspeeds*, for example, reported “Nelson, a slave of James Elliott, was indicted for the murder of David Sellers on November 11, 1845. The case resulted in a sentence of death on June 8, 1846.”<sup>20</sup> This statement is correct but misleading. Nelson’s conviction was overturned by the Tennessee Supreme Court in an

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<sup>19</sup> HISTORY OF TENNESSEE FROM THE EARLIEST TIME TO THE PRESENT: SKETCH OF HENDERSON, CHESTER, MCNAIRY, DECATUR, AND HARDIN COUNTIES 834 (The Southern Historical Press 1978) (1887) *available at* [http://www.mytennesseegenealogy.com/tn\\_county/hrn.htm](http://www.mytennesseegenealogy.com/tn_county/hrn.htm). (last visited Feb. 16, 2008).

<sup>20</sup> *Id.* at 834.

important decision setting out the rules of admissibility of dying declarations.<sup>21</sup>

The second source is a book written by Dr. and Mrs. Phillip Crane, a physician and his wife, who used vacation time to travel by car to each jail in Tennessee's ninety-five counties taking pictures of the jails.<sup>22</sup> Included in the picture book were the names of people executed in that county or sent to Nashville to be executed.<sup>23</sup> The Cranes reported the executions of Eve Martin in Hawkins County in 1820<sup>24</sup> and Green Turner in Giles County in 1871.<sup>25</sup> Neither was executed. Interestingly, Eve Martin was actually murdered by two men, Robert Delap and Mitchell Marcum, neither of whom the Cranes mention.<sup>26</sup> Turner's death sentence was reduced to a twenty-one-year prison sentence.<sup>27</sup>

Confirming that an execution actually occurred is a difficult task that requires a researcher to exhaust a number of sources; all available sources must be used to ferret out facts. Most importantly, every effort must be made to locate state supreme court opinions. Failure to make a good faith effort to locate *all* state supreme court opinions is inexcusable. This includes those affirming a conviction, as well as those reversing a conviction. Surprisingly, these opinions often go unaddressed. Quite often, this is because researchers assume these opinions have all been published.

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<sup>21</sup> *Nelson v. State*, 26 Tenn. 542, 543-44 (1847).

<sup>22</sup> SOPHIE CRANE & PAUL CRANE, *TENNESSEE'S TROUBLED ROOTS passim* (1979) (summarizing Tennessee county facilities for incarceration).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 41.

<sup>25</sup> *Id.* at 31.

<sup>26</sup> *State v. Delap*, 7 Tenn. 90 (1823) (affirming Robert Delap's conviction for murder); KNOXVILLE REG. June 19, 1821, at 3 (containing the confession of Mitchell Marcum).

<sup>27</sup> *Turner v. State*, 50 Tenn. 452 (1871); Journal of the H.R., 39th Gen. Ass., 1<sup>st</sup> Sess., app. Tbl. Showing Name and Number of Convicts, at 21 (Tenn. 1875) ("282 Green Turner col Giles Circuit Horse-stealing October 21, 1872 21 years").

On the contrary, many state supreme court opinions were handwritten. After all, many courts did not begin issuing typewritten opinions until the early twentieth century. Consequently, these opinions often prove very difficult to read. However, even the most diligent researcher may encounter an empty vessel. For at least sixty-three men condemned to death, the Tennessee Supreme Court, for example, issued written opinions, but these opinions cannot be located.<sup>28</sup> Startlingly, some of these “missing” opinions were issued as late as the 1940s and 1950s.<sup>29</sup>

If an appeal exists but no written opinion, published or otherwise, can be located or if the supreme court opinion contains no recitation of facts, as many do not, the trial court and appellate court opinions must be consulted. In addition to these court opinions, a death penalty researcher should examine court records. Hearn suggests the following research protocol for determining whether an execution actually occurred: Because many rural counties had no newspapers until the late nineteenth century, a diligent researcher must consult the minutes of the local county court to find entries where that body appropriated money to build a scaffold for the execution and to pay the sheriff to actually hang the accused.<sup>30</sup> Finally, fact-based death penalty research may also encompass short accounts known as “confessions,”<sup>31</sup> commutation records, newspaper accounts, and even “true crime” magazines.

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<sup>28</sup> See Lewis L. Laska, *Missing and “Mystery” Supreme Court Opinions*, 5 NASHVILLE B.J., June 2005, at 20-21. Even when a newspaper reports the court announced its decision on a certain day, many decisions from East Tennessee, especially from 1883-1903, cannot be located. *Id.* The fact that these opinions are “missing” is a discouraging aspect of fact-based death penalty research in Tennessee.

<sup>29</sup> *Id.*

<sup>30</sup> Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007).

<sup>31</sup> During the eighteenth and nineteenth centuries, a new form of popular literature arose, namely, the “confession” of a murderer. These pamphlets, prepared with the assistance of the condemned, recounted

Until the latter part of the twentieth century, most executions were carried out within a year of the crime. Hence, newspaper articles from that period are particularly helpful because they often include an account of the execution as well as the crime. In fact, one of the first national compilations of executions in the United States was the Chicago Tribune's Year Book, which was published for several decades.<sup>32</sup> "True crime" magazines may also be considered a useful source because many of the articles were written by the law enforcement officers who worked on the cases and therefore contain photos and details drawn from actual records that no longer exist.<sup>33</sup> Scholarly discussions of specific cases, however, should be used for their factual content, rather than any argumentative material therein.<sup>34</sup>

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the crime details. See THOMAS M. MCDADE, *ANNALS OF MURDER, A BIBLIOGRAPHY OF BOOKS AND PAMPHLETS ON AMERICAN MURDERS FROM COLONIAL TIMES TO 1900* (1961) (discussing the genre and describing 1,126 books and pamphlets); see also, Patterson Smith, *Thomas McDade and the Annals of Murder*, AB BOOKMANS' WEEKLY, Apr. 22, 1996, available at [www.patterson-smith.com/mcdadeArt.htm](http://www.patterson-smith.com/mcdadeArt.htm) (discussing the book as a "reference work of towering importance").

<sup>32</sup> It should be noted, however, that the Chicago Tribune inventories are strikingly incomplete: Death penalty researchers, including Espy and Hearn, have discovered hundreds of legal executions that were not included in The Chicago Tribune's Year Book. Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007). Moreover, many of the people shown as executed were actually suicides, lynchings, phantom cases, or reprieves at the last minute. *Id.*

<sup>33</sup> See generally Bernarr McFadden (1868-1955), "The Father of Physical Culture," <http://www.bernarrmacfadden.com/> (follow "A Publishing Empire") (last visited Feb. 12, 2008).

<sup>34</sup> This author has found only three books devoted to scholarly discussions of specific Tennessee cases. See generally ETHELRED W. CROZIER, *THE WHITE-CAPS: A HISTORY OF THE ORGANIZATION IN SEVIER COUNTY* 118-132 (1899) (describing the killing of Laura and William Whaley on December 28, 1896 and the execution of Catlett Tipton and Pleas Wynn on July 5, 1899); THURMAN SENSING, *CHAMP FERGUSON: CONFEDERATE GUERRILLA* (1942) (describing the killings Ferguson committed during the Civil War as proven at his trial in 1865); DO-



Finally, fact-based researchers are scientists, not storytellers. Language used must be clear and without viewpoint. For example, a murder is a killing or a shooting, not a slaughter. Perpetrators are not slashers, brutes, or bloodthirsty maniacs. Police are law enforcement officers, not conniving men protected by a thin veneer of law. Mental status must be described in the most neutral language possible. Perpetrators are not moral degenerates or imbeciles, but they may be mentally ill, suffering from schizophrenia, or mentally retarded. Likewise, cases must be discussed by placing facts first and law second, if at all; the law changes but facts do not.<sup>35</sup>

## V. Conclusion

Replacing death penalty story-telling with fact-based research should be a concern of all fair-minded people researching the death penalty in the United States. Again, the goal is to capture as many facts as possible within the bounds of fact-based death penalty research, as outlined, and present them clearly, without bias, cant, or sentiment. In the end, the best story-telling is simply this: Provide the facts that tell the truth. Facts are truly stubborn things.

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NALD E. SPURLOCK, *THE BRASSELL HANGINGS OF PUTNAM COUNTY, TENNESSEE* (1981) (describing the killings of brothers Russell Allison and John Allison and the execution of brothers Joseph Lewis Brassell and George Andrew "Teek" Brassell in 1878).

<sup>35</sup> Many perpetrators would not forfeit their lives today under "evolving standards of decency." See *generally* *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that execution of people under the age of eighteen is barred by the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of the mentally retarded is barred by the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (holding that execution for the crime of rape is barred by the Eighth Amendment).



*Publication of contributions does not signify adoption of the views expressed therein by the TENNESSEE JOURNAL OF LAW AND POLICY, its editors, faculty advisors, or The University of Tennessee.*

## NOTE

**STRIPPED BARE: STUDENTS' FOURTH AMENDMENT RIGHTS, SCHOOL SEARCHES, AND THE REASONABLENESS STANDARD**

Erin P. Davenport

**I. Introduction**

In *Beard v. Whitmore Lake School District*,<sup>1</sup> the Sixth Circuit examined whether the law governing searches of students, specifically strip searches, was clearly established and deprived school officials of qualified immunity.<sup>2</sup> The Sixth Circuit first evaluated the strip search's constitutionality under the Fourth Amendment.<sup>3</sup> Then, the Sixth Circuit addressed whether qualified immunity protected school officials.<sup>4</sup> *Beard* demonstrates that students' Fourth Amendment rights receive less protection than teachers' liability and could result in students shedding "their constitutional rights at the school house gate."<sup>5</sup> With violence and drug use on the rise in schools, courts consider students' constitutional rights less important than the school's safety and security.<sup>6</sup> *Beard* held that the strip search's scope was unconstitutional because the students' privacy expectations, the search's intrusive nature, and "the severity of the school system's needs" favored the students—not

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<sup>1</sup> 402 F.3d 598 (6th Cir. 2005).

<sup>2</sup> *Id.* at 601.

<sup>3</sup> *Id.* at 603.

<sup>4</sup> *Id.* at 606.

<sup>5</sup> *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>6</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (internal citations omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (internal citations omitted).

the school.<sup>7</sup> Nonetheless, the teachers received qualified immunity because the law was not clearly established.<sup>8</sup>

This synopsis will show how courts have approached the constitutional issues surrounding school searches and how students' rights have decreased over time under the reasonableness standard and qualified immunity. Prior to the Supreme Court's ruling in *New Jersey v. T.L.O.*,<sup>9</sup> schools used various approaches to school searches.<sup>10</sup> After *T.L.O.*, courts began to limit students' Fourth Amendment rights. Today, schools search for drugs, weapons, and evidence of drug use, and according to the courts, these searches do not violate students' rights.<sup>11</sup> Even if the courts consider some searches unreasonable, qualified immunity protects teachers from liability because the law surrounding these searches often is not clearly established. Thus, school officials can act with impunity because courts will likely perceive the search as reasonable or grant school officials qualified immunity for their actions. If this pattern continues, students will retain no constitutional rights within school walls, and this deprivation of Fourth Amendment rights could extend beyond school walls into everyday citizens' lives.

## II. Back in the Day . . . The History of School Searches and Students' Fourth Amendment Rights

Before 1985, courts in every jurisdiction approached students' Fourth Amendment rights differently.<sup>12</sup> The approaches offered four different levels of protection:

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<sup>7</sup> *Beard*, 402 F.3d at 604 (citing *Vernonia*, 515 U.S. at 664-65).

<sup>8</sup> *Id.* at 601.

<sup>9</sup> 469 U.S. at 325-26 (holding that the Fourth Amendment, excluding the warrant requirement, applied to schools).

<sup>10</sup> *See id.* at 340.

<sup>11</sup> *See Vernonia*, 515 U.S. at 664-65; *T.L.O.*, 469 U.S. at 346-48.

<sup>12</sup> *Bellnier v. Lund*, 438 F. Supp. 47, 52 (N.D.N.Y. 1977) (mem.) (internal citation omitted).

the Fourth Amendment did not apply; the Fourth Amendment applied, but the Exclusionary Rule did not; the Fourth Amendment did apply, but *in loco parentis* used the reasonableness standard to evaluate the search; or the Fourth Amendment fully applied.<sup>13</sup> Although the courts varied on students' Fourth Amendment rights, the Seventh Circuit declared that nude searches of children "exceeded the 'bounds of reason' by two and a half country miles."<sup>14</sup> Meanwhile, the Sixth Circuit adopted a balancing test, which weighed "the [F]ourth [A]mendment rights of individual students with the interests of the state and the school officials in the maintenance of a proper educational environment to educate today's youth."<sup>15</sup>

In 1985, the Supreme Court decided a watershed case, *New Jersey v. T.L.O.*,<sup>16</sup> which created the "special needs" doctrine for school searches.<sup>17</sup> The special needs doctrine allowed for warrantless searches when "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."<sup>18</sup> If the search fulfilled the two-part test, then it met the reasonableness standard.<sup>19</sup> The search had to be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."<sup>20</sup> The Supreme Court did not decide if "individualized suspicion [was] an essential element of the reasonableness standard" because the Fourth Amendment did

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<sup>13</sup> *Id.* (internal citations omitted).

<sup>14</sup> *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (per curiam).

<sup>15</sup> *Tarter v. Raybuck*, 742 F.2d 977, 982 (6th Cir. 1984).

<sup>16</sup> 469 U.S. 325 (1985).

<sup>17</sup> *Id.* at 351 (Blackman, J., concurring) (internal citation omitted).

<sup>18</sup> *Id.* at 341 (majority opinion).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

not list it as a requirement.<sup>21</sup> The Supreme Court believed that school officials could easily apply a reasonableness standard.<sup>22</sup> The dissent, however, warned that this standard would cause “greater uncertainty among teachers and administrators.”<sup>23</sup>

The courts applied the two-part test to determine the constitutionality of searches, but some courts clarified the Supreme Court’s test. In one case, the court held that a student’s conduct must create “a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation.”<sup>24</sup> Without reasonable suspicion of a violation, the court cannot deem a search reasonable.<sup>25</sup>

The courts also considered the search’s reasonableness under a “totality of the circumstances” analysis.<sup>26</sup> If a search occurred because of a student’s tip, the courts look at the totality of the circumstances to determine if school officials need to investigate further before conducting a search.<sup>27</sup> The totality of the circumstances applied to strip searches because factors, like “age and sex of the student and the nature of the infraction,” determined if a search’s scope was reasonable.<sup>28</sup> Small sums of money did not warrant a strip search, and courts considered these searches

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<sup>21</sup> *Id.* at 342 n.8 (internal citations omitted).

<sup>22</sup> *See id.* at 343.

<sup>23</sup> *Id.* at 365 (Brennan, J., concurring in part, dissenting in part).

<sup>24</sup> *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.); *see T.L.O.*, 469 U.S. at 342 (footnote omitted).

<sup>25</sup> *See Cales*, 635 F. Supp. at 457.

<sup>26</sup> *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 888 (6th Cir. 1991) (quoting *Alabama v. White*, 496 U.S. 325 (1990) (holding that an informant’s tip needs to be evaluated under a totality of the circumstances inquiry)).

<sup>27</sup> *See id.* at 888-89.

<sup>28</sup> *T.L.O.*, 469 U.S. at 342 (footnote omitted).

as unreasonable.<sup>29</sup> Without individualized suspicion, strip searches lacked justification unless a “legitimate safety concern” existed, and officials “must be investigating allegations of violations of the law or school rules . . . .”<sup>30</sup> Additionally, these searches needed to be “minimally intrusive.”<sup>31</sup>

Courts attempted to limit the use of suspicion-less searches if the students were not athletes.<sup>32</sup> Because athletes chose to participate in school athletics, they should “expect intrusions upon normal rights and privileges, including privacy.”<sup>33</sup> Physical education students, however, “[do not] willingly subject themselves to this degree of intrusion.”<sup>34</sup> Additionally, a suspicion-less search will not be considered reasonable in lieu of a possible “suspicion-based search” because the government’s needs “will never be strong enough to outweigh” an individual’s privacy interests.<sup>35</sup> If school officials request the police officers’ presence, or the police officers work at the school, then the reasonable suspicion standard applies.<sup>36</sup> Otherwise, they must show probable cause.<sup>37</sup>

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<sup>29</sup> See *Oliver ex rel. Hines v. McClung*, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995) (mem.) (referring to the argument in *Doe v. Renfrow* that a strip search for \$4.50 is unreasonable under the Fourth Amendment).

<sup>30</sup> *Konop ex rel. Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1201 (D.S.D. 1998) (mem.). But see *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (holding that student athletes were subject to suspicion-less drug testing because they had a “decreased expectation of privacy,” the search was relatively unobtrusive, and the severity of drug use in schools was a serious concern).

<sup>31</sup> *Konop*, 26 F. Supp. 2d at 1201.

<sup>32</sup> See *Vernonia*, 515 U.S. at 663; *Bell v. Marseille Elementary Sch.*, 160 F. Supp. 2d 883, 887-88 (N.D. Ill. 2001) (mem.).

<sup>33</sup> *Vernonia*, 515 U.S. at 657 (internal citations omitted).

<sup>34</sup> *Bell*, 160 F. Supp. 2d at 888.

<sup>35</sup> *Id.* at n.5 (quoting *Willis v. Alderson Cmty. Sch. Corp.*, 158 F.3d 415, 421 (7th Cir. 1998)).

<sup>36</sup> *Reynolds v. City of Anchorage*, 379 F.3d 358, 372 (6th Cir. 2004) (Moore, J., dissenting) (internal citations omitted).

<sup>37</sup> *Id.* at 372-73.



### III. Qualified Immunity: School Officials' "In Case of Unreasonable Search—Break Glass" Defense

A school official may claim qualified immunity if courts deem the search unreasonable. Qualified immunity "is an affirmative defense," and as state officials, school officials can invoke it.<sup>38</sup> Before the Supreme Court's decision in *Harlow v. Fitzgerald*,<sup>39</sup> this immunity had objective and subjective elements.<sup>40</sup> The Supreme Court, however, eliminated the subjective element because the "judicial inquiry" could disrupt "effective government."<sup>41</sup> Because qualified immunity is a question of law, courts must determine if qualified immunity protects the official.<sup>42</sup>

Qualified immunity requires an examination of "the objective reasonableness of an official's conduct."<sup>43</sup> If the courts think, "the law was clearly established," then the official loses the immunity because a "public official should know the law governing his conduct."<sup>44</sup> To determine whether a right is clearly established, courts examine Supreme Court decisions; its own decisions, as well as other decisions in its circuit; and other circuits' decisions.<sup>45</sup>

Most cases turn on whether a right is clearly established, but "a constitutional or statutory violation" must occur.<sup>46</sup> Thus, courts must look at the situation and determine whether "the [official's] conduct violated a constitu-

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<sup>38</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (citing *Gomez v. Toledo*, 446 U.S. 635 (1980)).

<sup>39</sup> *Id.* at 800.

<sup>40</sup> *Id.* at 815.

<sup>41</sup> *Id.* at 817 (footnotes omitted).

<sup>42</sup> See *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996) (internal citations omitted).

<sup>43</sup> *Harlow*, 457 U.S. at 818 (footnote omitted).

<sup>44</sup> *Id.* at 818-19 (footnote omitted).

<sup>45</sup> See *McBride*, 100 F.3d at 460.

<sup>46</sup> *Saylor v. Bd. of Educ. of Harlan County*, 118 F.3d 507, 512 (6th Cir. 1997) (internal citations omitted).

tional right[.]”<sup>47</sup> If the official violated a right, then the court considers whether that right was clearly established.<sup>48</sup> A right is clearly established if “a reasonable official would understand that what he is doing violates that right.”<sup>49</sup> Even if courts have not previously addressed the exact conduct, an official may lose qualified immunity if “in the light of pre-existing law the unlawfulness [is] apparent.”<sup>50</sup> Thus, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>51</sup>

Finally, courts must examine the official’s actions for objective unreasonableness, which can be determined “from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs.”<sup>52</sup> This evaluation “requires a careful balancing of . . . the individual’s *Fourth Amendment* interests’ against the countervailing governmental interests at stake.”<sup>53</sup> Once these criteria are met, the official loses qualified immunity and may be liable for the unconstitutional conduct.

#### IV. The *Beard* Strip Search

*Beard* began with a strip search for stolen money during a gym class.<sup>54</sup> The acting principal called the police

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<sup>47</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (internal citations omitted).

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>50</sup> *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004) (quoting *Anderson*, 483 U.S. at 640).

<sup>51</sup> *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

<sup>52</sup> *Champion*, 380 F.3d at 902 (quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003)).

<sup>53</sup> *Solomon v. Auburn Hills Police Dep’t*, 389 F.3d 167, 173-74 (6th Cir. 2004) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

<sup>54</sup> *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 601 (6th Cir. 2005).

and asked three teachers for assistance.<sup>55</sup> The teachers separated the students and searched their backpacks.<sup>56</sup> During the search, a male teacher made the boys remove their shirts, lower their pants, and lower their underwear.<sup>57</sup> To avoid gender discrimination, the girls endured a strip search, which required them to lift their shirts and lower their pants.<sup>58</sup> The teachers did not touch the students, and the search yielded no stolen money.<sup>59</sup>

The students sued the school, and the school filed a motion for summary judgment asserting qualified immunity.<sup>60</sup> The district court denied the motion on the basis that the law involving strip searches for missing money was clearly established.<sup>61</sup> The defendants appealed to the Sixth Circuit, which reversed the district court's decision.<sup>62</sup> The Sixth Circuit held that "the law did not clearly establish that the searches were unconstitutional under these circumstances."<sup>63</sup>

In this case, the court addressed the issue of whether the law clearly establishes that suspicion-less strip searches of students are unconstitutional under the Fourth Amendment. This case demonstrates that school officials have protection from liability even in an unconstitutional school search. Therefore, students lack constitutional protections from a search under the reasonableness standard. The Supreme Court's claim that students "do not shed their consti-

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 602.

<sup>59</sup> *Id.* at 601-02.

<sup>60</sup> *Id.* at 601.

<sup>61</sup> *Id.* at 602.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

tutional rights at the school house gate” is practically obsolete in today’s schools.<sup>64</sup>

The Sixth Circuit had to decide if school officials merited qualified immunity.<sup>65</sup> First, the court examined whether the searches violated the students’ Fourth Amendment rights under the reasonableness standard.<sup>66</sup> The Sixth Circuit evaluated whether the search was “justified at its inception” and “reasonably related in scope to the circumstances.”<sup>67</sup> The search was “justified at inception,” but the search’s scope was unconstitutional.<sup>68</sup> The search occurred in a compulsory gym class, and the students, unlike athletes, did not choose “to be regulated more closely than the general student population.”<sup>69</sup> As such, they merited a greater expectation of privacy than student athletes did.<sup>70</sup> The search was highly intrusive because the students disrobed, and the girls’ searches, unlike the boys’ searches, occurred with other students present.<sup>71</sup> Finally, the search attempted to locate missing money, which courts have considered to serve “a less weighty governmental interest than a search undertaken for items that pose a threat to the

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<sup>64</sup> *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>65</sup> *Beard*, 402 F.3d at 603.

<sup>66</sup> *Id.*; accord *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004).

<sup>67</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (internal citation omitted).

<sup>68</sup> *Beard*, 402 F.3d at 604-06.

<sup>69</sup> *Id.* at 605.

<sup>70</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662, 664-65 (1995) (holding that suspicion-less drug searches are constitutional when performed on student athletes).

<sup>71</sup> Compare *Beard*, 402 F.3d at 606 with *Reynolds v. City of Anchorage*, 379 F.3d 358, 365 (6th Cir. 2004) (demonstrating that a strip search’s intrusive nature can be minimized by conducting them in private rooms with a minimal number of staff).

health or safety of students, such as drugs or weapons.”<sup>72</sup> These factors, along with no individualized suspicion or consent, caused the search’s scope to be unconstitutional under the Fourth Amendment.<sup>73</sup>

Because a constitutional violation occurred, the Sixth Circuit had to determine if the law was clearly established “in light of the specific context of the case, not as a broad general proposition.”<sup>74</sup> In search of guidance, the Sixth Circuit examined Supreme Court cases, cases in the Sixth Circuit, and cases in other circuits.<sup>75</sup> The Sixth Circuit noted that *Vernonia*<sup>76</sup> and *T.L.O.*<sup>77</sup> articulated basic search principles.<sup>78</sup> These cases, however, offered school officials no guidance about what would constitute notice “that the searches . . . were unreasonable” because the Supreme Court’s test for reasonableness did not “explain *how* the factors should be applied” when school officials encountered these situations.<sup>79</sup> Additionally, the Sixth Circuit noted, “the reasonableness standard . . . has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a . . . cause of action.”<sup>80</sup>

The Sixth Circuit cases do not clarify whether the law surrounding strip searches was clearly established. The court granted qualified immunity in two cases because of individualized suspicion of certain students, but in another

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<sup>72</sup> *Beard*, 402 F.3d at 605; accord *Vernonia*, 515 U.S. at 661; *Oliver ex rel. Hines v. McClung*, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995) (mem.).

<sup>73</sup> *Beard*, 402 F.3d at 606.

<sup>74</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

<sup>75</sup> *Beard*, 402 F.3d at 606-07; see *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996).

<sup>76</sup> 515 U.S. 646 (1995).

<sup>77</sup> 469 U.S. 325 (1985).

<sup>78</sup> *Beard*, 402 F.3d at 607 (internal citations omitted).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (quoting *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991)).

case, the court denied qualified immunity because a rule or law violation may not have occurred.<sup>81</sup> Thus, the Sixth Circuit cases yielded no clear stance on strip searches for school officials.<sup>82</sup>

Other circuits have established a clear stance on strip searches, but the Sixth Circuit believes that these cases do not clearly establish "the unlawfulness of the defendants' actions in this case."<sup>83</sup> The Sixth Circuit only uses opinions from other circuits if they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."<sup>84</sup> Because these cases do not meet this standard, the Sixth Circuit held that the law was not clearly established and granted the school officials qualified immunity.<sup>85</sup>

## V. Ramifications of *Beard* on Future School Searches and Students' Rights

*Beard* shows how the reasonableness standard and qualified immunity has eroded students' rights and granted school officials enormous leeway in their searches. Initially, students' Fourth Amendment rights varied from school to school, but after *T.L.O.*, a reasonableness standard governed school searches.<sup>86</sup> The courts have broadened this standard. Under the reasonableness standard, school officials do not necessarily need individualized suspicion, but

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<sup>81</sup> See *Williams*, 936 F.2d at 889; *Tarter v. Raybuck*, 742 F.2d 977, 984 (6th Cir. 1984) (footnote omitted). But see *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 458 (E.D. Mich. 1985) (mem.).

<sup>82</sup> *Beard*, 402 F.3d at 608.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *Williams*, 936 F.2d at 885) (alteration in original).

<sup>85</sup> *Id.*

<sup>86</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

individualized suspicion could ensure that school officials will be entitled qualified immunity.<sup>87</sup> Thanks to the confusion, teachers do not know which searches are constitutional and perform questionable searches as a result. Justice Brennan's prediction in *T.L.O.* that the reasonableness standard would cause confusion has come true.<sup>88</sup>

*Beard* proves that courts need to define the law surrounding school searches more clearly. Otherwise, teachers can act with impunity because either they do not know the law, or they know that the confusion in the law will protect them. Because the law in various circuits is in a state of disarray, students lack protection within school walls. The added exceptions and qualifications to the reasonableness standard do not aid teachers in understanding the law; they only create more confusion. Without a clearly established standard for school searches, teachers almost always merit qualified immunity, and no check or balance exists to prevent them from trampling on students' rights. Thus, students' Fourth Amendment rights practically do not exist because the courts consider the searches reasonable or qualified immunity exists. *Beard* is a distress signal to the courts to reach a consensus on what is and is not constitutional in school searches.

*Beard* has far-reaching future implications. First, *Beard* demonstrates that teachers can conduct unreasonable and unconstitutional searches with little fear of liability. The decision allows teachers to see how far they can tread on students' rights because liability will not result thanks to qualified immunity. Second, if schools continue to conduct strip searches, the courts may eventually consider them reasonable in all situations. For example, the courts may

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<sup>87</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653-54 (1995); see also *Williams*, 936 F.2d at 889 (stating that the principal's reasonable suspicion that students were concealing drugs provided him with qualified immunity for his search).

<sup>88</sup> *T.L.O.*, 469 U.S. at 365. (Brennan, J. concurring in part, dissenting in part).

find a school's actions reasonable enough to allow strip searches in group situations without individualized suspicion. Third, *Beard* demonstrates that a clearly defined standard on student searches must exist to prevent students from "shed[ding] their rights at the school house gate."<sup>89</sup> If students have no rights in school searches, then the trend will spread from schools into society at large.

Fourth, this decision demonstrates that schools have become more concerned with crime prevention and safety than educating students. Teachers conduct unconstitutional searches under the guise of protecting students. The courts deem these searches unconstitutional, but the teachers still receive qualified immunity for their actions because the courts believe that today's schools are unsafe. If teachers must evaluate reasonableness, conduct a search, and prove that the law was not clearly established, when do they educate students? Teachers spend more time policing students and defending their actions than educating students. Without education, our government, judicial system, and society in general will suffer from ignorance.

## VI. Conclusion

In conclusion, *Beard* demonstrates how students' Fourth Amendment rights and school searches have come full circle. Even with the reasonableness standard, a state of confusion still exists, and qualified immunity protects teachers from liability. Students receive no benefits from the reasonableness standard. The courts must reach a consensus on the law in this area, or students will continue to endure unreasonable searches. If the law continues in its state of disarray, then students may have no Fourth Amendment rights in schools because the courts continue

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<sup>89</sup> *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).



to add exceptions. The courts must set a clear standard on school searches so that teachers and students can return to the important tasks of teaching and learning.



*Publication of contributions does not signify adoption of the views expressed therein by the TENNESSEE JOURNAL OF LAW AND POLICY, its editors, faculty advisors, or The University of Tennessee.*

NOTE

**A VICTORY IN DEFEAT:  
THE IMPLICATIONS OF *RUMSFELD V. FAIR* ON  
“DON’T ASK, DON’T TELL”**

Jill Shotzberger

**I. Introduction**

On March 6, 2006, the United States Supreme Court decided *Rumsfeld v. Forum for Academic and Institutional Rights*.<sup>1</sup> In this decision, drafted by Chief Justice John Roberts, the Court addressed the constitutionality of Congress (1) requiring universities to provide military recruiters with the same access to law school career services offices that the school would grant to other prospective employers and (2) withholding federal funding for the entire university if the law school failed to grant this access.<sup>2</sup> The Supreme Court held that these requirements did not violate the First Amendment rights of freedom of speech and freedom of association.<sup>3</sup> Although this case, which pitted thirty-six prestigious law schools against the Secretary of Defense, failed in its constitutional challenge, it succeeded in bringing attention to a larger public policy concern: the United States government’s continued implementation of the controversial policy of “Don’t Ask, Don’t Tell.”

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<sup>1</sup> *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, No. 04-1152, slip op. at 1 (U.S. Mar. 6, 2006) [hereinafter *FAIR*].

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.* at 20.

## II. The Solomon Amendment

In 1993, Congress enacted “Don’t Ask, Don’t Tell” (DADT), a policy that banned openly gay men, lesbians, and bisexuals from serving in the military.<sup>4</sup> This provision codified a fifty-year-old practice that allowed any statement by a soldier about his or her sexual orientation to *anyone* at *any* time to be reasonable grounds for dismissal from service.<sup>5</sup> Due to the implementation of the DADT policy, law schools began to marginalize or even disallow military recruiters on campus.<sup>6</sup> The Association of American Law Schools (AALS) requires its member schools to adopt a nondiscrimination policy that includes sexual orientation. This policy limits the availability of a school’s facilities and resources to those employers that comply with the AALS statement on equal opportunity employment.<sup>7</sup> Due to DADT, military recruiters were unable to meet the requirements of AALS’s nondiscrimination policy, and they were denied access or were granted limited recruiting access by AALS schools.<sup>8</sup>

In response to the restricted access for military recruiters, Congress adopted the Solomon Amendment in 1996 as a part of the National Defense Authorization Act.<sup>9</sup>

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<sup>4</sup> 10 U.S.C.A. § 654 (1993).

<sup>5</sup> E.g. NALP, Solomon Amendment Information, [www.nalp.org/content/index.php?pid=81&printer-friendly=true](http://www.nalp.org/content/index.php?pid=81&printer-friendly=true) (last visited June 4, 2006) [hereinafter *NALP*].

<sup>6</sup> *Id.*

<sup>7</sup> E.g. Memorandum from Carl Monk, Association of American Law Schools, Executive Committee Policy Regarding “Solomon Amendment” (Jan. 24, 2000), [www.aals.org/deansmemos/00-2.html](http://www.aals.org/deansmemos/00-2.html) (last visited June 6, 2006).

<sup>8</sup> See Remarks at the Georgetown Federalist Society Symposium: Solomon Amendment: Can Congress Condition Benefits to Colleges and Universities on Their Willingness to Allow Military Recruiters on Campus 9 (Oct. 20, 2005) (transcript available at Georgetown Law Center) [hereinafter *Georgetown Symposium*].

<sup>9</sup> 10 U.S.C.A. § 983 (1999).

This amendment prohibited the allocation of funds from the Department of Defense to colleges or universities that barred ROTC and military recruiters from access to campus or career services.<sup>10</sup> In 1999, the Solomon Amendment was modified in the Omnibus Appropriations Act to withhold funds from the Departments of Defense, Labor, Health and Human Services, and Education.<sup>11</sup> When the Solomon Amendment was enacted, if a department of a university (i.e. the law school) denied access to a military recruiter, federal funding would be terminated for that department. The 1999 modification expanded these sanctions by permitting all federal funding to an entire university to be withdrawn if military recruiters were denied access to a single department within the institution.<sup>12</sup> Congress approved a final expansion of the Solomon Amendment in 2004 to clarify and strengthen the policy by stating that military recruiters *must* have the same access as other employers and by increasing the potential penalty for noncompliance by adding to the list of federal agencies that could deny funding to the offending schools.<sup>13</sup>

### III. *Rumsfeld v. FAIR*

After the 2004 revision of the Solomon Amendment, thirty-six law schools, along with other affiliated groups and individual plaintiffs, united to challenge the constitutionality of the Solomon Amendment through a new organization entitled the Forum for Academic and Institutional Rights (FAIR).<sup>14</sup> FAIR asserted that the So-

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<sup>10</sup> *Id.*

<sup>11</sup> *See NALP, supra* note 5.

<sup>12</sup> 10 U.S.C.A. § 983 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Georgetown Symposium, supra* note 8 at 10-11; *see* Brief for the ACLU et al. as Amici Curiae Supporting Respondents at 3, *Rumsfeld v. FAIR*, No. 04-1152, slip op. (U.S. Mar. 6, 2006) [hereinafter *Brief of ACLU*].

lomon Amendment violated the First Amendment rights of free expressive association and free speech through compelled speech and viewpoint discrimination.<sup>15</sup>

The U.S. District Court in New Jersey held that there was no violation of free speech, because the law schools had adequate opportunity to express their own opposition to the military policy of DADT while still protecting the government's interest in allowing military recruiters on campus.<sup>16</sup> Additionally, the court determined that requiring military recruiters on campus comported with the standard set in *United States v. O'Brien*.<sup>17</sup> *O'Brien* determined that a compelling government interest in maintaining the availability of draft cards outweighs one's right to noncommunicative conduct.<sup>18</sup> With regard to the Solomon Amendment, this precedent allows the government "[to] regulate conduct even if such regulation entails an incidental limitation on speech."<sup>19</sup> Furthermore, the district court held that the expressive conduct of allowing military recruiters on campus was merely secondary to the primary economic purpose of supporting the armed forces.<sup>20</sup> According to the district court, the compelling government interest in raising an army balanced against the law schools' ability to reject the recruiters, albeit at the cost of losing their funding, failed to infringe on the constitutional rights of free speech and free association.<sup>21</sup>

The Court of Appeals for the Third Circuit disagreed, determining that it was unconstitutional to force a law school to choose between First Amendment rights and

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<sup>15</sup> *Brief of ACLU, supra* note 14 at 5; *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 274-75 (D.N.J. 2003).

<sup>16</sup> *See FAIR*, No. 04-1152, slip op. at 3.

<sup>17</sup> *FAIR*, 291 F. Supp. 2d 296 at 314.

<sup>18</sup> *See U.S. v. O'Brien*, 391 U.S. 367, 381-382 (1968) (holding that burning a draft card is noncommunicative conduct).

<sup>19</sup> *FAIR*, 291 F. Supp. 2d at 312 (citing *O'Brien*, 391 U.S. at 375).

<sup>20</sup> *Id.* at 308.

<sup>21</sup> *Id.* at 312.

funding under the unconstitutional conditions doctrine.<sup>22</sup> The Court also held that the *O'Brien* analysis did not apply because the Solomon Amendment explicitly restricted expressive conduct, making the amendment unconstitutional on alternate grounds.<sup>23</sup> The Court reversed and remanded the decision to the lower court to issue a preliminary injunction against application of the Solomon Amendment.<sup>24</sup> The Supreme Court granted Certiorari.<sup>25</sup>

#### IV. Statutory v. Constitutional Argument

The first struggle that came to fruition for FAIR and the parties who opposed the Solomon Amendment concerned their methodology in approaching the Court. Harvard Law professors, along with many of their colleagues, filed amicus briefs arguing for a statutory, rather than a constitutional, approach to eliminating the Solomon Amendment. This challenged the language in the statute which indicated that recruiters be granted access “at least equal in quality and scope to the access . . . that is provided to any other employer.”<sup>26</sup> Under this language, the professors argued that AALS members and other schools that prohibit military recruiters are doing so in compliance with the Solomon Amendment, because they are treating the military the same way that they would treat other employers who failed to adhere to the non-discrimination policy.<sup>27</sup> Thus, the schools would not be specifically targeting the military, but rather, all parties who discriminate. This ar-

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<sup>22</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 246 (3rd Cir. 2004).

<sup>23</sup> *Id.* at 243-44.

<sup>24</sup> *Id.* at 246.

<sup>25</sup> *Rumsfeld v. FAIR*, 544 U.S. 1017 (2005).

<sup>26</sup> 10 U.S.C.A. § 983(B)(1) (2006).

<sup>27</sup> Daniel J. Hemel, *Future of Campus Military Recruiting Hangs in the Balance at High Court*, THE HARVARD CRIMSON, Dec. 4, 2005, [www.thecrimson.com/article.aspx?ref=510278](http://www.thecrimson.com/article.aspx?ref=510278) (last visited June 8, 2006).



gument presents the premise that schools are complying with the Solomon Amendment as written, but Congress is still withholding funds until special, rather than equal, treatment is given to military recruiters.<sup>28</sup>

The law schools attempted to sidestep the constitutional issue by presenting the argument that they could implement their nondiscrimination policies while giving separate, yet equal access to military recruiters. Had FAIR only taken a statutory approach and won, it is conceivable that Congress might have immediately amended the statute to provide for special treatment of military recruiters, thereby re-launching the issue into a constitutional debate.<sup>29</sup>

Although not included in FAIR's brief, the Court did address this issue in its opinion. The Court determined that the intent of Congress in enacting the Solomon Amendment was not in the *content* of the Amendment, but rather, the *result*.<sup>30</sup> Therefore, because access is the intended result, when other employers have greater access than the military, the schools are in violation of the amendment. The Supreme Court interpreted the statute to imply that it is not sufficient to treat the military the same way as other employers who violate the nondiscrimination policy.<sup>31</sup> The military must be granted the "same access as those who comply with the policy" in order to act in accordance with the intention of Congress.<sup>32</sup>

## V. Unconstitutional Conditions Doctrine

The next element of this debate addressed by the Supreme Court was whether Congress placed an unconsti-

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<sup>28</sup> *Georgetown Symposium*, *supra* note 8 at 45.

<sup>29</sup> Hemel, *supra* note 27.

<sup>30</sup> *Rumsfeld v. FAIR*, No. 04-1152, slip op. at 7 (U.S. Mar. 6, 2006).

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

tutional condition on its allocation of funding.<sup>33</sup> In *Grove City College v. Bell*, the Court indicated that funding could be conditioned because universities are not obligated to accept that funding.<sup>34</sup> This is seen most often, as it was in *Grove City*, in Title IX gender discrimination cases. Despite Congress' ability to condition funding, *Speiser v. Randall* determined that it is unconstitutional for Congress to condition funding unless Congress would be able to directly mandate that action.<sup>35</sup> In this case, if Congress had the power to directly order that recruiters be permitted on university campuses, then they could condition the funding. This gives the Spending Clause of the Constitution, which determines how Congress may allocate funds, equal breadth with those powers that can be directly required by Congress. *United States v. American Library Associations* determined that funding cannot be limited if the burden placed on the accepting group infringes on constitutional rights.<sup>36</sup> FAIR argued that the Solomon Amendment placed an unjust burden on speech. The Court disagreed.

The Court determined that it would be constitutional for Congress to directly mandate that military recruiters be allowed on campus. This mandate is permitted because the government interest in supporting the military should be given deference.<sup>37</sup> FAIR's First Amendment challenges are outweighed by the compelling government interest in sustaining national defense. The Court has used and indicates it will continue to use the argument of a compelling government interest in national defense in challenges against

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<sup>33</sup> See *id.* at 9; see generally *Grove City College v. Bell*, 465 U.S. 555 (1984).

<sup>34</sup> See, e.g., *Grove City College*, 465 U.S. 555 at 575-76.

<sup>35</sup> See *Speiser v. Randall*, 357 U.S. 513, 526 (1958); see also *Georgetown Symposium*, *supra* note 8 at 25-26.

<sup>36</sup> See, e.g., *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003).

<sup>37</sup> *Rumsfeld v. FAIR*, No. 04-1152, slip op. at 8 (U.S. Mar. 6, 2006).

the military under Title IX or Title VI.<sup>38</sup> By asserting this position, the Court shows its commitment to uphold and give deference to military policies despite the possible discriminatory effect on gender, race, or sexuality.<sup>39</sup> Therefore, it is inconsequential whether the condition is attached to funding, because the Court validates the condition as a compelling government interest.<sup>40</sup> If a condition can be directly mandated, then it can be attached to funding through the Spending Clause.<sup>41</sup>

## VI. Speech

The next constitutional question addressed by the Court was whether the Solomon Amendment violates the First Amendment right to freedom of speech. The district court determined that “the inclusion of an unwanted periodic visitor did not significantly affect the law schools’ ability to express their particular message or viewpoint.”<sup>42</sup> The Court of Appeals disagreed, stating that speech was involved in promoting the recruiters and that this speech forced colleges to host the military’s message, as well as compelled the schools to sponsor the recruiters through their resources.<sup>43</sup> The Supreme Court rejected this position. According to the Court’s decision in *Johanns v. Livestock Marketing Assn.*, citizens may challenge compelled private speech but have no First Amendment right not to fund government speech.<sup>44</sup> Therefore, there is “no First Amendment right not to fund government speech as the representatives of the United States military.”<sup>45</sup> Any

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<sup>38</sup> *Id.*

<sup>39</sup> *See Georgetown Symposium*, *supra* note 8 at 27.

<sup>40</sup> *See id.* at 26.

<sup>41</sup> *FAIR*, No. 04-1152, slip op. at 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 10.

<sup>44</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

<sup>45</sup> *Id.*

speech expounded by the recruiters is considered government speech. In addition, the Supreme Court held that the assistance provided to the military recruiters was minimal and not of a monetary nature; therefore, the subsidy issue was not pertinent to the outcome of this case.<sup>46</sup>

The next speech issue under consideration by the Court was compelled government speech. The Court held that cases such as *West Virginia Board of Education v. Barnette* and *Wooley v. Maynard* do not govern *Rumsfeld* because, despite the fact that there are elements of speech in disseminating notice of the recruiters' presence on campus, the speech used to comply with the Solomon Amendment does not include a required government pledge or specific content that the school must endorse.<sup>47</sup> Requiring schools to include recruiters on event schedules or employment fair flyers does not approach the type of speech protected by *Wooley* or *Barnette*.

Like compelled speech, the type of speech required by the Solomon Amendment fails to meet the standard set forth in cases dealing with hosting or accommodating another group's message. To meet the burden of these cases, the Solomon Amendment would have to inhibit the school's own message and force the college or university to accommodate the military's message instead of their own, or the conduct would have to be of such an expressive nature that the message of the school would be compromised by the inclusion of the recruiters.<sup>48</sup> The Court held

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<sup>46</sup> *FAIR*, No. 04-1152, slip op. at 11 n.4.

<sup>47</sup> *Id.* at 11-12. See generally *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a state law requiring school children to recite the Pledge of Allegiance and salute the flag was unconstitutional); see generally *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding it was unconstitutional for New Hampshire to require that drivers display "Live Free or Die" on their license plate).

<sup>48</sup> *FAIR*, No. 04-1152, slip op. at 15. See generally *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (holding that the public accommodation law as applied to a private

that allowing recruiters on campus is not inherently expressive, because assisting a student in obtaining employment is not expressive.<sup>49</sup> Furthermore, the message of the school is not suppressed through this statute. Colleges and universities are free to voice their opposition to DADT or any other military policy. The colleges may post signs where the recruiters are located or speak out on the issue without ramifications under the Solomon Amendment. The Court rejected the argument that simply by having the recruiters on campus, the school would be viewed as endorsing the military's policies.<sup>50</sup> As the Court decided in *Board of Education of Westside Community Schools v. Mergens*, high school students are capable of distinguishing between speech that a school sponsors and speech that a school permits; Chief Justice Roberts contended, "Surely students have not lost that ability by the time they get to law school."<sup>51</sup> Since colleges and universities are still free to express their views on military policies and the message of the school is in no way compromised by the Solomon Amendment, the Court determined that there is no infringement on speech.

## VII. Expressive Conduct

Conduct can be recognized as symbolic speech when its inherently expressive nature merits First Amendment protection.<sup>52</sup> The Court determined that the conduct governed by the Solomon Amendment is not inherently

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parade can alter the expressive nature of the conduct and violates the First Amendment protection of choosing one's own message); *see generally* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that you cannot interfere with a speaker's intended message).

<sup>49</sup> *FAIR*, No. 04-1152, slip op. at 15.

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *FAIR*, No. 04-1152, slip op. at 15. *See* *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990).

<sup>52</sup> *See O'Brien*, 391 U.S. 367; *Texas v. Johnson*, 491 U.S. 397 (1989).

expressive.<sup>53</sup> Since the message that universities are sending when they exclude military recruiters is unclear without the accompanying speech, the conduct alone is not expressive.<sup>54</sup> The Court held that since explanatory speech is needed to accompany the conduct, *O'Brien* does not govern the issue.<sup>55</sup> Moreover, a minor burden on speech is permissible under *O'Brien* if the government regulation at issue promotes a substantial government interest that would be more difficult to attain without the existing policy.<sup>56</sup> Raising and supporting a military is a substantial government interest, and the effectiveness of this action is altered when schools hinder the military's ability to recruit. Although alternative methods for recruiting can be implemented, the Supreme Court has deemed this the responsibility of Congress rather than of the courts.<sup>57</sup> Since the Solomon Amendment does assist in the effectiveness of military recruiting and is the chosen method of Congress, the policy will withstand the challenge under *O'Brien* and does not constitute a violation of the First Amendment right to freedom of speech.<sup>58</sup>

### VIII. Freedom of Association

The First Amendment goes beyond the right of speech, in that it also protects the freedom of association. One important recent case on the freedom of expressive association is *Boy Scouts of America v. Dale*.<sup>59</sup> In *Dale*, the

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<sup>53</sup> *FAIR*, No. 04-1152, slip op. at 16.

<sup>54</sup> *Id.* at 16-17.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> *Id.* at 18.

<sup>58</sup> *Id.*

<sup>59</sup> *See Boy Scouts of America v. Dale*, 530 U.S. 640, 655-59 (2000) (holding that the Boy Scouts were an expressive association in which the forced inclusion of a homosexual would significantly affect their

government of New Jersey was forcing the organization to “accept members it did not desire.”<sup>60</sup> Unlike *Dale*, under the Solomon Amendment, schools are not compelled to associate with military recruiters in this fashion; the schools are simply required to interact with the recruiters for a limited time and purpose, which fails to inhibit the school’s message.<sup>61</sup> There is neither forced inclusion nor an effect on the schools’ right to expressive association, because they are still free to convey their disapproval of the military’s message. Likewise, according to the Court, there is no effect on the attractiveness of membership in the university simply because of the presence of military recruiters.<sup>62</sup>

Through this analysis, the Court held that there was no infringement on the First Amendment protections of freedom of speech, expressive conduct, or association. There was also no violation of the doctrine of unconstitutionality conditions. Therefore, the Solomon Amendment is constitutional and should continue to be upheld.

## IX. Why FAIR Lost the Battle

FAIR and numerous other organizations and legal scholars disagree with the Supreme Court’s decision in *Rumsfeld*. The first point of contention is how the Court treated speech. For FAIR, et al. the definition of speech may have been more narrowly construed than was expected. Email and written notices, as well as providing the recruiters with space and access to students, were actions too broad to be considered as speech by the Court. Renowned constitutional scholar, Erwin Chemerinsky, who personally filed his own amicus brief, wrote, “Never before

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expression. The states interest did not justify the intrusion; therefore, it violated the organization’s First Amendment rights).

<sup>60</sup> *FAIR*, No. 04-1152, slip op at 19.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 20.

has the Supreme Court held that the government can compel speech as long as the speaker can disavow the compelled message later.”<sup>63</sup> He cited *Hurley v. Irish- American Gay, Lesbian and Bisexual Group of Boston, Inc.* as illustrating that compelled speech was not excused only because the parade organizers could have expressed their disapproval of the group.<sup>64</sup> By limiting what is considered protected speech, the Court diminished the effectiveness of the FAIR supporters’ contentions.

Not only was the argument about the form of speech curtailed, but other scholars contend that the Court undervalued the significance of the non-discrimination message. Non-discrimination, to the extent it is valued by these universities, is a momentous expression. By denying recognition of this policy as speech, the Court not only affected challenges to the Solomon Amendment but many fear their decision spoke to the new Roberts Court’s approach to equality and discrimination issues.<sup>65</sup>

In addition to altering what was previously acknowledged as speech, this Court also took a new approach to the nature of freedom of association. For the first time, freedom of association was limited to those groups with membership.<sup>66</sup> The Court had previously ruled, “the government cannot compel association in a manner that is inconsistent with a group’s expressive message.”<sup>67</sup> Application of the Solomon Amendment to universities forces association by compelling interaction with military recruiters. It may have been unforeseen by FAIR and its supporters that “interaction” would be construed differently than

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<sup>63</sup> Erwin Chemerinsky, *The First Amendment and Military Recruiting*, TRIAL, May 2006, at 79.

<sup>64</sup> *Id.*

<sup>65</sup> See David L. Hudson, *Law Schools Told to Allow Military Recruiters*, ABA JOURNAL E-REPORT, Mar. 10, 2006.

<sup>66</sup> Chemerinsky, *supra* note 63.

<sup>67</sup> *Id.*; see *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).



“association” thereby negating their freedom of association claims.

A final misjudgment by FAIR may have been their choice of challenging the Solomon Amendment, rather than going to the root of the problem. DADT is bad public policy and is the origin of the challenges to the Solomon Amendment. Although DADT conflicts with the schools’ non-discrimination policies, many scholars, even those who vehemently oppose DADT, thought the First Amendment contentions against the Solomon Amendment were obscure at best. With a growing trend on the Court towards strict textualism, supporters acknowledged that it would be difficult to mold the law schools’ concerns into a First Amendment case.<sup>68</sup> On the surface, the statutory challenges were more substantiated than the constitutional claims, despite their easy correction by Congress through a minor change in the language. However, the Court struck these challenges down as well. Notwithstanding, their overwhelming defeat in this case, FAIR and their supporters still have other fronts on which they can voice their opposition to the Solomon Amendment and DADT.

## **X. Why *Rumsfeld v. FAIR* May Be a Turning Point in a Greater War**

The Solomon Amendment is only a symptom of a greater quandary. If DADT were repealed, law schools would not need to exclude the military, because there would be no conflict with the Solomon Amendment. *Rumsfeld v. FAIR* could act as a symbolic expression of a growing majority who oppose the military’s discriminatory policies. Bringing attention to challenges like *Rumsfeld* promotes messages of equality and the repeal of DADT.<sup>69</sup>

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<sup>68</sup> *Georgetown Symposium, supra* note 8.

<sup>69</sup> See SolomonResponse.org Home Page, [www.SolomonResponse.org](http://www.SolomonResponse.org) (last visited June 10, 2006).

In upholding the Solomon Amendment, the Court endorses a policy that forces schools to relent on their messages of non-discrimination. The outcome of *Rumsfeld* has inspired others to further scrutinize DADT, the policy on which the decision was grounded.<sup>70</sup> Even with unanimous defeat in *Rumsfeld*, DADT and the Solomon Amendment have been thrust into the public forum bringing attention to what many Americans would consider unfair and discriminatory policies. Once the issue reaches the forefront, new measures can be advanced and considered in defining a viable strategy to overturn these policies.

Given that the Solomon Amendment and DADT are statutory, there are two methods to defeat them. The first is for the courts to deem them unconstitutional. The second is for Congress to repeal them.<sup>71</sup> Currently, two challenges to DADT await litigation that could eliminate the policy.<sup>72</sup> Chemerinsky contends that *Rumsfeld* may have only a narrow impact as precedent or as a guide to policy because the longstanding tradition of deference to the military by the Supreme Court. This continuing deference, coupled with decisions like *Dale* and *Hurley*, which are discriminatory to the gay and lesbian community, may limit the Court's application of this case as future precedent.<sup>73</sup>

The second means of eliminating DADT, through Congressional repeal, is also gaining momentum. As more attention is brought to the millions of dollars spent to oust more than 10,000 homosexuals from the military, some members of Congress are taking action.<sup>74</sup> Representative

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<sup>70</sup> Posting of Sharon Alexander, Deputy Director of Policy, Servicemembers Legal Defense Network, to American Constitution Society Blog, [www.acsblog.org/guest-bloggers-2672-guest-blogger-losing-the-battle-but-winning-the-war.html](http://www.acsblog.org/guest-bloggers-2672-guest-blogger-losing-the-battle-but-winning-the-war.html) (Mar. 9, 2006, 2:15 PM EST) [hereinafter *Alexander*].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Chemerinsky, *supra* note 63.

<sup>74</sup> *Alexander*, *supra* note 70.

Marty Meehan of Massachusetts introduced the Military Readiness Enhancement Act, which would repeal DADT.<sup>75</sup> The bill, which currently has 114 co-sponsors in the House, is awaiting further discussion in the Military Personnel Subcommittee.<sup>76</sup> Interested parties are also working on finding bipartisan co-sponsors in the Senate to introduce similar legislation.<sup>77</sup> As support grows in Congress, increased attention will be brought to the dangers of discriminatory policies and their effects outside the military in places like universities.

## XI. Conclusion

Through the above-mentioned legislative and legal methods, the cause championed by FAIR and its supporters has not been lost; continued challenges to DADT are underway. As the attack on discriminatory public policies continues on multiple fronts, *Rumsfeld v. FAIR* may prove not to be a setback, but a stepping stone to the abolition of “Don’t Ask, Don’t Tell.”

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<sup>75</sup> See Press Release, Representative Marty Meehan, Meehan Introduces Legislation to Repeal Don’t Ask, Don’t Tell (Mar. 2, 2005), [www.house.gov/apps/list/press/ma05\\_meehan/NR050302DADT.html](http://www.house.gov/apps/list/press/ma05_meehan/NR050302DADT.html) (last visited June 8, 2006).

<sup>76</sup> See HR 1059, 109<sup>th</sup> Cong. (2005).

<sup>77</sup> *Alexander*, *supra* note 70.

