the weekly Standard

THE POPE'S ABDICATION
JOSEPH BOTTUM

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JUSTICE, OBAMA STYLE

CHARLOTTE ALLEN
on Attorney General
Eric Holder

WEEKLYSTANDARD.COM

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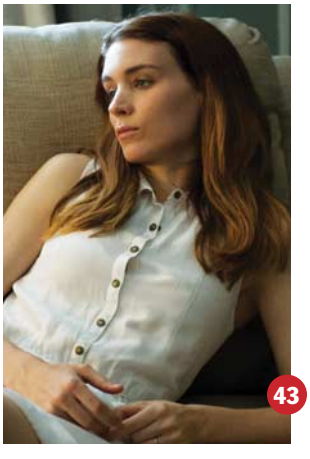

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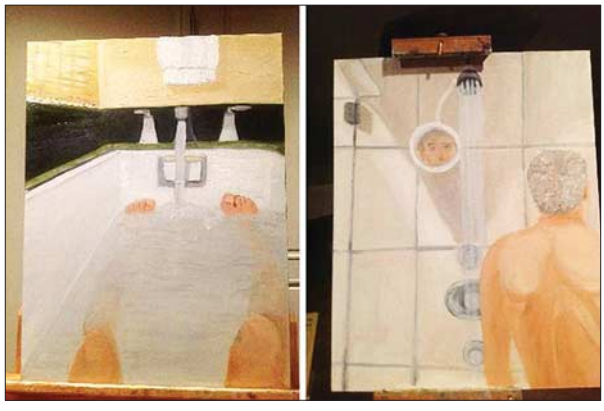
COVER BY GARY LOCKE

The Artist Known as 43

The Scrapbook finds itself in a quandary. A pair of paintings by George W. Bush have emerged in cyberspace. But they got there because the Bush family's email account was hacked, and images of Bush's art, intimate family gatherings, even George H. W. Bush's recent hospitalization were quickly splashed across the Internet. So while The Scrapbook wants to get in its two cents on the subject of these two pictures, it does not wish to join in this outrageous invasion of privacy. (Bush seems to have emailed photographs of the paintings to his sister, Doro.)



So let's just say, for the record, that The Scrapbook had no idea George W. Bush was a Sunday painter, and let us say also that the works are better than you would expect, show imagination, and are certainly evidence of Bush's well-developed sense of humor.

Both are self-portraits set in, of all places, a bathroom. One depicts him standing in a shower, from the waist up, his back to the canvas and his face revealed in a tiny circular mirror; the perspective in the other is the painter's own, his legs stretching forward in the water of a bathtub. The paintings—in their awkward simplicity, bright colors, and irregular perspective—strike The Scrapbook as delightful. We would like to see more.

Needless to say, the critical reaction, especially among the mentioning classes, has been predictable. The *Huffington Post* immediately reminded its readers that Adolf Hitler, too, was an amateur painter; the *New Yorker*'s website elicited responses dangerously close to self-parody: "W was and remains a vile person. . . . He should be doing time for war crimes and crimes against humanity." Britain's *Guardian*—"arguably worse than the twee oil paintings of Dwight D. Eisenhower"—managed to sound both tendentious and ridiculous.

The fact is that George W. Bush is not the first statesman to find painting therapeutic. Ike was a Sunday painter (and arguably more talented than the *Guardian* will admit); Winston Churchill took up painting after the 1915 Gallipoli disaster nearly ended his political career. Indeed, in old age, Churchill published a book entitled *Painting as a Pastime*, in which he declared, "I know of nothing which, without exhausting the body, more entirely absorbs the mind."

It has always been known that George W. Bush is a considerably more rigorous intellect than his reputation in the media would suggest; and certainly, as the husband of a librarian, he is a voracious reader. But The Scrapbook finds itself pleasantly surprised by the knowledge that art may now be included among his attributes.

The creative urge among retired presidents is not always strong, and for every Jimmy Carter who writes poetry (*She'd smile, and birds would feel that they no longer / had to sing*—"Rosalynn") there's a Gerald Ford or Bill Clinton on the links. More power, then, to George W. Bush and his paintings. ♦

Knight Errant

You may remember the downfall last summer of Jonah Lehrer, a popular journalist and author of the bestselling books *Proust Was a Neuroscientist* and *Imagine: How Creativity Works*. Despite Lehrer's well-polished conclusions—crafted to make NPR listeners feel smarter than they actually are—we're pretty confident in saying that Proust was not actually a neuroscientist, and no one really has a good idea of how creativity works.

We did, however, learn how Lehrer's creativity worked: by misappropriating the work of others and fabrication. (*Daily Beast* writer and occasional Weekly Standard contributor Michael C. Moynihan deserves credit for his skillful work exposing Lehrer's fraud.) Everyone in the hipster end of the intellectual wading pool was at a loss to explain why such a promising young journalist had self-immolated.

The irony here is that this might be one aspect of human nature that is readily explained. Here's a big clue, courtesy of the *Los Angeles Times*, which reported in 2010 that the "Hollywood Hills residence and studio of the late iconic photographer Julius Shulman has sold for $2.25 million." The buyer was a then-29-year-old Jonah Lehrer, who obviously had millions of reasons to make his work sound more exciting than it was.

A few days after his fall from grace last July, an item on *Forbes.com* was headlined "Jonah Lehrer Was Going to Give a Speech on Ethics. It's Canceled, Obviously." But as it turns out, it's not so obvious that paying Lehrer to talk about ethics is a laughable idea. Last week, the Knight Foundation—started by the founders of the once mighty Knight Ridder newspaper chain to support "transformational ideas that promote quality journalism [blah, blah, blah]"—gave Lehrer $20,000 for a talk on plagiarism.

Sadly, rewarding bad behavior is nothing new among the high priests of media. When *New Republic* fabulist Stephen Glass was exposed, the rush of media attention given to Glass prompted one betrayed colleague to complain to *60 Minutes*, "What you're covering now is contrition as a career move." After an outcry over the Lehrer speech, the Knight Foundation eventually tweeted: "You've spoken, we agree—it was a mistake for a journalism foundation to pay Jonah Lehrer for a speech." Somehow, we're not reassured. Does a journalism foundation that had to be publicly shamed into admitting it made a "mistake" by cutting a huge check to a plagiarist know anything of morality beyond the difference between good publicity and bad publicity? ♦

Civil Wrongs

The Scrapbook suspects that somewhere in the *Washington Post* stylebook there must be a paragraph advising reporters how to make a dubious subject palatable. Answer: Label it a civil rights issue, and describe it in terms of social progress.

We were reminded of this trick of the trade last week when the *Post* published a fawning piece by staff writer Nick Anderson about a conference at Gallaudet University in Washington, commemorating the 25th anniversary of the "Deaf President Now" movement. Here's the lede:

> Today it seems routine that a deaf man leads the pioneering university for the deaf and hard of hearing in the nation's capital. But a quarter century ago at Gallaudet University, that notion was revolutionary.

Sort of like gay marriage, or women in combat, or a black president. You get the idea.

What happened in March 1988? An experienced university administrator named Elisabeth Zinser was named the seventh president of Gallaudet, the federally chartered (and taxpayer-subsidized) institution of higher learning for the deaf. Because Zinser was not deaf, and because Gallaudet had never had a deaf president, some students and alumni condemned her appointment, holding rallies at the school and on Capitol Hill, occupying classrooms, blocking access to the campus, harassing individual trustees.

In due course, the marches, the rallies, and the cause attracted the allegiance of sympathetic journalists, members of Congress, and march/rally professionals such as Jesse Jackson. At the end of a tumultuous week Zinser stepped down, and a deaf Gallaudet dean who had originally supported her candidacy, I. King Jordan, was chosen in her stead.

In the *Post*'s view, the stirring events at Gallaudet a quarter-century ago were yet another chapter in civil rights history, drawing "global attention to the campus in Northeast Washington and in general to the cause of advancing equal opportunity for the deaf." And I. King Jordan is portrayed as a gallant hero, blessed with humility:

> Jordan said the biggest challenge of his tenure was simply to succeed in the job—overseeing university operations, raising money, securing congressional support. If he hadn't been able to do that, Jordan said, "People would look and say, 'See, deaf people are not really ready.'"

Of course, there is another way of looking at the events of 25 years ago. You could say that a well-qualified woman was deemed politically unacceptable to campus radicals and malcontents, who formed a mob to in-

timidate the duly constituted board; and that an ambitious I. King Jordan, seeing the way things were going, swiftly abandoned Elisabeth Zinser and got himself a promotion. You could also point out that Gallaudet University, led by presidents who were not deaf, had successfully educated generations of deaf students and advanced "the cause of . . . equal opportunity for the deaf" since the 1850s.

The irony, of course, is that Jordan's chosen successor, Dr. Jane Fernandes, was subjected to similar treatment in 2006 because she had not learned American Sign Language until she was in her early 20s—and so was not "deaf enough." The mob was revived, and I. King Jordan and his board of trustees threw Fernandes, like Zinser two decades before, under the bus.

Which confirms The Scrapbook's suspicion that the definition of a "civil rights" issue, especially in the press, depends on who's doing the talking. The reporter might just as easily have written this same story from a different angle: Namely, what is it about women presidents, deaf or not deaf, that the Gallaudet mob doesn't like? ♦

Horsefeathers

Last month the Food Safety Authority of Ireland found that 37 percent of the hamburger products it had tested—all of which were labeled 100 percent beef—contained horse DNA. The scandal widened: The frozen food company Findus, which supplies stores in the U.K., France, Sweden, and other countries, had sold frozen lasagna—again, marked as beef—that contained up to 100 percent horse meat.

A furious effort ensued to find which abattoir had been horsing around, if you will. But it proved remarkably difficult to track down the culprit. Why? As the *Global Post* reported:

> The horsemeat found in frozen "beef" lasagne sold in Britain by the Swedish company Findus reportedly originated from Romanian slaughterhouses that sold it to a Cypriot-registered company with links to the British Virgin Islands, run by a Dutchman operating out of Belgium. It then passed through two French companies before the Swedes bought it from a factory in Luxembourg.

So on one level, this is a story about the amazing complexity of global supply chains, with a half-dozen companies spanning a continent involved in the production of something as quotidian as frozen lasagna.

On another level, it's a cultural mystery story: Why have the British and Irish reacted so violently, when the French have been happily gobbling horsemeat for ages? The Scrapbook confesses to having eaten *cheval*—knowingly!—in Paris, and finding it to be quite similar to good old-fashioned ground beef. So, what's the, er, beef with eating horse? Well, for one, there's the fraud issue. And two, there's the simple squeamishness surrounding eating something . . . different. A billion Indians, after all, are probably repelled at the thought of tucking into a steak. Maybe the cultural relativists have a point. Or at least the culinary relativists do. ♦

Unmatched Pair

Some things are just not meant—in the largest possible sense—to go together. Teenage boys and good judgment. Democratic politicians and fiscal prudence. Sauerkraut and ice cream. You get the idea. And it would be hard to come up with any such juxtaposition worse than guns and alcohol. So now comes the NRA wine club (nrawineclub.com). And if the idea is atrocious, revealing an almost sublime tone-deafness, then the language in the pitch for the club's reds is even worse:

> selections include a perfectly balanced, nicely concentrated extraordinary Pinot Noir which is both floral and fruitful, a charming and silky French Bordeaux blend and a versatile California Cabernet Sauvignon that showcases impressions of blackberry, dark cherry and cocoa.

Memo to the NRA: Please stick to the Second Amendment, and if you absolutely must gush, do it about the frictionless action of a pre-64 Model 70. ♦

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BPA WORLDWIDE

Dreams from My Mother

We had hoped that she would live to Three Kings' Day. My mother loved Christmas and all its rituals, and as a Puerto Rican, she taught us children that the finest day of the season was January 6, when the wise men from the east arrived at the stable in Bethlehem bearing gifts for the infant Jesus.

Only as an adult, when I went to study and travel in the Middle East, was I struck by the incongruity of Caribbean islanders' celebrating the wanderings of Oriental royalty. But all through childhood, when we spent our Christmases in Puerto Rico, the similarities in climate appealed to us. Three magi riding past desert palms made more sense to us than a man in a fur-lined red suit sliding down a chimney. There was also the racial aspect. The kings, at least in the renderings of popular island artists, looked like they might have originated in the multiracial, multiethnic melting pot that centuries of European conquest and slavery had made of this island home of the Taino Indians.

Visiting from New York, my brothers and I would beg our parents to brave the nighttime traffic from Santurce to San Juan to go see the life-sized crèche overlooking the sea, where the kings and their horses and camels stood in the shadow of the 16th-century Spanish fortress, El Morro. Gaspar was olive skinned, like the majority of people on the island; Melchior was fair as a Spanish nobleman; and Balthazar was black, like many Puerto Ricans.

My mother's retelling of her life was expansive and imaginative, which is to say that what she remembered was occasionally embroidered. I was never quite sure whether the New York dinner party where she said Tennessee Williams taught her to eat an artichoke had actually happened. Maybe it had, or maybe she was simply charmed by the poetry of yoking together what, to a young woman from San Juan newly arrived in Manhattan, seemed like two extraordinary, exotic things—a world-famous playwright and a thorny, edible flower.

Maybe, as she said (though my father can't remember it), Harry

PHOTO COURTESY OF THE SMITH FAMILY

Belafonte really showed up unexpectedly at a small New Year's Eve dinner back in the '60s, where she joked, sang, and danced the calypso with him. Maybe she really did have a longstanding feud with Barbra Streisand dating back to the days when Mom worked as a secretary at London Records and the blossoming megastar slighted her. And maybe, as she once said, we were black.

That revelation came in her kitchen on the Upper West Side. It was shortly after Barack Obama was first elected, and we were talking about identity politics. It was a new twist to our racial heritage, a subject that had come to captivate my mother. She was increasingly certain that we were Jewish and, oddly, seemed to insist on this especially at Christmas, which she still cherished nonetheless.

Her chief evidence for our Jewishness came from my grandmother, whom we called Mamiña. She had started to relate more of her own childhood, remembering, for instance, that on Friday nights her family used to turn the crucifixes and mirrors to the wall, light candles, and say a prayer that Mamiña no longer remembered. Mom informed her that this meant we were "secret Jews."

It was plausible. My grandmother's mother came from Spain, where in the 1400s many Jews had converted, or been forced to convert, to Christianity. Some had secretly kept their own customs and traditions. What Mamiña described sounded like a Sabbath dinner, a custom passed down as an intimate family ritual. My mother couldn't have been happier. As a Puerto Rican and, she was almost convinced, a Jew, she felt she was doubly at home on the Upper West Side. And now, in her latest telling of our history, her grandfather, Mamiña's father, was the son of a black man and a white woman. What, I asked her, were we not?

I mostly forgot this fantastic narrative until last Christmas. One of my brothers brought along mementoes from Mamiña's apartment in Puerto Rico. She died two years ago at the age of 106; then six weeks later our mother died, on January 4, just before Three Kings' Day. Among the items he brought were pictures of our mother as a little girl that I had never seen. In the photographs, the girl with the sweet and open smile has skin much darker than it became in adulthood, and hair much curlier even than the stylish afro she wore through the '70s and '80s. I smiled to see in the features of the little black girl confirmation that this time my beautiful mother had her story straight.

Lee Smith

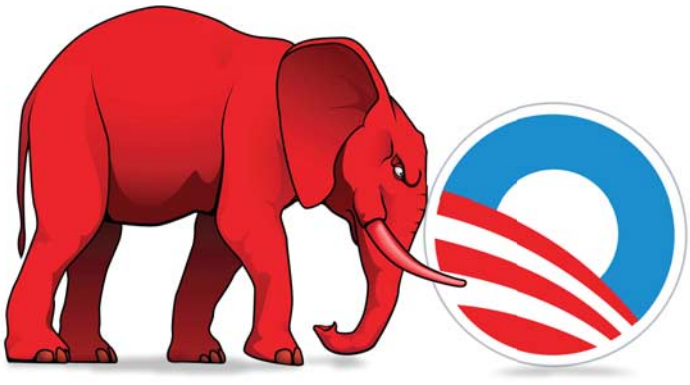
the weekly Standard

Resistance Is Not Futile

In the states, Republicans are governing successfully. At the think tanks, conservatives are arguing intelligently. Around the country, activists are organizing energetically. All well and good. And important. But not enough.

Because in Washington we have a president and an administration, aided and abetted by a Democratic Senate, whose efforts over the next four years, if unchecked, could overwhelm the good deeds of Republican governors, the astute arguments of conservative policy experts, and the hard work of grassroots activists.

That's why resistance in Washington today has to be central to the agenda for a conservative future tomorrow. If Republicans in Congress lack the nerve to stand up to President Obama, or the moxie to do so effectively, all other admirable efforts could end up being for naught. The federal nanny state could be so expanded, its tentacles could become so much more deeply embedded in the fabric of American life, that it would prove almost impossible for the next administration, however well-intentioned, to extricate us from it. The fiscal and monetary crisis could become so overwhelming that the soundest policies would be too little, too late. The American military could be so weakened, and our credibility abroad so damaged, that the most determined administration taking over four years from now would find it almost impossible to restore peace and advance freedom in a world that has spun out of control.



It may be that resistance is less edifying than reform. It's perhaps true that resistance is less intellectually stimulating than devising remedies. It could well be the case that resistance is less inspiring than reviving a party or rebuilding a movement. And there may well be occasions where emergencies and the national interest will call us to work with the president. But the chief duty for Republicans over the next four years will be resistance.

Now all this talk of resistance may sound a bit negative, even mean. But as Ralph Waldo Emerson famously wrote, "There is always a certain meanness in the argument of conservatism, joined with a certain superiority in its fact." This is a moment, as we face Obama, to emphasize the superiority of conservatism's facts even at the expense of the accusation of meanness. There will be time, in 2016, to leave the meanness behind. But fact-based resistance is needed now.

So resist we must, and resist we shall. Obamacare can be delayed with a view to its ultimate repeal and replacement. The expansion of the administrative state can be checked with a view to its fundamental reform and retrenchment. The gutting of the military can be blocked with a view to its future strengthening. The worst cabinet nominees can be blocked with a view to having more responsible custodians for the time being, with exemplary leaders possible down the road.

It's not a new insight that at times resistance is a necessary prelude to revival and reform. Our British cousins have centuries of experience in the trials and tribulations of self-government. What does their great and inspiring anthem say?

The famous first stanza of "God Save the Queen" is positive and uplifting:

God save our gracious Queen,
Long live our noble Queen,
God save the Queen:
Send her victorious,
Happy and glorious,
Long to reign over us:
God save the Queen.

This is followed by a stanza less often sung but in its own way instructive and energizing:

O Lord, our God, arise,
Scatter her enemies,
And make them fall.
Confound their politics,
Frustrate their knavish tricks,
On thee our hopes we fix:
God save us all.

BIGSTOCK PHOTO

The British have known for centuries that it's not enough to hope for happy and glorious days in the future. It's also necessary, with God's help, to act in the present to scatter our enemies and make them fall. It's necessary to confound their politics and frustrate their knavish tricks.

So as we prepare for a brighter future of conservative resurgence and Republican ascendancy, we fight Obamacare and the nanny state. We resist the confirmation of Chuck Hagel and the decimation of our military. We accept John Kennedy's admonition that "here on earth God's work must truly be our own." But contemplating four more years of Obama and the limits to the success of even the most steadfast and skillful resistance, we're also inclined to pray along with the Brits, sotto voce: *God save us all.*

—William Kristol

The Afghan Endgame

U.S. Marine General Joe Dunford at the change of command ceremony in Kabul, Feb. 10

NEWSCOM

President Obama's decision to withdraw another 34,000 troops from Afghanistan over the course of the next year is unwise. It greatly increases the risk of mission failure in that important conflict, jeopardizing gains already made in the Taliban heartland in the south and compromising the ability of Afghan and coalition forces to finish the fight against the Haqqani Network in the east. It also increases the risk that al Qaeda will be able to reestablish itself in limited safe havens in Afghanistan over time. Removing troops and capabilities before Afghanistan's next presidential election, scheduled for April 2014, further exacerbates the danger that Afghanistan might collapse into renewed ethnic civil war.

It was not as bad as it might have been, however, and prospects for success in this conflict remain, although the odds grow ever longer. The president appears to have yielded to military realities and the laws of physics on a number of important points. The drawdown itself is paced to keep a significant number of American troops in Afghanistan through most of this coming fighting season: Around 6,000 troops are to be withdrawn between now and this spring; another 8,000 by November; and the final 20,000 by February 2014.

Senior administration officials explained on background that the first stage of this withdrawal is already underway and results largely from the deployment of brigades configured to conduct training and advising missions rather than combat. General Joe Dunford, the new commander in Afghanistan, will therefore have to redeploy only another 8,000 troops while fighting the enemy this summer—a far more manageable challenge than if he had had to redeploy the full 28,000 while still trying to accomplish his primary mission of helping the Afghans defeat our common enemies and consolidate gains. Administration officials also said that a sizable contingent of planners and logisticians now in Afghanistan to design and execute the drawdown are not counted against the total troop numbers—a vital fact, since writing and implementing such a plan is a massive undertaking that could well otherwise consume the staffs and commanders who must focus on continuing progress against the enemy and training the Afghan National Security Forces (ANSF).

The president has also postponed an announcement—and, according to administration officials, even the decision—on the size of the post-2014 U.S. military presence in Afghanistan. That postponement is very wise. The discussion of the long-term presence is premature at this stage of the campaign. It is impossible to describe the security situation in 2015 before the 2013 fighting season has even begun. And considering that administration officials were floating the idea of keeping no troops at all in Afghanistan after 2014 when President Hamid Karzai came to Washington in January, the deferral of a decision on this matter is a relief.

Perhaps the most encouraging part of the change in

the White House decision-making is that—according to senior administration briefers—plans to cut the ANSF by more than 100,000 troops starting in 2015 are not final. It appears that the president is considering supporting the current force of 352,000 ANSF troops through 2017 instead. Maintaining a large ANSF is absolutely vital. It is almost impossible to imagine a security situation in 2015 in which dismissing more than 100,000 trained Afghan soldiers and police (meaning unemployment for many of them) makes any sense. It is equally important to wait until we have seen how Afghan forces perform after the American and international mission changes in 2015 before deciding on the future size and composition of those forces.

It is still possible, therefore, that coalition and Afghan troops may be able to hold onto gains already made and even expand them over the course of this fighting season. That hope justifies continued support for an important mission, as well as continued pressure on the White House to reduce the enormous risks it is assuming in Afghanistan in pursuit of extremely small rhetorical, political, and economic benefits.

The cost of keeping 14,000 troops in Afghanistan until next February rather than bringing them out by November is budget dust in the context of overall defense spending, let alone the national debt, the deficit, or any major social program. Even the cost of keeping all 34,000 troops now scheduled to come out over the next year in Afghanistan for another six or eight months would hardly register compared with other budget items. Administration officials accurately and honestly insisted that withdrawing those forces increases the risk of failure in Afghanistan. Accepting that increased risk—on top of the enormous risks the administration has already accepted by previous premature troops withdrawals—is difficult to justify.

The president's decision on Afghanistan was not as bad as it might have been—indeed, it was not as bad as it seemed certain to be at the start of this year. It leaves a glimmer of hope for success, which our commanders, troops, and diplomats in the field will exert all their powers to keep alive. But it was still a mistake that puts our nation's security in greater jeopardy. We hope that the president will continue to reevaluate his own willingness to accept risk in light of the rapidly diminishing economic and political returns he will receive from lowering force levels.

The war in Afghanistan is not yet lost. We are not yet losing, in fact, and success remains possible. But it is absolutely vital that the White House give General Dunford some flexibility to adjust the withdrawal timelines, and even to ask for temporary reinforcements, as the situation on the ground evolves.

—Frederick W. Kagan & Kimberly Kagan

The Papal Abdication

Benedict XVI's problematic farewell.

BY JOSEPH BOTTUM

In 1294, Peter of Morrone—San Celestino, little St. Celestine, as popular devotion calls him—was elected pope of the Holy Roman Catholic and Apostolic Church. The Spirit moves where it will; perhaps a shy, ascetic monk was necessary at that moment, to remind the church of its truest calling. The college of cardinals thought so, at least, desperate after two years of failing to choose a successor to Nicholas IV.

Still, no one should have been surprised that a man who had previously lived as a hermit in a cave in Abruzzi would prove one of the least competent administrators the world has ever seen. He never actually made it to Rome, ruling—if the word is allowed a certain looseness—from Naples and attempting such governance practices as disappearing for the whole of Advent to fast and pray. After five months and eight days in office, the saint had simply had enough. Citing his desire for a purer life, his physical weakness, his ignorance, the perverseness of those around him, and a longing for tranquillity, he issued a papal decree that popes had the authority to leave their office, and then took advantage of his decree to resign the papacy and flee to a monastic retreat in the forest.

Where he was promptly arrested by his successor and imprisoned till his death: a chess piece no one wanted but no one could allow to roam free in the complicated game of thrones that was European politics. A certain cynical wisdom lay behind the previous ban on resignations. It took a saint to brush all that aside—the political cynicism, perhaps rightly; the political wisdom, less so—and bad things followed. Pope Celestine V was intelligent enough to see the reasons that he should abandon the papacy, but he wasn't quite wise enough to see the reasons he shouldn't.

In 2005, a devout and serious theologian named Joseph Ratzinger was elected pope, taking the name of Benedict XVI in honor of St. Benedict, one of the founders of Western monasticism and, in interesting ways, one of the founders of the West itself. At the time of his election, commentators made much of Ratzinger's nod toward the Christian root of European self-understanding. They might have been better served by paying attention to his nod toward the monastic element—for in February 2013, Benedict XVI suddenly and inexplicably reaffirmed Celestine's decree of papal authority to resign and announced his own resignation from the office, effective at the end of the month. He would, he informed the world, be spending the rest of his life in prayer, isolated within a monastery.

In certain ways, the decision is intelligent. For the rigors of an extremely public office, the 85-year-old pontiff is increasingly and recognizably unfit. Always something of an isolated figure, he was a man with few close advisers. "He never talked to anyone," a Vatican official told me, "not really." He seemed to have no friends who were also high officials in the church—no counselors who could understand the stresses of his position. Worse, his natural distaste for the glad-handing part of the job was a constant burden. John Paul II drew strength from crowds; they revived his spirit even in his infirm old age. Benedict saw and felt the

NEWSCOM

Joseph Bottum is a contributing editor to The Weekly Standard *and the author, most recently, of* The Christmas Plains *(Image/Random House) and the novella "Wise Guy," an Amazon Kindle Single.*

press of people as a burden, necessary but uncongenial, and as the almost eight years of his papacy went by, one could see the endless papal audiences exhausting him more and more.

Besides, the central part of his public ministry proved to be his writing: As the wild schedule of jetting around the globe was to John Paul II, so authorship was to Benedict XVI—the place, the method, by which he hoped to reach the world. His Jesus of Nazareth collection (reaching its third volume this past Christmas with its bestselling account of the nativity narratives) may well prove the most lasting and influential project of his papacy, and why does he need to be pope to finish it? No, leaving behind the detritus and concentrating on the essentials, prayer and writing, in the years he has left—that's the smart thing to do.

It's just not the wise thing to do, maybe, as the reception of the news seems to have proved. The rehashing of the priest scandals in news reports—6 out of 26 paragraphs in the first *New York Times* piece, for instance—was probably inevitable; had he died, his obituaries would have done the same. But lurking within the ostensibly neutral reports was a suggestion that Benedict was resigning because of those scandals, and it filtered down the food chain of American information until the hosts of the television program *Entertainment Tonight* breathlessly suggested that the pope was forced to abandon St. Peter's chair by a recent made-for-television movie about clerical sexual abuse on a cable channel.

"In today's world, subject to so many rapid changes and shaken by questions of deep relevance for the life of faith, in order to govern the bark of St. Peter and proclaim the Gospel, both strength of mind and body are necessary," Benedict explained in the terse statement he read aloud, in his scholar's Latin, to a consistory in Rome on February 11. The truth is, however, that if proper governance of the church—doing the hard administrative work needed to sail that ship of the fisherman, St. Peter—were all that is required of a pope, then Benedict should have resigned long ago. His aging has brought little new; he has been, all in all, a terrible executive of the Vatican. Not in San Celestino's league, of course, but as bad as a pope has been for 200 years.

Some of the difficulties Benedict faced when he became pope derived from his Polish predecessor and the peculiar, fascinating way John Paul II seemed more to wear the papacy than rule it—administration by personal charisma. When John Paul II took office in 1979, he immediately perceived that he had been elected to lead an entrenched, recalcitrant (and mostly Italian) clerical bureaucracy in Rome—and a church outside of Italy that was still weak from the changes of the Second Vatican Council, locked in battles between conservatives, who thought the texts of Vatican II broke the church, and liberals, who thought the spirit of Vatican II required breaking even more.

John Paul's solution was simply to do an end run around both his problems. He carried the papacy with him, rather than leaving it in Rome with the bureaucrats, and although he found a few people to help him with theological applications (notably Joseph Ratzinger), he mostly ignored the Roman world and used his personal staff as a kind of shadow Vatican—more real, as the years went by, than the Vatican itself. What's more, he used the canons and decrees of Vatican II in a parallel way. Ignoring both armies of theological combatants in those 1970s-themed struggles, he ran around the world proclaiming directly to the people that Vatican II didn't mark any break at all—but was, instead, a fully orthodox, fully intelligible flowering of the church's long tradition.

As strategies for sidestepping the problems of his moment, both of these were brilliant and effective. Unfortunately, they also left the problems themselves unaddressed: time bombs waiting for his successor. For Joseph Ratzinger, Pope Benedict XVI.

And off with a boom they duly went. A church bank so incompetently run that the Bank of Italy finally prohibited all electronic teller transactions on Vatican territory, in an effort to stop the local criminals who were using them to launder money and cash in on stolen credit cards. A household staff who were pilfering papers and selling them to journalists and souvenir seekers. A press office that lurched from crisis to crisis like arsonists in firemen's clothes—apparently incapable of not pouring gasoline on the fires they were called to put out. The aftermath of the Regensburg lecture in 2006, for instance, in which the pope was accused of insulting Islam, ought to be mandatory reading for press secretaries in how never to behave.

As, for that matter, ought the press office response to the European reporting on the gradual uncovering, from 2005 to 2010, of the priest scandals of the 1970s and 1980s. It's possible that John Paul II didn't entirely believe the scandals at first; his only experience of such charges was in Communist Poland, where accusations of sexual crimes were a favorite device of the secret police to discredit opponents of the regime. But Joseph Ratzinger knew the actual facts, and it took stunning Vatican incompetence to turn him—one of the heroes of that vile era, the man who publicly denounced "the filth" in the church—into a popular villain of reporting on the priest scandals.

Perhaps no one could have done better than Benedict has with the looming problems that John Paul II managed to keep temporarily in the wings during the grand drama that was his pontificate. Still, the fact remains that Benedict has not done well with them—and perhaps mostly because he was never a good administrator. He was always a serious and absorbed theologian, and his advanced age is not the cause of his incapacity.

And yet, John Paul II also reminded us that running the Vatican isn't the sole or even the most important job of the pope. Being a teacher, a living example of holiness, remains at the center. "I am well aware that this ministry, due to its essential spiritual nature, must be carried out not only with words and deeds, but no less with

prayer and suffering," Benedict writes, but his resignation takes from the world stage that picture of a whole life, a rounded image of human existence with a shape and a goal.

After this, how will any of his successors feel able to do what John Paul II did, failing physically in the full view of the public—preaching one last homily with his death? Benedict speaks of the unique pressures of "today's world," which he insists require a younger man's strength of mind and body. But today's world is unique only because we say it is. Human life remains as it was, our aging and our deaths what they always were.

In other words, the modern world doesn't really need to see in the pope a model of competent administration, nice as that would be. It does need, however, a public reminder that we are not incapacitated as human beings when we age and prepare to die. We are not to be tucked away or compelled by moral pressure to remove our lives and deaths from public view. The older vision of life is the more complete one, and in today's world, perhaps uniquely, we are in special need of remembering that.

Besides, there remains the problem of political theory that the aftermath of San Celestino's abdication taught us. If popes can resign, then popes can be *forced* to resign, notwithstanding the fact that the church believes they are chosen with guidance from the Holy Spirit. And after they resign, what then? What are we to do with them? The sheer presence of a retired pope in a Vatican monastery may prove a burden and distraction for his successor. And if, with Benedict in 2013, a retired pope does not seem to pose a direct political threat, that hardly insures that no future retired pope will prove so. The political portions are part of the pope's job, too.

That's something, one suspects, that the ascetic monk Peter of Morrone didn't grasp while serving as Pope Celestine V, saint though he was. It's something that Joseph Ratzinger seems to have ignored as Pope Benedict XVI, saint though he too may be. ♦

Governor Walker's Play-by-Play

The State of the Union, as seen from Wisconsin.

BY STEPHEN F. HAYES

Madison, Wis.

Sitting in front of an oversized HD television in the basement of the governor's residence, a relaxed Scott Walker settles in to wait for Barack Obama to begin the first State of the Union address of his second term.

The residence is otherwise empty. Walker's wife, Tonette, is back at the family home in Wauwatosa, where he would join her later that evening. Aside from one security officer, there is no staff. Walker fetched plastic-wrapped dinner from the kitchen counter—roast-beef sandwiches on kaiser rolls, raw veggies, potato salad, and deviled eggs. The governor, on antibiotics for a sinus infection, opts for an IBC Root Beer rather than a cold (and exceptionally tasty) Spotted Cow, brewed nearby in New Glarus. One of the owners of the brewery, Walker says, is at the speech as a guest of Michelle Obama.

Out back, beyond several feet of fresh, untrampled snow, the surface waters of Lake Monona are frozen solid. Not long ago, during the chaos and controversy that attended Walker's budget reforms in 2011 and 2012, those waters made it possible for protesters to register their displeasure with Walker by boat. But things are quiet now, and not just because it's winter.

Walker's reforms worked. In two years, Wisconsin's $3.6 billion biennial deficit has disappeared. The latest projections from the state show Wisconsin with a surplus of $342 million, a figure that does not include funds deposited into the state's "rainy day" account. As Washington, $16.5 trillion in the red, debates whether the federal government has "a spending problem," Walker is rolling out additional reforms to make state government leaner in advance of the presentation of his next budget on February 20. Among those new proposals are major changes in Medicaid, welfare, and taxes, all of them designed to further reduce the role of government in the lives of Wisconsinites. With his party in control of both houses in the state legislature and a wonk's enthusiasm for policy innovation, Walker may be the closest thing to the anti-Obama that exists in a state capitol today. He watches the president's speech with a keen eye on its implications for states and its broader philosophical message.

As Obama begins, Walker's eyes alternate between the TV and his BlackBerry, on which he reads along with the president and notes every time Obama departs from his prepared remarks. The president opens with language that could have come from a Ronald Reagan speech, with a call for a limited government that "encourages free enterprise, rewards individual initiative, and opens the doors of opportunity to every child across this great nation."

Walker anticipates that Obama is saying this to set up a contrasting argument. "I agree with all of that," he says. "It's too bad everything he's going to talk about tonight contradicts that."

As predictions go, that's not exactly brittle-limb territory. Moments later, Obama begins his aggressive defense of government activism, and Walker begins doing what conservatives across the country are no doubt doing as the president speaks: talking at the

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television. Walker never raises his voice, but he offers a *Mystery Science Theater*-style running commentary on Obama's claims and promises.

Obama: "Most Americans—Democrats, Republicans, and independents—understand that we can't just cut our way to prosperity." (Walker: "We can't spend our way to prosperity, either. We have to grow.") "They know that broad-based economic growth requires a balanced approach to deficit reduction, with spending cuts and revenue, with everyone doing their fair share." (Walker, shaking his head: "How many times can you tax the rich?")

Obama: "Let's agree, right here, right now, to keep the people's government open, pay our bills on time, and always uphold the full faith and credit of the United States of America." (Walker: "To pay your bills on time means you don't spend more than you have.")

Obama: "I urge this Congress to pursue a bipartisan, market-based solution to climate change." (Walker: "If there are market-based solutions to climate change, why do we need Congress to act?")

When the camera focuses on a miserable House speaker John Boehner after a line that caused Democrats to jump to their feet, Walker is sympathetic. "That's got to be the worst job. You almost hope for a line you can get fired up for just so you stand up and get your blood circulating."

Walker, on Obama's universal preschool proposal: "Where does that money come from?" On the minimum-wage hike: "We need jobs that are well above the minimum wage, and this will keep young kids who want a job from being able to get one and get into the workforce."

When the speech is over, Walker offers praise for two passages—on immigration ("not half bad") and fatherhood—but overall thinks the address was a clunker. "It's a Trojan horse for more spending," he says. "I don't think he made the moral case for why we have to spend more money. He gave us a list of programs and he kind of gave the false perception that we can do all of this without shared sacrifice."

DAVE MALAN

Walker's chief of staff, Eric Schutt, had joined the governor halfway through the president's address. After the speech, he presented the governor with the proposed slides for a PowerPoint presentation on "Entitlement Reform" that Walker would give the next day. Walker had sketched his slides out on a single sheet of paper as he flew across Wisconsin, and his staff, apparently accustomed to the chicken scratching, used the draft to construct the presentation.

The announcement was a big one. Among other things, Walker declared that Wisconsin would pass on federal funding for Medicaid. He made this decision, at least in part, over concerns that the deteriorating fiscal situation of the federal government would leave Wisconsin responsible for making up the difference when that funding is cut in the future. "I don't think it's reasonable for us to assume the money is going to be there. It's my job as governor to consider both state-level finances and federal, and the feds are only going to be paying 100 percent for a few years."

Walker's plan seeks to shift some Medicaid recipients—those with incomes between 100 percent and 200 percent of the poverty level—to the health care exchanges set up under Obamacare, in which they will be eligible for federal subsidies to buy coverage. Those under the poverty line would remain on Medicaid. Walker's office projects that this will result in a 47 percent reduction in Wisconsin's uninsured and keep the state from opening itself up to greater dependency on a federal government unable to pay its bills.

Walker proposed other reforms, too, including new or additional requirements of those receiving food stamps and unemployment benefits. And his budget proposal will offer what one source describes as "significant tax cuts that are down payments on future tax cuts."

Walker's new proposals won't generate nearly the kind of attention that his budget reforms did. But his continuing reforms, like his running commentary during the State of the Union, suggest that the government in Wisconsin is heading in a very different direction than the one in Washington. ♦

The Obama Scorecard

Every government program is a winner.

BY FRED BARNES

Liberalism has its advantages. It puts government in the driver's seat and encourages the creation of more and more government programs that sound good and seem nice. Who could be against them? In his State of the Union address last week, President Obama touted a College Scorecard his administration would develop "to give students and families clear information about college costs and quality." Who could oppose that?

Conservatives should. A College Scorecard put together at the Department of Education in Washington is redundant, meeting a need that has long since been met. *US News & World Report*, the old newsmagazine, has been putting out college advice and rankings for years. Bookstores are teeming with college guides. The Internet offers plenty of free guidance.

Obama knows this. But there's a political method in his policy madness. If programs lifted from the liberal book of dreams are enacted, Obama and his allies will be thrilled. If conservatives—congressional Republicans in this case—block those programs, that's fine too. Democrats can exploit GOP opposition to winsome new programs to recapture the House in 2014 and transform Washington into a liberal juggernaut for the president's final two years.

There's an added benefit, a big one. Obama desperately wants to bury the deficit and debt issue by ignoring it, not by dealing with it. The media will help, as we've seen by their generally favorable coverage of his inaugural and State of the Union speeches. But Obama also needs a distraction from Republican emphasis on his fiscal recklessness.

If you think this tactic cannot work, think again. We've just seen it work brilliantly in Obama's reelection campaign. The election was less a referendum on Obama's first term—the norm for reelections—and more a negative verdict on Mitt Romney, the challenger. The Obama team cast Romney as a heartless corporate buccaneer and made him the centerpiece of its campaign. He was the distraction.

The revolutionizer-in-chief in Asheville

Given Obama's professed goal of a "growing economy that creates good, middle-class jobs," he has no alternative except to target Republicans and make them the distraction. In effect, he's accepted a slow growth, high unemployment, high tax, large debt economy, but he can't acknowledge it for obvious reasons.

Nor can he turn to the most effective tools for stirring economic growth and job creation—that is, cutting tax rates on individual income and capital gains and reducing government spending. He just raised rates on income and capital gains and wants to increase spending. Besides, Obama is loath to unleash the private sector to boost the economy. That way, government loses control.

So what we get from Obama, for example, is a proposal for a network of Manufacturing Innovation Institutes at a cost of $1 billion. He set one up in Ohio last year, plans to launch 3 more by executive order, and wants Congress to fund an additional 11. The institutes are—you've heard this before—a "partnership" of government, business, and local colleges that will "develop and build manufacturing technologies and capabilities."

This tired idea has been kicking around the Department of Commerce bureaucracy for years, and wiser administrations saw it for what it is, a boondoggle likely to increase employment only by the number of persons staffing the institutes themselves. Somehow manufacturing boomed in the 1980s and 1990s without these institutes.

But not to hear Obama tell it. He traveled to Asheville, North Carolina, the day after his speech to spread the word. "There are things we can do right now to accelerate the resurgence of American manufacturing," he said, starting with more of these "global centers." They're "number one" on his list of priorities.

Perhaps he believes they really can develop "the potential to revolutionize the way we make everything," as he claimed the Ohio institute has. But he didn't announce he'd immediately dispatch legislation to Capitol Hill, nor did he say he'd confer with members of Congress about authorizing more centers. Instead, he gave a speech in Asheville (in a right-to-work state, no less).

If Republicans roll their eyes at Obama's plan for government-created innovation, as they should, you can almost hear Obama's response now. Republicans don't care about the middle class, they're only looking out for the rich, they're anti-innovation.

The president has also positioned Republicans to be enemies of the poor. He's called for increasing the federal minimum wage from $7.25 to $9 an hour. Working at today's minimum wage, the head of a family of four would earn $14,500 a year, less than the poverty level, he noted in his State of the Union speech and again in Asheville.

Only the uncaring could oppose a minimum wage hike, right? Faced

NEWSCOM

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with that question, Republicans may capitulate. They shouldn't. Those earning $14,500 are potentially eligible for numerous stipends for the poor (food stamps, Medicaid, rent supplements), which mean they don't live below the poverty line. And when the minimum wage rises, the number of jobs declines, counteracting Obama's aim of adding jobs.

But the minimum wage is popular, and Obama's proposal to make preschool available to all low- and medium-income families may be as well. According to economics columnist James Pethokoukis of the American Enterprise Institute, it could cost as much as $100 billion over 10 years. But, as we've come to expect, Obama didn't cite a price tag when he promoted the program in Decatur, Georgia, two days after the speech to Congress.

He insisted "study after study" shows early education achieves positive results. On the contrary, the federal preschool program, Head Start, has poor results. "Every dollar we invest in high-quality early education can save more than $7 later on," Obama said, "boosting graduation rates, reducing teen pregnancy, reducing violent crime."

That must set a record for far-fetched claims for liberal social policy. But what difference does that make? The program is "for the children." Are you against giving every child in America a chance in life? Or as Vice President Biden might say, "Even if it helps only one child …"

All this will soon confront Republicans. Obama won't let go. And there's still more in his grab bag of programs: the Select USA Investment Summit, an Energy Security Fund (actually, it's a tax hike), the Fix It First project, the Partnership to Rebuild America, Project Rebuild, and Promise Zones.

For Republicans, the response may be easier than they think. It's simple: Forget the politics and do what's right. Obama thinks the public loves government programs and wants more, whatever the cost. If he's right, Republicans are doomed regardless of what they do politically. If he's wrong, a Republican comeback is slouching toward Washington. ♦

Bumps Along the Path to Citizenship

Put not your faith in federal bureaucracies.

BY PETER SKERRY

President Obama and the Democrats have made clear that their "path to citizenship" for illegal immigrants should be as direct as possible. Many Republicans are not sure they want any such path. Those who do, like Senator John McCain, call for "a long and arduous process." His fellow Arizona senator Jeff Flake agrees: "As more people learn of all these requirements that are put in place—back taxes, pay a fine, learn English not just for citizenship, to get your green card—and learn that it's going to take a while, they'll be more comfortable with this path." Yet the longer and more arduous this path, and the more twists and turns it involves, the less effective it will be in reassuring Americans that illegal immigrants aren't being given an unfair advantage.

Republican lawmakers are appropriately attentive to such anxieties, but in the aftermath of the November elections, they are also straining to be fair to millions of undocumented immigrants, who came here, after all, because other Americans wanted to hire them. To negotiate this minefield, Republicans should consider simpler options that offer prompt relief to the undocumented, while imposing fewer complicated rules and penalties that necessarily get administered by government bureaucracies in which so many Americans justifiably lack confidence.

Our experience with the Immigration Reform and Control Act of 1986 (IRCA) confirms suspicions that whatever Congress manages to agree on in the months ahead will not be satisfactorily implemented. Most glaring has been the complete inadequacy of IRCA's sanctions against employers hiring illegal immigrants. As for IRCA's notorious amnesty program, it was thrust upon an already poorly managed agency—the Immigration and Naturalization Service—that was more focused on keeping illegals out than on letting them in. Yet under pressure from immigrant advocates and activist lawyers, INS transformed itself into a legalization machine. In California, the hardline, Reagan-appointed INS regional commissioner literally donned a sombrero and went on the road with two compadres as "the Trio Amnestía" to promote the amnesty program.

There was nothing objectionable in any of this. In fact, it reveals how well-orchestrated external pressure can overcome bureaucratic inertia. But for many Americans, IRCA has left a disturbing legacy—hundreds of thousands of fraudulent amnesty applications that were passed on favorably. *New York Times* reporter Roberto Suro characterized one of the two major components of the amnesty program as "one of the most extensive immigration frauds ever perpetrated against the United States government."

It seems doubtful that this specific fiasco will be soon repeated. We do learn some things. And the INS has been absorbed into the monstrous Department of Homeland Security, which has plenty of problems but is undoubtedly an improvement over the old INS. In any event, DHS would almost certainly do a reasonable job of collecting the fines that just about everyone agrees must be levied on

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illegals wanting to regularize their status.

One looming challenge here is the English-language requirement. Existing ESL programs are already oversubscribed and woefully underfunded. Even if additional resources were appropriated for such efforts—a dubious proposition in the current context—it is not clear how well English is currently being taught to poorly educated immigrants preoccupied with working to support their families. This reflects a deeper neglect of assimilation, which Americans routinely call for but invariably do little to promote. None of this is likely to change under pressure to process millions of immigrants suddenly eligible for legalization. Indeed, the likely scenario is increased demand, inadequate resources, oversubscribed classes, and the inevitable—and in the event, understandable—lax enforcement of standards so as not to obstruct the path to citizenship. After all, who's going to want to stand in the way of a middle-aged cleaning lady with three kids becoming a citizen just because she doesn't speak much English?

As for collecting back taxes from illegals, prospects are even dimmer. To begin, illegals already pay sales and property taxes. Many also pay Social Security and other payroll taxes. But because they use fraudulent documents, those funds go to accounts under someone else's name. Some pay income taxes using Individual Taxpayer Identification Numbers (ITINs), devised by the IRS as an alternative to Social Security numbers for foreign nationals, including the undocumented.

The overarching question is whether the tax proceeds to be collected from low-income, unskilled workers would exceed the costs of securing those taxes. It would be a nightmare, for example, to reconstruct work histories in the informal sector where the undocumented typically labor. Even Steven Camarota, research director of the restrictionist-oriented Center for Immigration Studies, concludes that "this is not a provision to generate income, it is a provision to create the illusion of toughness the public likes."

The irony is that as Republican lawmakers attempt to respond to popular outrage about illegal immigration, they turn to procedures and agencies that their constituents typically—and justifiably—distrust. Put another way, Republican immigration reformers are relying heavily on an administrative state whose routine functioning is the source of much of the disaffection with government on which their party's political success has been based.

When it comes to immigration policy, popular skepticism is not misguided. Americans' diffuse anxiety about illegal immigration is no match for the narrower, well-organized immigrant advocates who will be litigating in the federal courts, plying the halls of Congress and the agencies, and working the media long after voters have focused on some other issue. Americans may not be able to articulate this scenario, but they feel in their bones that something is wrong when their elected representatives in Washington resort to such complicated schemes.

There is no silver bullet here. Given the institutional context within which Republicans must function, there is no avoiding such dilemmas. But Republicans must manage them skillfully and avoid alienating their base as they struggle to address immigration more responsibly than they have in the recent past.

My own view is that Republicans must keep their immigration proposals tough, fair, *and simple*. This is why I have argued for awarding illegals permanent noncitizen resident status—with no option ever of naturalizing. Such an approach would deliver up front a clear and decisive penalty to illegals and avoid complicated schemes designed to elicit remorse, levy fines, and extract back taxes. Meanwhile, illegal immigrants would receive what I believe most of them really seek—the ability to live and work in America without fear of arrest and deportation. Now that's simple! ♦

Fiscal Fitness

A political economy regimen for Republicans.

BY LEWIS E. LEHRMAN & JOHN D. MUELLER

A winning agenda for a political party must simultaneously satisfy the requirements of economic effectiveness and political success. Ronald Reagan had such an agenda in the 1980s. Subsequent Republican presidential candidates have not. The opportunity now is great. Far from having a free hand after reelection, President Obama is constrained by the same economic and political realities as everyone else. This is why his first act of 2013 was to sign into law a tax code in which the top rate on labor income is about twice the rate on property income, disappointing the dominant faction of his own party.

The four basic principles of successful American political economy may be summarized simply:

1. Current peacetime government consumption of goods and services should be funded by current taxation, not money creation—thus limiting peacetime government borrowing to an amount equal to government-owned investments of the same or lesser duration. This principle was first enunciated and implemented under President George Washington.

2. Current consumption of true public goods (such as national defense and administration of justice) should be funded with an income tax levied about equally on labor and property income. This principle was first implemented under Abraham Lincoln.

3. More narrowly targeted "quasi-public" goods, which benefit many but not all citizens, should have dedicated funding. Social benefits for specified individuals (Social Security, Medicare, and Medicaid, primarily) should be financed by payroll taxes on individuals, not by income or property taxes. This principle was first applied under Franklin D. Roosevelt at the insistence of his Treasury secretary, Henry Morgenthau.

The counterpart to this policy is that subsidies to property owners (e.g., tax-advantaged savings accounts and product, corporate, and banking subsidies) should be financed by taxes on property income (such as interest, dividends, rents, or capital gains), not payroll or income taxes.

4. Government's size and methods should be strictly limited in order not to displace private jobs, or cause general unemployment or disinvestment in people and property. This was attempted by Ronald Reagan (with its success limited by factors we will describe).

Yet the dominant factions of both parties have violated all four principles.

1. Both have relied on government deficit spending, financed by new central bank credit and money (from the Federal Reserve and especially foreign official dollar reserves), causing chronic episodes of commodity-led inflation, international payments deficits, and uncontrolled federal budget deficits (rationalized with the slogan "Deficits don't matter").

2. Both parties' dominant factions have diverted payroll-tax surpluses—labor income—to fund public goods, instead of using income taxes levied on both labor and property income. Democrats have done this to increase spending, and Republicans to give tax loopholes to favored constituents or cronies.

3. Republicans have sought to shift the burden of general government from all income to labor income, while Democrats have sought to subsidize personal social benefits (Social Security, Medicare, welfare, etc.) with the income tax and/or taxes on property income.

4. Both parties are complicit in permitting the levels of social benefits and income tax rates to mushroom to levels that crowd out new investment in people and property, causing declining productivity and prodding the U.S. birth rate to fall below replacement rate.

James Madison explained the foundation of these asymmetries in *Federalist* No. 10: "The most common and durable source of factions has been the various and unequal distribution of property." And Madison distinguished property in the narrow sense, meaning "dominion . . . over the external things of the world," from property in its "broader and juster meaning," which includes anyone's "property in the free use of his faculties," and even religious opinions.

As the nearby chart shows, Madison's account of factions remains a good description of U.S. national elections, as reflected in the American National Election Studies. Broadly speaking, self-identified Democrats and independent voters receive their family income disproportionately from labor (wages, salaries, fringe benefits), while self-identified Republicans received their family income disproportionately from property compensation (interest, dividends, royalties, capital gains).

While the first chart shows party identification by level and source of income, the second chart shows the evolution of party identification through the 2008 election. (The 2012 results won't be released for at least a year, but are unlikely to have changed much.) Since the reelection of Ronald Reagan, about 50 percent of American voters have identified themselves as Democrats, about 40 percent as Republicans, and about 10 percent as independents. This means that, like Ronald Reagan, to win, a Republican presidential candidate must attract all of the Republicans, all of the independents, and some of what used to be called the "Reagan Democrats."

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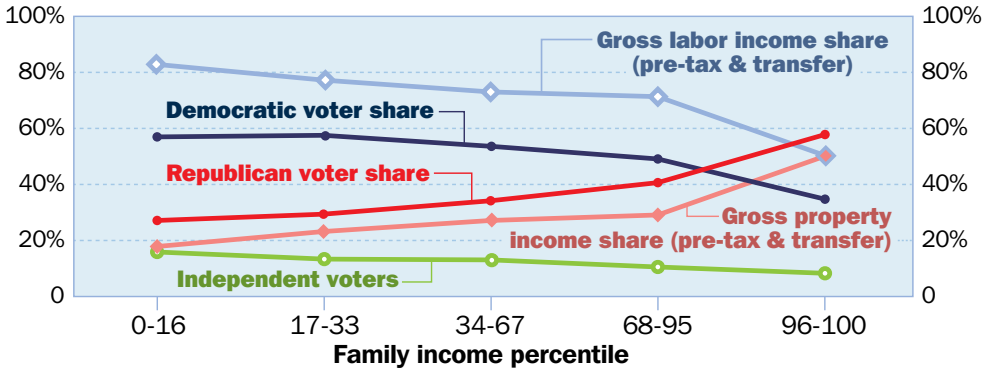
‘The most common and durable source of factions’ (Madison)

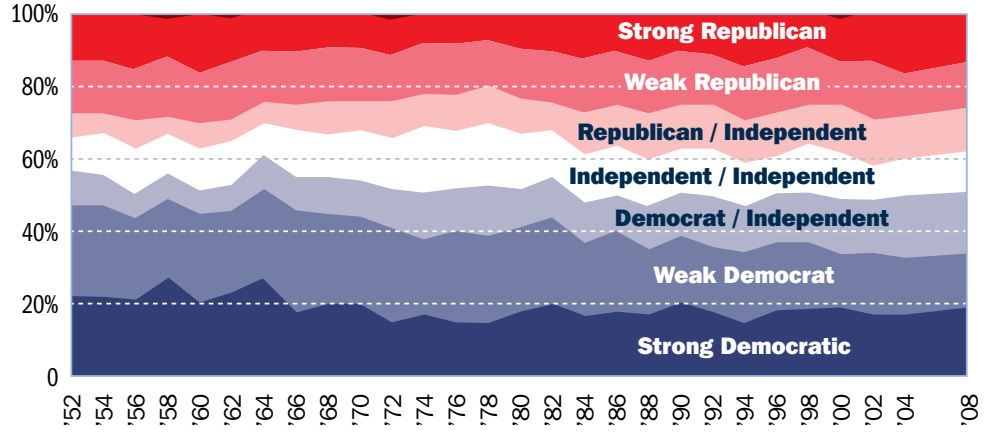
Level and Sources of Voter Family Income vs. Party Identification (including leaners)



Source: American National Election Studies (1952-2008 cumulative), Treasury, BEA
John D. Mueller, *Redeeming Economics*, Fig. 14-3

Self-Identification of American Voters by Party

American National Election Studies, 1952-2008



The key to Reagan’s success was treating, as far as possible, labor and property income alike. That fiscal policy explains why a government that was as divided as today’s—with a Republican president and Senate and a House controlled by Democrats—achieved some of the biggest legislative victories of the 1980s: the tax reforms of 1981 and 1986 and balancing Social Security in 1983.

But every Republican presidential candidate since has lost on the economic issue, because of the principle that Jack Kemp, who devised Ronald Reagan’s tax strategy, borrowed from Arthur Laffer: “When you tax something, you get less of it.” Once the GOP shifted its ideal from taxing labor and property income equally to shifting the burden of government onto labor income, the party’s presidential candidates lost the support of independent voters and Reagan Democrats. The principles outlined by Mitt Romney were actually the closest any 2012 Republican presidential candidate came to taxing labor and property income alike. But without a specific plan, like the across-the-board 1981 Kemp-Roth tax-rate cuts or the Republican and Democratic prototypes for the Tax Reform Act of 1986, there was no legislative vehicle to deliver on Romney’s principles. Given the electoral arithmetic we have described, it is hardly surprising that President Obama defeated Governor Romney.

The following agenda would update and apply these tested American maxims of successful public finance (put here in slightly different order):

Instead of taxing income when *received* by workers and investors, all labor and property income should be taxed when first *paid* by businesses, governments, or nonprofit foundations, at a single flat rate, with no exclusions or credits (including capital gains and capital consumption allowances). A single credit for “human maintenance,” based solely on family size, would rebate income *and* payroll taxes up to the poverty level. (Property maintenance costs are already excluded before calculating property income.) Since existing deductions and exclusions are progressively skewed, imposing a flat rate upon a consistent measure of income would leave the distribution of the federal tax burden little changed. This is the bargain: The dominant Republican party faction gives up progressive tax loopholes, and the dominant Democratic party faction gives up progressive tax rates.

Current Social Security, Medicare, and Medicaid benefits should be balanced by current payroll taxes and premiums. But if prospective Social Security deficits continue, because of a shrinking workforce and fertility rate (from 2.5 children per woman in 1971 to 1.9 now), benefits should be made proportional not only to a worker’s past contributions but also to the number of children each worker has raised.

Unemployment insurance—which added about 2 percentage points to the unemployment rate when it was extended to as many as 99 weeks—should be restored to its original 26-week limit, which should cause a sharp fall in the unemployment rate to below 6 percent.

Automatic open-ended financing of federal deficits by the Federal Reserve and foreign central banks should be ended by defining the dollar again as a weight of gold while refunding existing

official dollar and other official foreign currency reserves, much as Alexander Hamilton refunded the massive Revolutionary War debt.

We close with a prediction: President Obama will have succeeded, and any candidate of either party contending for the presidency in 2016 will succeed or fail, in precise proportion to his adherence to these classic and successful principles of American public finance. ♦

Railroad to Ruin?

Indiana's new governor faces a mass-transit decision.

BY RYAN LOVELACE

Fiscally conservative governors in Ohio, Wisconsin, and Florida have rejected billions of dollars in subsidies for the growth of high-speed rail and new public transportation projects in their states in recent years. Indiana's new Republican governor, Mike Pence, may have the opportunity to make a similar decision in his first year on the job.

But rejecting a proposed multibillion-dollar overhaul of central Indiana's public transportation system may prove difficult, given local support of the plan. Indianapolis mayor Greg Ballard, also a Republican, endorsed the Indy Connect Now plan at a November 15, 2012, press conference.

Mike Pence

"World-class cities provide their residents with world-class infrastructure that helps them achieve success," Ballard said. "We can no longer accept being the 12th-largest city in the country with a bus system that ranks 89th in the nation."

Indy Connect Now, a partnership of private and public officials who developed the plan, launched a promotional campaign featuring local television and radio ads earlier this year. The plan has received more than 8,000 petition signatures, 4,000 Facebook likes, and endorsements from dozens of local and statewide groups.

So Pence and Republicans in the Indiana general assembly will likely face harsh criticism if they turn down the proposal. Approving the proposal, however, could also bring public scrutiny, and Pence and fellow Republicans might lose support from fiscal conservatives.

The plan would cost approximately $2.3 billion over 25 years, according to Ehren Bingaman, the Central Indiana Regional Transportation Authority (CIRTA) executive director. During the first 10 years, $1.3 billion would be spent to build bus and rail infrastructure, including a 22-mile light-rail transit system connecting downtown Indianapolis with its wealthy northern suburbs. The completed public transit system would require $136 million to operate every year thereafter. The eventual price could well be much higher, as Bingaman said these calculations were made using the 2010 value of the dollar.

A combination of federal, state, and local money and transit fares is expected to fund the plan, with local funding coming from a proposed 0.3 percent income tax rate increase.

If the Indiana general assembly passes the bill and Pence signs it into law, officials in the counties that would pay the higher income tax would have a referendum on the surtax on their local ballots in November. If approved by voters, construction would begin in 2014.

Mayor Ballard wants to move on the plan now so Indianapolis can compete with similar metropolitan areas such as Charlotte, Minneapolis, and Salt Lake City for young talent, he said during his endorsement of the plan.

The unanswered question, in the event the state approves funding for Indy Connect Now, is whether Ballard's "if you build it they will come" approach to mass transit has any chance of succeeding in Indianapolis, or if the project would become a mammoth white elephant. Just 2 percent of workers use public transportation to commute to work in Indianapolis, according to the U.S. Census Bureau. More Hoosiers work from home in Indianapolis than use public transit.

Asking Hoosiers to embrace a public transit system similar to the defunct Interurban, a series of electric rail cars that connected Indianapolis with towns throughout Indiana and thrived during the early 20th century, appears to be a longshot. Indianapolis does not have the centralized population that a city such as Chicago does, and the Indy Connect Now plan would not change that.

How Pence responds remains to be seen, but Ron Gifford, the Central Indiana Transit Task Force executive director who has been pushing the plan's legislative agenda, said he is optimistic that Pence will sign the legislation if it reaches his desk.

Christy Denault, the governor's spokesman, said in an email, "Mike Pence would certainly give fair hearing to mass transit proposals, including high-speed rail, as long as those proposals were sustainable without ongoing support from the state." ♦

AP / DARRON CUMMINGS

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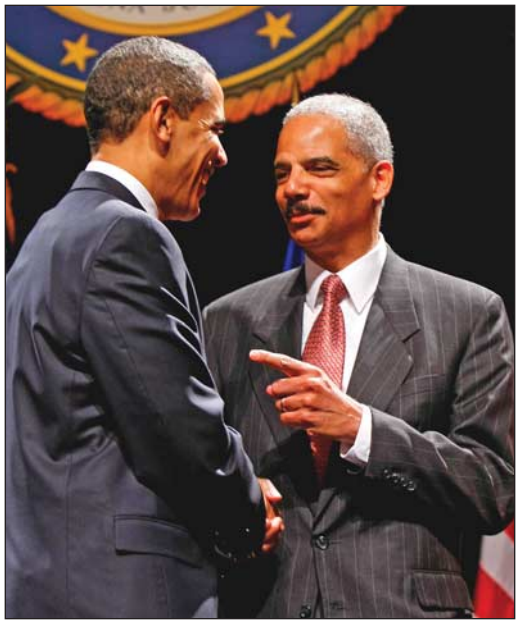
Politicizing Justice

Attorney General Eric Holder's agenda begins and ends with delivering favors to Obama's constituencies

By Charlotte Allen

On the morning of January 21, just before President Obama's second inauguration, Rep. Paul Ryan, the Wisconsin congressman and House budget chairman who had run unsuccessfully as the Republican candidate for vice president, was roundly booed by the gathered crowd as he left the Capitol to attend the ceremonies on the Mall. Within minutes Daniel J. Freeman, a young career trial lawyer with the Voting Section of the U.S. Justice Department's Civil Rights Division who was at the Capitol for the festivities, took credit in a Facebook post for instigating the anti-Ryan derision. "Just started the crowd booing when Paul Ryan came out," he wrote.*



What is interesting about Freeman's boast isn't just that a career civil servant considered himself entitled to indulge in, and encourage others to indulge in, some public and highly partisan incivility—helping to give Obama's second inauguration quite a different tone from that of his fellow Democrat John F. Kennedy, who had declared in his 1961 Inaugural Address, "We observe today not a victory of party, but a celebration of freedom." It's that Freeman, a 2007 graduate of Yale Law School who started working for the Justice Department in 2010, mirrors in his professional interests two of the political and ideological preoccupations of his ultimate boss, Attorney General Eric H. Holder Jr., appointed by Obama soon after taking office in 2009 and one of the few high officials in the administration who has survived into Obama's second term.

Charlotte Allen, a frequent contributor to The Weekly Standard, *last wrote on taxes in California.*

While in law school and during a yearlong fellowship afterwards, Freeman interned, apprenticed, and acted as student representative for several self-described "human rights" organizations, including the American Civil Liberties Union and its affiliate the New York Civil Liberties Union. Freeman's legal focus during that time, as he described it on LinkedIn, was "torture" and "military tribunals"—that is, attacking the counterterrorism policies of Obama's Republican predecessor, George W. Bush. War on Bush's war on terror has been a signature obsession of Holder's as well. In a June 2008 speech to the American Constitution Society, a liberal law group to which Freeman had belonged at Yale, Holder declared that "we owe the American people a reckoning" on such Bush-era interrogation practices as waterboarding and sleep deprivation. At the time Holder, who had served as deputy attorney general during Bill Clinton's second term, was a partner with the elite Washington law firm Covington & Burling, whose attorneys (although not Holder himself) were providing free legal representation to suspected-terrorist detainees at the Guantánamo Bay Naval Base in Cuba.

As for the Justice Department's Voting Section, the Holder years have been marked by an aggressive effort on the part of the section's lawyers to use the 1965 Voting Rights Act to nullify state voter-identification laws on the ground that requiring people to present a photo ID at the ballot box disenfranchises blacks and other members of ethnic minorities.

*Freeman's Facebook page has since either disappeared or been rendered inaccessible, and his Twitter account, @DanJFreeman, has been shut down. Both Freeman and the Justice press office declined my requests by phone and email for comment on the incident and did not respond to my requests for interviews with other personnel.

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Holder went so far as to call voter-ID laws "poll taxes" in a 2012 speech to the NAACP, referring to the onetime Southern-state practice, ruled unconstitutional in 1966, of denying blacks the vote by exacting a price that the poorest of them could not afford to pay.

Like master, like man, the old saying goes. In this case, it's like Holder, like Freeman. But it's also like Obama, like Holder. Each of Holder's belligerent stances on the above two issues has served and indeed reflected the interests of key Democratic constituencies that Obama courted during both his campaigns. One of the president's first executive orders, signed just two days after his inauguration on January 20, 2009, was a pledge to shut down the military prison at Guantánamo, which houses about 240 foreign nationals suspected of terrorist activities, including Khalid Sheikh Mohammed (KSM), the self-proclaimed mastermind of the massacre of 9/11. Tellingly, Obama tasked the Justice Department with closing the facility within a year and sending the detainees either to the United States for trial or back to their home countries. Getting rid of Gitmo—an event yet to materialize to this day—had been a nonnegotiable demand of the progressives who formed the hard-left substrate of Obama's base. They had also beaten the drum for Obama to hold war-crimes trials for Bush, former vice president Dick Cheney, and other Bush administration officials connected to torture allegations and wars in Islamic countries.

Less than a month after Obama took office, Holder celebrated black history month with a controversial speech to several hundred Justice Department employees in which he castigated America as 'a nation of cowards' living in 'race-protected cocoons.'

Similarly, on February 17, 2009, less than a month after Obama took office, Holder, 62, the first African-American U.S. attorney general, celebrated black history month with a controversial speech to several hundred Justice Department employees in which he castigated America as "a nation of cowards" living in "race-protected cocoons" who needed to have "frank conversations" about racial inequality. The implication was that whites were in sore need of reeducation. In another speech Holder vowed to "revitalize the Civil Rights Division" at Justice. That had a special ideological meaning. In his 2008 address to the American Constitution Society, Holder had promised that if Obama won the election, his Justice Department would be "looking for people who share our values," and that "a substantial number of those people would probably be members of the American Constitution Society."

This amounted to a declaration that workaday civil-service hiring at Justice, supposed to be strictly merit-based, would be governed by the same political considerations that have traditionally governed hiring at the very top, where assistant attorneys general in charge of divisions are appointed by and serve at the pleasure of the president. And so it was. According to hiring documents obtained by the PJ Media website under a 2011 court order (Justice had refused to provide the documents voluntarily under the Freedom of Information Act), the Voting Section made 16 new hires, among them Dan Freeman. The résumés of all 16 indicated involvement in liberal-activist causes ranging from abortion rights to amnesty for illegal immigrants. Many of the new hires had been directly involved in legal challenges to voter-ID laws, while others had tried to get state laws forbidding voting by convicted felons overturned (federal courts have declined to strike down the felon-disenfranchisement laws, which are permitted by the Fourteenth Amendment). The beefed-up Voting Section under Holder began an aggressive campaign against voter-ID laws, notably in South Carolina and Texas, invoking Section 5 of the Voting Rights Act, which requires changes in voting procedures in nine states (mostly in the South) and localities in seven other states to be approved by Justice in a process called "preclearance" before they can take effect.

Furthermore—and this is what Holder might have meant when he announced his intention to "revitalize" the 350-lawyer Civil Rights Division—Holder's division chief, Associate Attorney General Thomas Perez, appointed by Obama in 2009, seemed to reverse abruptly a Bush administration policy of strict race-neutrality in enforcing voter-fraud and voter-intimidation laws. According to *Who's Counting?*, a book about election fraud by *National Review* columnist John Fund and Bush-era Civil Rights Division counsel Hans von Spakovsky, Holder's Justice Department canceled an investigation into allegedly stolen ballots in black-majority Noxubee, Mississippi, and dismissed a Bush-era lawsuit against the state of Missouri for failing to purge registration lists of deceased and no-longer-resident voters as required by the National Voter Registration Act of 1993 (according to the book, numerous counties in Missouri had more registered voters than residents).

The most notorious turnabout from Bush-era policy was a Justice Department decision, on May 15, 2009, to abandon most of a voter-intimidation lawsuit filed during Bush's last weeks in office against the New Black Panther Party for Self-Defense, which had stationed two men in Panther uniform, one of them videotaped

wielding a nightstick, in front of a polling place in Philadelphia on Election Day 2008. Under Holder and Perez, Justice dropped charges against all the defendants except the man with the nightstick, King Samir Shabazz, against whom the department obtained a narrow injunction preventing him from displaying a weapon within 100 feet of a Phildelphia polling place through November 15, 2012. "We sat in stunned disbelief," wrote J. Christian Adams, a former career Voting Section attorney who had helped file the Panther suit, in a 2011 book, *Injustice: Exposing the Racial Agenda of the Obama Justice Department*. "Our superiors had sided with thugs, and all we could do was silently look at each other, helpless and beaten." Adams, who resigned from Justice in 2010, and Spakovsky were the driving forces at PJ Media behind the court order for the release of the Holder-era hiring documents.

Philadelphia's New Black Panthers man the polls, 2008.

In another Freedom of Information Act lawsuit, this one filed by the conservative activists at Judicial Watch seeking documents pertaining to Justice's sudden change of legal stance in the Panther case, U.S. District Judge Reggie B. Walton noted, in a July 23, 2012, opinion, that some of the emails and memos indicated that high-level Obama appointees at Justice had been discussing the case and its resolution during the days before the department filed its request for dismissal. This, Walton wrote, "would appear to contradict" Perez's sworn testimony before the U.S. Commission on Civil Rights, an independent federal agency that was investigating the Panther *volte-face*, "that political leadership was not involved in that decision." In a House hearing on the matter on March 1, 2011, Holder expressed irritation when Rep. John Culberson, R-Texas, read aloud a statement by Bartle Bull, a lifelong Democrat famous for his participation in the civil rights movement of the 1960s. Bull, who had witnessed Shabazz slapping his nightstick against his palm at the door of the polling place, stated that this was the most serious case of voter intimidation he had witnessed in his career. Holder countered that Bull's characterization of the event "does a great disservice to [the 1960s activists] who put their lives on the line, who risked all, for my people."

"My people"? Holder's father and maternal grandparents were immigrants from majority-black Barbados, where slavery was abolished by the British during the 1830s and Jim Crow unknown. Growing up in the Bronx, Holder moved easily from an academic program for gifted youngsters to Columbia University for both college and law school, graduating from the latter in 1976. Then followed a successful career as a federal prosecutor in Washington, appointment by Ronald Reagan to a judgeship for the District of Columbia in 1988 (where he was highly respected), and nomination by Bill Clinton as U.S. attorney for the District of Columbia in 1993 and, in 1997, as deputy to Attorney General Janet Reno. But Holder's foray into African-American victimology, like the "reckoning" on Bush's war against terror that he had promised progressives in mid-2008, was an appeal to a key portion of Obama's base. "The Civil Rights Division has been busy for the past four years making sure that Obama got reelected," said a former Justice employee in an interview. "There was even Obama campaign stuff on the office walls of employees' offices, which is supposed to be a violation of federal policy."

Under Perez, for example, the unusually active division has turned the subprime mortgage implosion into a civil rights cause, extracting a settlement of $335 million in December 2011 from Bank of America (which had acquired subprime pioneer Countrywide Financial Corporation) and $175 million in July 2012 from Wells Fargo & Co. Both lawsuits alleged the institutions' mortgage practices had a "disparate impact" on blacks and Hispanics, who tended to take out more of the high-risk loans than whites (the department accused the banks of steering minority-group members into the loans, but neither has admitted any wrongdoing). Justice further shored up Obama's Latino base with a 2010 suit challenging Arizona's new anti-illegal immigration law. The Supreme Court struck down most of the law's provisions as preempted by federal immigration policy on June 25, 2012, ten days after Obama announced that his administration would suspend immigration enforcement and streamline the route to citizenship for many young illegals. The Justice Department also filed a racial-profiling civil suit against Joe Arpaio, a hardline and outspoken opponent of illegal immigration reelected in November 2012 for a sixth term as sheriff of Arizona's Maricopa County.

Then there is Obama's overwhelmingly Democratic gay and lesbian base, appeals to which formed a prominent part

of the president's inaugural speech in January. On February 23, 2011, Holder, acting on Obama's orders, had announced that the Justice Department would cease defending the constitutionality of a key segment, Section 3, of the Defense of Marriage Act (DOMA), a 1996 law signed by Clinton, that defines marriage for federal purposes as existing only between a man and a woman. Under the Constitution it is supposed to be the president's—and thus the Justice Department's—duty to defend duly enacted federal laws in court. Justice effectively left no one to defend DOMA in several pending lawsuits alleging that the law unconstitutionally discriminates against gays and lesbians. In one of those cases, *U.S.* v. *Windsor*, which the Supreme Court will hear on March 27, the GOP-controlled House of Representatives directed its bipartisan legal advisory group to hire a lawyer in order to mount a DOMA defense, but there is a question as to whether the group has legal standing to defend a federal law. Meanwhile, gay-rights groups, liberal politicians, and the *New York Times* are currently urging Justice to get involved in *Hollingsworth* v. *Perry*, another same-sex case before the Supreme Court, regarding the constitutionality of Proposition 8, a 2008 ballot measure in California that also defines marriage as between a man and a woman. The justices will hear argument in *Hollingsworth* on March 26, and gay-rights activists want the department to file a friend-of-the-court brief arguing that Proposition 8 violates the Constitution's equal-protection clause.

One might ask: What did you expect? America's electorate has twice voted into office perhaps the most liberal president the country has ever known. That Obama would appoint Holder, who has never made a secret of his own liberal views (he opposes the death penalty and favors draconian federal hate-crime laws), to the post of the nation's chief law-enforcement officer should surprise no one. Politicization of the office of attorney general—and complaints about politicization from the party out of power—have been a constant in Washington at least since the days of Franklin D. Roosevelt, who used his attorney general, Homer S. Cummings, to draft the Supreme Court-packing legislation in 1937, surely setting the gold standard for egregious interference with the separation of powers. John F. Kennedy chose his relatively inexperienced brother to fill the position. Richard Nixon's attorney general, John Mitchell, went to prison for obstruction of justice and perjury over his role in the Watergate break-in and its subsequent cover-up. Alberto R. Gonzales, Bush's attorney general from 2005 until his resignation in 2007, was criticized by an inspector general following the dismissal of nine U.S. attorneys for improper political reasons, and critics charged that Gonzales ignored and even misled Congress regarding abuses by the FBI in collecting information about suspected terrorists under the post-9/11 Patriot Act. Another inspector general's report found that the Civil Rights Division during the Bush years had itself made hiring decisions on the basis of ideological affiliation, allegedly giving preference to lawyers whose résumés listed membership in the Federalist Society, the conservative opposite number to the American Constitution Society at law schools. Holder, like those predecessors, has a reputation for absolute loyalty to the presidents he has served. For example, he helped arrange—unwittingly, he later insisted—Clinton's pardon of billionaire financier Marc Rich, who was under indictment for tax evasion and illegal oil purchases from Iran, just hours before Clinton left office on January 20, 2001 (Rich's former wife, Denise, had been a major Democratic donor).

Janet Reno, Holder's immediate superior under Clinton, did her fair share of what appeared to be politics-based law enforcement. She had convened a grand jury for 16 months during the mid-1990s with the goal of finding evidence of an organized campaign by national antiabortion groups to bomb clinics and kill their personnel. Reno's Justice Department abandoned the probe in 1996 without securing a single indictment, prompting conservatives to charge that she had convened the jury solely to placate the radical feminists who formed an important part of Clinton's voter base. Certainly Holder could be said to have done less tangible harm to individuals than Reno. There has been no repeat of Waco, with its 76 dead in an FBI attack on a religious cult's compound in April 1993, or a Holder equivalent of the Elián González incident, in which a domestic dispute over the custody and repatriation of a 6-year-old Cuban boy escalated at Reno's instigation into a door-busting, machine-gun-wielding federal SWAT raid on the home of the frightened child's uncle in Miami. But there is a difference: "Reno had her own agenda, which wasn't necessarily Clinton's," said a former Justice employee. "She wasn't a D.C. political hack the way Holder is."

What is different about Holder is the sheer number of ideological pies into which he has sunk his thumb during four years in high office. Furthermore, a significant number of those adventures have produced results ranging from equivocal to disastrous, lending a Don Quixote-like cast to Holder's quests for justice. Even in the successful Justice Department challenge to Arizona's immigration law, the Supreme Court upheld the most tactically important feature of the statute: the right of law-enforcement officers to check the immigration status of people stopped for other reasons, including traffic violations. A 2008 report from the Maricopa County attorney's office had found that 22 percent of the felons convicted in the county, which encompasses the Phoenix area, were illegal immigrants, even though they accounted for only 9 percent of the population.

The most spectacular failure of the Justice Department's forays into politically contentious law enforcement to date—and the one that has made Holder's tenure most controversial—was Operation Fast and Furious, a 2009-2011 effort by Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to have licensed U.S. gun dealers in border states sell weapons to illegal straw purchasers who would then pass them on to Mexican drug dealers. The tactic, questioned by many career officials in the ATF because it meant losing control over the firearms, seemed to be linked to Holder's own views on gun control, which were predictably liberal. In 1995, for example, when Holder was U.S. attorney for the District of Columbia, he gave a speech to the Women's National Democratic Club expressing a need for society to "change the way in which people think about guns . . . and make it something that's not cool, that it's not acceptable . . . not hip to carry a gun anymore." It was difficult not to speculate, as many people did, that the real goal of Fast and Furious wasn't to finger the leaders of Mexican drug cartels via walked guns, but to demonstrate how easy it was for U.S.-sold firearms to end up in the hands of foreign criminals—with the hope of fomenting public outrage that would trigger tougher gun restrictions in America. If that were true, Fast and Furious could be said to resemble Obama's use of the December 14 massacre of schoolchildren in Newtown, Connecticut, to launch a gun-control offensive in Congress. (Holder and Obama met in the White House on January 28 in a gun-control photo-op with the police chiefs of Newtown and other cities where shooting rampages have occurred in recent years.)

In any event, Fast and Furious proved to be a calamity, with the ATF losing track of nearly 2,000 weapons, hundreds of which were later recovered at crime scenes and in Mexican drug lords' caches. A Mexican legislator claimed that about 150 Mexican civilians had been killed or wounded in the altercations, which did little for diplomatic relations between the United States and Mexico. Finally, a U.S. Border Patrol agent, Brian Terry, was murdered on December 14, 2010, during a firefight over the interception of a drug shipment in southern Arizona. Several walked weapons were found at the scene of the homicide, and Operation Fast and Furious was shut down shortly afterwards. Both Holder and Obama maintained they knew nothing about the gun-walking program until after Terry's death. Holder, however, refused to turn over about 1,500 pages of Fast and Furious documents to a House oversight committee investigating the debacle this past summer, and the White House refused to cooperate with the Justice Department's inspector general, Michael Horowitz, who was also conducting a probe. On June 28, the House voted 255-67 to hold Holder in contempt of Congress, the first time it had ever taken such a dramatic step against a sitting attorney general.

The Holder Justice Department's legal assault on state voter-ID laws has not exactly been a success, either. Such laws are overwhelmingly popular. In a *Washington Post* poll last August, 74 percent of respondents believed voters should have to show some form of photo-identification when they cast ballots (57 percent said they "strongly" agreed). Support among the elderly and those with household incomes under $50,000—cohorts that might be least likely to possess identification documents—was in the 75 percent range, and two-thirds of nonwhites also backed voter ID. This is not surprising, since photo-IDs are now required for a range of everyday activities, from driving a car to boarding an airplane to cashing a check to buying a six-pack of beer. Some 30 states already require voters to show ID at polling places, as a deterrent to fraudulent and duplicate voting.

On August 30 of last year, a three-judge federal court panel in Washington upheld the Justice Department's block on a photo-ID law in Texas, the largest state subject to preclearance under the Voting Rights Act. The panel held that requiring a photo-ID would impose "strict, unforgiving burdens" on poor blacks and Hispanics in rural areas. (The IDs were free, but residents who lacked copies of their birth certificates would have to spend about $22 to obtain necessary documentation, which the court said would force "poorer citizens to choose between their wages and their franchise.") That meant, however, that an older Texas voter-ID law that did not require a photograph would continue in effect.

Then, on October 10, a different three-judge panel unanimously rejected a similar discrimination argument against South Carolina, another preclearance state. South Carolina's law allowed for identification by affidavit if a voter found it too difficult to obtain an official photograph. (The court did say that it was too late for South Carolina to implement the law in time for the November 2012 election.) On January 4 the panel further ruled that the federal government—that is, U.S. taxpayers—would have to reimburse South Carolina as a prevailing party for some of the $3.5 million that the state spent on court costs and legal fees in order to defend its statute.

It is believed by some observers that the entire South Carolina lawsuit was gratuitous; that the Voting Rights section had chosen to ignore an internal memo (which Justice has refused to release) urging preclearance of the South Carolina statute, which gave state voters a generous range of five sources of acceptable photos plus the affidavit alternative. In 2005 the Justice Department had precleared a photo-ID law in Georgia that was nearly identical to South Carolina's. But Holder's Civil Rights chief Perez, in a 2011 letter to South Carolina's government, insisted that the Voting Rights Act would be violated in that state because 10 percent of South Carolina's nonwhite voters lacked

photo-identification, in contrast to 8.4 percent of white voters.

Nonetheless, Holder, Perez, and the Civil Rights Division may have painted themselves into a corner. The Supreme Court will be hearing arguments on February 27 on the constitutionality of Section 5 of the Voting Rights Act, in *Shelby County* v. *Holder*. (Shelby County is in Alabama, another preclearance state.) The main argument is that Section 5, reauthorized by Congress for 25 years in 2006, not only intrudes upon state sovereignty by requiring federal micromanagement of the tiniest changes in local election procedures (such as moving a polling place a couple of blocks), but is anachronistic. Section 5, which puts the affected states and localities into a kind of federal receivership under the thumb of the Justice Department, started out in 1965 as an emergency response to Southern-state abuses, with an original shelf-life of only five years. Yet Congress has repeatedly renewed Section 5 along with the rest of the Voting Rights Act, rewriting the act's preamble in 1982 to permit Justice to attack state and local election procedures that produce the "result" of lower minority turnout, whether intended or not. Furthermore, starting in the 1970s, Justice began including Hispanics, Asian Americans, and other groups besides blacks as eligible for Voting Rights Act protection. That resulted in three boroughs of New York City, hardly a stronghold of the Ku Klux Klan, finding themselves subject to Section 5 preclearance to this day.

Perhaps because of Section 5's obvious trespass on federalism, the provision had been falling into disuse as an enforcement mechanism well before Obama took office. (A different provision, Section 2, still allows the Justice Department to sue states and localities for violating the act after the alleged violation takes place, bypassing the heavy-handed preclearance process.) Indeed, the last time before Holder that Justice had invoked Section 5 to block a state election law was in 1994. And just as Holder's department began revving up its Section 5 attacks on South Carolina and Texas, the Supreme Court began dropping hints that Section 5's long-term prospects were in doubt. In a 2009 decision, *Northwest Austin Municipal Utility District No. 1* v. *Holder*, the High Court ruled 8-1 to allow the utility district to escape Section 5 oversight, with even liberal justices signing on to an opinion by Chief Justice John Roberts stating that the provision "imposes current burdens and must be justified by current needs." In 2008 the Supreme Court had upheld a photo-ID law in Indiana against a Democratic party challenge. Holder's promise to "revitalize" the Civil Rights Division could well result in the Supreme Court's ruling that the very apparatus he has chosen for revitalization is unconstitutional.

Operation Fast and Furious—an effort by Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives to have licensed U.S. gun dealers sell weapons to illegal straw purchasers who would then pass them on to Mexican drug dealers—proved to be a calamity, with the ATF losing track of nearly 2,000 weapons.

Similarly, Holder's efforts to nullify the Bush administration's war on terror have resulted in, well, not much. Long before Obama became president, he had promised his progressive base that he would reverse nearly all of Bush's antiterrorism policies. "As president, I will close Guantánamo, reject the Military Commissions Act, and adhere to the Geneva Conventions," Obama declared in an August 10, 2007, speech. The Military Commissions Act, signed into law by Bush in 2006, established military tribunals, with their limited constitutional protections, as the venue for trying foreign-born enemy combatants captured outside the United States. The law, revised in 2009 to ease its due process restrictions somewhat, effectively ratified the Bush administration's use of tribunals to try foreigners suspected of 9/11-related activities.

Civilian rights and civilian trials for foreign terrorism suspects were a rallying cry of the left throughout the Bush years but managed to outrage nearly everyone else. Holder's decision to classify the so-called underwear bomber, the Nigerian national Umar Farouk Abdulmutallab, who was caught with explosives on a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day in 2009, as a civilian despite evidence of al Qaeda ties—and also to have the FBI read him his Miranda rights after only 50 minutes of interrogation—met with much criticism that the attorney general was sacrificing national security to a preoccupation with procedural niceties for alleged terrorists. Fortunately for Holder's political future, Abdulmutallab, after firing his lawyers and insisting on representing himself, pleaded guilty in 2011 to eight counts, including attempted mass murder and attempted use of a weapon of mass destruction; he was sentenced to life in prison.

Even more scandalous, in the eyes of Holder's critics, was his decision in November 2009 to try Khalid Sheikh Mohammed in a civilian federal court in lower Manhattan. That meant terminating an ongoing military trial of Mohammed in Guantánamo, where KSM had already indicated

he would plead guilty. Bipartisan protests against Holder's proposed Manhattan trial venue quickly ensued, especially among New Yorkers angered by the months of likely traffic paralysis near the courthouse, and also by the prospect that more lenient civilian trial rules could result in KSM's release in the very shadow of 9/11's Ground Zero. Holder tried to calm the furor by hinting that it would actually be a show trial: "Failure is not an option." To forestall such trials, Congress in 2011 passed a law forbidding the use of federal funds to transfer Guantánamo detainees to the United States—a law criticized both by Obama (who signed it anyway) and by Holder, who continued to insist that KSM was due a civilian trial. KSM and four alleged co-conspirators are currently undergoing a second trial before a military commission at Guantánamo. The military prison at the base remains open, despite a promise by Obama during his 2012 campaign that he would renew efforts to shutter it. One problem is that few other countries want to take any of the detainees at the base.

Holder also promised a "reckoning" for Bush-era waterboarding and other harsh interrogation techniques practiced by the CIA at Guantánamo and also at secret CIA prisons—or "black sites"—abroad where some suspected terrorists had been forcibly transported in a process called rendition. Whether harsh interrogation—forcing prisoners to stand for long periods of time or assume uncomfortable positions, assaulting their ears with high-decibel rock music, and leaving them naked in chilly cells—actually amounts to torture remains an open question, since none of those methods inflicts the intense pain or lasting physical damage traditionally associated with torture. Most of the interrogation methods relied on deception and fear rather than physical torment to persuade the suspect to disgorge information: slaps, sleep deprivation, a harmless caterpillar described as a stinging insect.

Waterboarding was the most controversial of the interrogation methods, since it involved tying the suspect to a plank and simulating drowning, by all accounts a terrifying experience. Yet, as a 2007 investigative report by ABC News revealed, waterboarding was used on exactly three al Qaeda-linked figures, all during the course of a single year, 2002-2003. One of the three was KSM, who had been held in a CIA secret prison since 2003 before being transported to Guantánamo. Fewer than three dozen prisoners in total —about a third of those in CIA custody—were subjected to any form of harsh interrogation. And if any excuses might be made for their treatment, nearly all the extreme measures were carried out during the first two years after the 9/11 massacre, when government agents were desperate to obtain information quickly about any possible future 9/11s. And it indeed appeared that enhanced interrogation yielded valuable information, some of it helping to lead, for example, to the location of al Qaeda leader Osama bin Laden in Pakistan.

Meanwhile Jay Bybee, assistant attorney general in charge of Justice's Office of Legal Counsel under Bush (Bybee is now a federal appeals court judge for the Ninth Circuit), and John Yoo, a law professor at the University of California, Berkeley, who worked in the Office of Legal Counsel from 2001-2003, had written a series of letters and memos in 2002 and 2003 for the CIA and the Defense Department giving the green light to waterboarding and other harsh interrogation tactics. The memos concluded that the tactics did not meet the legal definition of torture and were permissible if not engaged in on U.S. soil. Yoo, an advocate of expansive presidential powers, was an intimate of Cheney, ever the interrogation hardliner. Many career lawyers in the Justice Department believed that, via the Office of Legal Counsel, which gives legal advice to other government agencies and prides itself on its integrity, "the White House was pressuring the Justice Department and politicizing it," a former Justice lawyer told me. "It was a very uncomfortable time for the department."

In 2003 Jack Goldsmith, now a Harvard law professor, succeeded Bybee. In 2004 Goldsmith rescinded all the Bybee-Yoo interrogation documents and then resigned from office. That same year the CIA's inspector general conducted an investigation of the CIA's interrogation practices and turned over the resulting memo to the U.S. attorney's office for the Eastern District of Virginia, which has jurisdiction over the CIA's headquarters in Langley, Virginia. A special team of career prosecutors from that office also performed an investigation, but it eventually issued "declination memos" citing such reasons as insufficient evidence of criminal conduct and intent and low probability of conviction for all involved in the interrogations except one outside contractor, who was convicted of assault. By 2004 the unauthorized abuse of detainees by members of the military at the Abu Ghraib prison in Baghdad had become public knowledge, shocking Americans and leading to court-martials and prison sentences. In 2005 Congress passed a law limiting the use of harsh interrogation, and in 2006 Michael Hayden, a former director of the National Security Agency, became CIA director and specifically outlawed waterboarding and other extreme techniques.

In November 2005, in the midst of the furor over waterboarding, the CIA had destroyed dozens of videotapes its agents had made of their interrogations of the two other al Qaeda suspects who had been waterboarded, Abu Zubaydah and Abd al-Rahim al-Nashiri, both prisoners at a CIA black site believed to be in Thailand. The destruction did not come to light until 2007, when information about it was leaked to the *New York Times*. In January 2008, Michael Mukasey, who succeeded Gonzales as attorney general, appointed John H. Durham, an assistant U.S. attorney in Connecticut with a reputation

for securing convictions in tough cases, to conduct an independent investigation of the tape destruction to find out whether there had been obstruction of justice or other criminal misconduct. Durham duly convened a grand jury in Alexandria, Virginia.

What Holder did when he encountered this state of affairs upon becoming attorney general in 2009 was essentially to use the CIA's interrogation practices to make a humiliating spectacle out of both the intelligence agency and the Bush Justice Department. In April 2009, Obama released to the public four previously confidential "torture memos," as they came to be called, one of them written by Bybee for the CIA in 2002 providing details of 10 different Bybee-approved techniques, including waterboarding, designed to "increase pressure" upon detainees to talk. The other three memos were written by Justice officials in 2005 explicitly condemning those enhanced-interrogation techniques. In May 2009 Holder's Justice Department announced that its Office of Professional Responsibility (OPR) was nearing completion of an internal investigation of Bybee and Yoo that would not result in prosecution but would lead to a recommendation that the two be disbarred or otherwise disciplined by state bar authorities. (Those disciplinary actions never took place.)

Then, in August 2009, while Durham's grand jury was still hearing evidence on the tape destruction, Holder expanded the scope of Durham's mandate to include not just the alleged destruction of evidence but the CIA's interrogation techniques themselves. He thus ignored (some say never bothered to read) the declination memos produced by the team of career prosecutors of the Eastern District who had decided there wasn't enough evidence to prosecute. Holder did hint that he might have some new evidence of CIA wrongdoing, because OPR was also conducting a probe of abuses of detainees. This was an unusual task for OPR, whose bailiwick is supposed to be limited to examining alleged ethical violations by Justice lawyers, not the employees of other government agencies. Holder also released a redacted version of the CIA inspector general's investigation—a gesture that had no tactical significance beyond further demoralizing an already demoralized CIA, whose agents would now have to appear before a grand jury, and playing to the desire of Obama's progressive base to associate the Bush administration with war crimes. Even Leon Panetta, Obama's own appointee to head the CIA, protested the reopening of the criminal investigation.

After the great ideological fanfare of 2009, the case against the CIA slowly fizzled out. In November 2010, when Durham had failed to produce any indictments, Holder announced that there would be no charges stemming from the destruction of the videotapes. In June 2011, Holder further announced that he was closing the cases—again because there had been no indictments—of all but 2 of the 100 detainees whose cases had been reviewed for evidence of abusive treatment. Then, on August 29, 2012, Holder declared that those last two cases, both stemming from the deaths of prisoners in CIA custody in 2002 and 2003, would also be closed. Holder maintained that his department had declined prosecution solely because "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt," and not because the CIA had been exonerated "regarding the propriety of the examined conduct."

In his investigations of waterboarding and other interrogation practices, 'Holder was using the CIA as a prop in a political drama,' a former CIA employee told me. 'The idea was to wait for the public outrage—but there wasn't any.'

"Holder was using the CIA as a prop in a political drama," a former CIA employee told me. "The idea was to wait for the public outrage—but there wasn't any." In truth, few Americans cared much about the fates of a few dozen alleged terrorists caught in the aftermath of a catastrophe that traumatized the nation. "Most people just got tired of the argument that enhanced interrogation is always wrong. There's a streak of pragmatism in the American people. They'd listen to all the human-rights charges, and then they'd say, 'How about those Redskins?'"

And now, more than four years after George W. Bush left office, the stage sets in that political drama have shifted, at least where the war on terror is concerned. Obama's drone strikes have killed orders of magnitude more suspected terrorists than interrogation at CIA black sites ever did. And as for Holder, as early as March 2012 he argued for the constitutionality of using drones to kill American citizens abroad who were suspected of al Qaeda ties. (Two such drone attacks in Yemen in 2011 targeted and killed U.S. citizens who had never been formally charged with terrorist activities.) White House antiterrorism adviser John Brennan, selected by Obama to become the next CIA director, said in a speech last year that the fatal strikes were "consistent with the inherent right of self-defense." He sounded as though he were reading from one of John Yoo's memos defending waterboarding. As Obama goes, so goes Eric Holder's Justice Department. Like master, like man. ♦

The Perils of Reform

Our immigration system can be fixed, but Republicans should aim for better policies, not better pandering

By Irwin M. Stelzer

Put vote-getting ahead of policy. Then conflate and aggregate. That's all you have to do to make a mess of immigration reform. Which is what our political class seems determined to do.

Although the details of reform legislation have yet to be worked out, the broad contours of the deal can be seen through the rhetorical haze that passes for political debate. Illegal immigrants will be granted probationary legal residence and the right to work if they have avoided any crimes other than crossing our border without permission. This amnesty will be followed by permanent residence, the first step on a path to citizenship, but only after a board of governors, state attorneys general, and notables from border states testifies that the border has been secured. These probationary guests are to be denied access to Obamacare and other public assistance and will eventually have to pay back taxes when applying for citizenship.

There you have it. Sounds reasonable enough, with great appeal to the generosity of most Americans, many acquainted with some of these immigrants, whom they know to be hard-working. And to politicians in a bidding war for the votes of these citizens-to-be and, until then, of American citizens of Hispanic origin.

There is no denying that current policy needs fixing: As John McCain once told an insistent deport-them-all advocate at a small meeting in our living room, "Lady, we don't have 11 million pairs of handcuffs in America." Not only is mass deportation infeasible, it would be inhumane. More inhumane even than leaving 11 million people—12 million according to Patrick Leahy, chairman of the Senate Judiciary Committee, or is it 15 million as many of my Colorado neighbors contend?—to struggle along in some zone between illegality and de facto acceptance. As the president is fond of saying, "There is work to be done."

This is no easy chore. Emotions run high, not only among the illegal immigrants but among politicians who are in a bidding war for the favor of a voting bloc that is large and growing larger. So far, game, set, and match to the Democrats, who corralled some 70 percent of Latino voters in the recent elections, in part with promises of college and work permits for their kids—no legislation necessary, as the president exercised "prosecutorial discretion" on a massive scale. Now, a frightened batch of Republicans who once took a dim view of illegal border-crossing has entered the bidding in the hope of wooing this bloc to their banner.

Why they think this is possible is difficult to understand. Yes, many of these largely Hispanic illegal immigrants are socially conservative—they attend church, buy homes, start small businesses, and work hard, with over 90 percent of adult men in the labor market according to Pia Orrenius and Madeline Zavodny, economists at the Dallas Fed and Agnes Scott College, respectively. Those characteristics, argue conservative analysts in a display of the triumph of hope over experience, make them natural conservative voters. Alas, not so. There is another group that works hard, starts businesses, and should find the don't-overtax-the-rich mantra of Republicans attractive: Jews. But they identify with the underdog, even now, and see WASPy Republicans as less likely to understand them. Why Republicans think illegal immigrants, having trod the winding path to citizenship, will be any easier pickings than Jewish voters, I don't know. Surely, a better strategy than entering a bidding match against masters of that art would be to support sensible policies and compete for the great mass of voters on the basis of superior policymaking rather than superior pandering.

That requires avoiding the twin perils of conflation and aggregation. Start with the error of conflating the need to do something about the status of illegals with providing

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them a path to citizenship. Many people who understand the desirability of giving these illegals some sort of stable life don't understand why that goal requires a path to citizenship for people who have jumped the queue. Granting legal status to these millions so that they might enjoy a more decent existence is one thing. Granting them the right to vote and to participate in the determination of the policies, domestic and foreign, of a nation they have entered illegally is quite another. Those who arrived as children, illegally but involuntarily, have a reasonable claim to more generous treatment. If recollection serves there is something in our tradition about not visiting the sins of the fathers on their sons. Arguably, creating a path to citizenship for this second generation is not a reward for illegal behavior, as it would be in the case of their parents. And, unlike their parents, this group will be proficient in the English language, as we define proficiency these days.

Their parents, however, have no claim that demands conflating the grant of a more secure status with citizenship. The British grant many people, this writer included, "indefinite leave to remain," which conveys the right of residence and freedom to find work, but not citizenship. Such a status might be a model for reform of our treatment of illegal immigrants. But do not for one moment believe that the millions with their residence "regularized" can be barred from the use of public services, a provision some would include in the immigration reform legislation. Teachers are not going to turn away such students, doctors are not going to refuse them care when they present themselves at hospitals in an emergency, police are not going to tell any who become crime victims that their assailants will not be pursued. Give them the right of residence, and you are effectively giving them access to the same public services to which citizens are entitled.

Do not for one moment believe that the millions with their residence 'regularized' can be barred from the use of public services.

Having avoided the error of conflation, then disaggregate. The 11 million are not a homogeneous group. Everyone knows that, but the president and his party see their chances of getting the mass of the 11 million on the path to voterhood maximized by lumping millions of unskilled non-English speakers, nearly two-thirds of whom have never graduated from high school, with engineers who entered the country legally and received their advanced degrees here. That is why the president has warned Republicans "not to pull this thing apart," and the Democratic leadership in the Senate is insisting on a comprehensive bill—the sort preferred by Nancy Pelosi, whose idea of good policy is not to find out what is in a bill until after you pass it.

Avoiding this politically inspired aggregation is one of the keys to sensible policy. A guest worker program will take care of the needs of those who come for seasonal work: There is no need to issue permits that extend beyond the season or period in which those needs exist. Some will, of course, not go home and will overstay their visas. But far fewer than would were the amnesty granted the 11 million to include a path to citizenship. At the other end of the labor market, the highly trained and highly skilled can be granted both indefinite leave to remain and a path to citizenship, on the general theory that they will over their lifetimes provide a net benefit to the American economy and are more rather than less likely to learn English and otherwise assimilate. How many? Let employers bid for visas, rather than doling the bulk of them out for family reunification, and use the funds to offset some of the social costs imposed on communities with high percentages of immigrants.

After all, it is employer groups that are clamoring for more visas for these sorts of immigrants, whom they prefer to hire rather than the trained Americans available in ample supply, if data compiled by Ross Eisenbrey of the Economic Policy Institute ("America's Genius Glut," *New York Times*, February 8) are to be believed. I have not attempted to decide whether the EPI data or the view of Caterpillar's chief technology officer Gwenne Hendricks that we "need to have access to the best skills in higher volumes than we can access just out of the North American market" more closely represents reality. But even if Hendricks is correct that such home-grown talents are not now available, it is unclear why increasing compensation for these skilled positions, rather than holding the line on pay by importing talent, would not increase the domestic supply in the long run. Which may be why the Silicon Valley CEOs are pressing so hard for comprehensive reform, without which "the odds of high-skilled [legislation] passing . . . is close to zero," according to Robert D. Atkinson, president of the Information Technology and Innovation Foundation.

Consider the analogy of the law business. When it was booming and compensation was rising, students flocked to law schools. Now that the bloom is off that rose, and law firms are either not hiring or keeping compensation under control, law-school enrollment is plummeting, so much so that some schools are threatened with closure. The price system works, in labor markets as well as in the markets for goods and services.

Then there is the great mass of the illegals. These people should be allowed to stay, out of the shadows. In part because this is the humane thing to do, in part because we have no feasible way of deporting them, and in part because with few exceptions they are hardworking, granting the

right to remain is worth the risk that it will encourage a new wave of illegal immigration. And that risk is far from trivial. After all, it would not be irrational for a prospective illegal entrant to believe that just as Reagan granted amnesty to 2.7 million in 1986, and we are now considering granting amnesty with a path to citizenship to 11 million, some day he or she will receive a similar blessing. Yes, the current amnesty is advertised as "probationary." But there is no conceivable circumstance under which the passage from probation to permanent residence to citizenship would be halted, unless the politicians in charge of determining whether the porosity of the border has been reduced declare that effort a failure. Anyone who believes that a group of vote-seeking politicians would risk antagonizing millions of potential voters might usefully spend his time bidding for a bridge in Brooklyn. And anyone who hopes that the Democrats among these judges will call a halt to the probationary millions' march to citizenship by declaring our borders insecure is doomed to disappointment.

After all, were it not for our tough job market and a miniboom in Mexico, the flow of immigration would not have receded in recent years. As Senator Marco Rubio pointed out in his response to last week's State of the Union address, the history of border controls is a history of "broken promises . . . to secure our borders and enforce our laws." Last week Chris Crane, president of the Immigration and Customs Enforcement agents' union, told a congressional committee, "We are under orders" not to enforce the law, and Michael Teitelbaum, former member of the Barbara Jordan Commission on Immigration Reform, has testified that there have been no "serious efforts" to control illegal immigration.

This error of aggregation also applies to the cost-benefit studies that prove, or fail to prove, that immigration reform would be a net economic plus for the country as a whole. Whatever the balance of total costs and total benefits, disaggregation will reveal that the beneficiaries of immigration are very different from those who bear its costs.

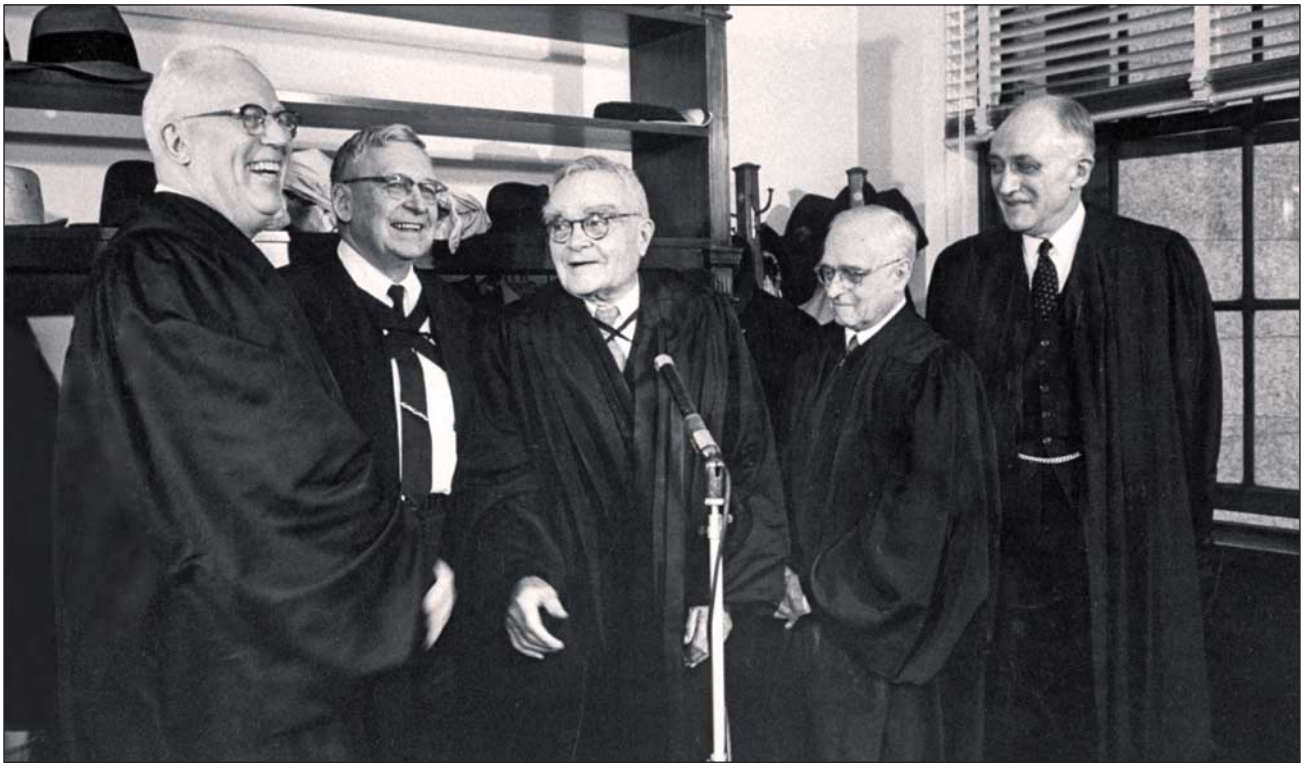
■ Owners of large lawns and swimming pools quite naturally favor an increase in the supply of labor available to tend these suburban amenities; Americans who mow lawns, from schoolkids trying to earn a bit towards their education to grownups for whom these chores constitute a decent living if they can command a decent wage, are understandably less enthusiastic about this new, wage-lowering competition.

■ Labor union bureaucrats, who lust after the dues that come with new members, benefit from increasing the supply of legal workers who make beds and clean hotel rooms, as do vacationers and business travelers who might see room rates rise if hoteliers had to pay the wages that might prevail if the supply of workers were restricted to legal residents. American workers, including legal immigrants, who could do those jobs, or would do them if wages reflected the available supply of legal residents, bear the cost of the benefits that go to trade union leaders in the form of increased dues, to hoteliers in the form of higher profits, and to more affluent American business travelers and vacationers in the form of lower room rates. Little wonder that union leaders who want more dues-payers oppose guest-worker programs that would legalize immigrants who come to work but plan (or say they plan) to return to their homeland when their work is completed. This itinerant group is notoriously difficult to unionize, whereas, once legalized, car washers and other such unskilled workers would join unions —one-fourth of the over two million members of the Service Employees International Union (SEIU) are Hispanic. "With papers, more of us will want to join the union," one of the 10,000, mostly illegal, Hispanic carwash workers in Los Angeles told the *Wall Street Journal*.

■ And the working-class Americans whose children are unchallenged in school owing to the large number of students who do not speak English pay a cost not borne by the Washington political class enthusiastically hunting for policies that will increase the flow of immigrants with still another amnesty, but whose kids attend Sidwell and St. Albans, and who live in school districts in which non-English-speaking students are only a minimal presence.

The mismatch between beneficiaries and those who bear the costs of immigration, ignored by policymakers but not by those who gain and those who lose, cries out for a mechanism by which the beneficiaries share those benefits with the millions of American households and workers adversely affected by immigration.

There you have it. Reform the broken immigration system. Allow the 11 million to "come out of the shadows," to use a phrase preferred by those who have not noticed that many even now enjoy the sunlight in welcoming cities and communities, but don't conflate that with a guaranteed path to citizenship. Set their more assimilable youngsters —innocent of intentional wrongdoing, and found by a Pew study to be at least as successful as the general population —on such a path. Then disaggregate. Legalize guest workers so employers cannot exploit them. Ease the path to permanent residence and citizenship for the highly educated and highly skilled, despite Obama's opposition to what the White House calls a "narrowly tailored proposal," with no explanation as to why such focused reforms are undesirable. Arrange for the beneficiaries of the new immigration policy to compensate those who will bear its costs. And by all means avoid one of those 2,000-page bills in which unseen evil lurks. ♦



Judge Learned Hand (center) is honored for 50 years' service on the federal bench. Left to right: Chief Justice Earl Warren, Judge Charles Clark, Justices Felix Frankfurter and John Marshall Harlan (1959)

On the Other Hand…

The judicial temperament, in private.

BY G. EDWARD WHITE

Learned Hand, whose last year of judicial service was 1961, may be poised on the edge of obscurity, although the late Ronald Dworkin's foreword to this volume serves as a reminder that some of Hand's clerks have helped perpetuate his influence by occupying very distinguished positions in the legal profession. A review of Hand's opinions on the federal district court for the Southern District of New York, and on the Second U.S. Circuit Court of Appeals will reveal some marvelous performances; though, as with all judges whose tenures took place in past eras, opinions gradually lose their precedential weight, and a selective treatment of opinions in contemporary law school casebooks can distort impressions of a judicial career.

Reason and Imagination
The Selected Correspondence of Learned Hand
edited by Constance Jordan
Oxford, 480 pp., $39.95

Fortunately, in some instances, collections of letters can serve to revive interest in a judge as an erudite observer of human affairs. But any list of American judges who wrote and received interesting letters would be a short one, and there have been precious few collections of judicial correspondences. Joseph Story's son published a life of his father that included several letters, some of them quite revealing. Roger Taney wrote regularly to family members, although those letters have not been published. Samuel Miller wrote numerous letters about his work on the Court, mainly to his brother-in-law. Those letters have regularly been utilized by scholars, but remain unpublished. Louis Brandeis had several "conversations" with Felix Frankfurter during Brandeis's tenure on the Court; Frankfurter made notes of the conversations, and they were subsequently published.

That exhausts the list, with three significant exceptions. Oliver Wendell Holmes Jr. had an extensive correspondence with several people, and a good deal of it has been published,

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including Holmes's exchanges with Frederick Pollock, Harold Laski, Lewis Einstein, John C.H. Wu, and Felix Frankfurter. Frankfurter himself was a frequent correspondent, and, in addition to his conversations with Brandeis and his letters to and from Holmes, a volume of his correspondence with Franklin D. Roosevelt has appeared.

The third exception is Learned Hand, and Hand's correspondence is arguably the most wide-ranging of the three. When Gerald Gunther published a biography of Hand in 1994, some reviewers were startled by the amount of space Gunther devoted to Hand's extrajudicial activities, particularly his involvement with national politics. Hand's correspondence justifies that emphasis. Although a fair amount of it discusses legal issues, more is directed toward national affairs. In fact, one could use Hand's letters as a vehicle for tracing the central concerns of educated Americans over the first five decades of the 20th century: The emergence of the Progressive movement, two world wars, the Great Depression, the Cold War and the emergence of McCarthyism in the 1950s, freedom of speech, race relations, isolationism—all of those developments are commented upon by Hand and his correspondents.

The roster of those correspondents furnishes something of a Who's Who of American law and politics in the same period. Included among the persons who corresponded with Hand are Holmes, James Bradley Thayer, Augustus Hand (Learned's cousin and a fellow Court of Appeals judge), Henry L. Stimson, Theodore Roosevelt, Herbert Croly, Zechariah Chafee, Alfred E. Smith, Benjamin Cardozo, Charles Evans Hughes, Charles Wyzanski, Harlan Fiske Stone, Dean Acheson, Louis Henkin, Harry S. Truman, Elliott Richardson, George Kennan, and Erwin Griswold.

Three additional individuals, intimate friends of Hand, have their correspondence featured: the art historian Bernard Berenson, the political columnist Walter Lippmann, and Frankfurter. The correspondence between Frankfurter and Hand began in 1911 and continued, without much interruption, for the next 50 years.

While one of the virtues of Hand's correspondence is that it serves as a barometer of events of national and international significance over the course of much of the 20th century, another is that Hand and his correspondents did not simply make reference to those events. They engaged, on the whole, in intelligent conversation about them. In those conversations, one gets a glimpse of the starting assumptions that framed the analysis of public events by members of the 20th-century American intelligentsia.

An illustration of those assumptions is provided by a 1957 exchange of several letters between Hand and Frankfurter discussing the constitutionality of antimiscegenation statutes, an issue that both foresaw coming to the Supreme Court in the wake of *Brown* v. *Board of Education*. (The Court did eventually consider the constitutionality of a Virginia statute and declared it invalid, but that was not until 1967, two years after Frankfurter's death.)

In the exchange on miscegenation, Hand asserts that, once one granted the premise of *Brown*—that legislative classifications based on race violate the Equal Protection Clause—antimiscegenation statutes must fall, because they permitted same-race marriages but outlawed interracial ones. In response, Frankfurter proposed various devices—the idea that the Fourteenth Amendment's Equal Protection Clause does not specifically refer to race; the doctrine that the Court should be hesitant to decide "political questions"; the claim that racial classifications might be acceptable for some purposes—to avoid reaching Hand's conclusion. But both men entered into the discussion with the same view of racially mixed marriage. Hand states, "I must own that it is to me a most unwelcome result," and Frankfurter claims, "I know I would not have agreed to . . . [the proposition] that distinctions between different biological strains, colored and 'white,' are now out," after *Brown*. Frankfurter added, "I shall work, within the limits of judicial decency, to put off decision on miscegenation as long as I can."

Thus, one could know little about Learned Hand the judge, or legal issues generally, and still profit from exposure to Hand's correspondence. But for those inclined to seek a fuller explanation of why so many of those who came in close contact with Hand felt that he should have been appointed to the Supreme Court and that, had he been, his nomination would have received universal acclaim, what do the letters tell us about Hand as a person and a judge?

Two themes surface: Hand's gift for intellectual companionship and his commitment to the intricacies of creating an accomplished judicial work product.

Hand grew up in Albany, where his father and grandfather had both been lawyers. He was an excellent student, but he had inherited a family tendency toward anxiety, and his lack of athletic ability, plus the fact that his mother was overly protective of him after his father died when he was 14, made him worry that he was a "sissy."

His social concerns continued at Harvard, whose system of social clubs he encountered on matriculating in the fall of 1889. In the spring of Hand's second year, he was one of 83 members of his class of 300 elected to the Institute, the organization that formed the selection base for "final clubs," membership in which was an index of social prestige. Of those selected for the Institute, around 70 were invited onto the next rung of the club social hierarchy, the DKE or "Dickey," from whose members the final clubs were eventually drawn. The names of those selected to the Institute were published in Boston newspapers in the order of selection, and Hand's name was sufficiently far down the list that he was not invited into the Dickey. Later, he would describe himself as being "on the fringe socially" at Harvard.

Hand was also not much of a success in extracurricular activities, failing to be accepted into the glee club, the football team, and the varsity crew. But he was an outstanding student, graduating magna cum laude. His particular interest was philosophy, and he considered pursuing a graduate degree in that field, but resolved not to do so after Josiah Royce, one of his teachers,

failed to respond with enthusiasm when Hand proposed doing graduate work. Hand probably overreacted to Royce's seemingly lukewarm response; the incident revealed his continuing insecurities about his own intellectual prowess. He then "drifted into" Harvard Law School, pursuing a professional path of least resistance.

Once in law school, however, Hand found that he was appreciated, both intellectually and socially. His intellectual gifts were quickly recognized by his contemporaries, resulting in his being elected to the Pow-Wow Club, the most prestigious of the clubs that participated in moot court arguments, and the *Harvard Law Review*, a student-edited journal that publishes scholarly works, even before he had received any grades. Membership in those organizations widened his circle of friends, and after his first year he moved into a boarding-house with some of his classmates. That residence became the social and intellectual center of his life at Harvard Law School: After a year, he resigned from the *Law Review* and was never very active in the Pow-Wow Club. His close friends included some members of socially prominent families, but on the whole he and his circle valued intellectual exchange above all. By the time Hand graduated from Harvard Law in 1896, he had become more self-confident, both academically and socially.

But despite his success at Harvard, Hand retained an insecurity about his fitness for competitive law practice, and chose to return to Albany, where he lived at home and joined a small firm. He remained there until 1902, when he accepted a position with a Manhattan firm, where he practiced until 1909. Generally speaking, this time in Hand's life was neither successful nor rewarding: He associated his years in Albany with "a kind of mournful dreariness," and later in his life stated that he "was never any good as a lawyer."

Hand was good, however, at intellectual companionship. He had become interested in reform politics at the turn of the century and was active in "good government" circles in Albany and New York City. His connections would prove useful when an additional federal judgeship was created in 1909, and the Taft administration, eager to promote its reformist credentials, resolved to make a good government appointment.

Learned Hand's appointment was a testament to the widespread perception among those who had encountered him in good government circles that judging would lead to his strengths. That perception was correct. And as Hand grew more comfortable as a judge, he retained his interest in politics and in ideas generally; his correspondence enabled him to cater to those interests.

In December 1917, Hand received a letter from Judge Charles Merrill Hough on the U.S. Court of Appeals for the Second Circuit, which reviewed cases appealed from Hand's district court. Hough enclosed in the letter Hand's opinion in a contracts case, which the Second Circuit affirmed. He added that, although he found Hand's opinion "amazingly interesting … as illustrating your turn of mind," he also wondered "why in the world you work so hard to arrive at an end which … might be so much easier reached." Hough had noticed Hand's tendency to analyze straightforward cases in great detail and depth "many times before," and warned him that "you wear yourself unduly by unnecessary exertion."

Hand responded with a letter agreeing with Hough's comments:

> I see all these difficulties. I suppose I see too many; when I do see them, it seems to me that an adequate statement of the case requires their consideration and their answer. I can't *do* the work any differently. I have got to go into these things.

The exchange captured the essence of Hand's attitude toward his judicial work. He took it extremely seriously, seeking to delve fully into every case he considered and to craft as painstaking and intellectually satisfying an opinion as he could. His instincts toward moderation and tentativeness disinclined him to leap quickly to the resolution of a case, and once he reached it, he labored to find justifications that he found adequate. Regularly, as Hough pointed out, this resulted in elaborate presentations of cases whose resolution seemed simple enough.

But Hand, as he noted to Hough, couldn't work any other way. In fact, he loved the process of analyzing legal issues, arguing with himself, reaching a decision, and then seeking to justify it. He would subsequently describe himself as a judicial "jobbist," one of a group of judges who were primarily interested in putting out the best products they could in an unadvertised fashion. After Hand became a Court of Appeals judge in 1924, he regularly hired a law clerk to assist him every year, but the clerk never wrote a line of his opinions or helped Hand with legal research. The law clerk's function was to provide a sounding board as Hand thought through the issues of a case.

A consequence of Hand's approach was that he felt compelled to master the technical details in which cases that came to him were set. As a result, he became conversant in such arcane specialties as admiralty and patent law, and his opinions became recognized as illuminating overviews of the state of the law in multiple fields. No case was trivial or routine for Hand. He sought to "see all the difficulties" and to derive "an adequate statement" of the issues presented.

Hand's approach meant that in the great majority of the cases he decided—which involved issues of common law and statutory interpretation—he could think of judging as an exercise in intellectual creativity. But on the question of how much latitude judges had to review the decisions of legislatures under the due process clauses of the Constitution, Hand advocated a more restrained approach. His position was the result of two early experiences in his career.

Of all the professors Hand encountered at Harvard Law School, his favorite was James Bradley Thayer, whose course in constitutional law Hand took during his third year. Hand remembered Thayer as "imbu[ing] us with a scepticism about the wisdom of setting up courts as the final arbiters of social conflicts" in constitutional cases, because "most of constitutional law had been constructed out of circular propositions, which justified the predetermined

attitudes of the judges." The only way to prevent the courts from becoming "a legislative body with a veto" was for judges "to hold back and have a certain moderation" when reviewing the constitutionality of legislative acts.

Hand's enthusiasm for Thayer's limited conception of judicial review in constitutional cases was reinforced during the first decade of the 20th century, when the Supreme Court began striking down state minimum-wage and maximum-hours legislation as invasions of "liberty" under the 14th Amendment's Due Process Clause. Hand responded with a 1908 article in the *Harvard Law Review*, "Due Process of Law and the Eight Hour Day," in which he criticized the Court's decision in *Lochner* v. *New York* to invalidate a New York state maximum-hours law for the baking industry.

In the course of suggesting that maximum-hours legislation was an "experiment," and "the legislature, with its paraphernalia of committee and commission [the] only public representative really fitted" to carry out social experiments, Hand added, "There is an inevitable bias upon [social] questions in all men, and the courts are certainly recruited from a class which has its proper bias."

Hand was to retain his limited conception of judicial review in constitutional cases for the remainder of his career. He held it through years in which it represented the approved "progressive" response to heightened judicial scrutiny of social and economic legislation, and years in which it coexisted uneasily with increased judicial protection for free speech after World War II.

The latter set of implications for limited constitutional review was particularly awkward for Hand, since he had staked out a highly speech-protective view of restrictions on expression as early as 1917. But he retained the view that aggressive judicial review of legislation under the due process clauses was not justified under any textual reading of the Constitution, and that it was dangerous. This position did not detract from the general esteem in which he was held: On two occasions, in 1930 and in 1942, he barely missed being nominated to the Supreme Court.

The most visible statement of Hand's approach to judicial review came in 1958, when he delivered the Holmes Lectures at Harvard Law School. In those lectures, he described the due process clauses as "not definite enough to be guides on concrete occasions," suggested that there was no principled basis for a different standard of review when a legislature was restricting civil rights and liberties as distinguished from economic activity, questioned the Supreme Court's intervention to invalidate racial segregation, and indicated that judicial protection for free speech could not be justified on constitutional grounds, only on the belief that legislatures were especially likely to repress unpopular forms of expression and needed a "third chamber" to restrain them.

Hand's uncompromising defense of limited judicial review isolated him from the main currents of jurisprudential thought in the late 1950s and 1960s: In 1964, Judge Charles Wyzanski, one of Hand's former clerks, declared that Hand's position had not been "supported by a single eminent judge or professor."

Hand's jurisprudential isolation at the very end of his career was ironic, for his views had placed him at the center of elite reformist legal thought for most of his judicial life. Whether the issue was the Supreme Court's use of doctrines such as "liberty of contract" to fashion interpretations of the due process clauses, or wages and hours legislation, or the suppression of "subversive" expressions, or racial segregation, or the prosecution of Communists, or the deportation of aliens lacking "good moral character," Hand approached each with the sensibility of a Bull Moose Progressive who had evolved into a moderate midcentury liberal.

But his political instincts rarely penetrated the carapace of judicial modesty that he had erected around his work as a judge. Ultimately, that modesty was ironic as well, because no one worked harder to get to the bottom of legal issues than Hand, or labored more diligently to construct rhetorical justifications for the conclusions he reached—or was more convinced of the rightness of his position once he had reached it.

There were, nonetheless, dimensions of uncertainty and self-doubt in Hand's stance—not so much about his ability as a judge but about his worth as a person. It was this uncertainty, coupled with his great abilities and his abiding intellectual curiosity, that made him a boon companion. And nowhere is Hand's distinctive version of companionship more visible than in his correspondence. ♦

B&A

Surveying the Fields

And the (surprisingly) gradual process of commemoration. **BY ANTHONY PALETTA**

Now that Gettysburg hotels sell out for the July battle anniversary by December, and the Virginia peninsula might as well be rezoned as a historical theme park, it's worth looking back to a time when plenty of American history wasn't the stuff of vacation plans. There was no permanent monument at Yorktown until the battle's centennial in 1881, and nearby lodging for its dedication was so sparse that visitors to the commemoration were housed in tents.

Memories of War
Visiting Battlegrounds and Bonefields in the Early American Republic
by Thomas A. Chambers
Cornell, 232 pp., $29.95

Anthony Paletta is a writer in Brooklyn.

How things have changed—and this fascinating study is ideal reading for the ongoing sesquicentennial of the Civil War and bicentennial of the War of 1812. It offers a close examination of just how overgrown fields and crumbling fortresses came to be reclaimed as objects worthy of preservation and visitation.

The tale of how a protean form of the American battlefield came about has several phases, some relating directly to a sheer drive for historical remembrance, and many bearing a considerably peripheral relation to the conflicts themselves. In the end, though, who's to argue with a good thing, especially when it makes so captivating a story?

A core difficulty in early American existence was simply getting anywhere, let alone to commemorative battlefields. Author Thomas Chambers cites the example of a traveler who "encountered a mere seven bridges but crossed fifty-five ferries on his four-month journey in 1744 from Virginia to Maine." Cities tended to crop up at convenient locations; battlefields, unhelpfully, did not. Sheer accessibility played a significant role in the emerging cultural significance of some early battlefields. Braddock's defeat, near Pittsburgh, occurred along the subsequently busy Braddock's Road, where grisly evidence of the battle could be found for decades. (The Pennsylvania Turnpike might be a modern-day horror, but at least it is not littered with skulls.) Fort Ticonderoga on Lake Champlain, meanwhile, lay remote and neglected until it became a convenient, picturesque sight for burgeoning steamship traffic in the 1820s.

Soon after this rise in technological accessibility, Fort Ticonderoga and other Hudson River sites began to benefit considerably from the rise of a new spirit of Romantic tourism. The Hudson figured prominently in the nascent domestic reckoning of the European Grand Tour. Here, scenery, rendered vivid in works by the Hudson River school of artists and described in newly emerging guidebooks, seemed to trump history as an active draw, yet the past was rarely far from nature in descriptions of the merits of these trips. As Chambers writes of Thomas Cole's "Essay on American Scenery" (1835), "America's wild and unsettled scenery provoked more than reflections upon a specific castle's legend or an associated poem. Surrounded by untrammeled mountains and ancient forests, 'the consequent associations are of God, the Creator; they are his undefiled works, and the mind is cast into the contemplation of eternal things.'"

"American scenery," Chambers adds, "struck the perfect balance between historical associations and unspoiled wilderness; it provided a source of national

Yorktown monument, Virginia

pride while simultaneously conforming to British ideals of the picturesque."

Ticonderoga's Romantic role was accentuated by the fact that the fort itself was a collapsing ruin, and scattered aged veterans added to the location's impressionistic appeal. Nathaniel Hawthorne, upon visiting in 1835, was irritated by his youthful West Point guide; rather, he

> should have been glad of a hoary veteran to totter by my side, and tell me, perhaps, of the French garrisons and their Indian allies, of Abercrombie, Lord Howe, and Amherst; of Ethan Allen's triumph and Saint Clair's surrender. The old soldier and the old fortress would be emblems of each other.

This type of yearning, no doubt, provided an opportunity for distinctively American con men: A notably grizzled Ticonderoga "veteran" in the 1830s, Isaac Rice, was a complete fake.

Another, very different sort of tour—taken by the Marquis de Lafayette upon his return to the United States in 1824—proved a significant reminder of the lag in American attention to the country's formative history. Lafayette's circuit spanned much of the breadth of the Eastern seaboard, with multiple battlefield stops. Along the way, he encountered exceedingly few permanent markers of the War of Independence. In point of fact, besides the "pyramid which indicates the place where the first martyrs of liberty fell, and now repose" at Lexington, only Bunker Hill and Yorktown featured completed battlefield monuments which Lafayette could visit during his trip. That one of the revolution's greatest military heroes encountered so few monuments in any state of completion is surprising. And that one of these monuments was inconspicuous, another wooden, and the third temporary, reveals the relatively weak American interest in erecting permanent monuments to the places where independence was won.

Lafayette's visit set off some measure of catching-up. He participated in several cornerstone-layings and subscribed to monument funds. Progress often promptly stalled after these auspicious starts, however. And while not all monuments advanced as glacially as, say, the Brooklyn Prison Ship Martyrs' Monument—fundraising began in 1802 but construction didn't start until 1844, and it wasn't complete until 1908!—Chambers calculates the average number of years required to complete a monument prior to 1861 as 31.

Here, again, battlefields benefited from another rising tide in society—that of the first landmark cemeteries, such as Mount Auburn in Boston and Greenwood in Brooklyn. These, Chamber suggests, provided a ready model of how death might be treated monumentally, and paved the way toward combat commemoration.

A turn to the South offers another informative study on how a new force—politics—came to aid the cause of battlefield preservation. Here, battlefields

were remote even by rural standards, and local scenery rarely offered any attraction from which battlefields could benefit: Affluent Southerners were in the habit of traveling North for pleasure. Several battlefields had returned, in considerable part, to farming uses; or, if they had once been farmland, they had since become overgrown. As sectional hostilities began to flare, however, so did interest in local battlefields.

In 1850, William Gilmore Simms published an important essay, "Summer Travel in the South," that announced the discovery of new historic destinations in the American South. After a summer of cholera outbreaks and "abolition mania" in the North, "patriotic" Southerners declined to spend "time and money among a people whose daily labor seems to be addressed to the neighborly desire of defaming our character and destroying our institutions."

Suddenly, monuments began to spring up across the South—at Cowpens, Kings Mountain, Moore's Creek, and Waxhaws. The dedication at Kings Mountain featured an invocation of revolutionary liberties above union: "This union, glorious and blessed as it has been, and is—is not the holiest of holies." An orator at the Cowpens battlefield dedication cited "the black and threatening cloud which darkens our northern horizon." Efforts to honor specifically local contributions to victory grew, and in 1859, the cornerstone was laid for a monument to Virginia soldiers at Yorktown.

Some similar efforts arose in the North. A meeting to begin construction of a monument at Saratoga in 1856 declared that "our love of the union may be strengthened by being reminded of the sacrifices made to achieve our independence." Stephen A. Douglas drew a similarly unitary message during his 1860 presidential campaign. While speaking to a Vermont rally, he stated, "The glories of Bunker Hill, of Bennington, of Kings Bridge [*sic*], of Eutaw Springs, of Yorktown are our glories. We will have no dissolution!"

Ultimately, we did not have dissolution, but we *do* have countless monuments. By the outbreak of the Civil War, the country had achieved, through a series of varying societal impulses, a culture of commemoration and battlefield visitation that might be familiar to today's visitor. Chambers cites a 2010 figure that more than 8.5 million people visited the 22 battlefields run by the National Park Service that year. If you're making a trip to any of these venerable sites, take a moment to recall the long period, experienced at most battlefields, when you wouldn't have found any monuments, any visitors' center, or any hotel—and certainly no one who would be counting attendees. ♦

B&A

The Singapore Cure

An economic, not political, solution to the health care crisis. **BY MATTHEW CONTINETTI**

Catastrophic Care
How American Health Care Killed My Father—and How We Can Fix It
by David Goldhill
Knopf, 369 pp., $24.95

David Goldhill is a liberal Democratic business executive whose father was killed by a hospital-borne infection several years ago. The experience drove him to study the American health care system in search of an explanation. "How is it possible," he writes, "that my father's death was an avoidable accident with no one to blame?" The answer shocked him.

Goldhill discovered that health care is unlike any other industry:

> Everything about health care—how we pay for it, how we regulate it, how we judge its effectiveness, how we're willing to accept low standards from it, even how we talk about it—exists on a separate island from the mainland of every other service or product in our economy.

Americans are marooned on that island. And in their interactions with the health care sector, Americans have been willing to tolerate inefficiencies and insults and egregious prices that would spark riots at car dealers, electronics stores, or coffee shops. Medical errors kill at least 98,000 Americans annually. The increasing cost of health care is responsible for stagnant wages and higher taxes, and threatens to crowd out all other forms of federal spending. The "essential service" of diagnosis and treatment of illness has been utterly deformed. Health care has become a "Beast" that devours everything in its path.

The main problem, Goldhill concludes, is the way we pay for health care. "For every hundred dollars spent on health care in the United States," he writes, "the patient acting as consumer pays only eleven dollars; an intermediary pays the rest." Having a third-party assume most of the cost of medical services encourages overconsumption, waste, fraud, and inflation. It generates the perverse incentives of moral hazard. The price mechanism is not allowed to function.

Insurance is meant to be a hedge against the risk of an unexpected and improbable contingency, such as property theft, house fire, car wreck, or premature death. But it is neither unexpected nor improbable that you or I will interact with the health care system. Quite the opposite: Visiting doctors' offices for checkups or treatment is inevitable and often routine.

So what happens when the insurance model collides with the provision of health care? Insurance premiums rise

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because insurance companies cannot make money without encouraging the insured to spend more on health care. Meanwhile, patients are shunted aside:

> Health insurers are essentially giant intermediaries between consumers and the health care system, negotiating charges, checking bills, assuring payment—basically shifting money around from consumers and taxpayers to providers.

Americans encounter horrible service and indecipherable hospital bills precisely because they are not the hospitals' customers. Health insurers and governments are.

Goldhill invents a character, Becky, who illustrates the cost of this distorted system. Becky is paying for health care all the time. She pays through her premiums and co-pays. She pays through lowered wages (her employer bears the cost of some of her premiums). She pays through payroll and federal and state income taxes that fund Medicare and Medicaid along with other government health care programs.

In fact, Becky will pay, over the course of her life, close to 50 percent of her total earnings "into the health care system for herself and her dependents." That number is staggering, but Goldhill is happy to explain his calculations. Surely, he writes, there are better uses to which Becky and Uncle Sam could put such an enormous amount of money: a trip to Disney World, say, or an aircraft carrier battle group.

Insurance has so deranged American health care that our policy debate is framed in terms of increasing and standardizing coverage, not lowering cost and thereby improving access through competition and customer accountability. Goldhill is unsparing in his criticism of the 2010 Affordable Care Act (ACA), aka Obamacare, which mandates universal health coverage: "The ACA's most obvious characteristic," he writes, "is its continuity with our existing system: a continued reliance on insurance as the funding mechanism for all care."

Obamacare is "fundamentally an exercise in Rube Goldberg-like financial engineering." It is "profoundly old-fashioned," which is just about the worst thing anyone can call a liberal program. It drastically expands Medicaid, "the most complicated program ever designed by the federal government." It may even have the unintended consequence of reducing the number of Americans with insurance.

The legacy of Obamacare may not turn out to be what liberals expect, which is that it will guarantee health coverage for every American and, ultimately, lower costs. Obamacare's expense and complexity may only sharpen the contradictions in the insurance-based health system and precipitate its collapse.

What would be the replacement? No doubt, egalitarians would prefer a system in which government pays for all health care and uses price controls and rationing to limit costs. But Goldhill has a different prescription:

> Since we are unable to repeal the economic laws of gravity in health care, it's time to embrace them, to build a more normal system of financing care—and a more normal system of weighing its value and holding its providers accountable.

The place to look for a model is Singapore. That Southeast Asian city-state is smaller than New York City, but its per-capita gross domestic product and life expectancy are similar to those of the United States. Singaporeans spend much less money on health care (4 percent of their economy) than we do (18 percent).

Goldhill identifies three major differences between the Singaporean health system and ours. In Singapore, individuals contribute much more money at the point of purchase. The payment mechanism varies according to treatment and patient. Government doctors and facilities compete with private health care workers. Singaporeans are required to contribute to health savings accounts and purchase a catastrophic insurance plan. There is an insurance pool for the severely disabled and a fund to pay their bills. There are subsidies to providers based on their level of service.

But the thrust of Singapore's system is individual responsibility for a large portion of direct payment. And the results are positive. "Health care in Singapore is high quality, high-tech, and, by international standards, cheap," writes Goldhill. "Genuinely cheap, not just misleadingly cheap at the point of service."

A small group of policy intellectuals are attempting to apply the lessons of places like Singapore to the United States. They are advocates of consumer-driven health plans that combine high deductibles with health savings accounts. Goldhill favors the consumer-driven approach, but he also recognizes that the results, to date, have been mixed. Current tax law puts such plans at a disadvantage. The Democrats in power are obsessed with universal coverage and subsidies for every form of health consumption. The Republicans have been content simply to oppose the Democrats, and GOP proposals maintain the flawed insurance model.

There is also the problem of expectations: Americans are not used to behaving like health care consumers. They are sometimes shocked by the sticker price of doctor appointments.

Goldhill understands that the health system will not meet his goals of equality, efficiency, and rationality overnight. He says it may take as long as a generation to introduce consumer markets to health care, and that the process may not begin until the system reveals itself as bankrupt. But he is not a defeatist.

"As quickly as possible," he writes, "we must divert as much of the resources spent on non-catastrophic care into individual accounts." Turn health care into as much of a consumer market as possible, he writes, and "we all will see the benefits of an industry competing on price, quality, and service." He proposes a "balanced" system of "health accounts, health loans, and catastrophic insurance with a very high deductible."

Goldhill's radical plan would require more activity, and more direct payment, from the individual consumer. People like Becky would cease to be passive recipients of insurance benefits from corporations or governments and would become decisive agents in the

marketplace. Consumer-driven health care thus strikes a blow against Big Government and managerial experts. "Health care experts want us to believe that health care is too complicated for patients-consumers to serve as an effective disciplinary force," he writes. "But what's the alternative?"

My only criticism of this comprehensive, thought-provoking, empirical, and well-written book is that it was published only this past month. Goldhill first wrote about the death of his father and the idea of consumer-driven health care in a cover story for the *Atlantic* in the summer of 2009. He clearly took his time in researching the health care problem, the Affordable Care Act, and possible solutions before he committed his ideas to book form.

Yet I cannot help thinking that *Catastrophic Care* might have had a significant impact on the debate over Obamacare, even on the 2012 campaign, if it had been published in, say, 2010. But that did not happen, and we are left with imperfect options. We can try to persuade Republicans and Democrats of the virtues of consumer-driven care as America continues its insurance-driven slide into insolvency. Or we can move to Singapore. ♦

B&A

Portrait of a Lady

A second look at Evan S. Connell's domestic masterpiece. BY WILLIAM H. PRITCHARD

The death of Evan S. Connell last month prompts reflection on an American original who, over a lifetime of steady work—many volumes of novels, stories, biography, essayistic speculations—left as his permanent contribution to letters one brilliant, memorable book: the novel *Mrs. Bridge*, published in 1959.

To be sure, Connell's other work notably contained an imaginative biography of General Custer (*Son of the Morning Star*), an account of the Crusades (*Deus lo Volt!*), many readable short fictions, and *Mr. Bridge*, his revisiting of the Bridge family, this time from the husband and father's point of view. But nothing he subsequently wrote can match the exquisite humor and sadness of *Mrs. Bridge*. (Even *Mr. Bridge* is not quite in its class.) Cyril Connolly once declared that the only function of a writer is to produce a masterpiece. This Connell did, and he never came close again.

The novel sold well, even made the bestseller list for a respectable number of weeks, and has stayed in print ever since. Looked at historically, and thinking of other end-of-the-fifties, urban, family-oriented works that have survived, there is Philip Roth's first book, *Goodbye, Columbus* (1959), John Updike's first novel in the Rabbit series, *Rabbit, Run* (1960), Richard Yates's dark hymn to suburbia in his first novel, *Revolutionary Road* (1961), and John Cheever's stories from the period. But all of them are set in the American midcentury present; Connell's novel is firmly anchored in the 1930s and early '40s, with World War II as a terminus.

EVERETT COLLECTION

Paul Newman and Joanne Woodward in 'Mr. and Mrs. Bridge' (1990)

Nor are the other books constructed in the special way Connell made up for himself: 200 and some pages broken up into 117 "chapters," each titled in a terse, usually humorous way. In an afterword to a recent reprint, James Salter tells us that *Mrs. Bridge* was turned down by nine publishers before Viking accepted it, and surely its unconventional form must have roused doubts—as did, perhaps, the less-than-heroic location of the action in Kansas City, where Connell himself grew up.

Mrs. Bridge, whose odd first name is India ("It seemed to her that her parents must have been thinking of someone else when they named her"), is married to Walter Bridge, an overworking lawyer. Their three children, Ruth, Carolyn, and Douglas, are evenly spaced apart in age and, over the course of the book, grow up and leave the nest, with Mrs. Bridge desperate to fill up the days. The novel's epigraph is from Whitman's "Facing West from California's Shores": *But where is what I started for so long ago? And why is it yet unfound?* Mrs. Bridge's increasing preoccupation with the question reminds us that Connell's novel predates the second wave of feminism (Betty Friedan's *The Feminine Mystique* appeared in 1963). The novel could be viewed as evidence of the plight of married American women, whether in the 1930s or 1950s, who hadn't much life outside a kitchen full of the latest appliances. It might also be thought of as documenting the repressed, compliant spouse, dependent for her opinions on her husband's authority, and subservient to his will.

Yet to speak in this knowing way takes away the charm of Connell's presentation. For example, at one point Mrs. Bridge decides that what she needs is psychoanalysis, and one

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night near bedtime she tremulously announces this to her husband as he is reading about the stock market. "Australian wool is firm," he mutters, then looks "inquisitively" at her: "'What?' he demanded. 'Nonsense,' he said absently, and he struck the paper into submission and continued reading."

There is a cool touch in the novelist's treatment of a potentially poignant confrontation that tilts things toward the aesthetic, if ever so slightly.

John Updike once denied that his relation to his characters was a satirical one; since he created them, why should he laugh at their follies? An overstatement, but useful in suggesting why it's a mistake to treat Connell's relation to his heroine as a satirical one—putting "the literary scalpel to the suburban skin," as one of his critics described it. In the first place, it would not be much of a feat to score points off so unprotected and uncertain a figure as India Bridge; in the second, closely connected place, the book is simply too rich in its inventions to be so reduced.

When Mrs. Bridge and her lady friends attend a stage performance of *Tobacco Road*, a once-reputed "earthy" novel by Erskine Caldwell, the ladies agree that they didn't much like the play. Mrs. Bridge doesn't see why such a play is "necessary," yet it has its effect. One hot morning, she forgoes wearing stockings, then is embarrassed when two elderly widowed sisters come to call: "'My goodness,' cried Mrs. Bridge as she greeted them at the door. 'I look like something out of *Tobacco Road!*'" Connell then begins a new, very short chapter with perhaps the book's longest sentence:

> Having been repelled by *Tobacco Road* to the point where it obsessed her, she employed it as a pigeonhole: whatever she found unreal, bizarre, obnoxious, indecorous, malodorous or generally unsavory, unexpected, and disagreeable henceforth belonged to *Tobacco Road*, was from there, or should have been there.

If this is "satire," it is of the sort T.S. Eliot once called "creative" rather than "critical," emanating not from an animus directed at some piece of human folly, but from an impulse to enhance the folly rather than reduce it. So Mrs. Bridge becomes the focus of a complicated, densely witty construction rather than something to be scornfully dismissed.

Perhaps the greatest pleasure we can derive from reading *Mrs. Bridge* is in the confirmation it provides of things we've forgotten about, like "Guest Towels" (the title of Chapter 13). These are put out for visitors but never used, either by them or by members of the Bridge family. When Mrs. Bridge goes around to collect the "little pastel towels," she finds one missing, then discovers it in her son Douglas's bathroom, filthy. It has obviously been used by him, whom she finds sitting in a tree in the adjacent vacant lot and who admits to having dried his hands on it. "'These towels are for guests,' said Mrs. Bridge, and felt herself unaccountably on the brink of tears." As Douglas climbs higher into the tree, she begins to feel foolish, waving the towel and addressing someone who is invisible to neighbors who might possibly be watching. The scene is perfect in its compression, concluding with her repeating that guest towels are for guests, as Douglas climbs higher in the tree.

Then there is the problem of how far to go in decorating one's house at Christmas. Mrs. Bridge (like my mother) believes in making the home "festive without being ostentatious." This she does unfailingly, and, on one holiday occasion, she takes the children for a ride in the car to look at the Christmas decorations of others. One house, outrageously, has an enormous cutout of Santa Claus on the roof, "six reindeer in the front yard, candles in every window and by the front door an enormous cardboard birthday cake with one candle. On the cake was this message, 'HAPPY BIRTHDAY, DEAR JESUS.'"

How might an inventive writer end this chapter, titled "A Matter of Taste"? By having his heroine declare, thoughtfully, "My word, how extreme. . . . Some Italians must live here."

As a professor of literature, I have "taught" the novel many times and always wonder what part of it to conclude with. Late in the book, Mr. Bridge presents his wife with a Lincoln automobile, the size of which intimidates her. In trying to parallel-park, she remembers that Douglas, in a fit of measuring things, had determined that the Bridges' pantry is approximately two cubic feet smaller than the Lincoln. But this does not assist Mrs. Bridge as she struggles to park the car, thinking "that it would have been easier to park the pantry." At novel's end, she is sitting helplessly inside their garage, the Lincoln's motor having died, without room for her to exit the vehicle.

This is, of course, a metaphor for the lonely confinement of her life that the death of her husband and the departure of her children has brought on. It is an affecting close, but maybe too painful a note for the professor to end on. I choose, instead, another moment of the woman's defeat, but one that Connell has surrounded with more than enough literary compensation. Mrs. Bridge, determined to surprise her husband with a favorite dish she hasn't made in a long time, mixes up a batch of pineapple bread to accompany the less-than-thrilling casserole that is dinner. "'Oh-ho!' says Mr. Bridge, rubbing his hands together, 'What have we here?'" As directed, he cuts into the fragrant-smelling loaf:

> The first slice fell down like a corpse and they saw bubbles of white dough around the pecans. Mrs. Bridge covered it with the towel and carried it to the kitchen. Having disposed of the bread she untied her little ruffled apron and waited quietly until she had regained control of herself. Returning to the dining room with a loaf of grocery-store bread, Mrs. Bridge smiles and says, "It's been a long time, I'm afraid."

It may have been tempting for Connell to stop right there, one more bit of pathos to be added to the ever-growing list. Instead, he ends this way: "'Never mind,' said Mr. Bridge as he removed the lid of the casserole, and the next day he brought her a dozen roses."

My sense is that student readers in 2013 are as touched and pleased by this scene as their parents and grandparents may be imagined to have been. Connell's art in this novel is geared to a time period, but is also timeless. ♦

B&A

Red Herring Alert

You will be pleasantly surprised by the surprise here.

BY JOHN PODHORETZ

Steven Soderbergh's *Side Effects* is one of those rare movies that spends an hour seeming to be one thing until it pivots, about two-thirds of the way through, and becomes something entirely different.

The husband (Channing Tatum) of a depressed young New Yorker named Emily (Rooney Mara, the American *Girl with the Dragon Tattoo*) has just gotten out of prison after a four-year stint for insider trading. Emily has been loyal and loving throughout, even though she lost everything and has had to move to the marginal Washington Heights neighborhood. Her husband's talk of starting a business with a fellow minimum-security prisoner triggers thoughts of suicide, and she drives her car into the wall of her garage. At the hospital, she encounters a psychiatrist, Jonathan Banks (Jude Law)—a good and caring man who genuinely wants to help her.

Everyone in *Side Effects* is either on an antidepressant, has taken an antidepressant, prescribes antidepressants, or sells them. Dr. Banks is excited to become part of a clinical trial for a new drug, Ablixa, because the pharmaceutical firm will pay him $50,000 and his wife is out of work. Emily, whose current medication isn't working, almost jumps in front of a subway. Her boss tells her about Ablixa, which is being heavily advertised. When Emily asks Dr. Banks to prescribe it for her, he does so. It works—she cheers up and her sex drive is renewed—but it causes her to sleepwalk. So Dr. Banks prescribes another drug to help control the sleepwalking. Awful things ensue.

Side Effects is a meticulously realized portrait of a young woman in the grips of a terrible malady—but it turns out this is only the windup. There's a big red herring at play here, which subverts our expectations beautifully. Screenwriter Scott Z. Burns produced Al Gore's *An Inconvenient Truth*, so an anti-Big-Pharma storyline would seem to be in his wheelhouse. And Steven Soderbergh made *Erin Brockovich* a dozen years ago, so he has a history of making movies that lionize tort lawyers and their junk suits. Together, Burns and Soderbergh made the comic whistleblower picture *The Informant!* starring Matt Damon.

Suffice it to say that if Burns and Soderbergh were characters in this movie, they would only have made those other films to establish their leftie bona fides and thereby fool you into thinking they were making a movie about poor people being poisoned by bad drugs. (They pulled the same trick last year in their brilliant thriller *Contagion*, in which a muckraking leftist blogger turns out to be a villainous scam artist.)

The movie *Side Effects* resembles most closely is the criminally underrated *Malice*, made in 1993 with Bill Pullman, Nicole Kidman, and Alec Baldwin (in the role that helped end his problematic tenure as a matinee idol and begin his second career as one of the great character actors of all time). Pullman and Kidman are a married couple having trouble conceiving a child. They rent an apartment in their house to Baldwin, an incredibly arrogant surgeon who talks Pullman into approving an unnecessary procedure on Kidman that renders her infertile. The couple sues; Baldwin handles himself catastrophically at trial and loses a huge judgment; Kidman leaves Pullman. And *then* the plot really begins.

Most people would probably say the ultimate red-herring movie is *The Usual Suspects*, which features a crook telling a cop about a crime in which he was involved and which we watch unfold as he recounts it—only to learn in the last two minutes that the entire story was being improvised by the crook from bits and pieces on a bulletin board behind the cop's head.

But the red-herring movie to end all red-herring movies is actually *The Shawshank Redemption*, which has the startling distinction of being the favorite film of all time in a poll of the users of the website IMDb.com, its 916,000 votes far outdistancing *The Godfather*'s 658,000. Most of those voting for it surely think they love *The Shawshank Redemption* because it is a testament to the human spirit, an account of a man who does not let a terrible injustice destroy him, among other sentimental readings.

In fact, the reason *The Shawshank Redemption* is so effective is that it turns itself from a prison melodrama into a dazzling revenge caper, in which one of the prisoners steals a fortune from the corrupt warden *and* forces his suicide. The movie needs its two hours of drippy uplift to make the caper emotionally satisfying. Without the heist, it's just sodden nonsense. With the heist, *The Shawshank Redemption* is something unexpected and original.

So is *Side Effects*. ◆

Side Effects
Directed by Steven Soderbergh

Rooney Mara

OPEN ROAD FILMS

John Podhoretz, editor of Commentary, *is* The Weekly Standard*'s movie critic.*

"Pope Benedict XVI's resignation opens the door to an array of possible successors, from the conservative cardinal of Milan to a contender from Ghana and several Latin Americans."
—Associated Press, February 11, 2013

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Vice president angling to succeed Benedict XVI

HABEMUS BIDEN

'I've known two popes—one of them intimately'

BY ANTHONY FAIOLA

Joe Biden laughs after securing the support of former Italian prime minister Silvio Berlusconi

ROME — "This reminds me of my old commute," Vice President Biden said as he rode the 64 bus en route to Vatican City. "Except for the pickpocketing gypsies and the weird smells, I might as well be on the Acela to Wilmington. Now what happened to my wristwatch?" Biden has been making the daily trip from his hotel to the Holy See ever since Pope Benedict XVI announced he will be stepping down at the end of the month.

"I thought about a possible run for the White House," the vice president mused. "But the president said I have a better chance of getting elected pope. So that's why I'm here, meeting with honest-to-goodness Italians." Biden had earlier written a letter to Pope Benedict announcing his candidacy. "I told him, 'Your Holiness, I don't agree with everything you say, but bless your heart, I do hope you and the College of Cardinals will not just consider the ordained but also real, hardworking Catholics like myself. P.S. What the hell's wrong with your pizza?' "

Addressing a townhall meeting inside the Castel Sant'Angelo, Biden praised the Italian people's "zest for life." He also noted, "I've been fortunate to meet so many of you these past few days—and you're not all 'Goodfellas,' if you know what I mean. So many of you are articulate and bright and clean and nice-looking." The vice president pointed out that if elected, he would be the first pope from Scranton, Pa. He then warned against electing hardliners who "are going to put you all in chains, capisce?"

"He's joking, right?" asked papal nuncio Carlo Maria Viganò. But when told Biden was in earnest, the archbishop chuckled and said, "Signor Biden won't be in the running, trust me. It's a funny joke, but if he keeps it up, we're going to make him an offer

FREDO CONTINUED ON A12

Rubio's water problem

Unclear if senator recycled bottle

DANA MILBANK

that he listens to hip-hop tunes aimed primarily at female

the weekly Standard
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