

**SEN. MIKE LEE,
CONSTITUTIONALIST**
TERRY EASTLAND

the weekly

Standard

SEPTEMBER 9, 2013

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A detailed black and white portrait of a man with a full, dark beard and mustache, shown in profile facing left. He is wearing a dark suit jacket over a light-colored shirt and a dark tie. The background is a soft, textured grey.

Rediscovering Bagehot

What a great Victorian has to say to us

GERTRUDE HIMMELFARB

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A Partisan Anniversary

THE SCRAPBOOK did not attend the 50th anniversary observance of the 1963 March on Washington for Jobs and Freedom. But like most Americans, we did tune in on television for a few minutes—and saw a couple of distressing things, and one very mysterious thing.

To begin with, there was a total absence of Republicans among the many activists, politicians, performers, and distinguished relatives who spoke from the steps of the Lincoln Memorial in Washington. Which was odd, and unfortunate, since Martin Luther King made every effort during his lifetime to appear non-partisan—and, of course, the man for whom the Lincoln Memorial is named was not a Democrat. Indeed, when the civil rights bills of 1957 and 1964 were enacted, along with the Voting Rights Act of 1965 and the Fair Housing Act of 1968, it was Democrats, not Republicans, in Congress who constituted the opposition. For some reason or other, this went unmentioned last week.

The absence of the GOP also deprived organizers of a salient moment. Beside the lectern on the

memorial steps was a bell salvaged from the tower of a black Baptist church in Birmingham that was bombed in September 1963, a few weeks after the march. As everyone surely must know, four little girls attending Sunday school were killed in that bombing, and yet the first black woman in history to serve as secretary of state—who actually knew the four girls in childhood, and could have furnished a moving link to that tragic event—was not invited. Oprah Winfrey spoke at the Lincoln Memorial, as did the convicted child molester Peter Yarrow of Peter, Paul, and Mary fame; but not Condoleezza Rice.

And then there's the mystery. Two presidents—Bill Clinton and Jimmy Carter—spoke, as did two daughters of presidents: Caroline Kennedy Schlossberg and Linda Johnson Robb. There were no representatives of the Eisenhower, Nixon, Ford, Reagan, or Bush families—which, of course, was the organizers' prerogative. But THE SCRAPBOOK was surprised to see Lyndon Johnson's older daughter, Linda Bird, and to see her chatting amiably with the members of Dr. King's family.

For not too many years ago (1997), Dr. King's two sons, Dexter and Martin III, visited their father's assassin, James Earl Ray, in his Tennessee prison—and absolved him of guilt. Ray had “basically nothing to do with this assassination,” said Martin Luther King III. And Dexter King, according to the *New York Times*, “asserted that President Lyndon B. Johnson must have been part of a military and governmental conspiracy to kill Dr. King.”

“I am told that it was part and parcel Army intelligence, CIA, FBI,” Dexter King told the *Times*. “I think we knew it all along.”

To THE SCRAPBOOK's knowledge, neither Dexter King nor Martin Luther King III has ever publicly acknowledged error on the subject, nor declared that they have changed their mind from their conviction that their father was murdered in 1968 by a government conspiracy masterminded by President Lyndon Johnson. In which case THE SCRAPBOOK would have been very interested to overhear the pleasantries exchanged last week between the King family and LBJ's daughter on the Lincoln Memorial steps. ♦

We Don't Believe in Santa Cruz

The state of California may have a lot to recommend it—give us a few days, and we'll think of something—but Santa Cruz, a beach town of 60,000 some 70 miles south of San Francisco, encapsulates everything wrong with the Golden State.

Yes, the weather's nice, but the city is beset with astonishingly high real estate prices and exorbitant taxes. What's worse, Angela Davis is a “distinguished professor emerita” at the local (publicly funded) university. The city's streets are dominated by a massive population of transients—

the voluntarily homeless, mostly young, who travel up and down the West Coast, and who are attracted to cities like Santa Cruz and Portland, Oregon, that all but roll out a red carpet for them. And all of this is washed down with a healthy dose of self-congratulation (and Kombucha). In THE SCRAPBOOK's visits to Santa Cruz, we've met dozens of locals who have convinced themselves that they live in the greatest place on earth.

But even the most delusional Santa Cruzers are surely alarmed by the city's remarkably high crime rate. Earlier this year, the *Santa Cruz Sentinel* reported that “according to FBI statistics, Santa Cruz's reputation

isn't the only outsized thing about the place. It also has a significant crime problem, with the highest property crime rate in California among medium and large cities. . . . Santa Cruz also has a higher violent crime rate than all but eight cities in the Golden State. People are more likely to become a victim here than in Los Angeles, San Francisco or Vallejo.”

It seems that many of the crimes in town are committed by transients—indeed, several months ago, two Santa Cruz police officers were killed during a routine investigation by a traveler who had just come down to Santa Cruz from . . . Portland, Oregon, of course.

A Santa Cruz County Superior Court judge named Ariadne Symons has had enough. Last week, according to the *Sentinel*, she said, “Santa Cruz is a magnet for people who want to live on the streets and commit crime.” Speaking at a public meeting, the judge declared, “We need to change that reputation and discourage that kind of activity. . . . How many people have to die before we do something about this?” She then went on to urge the city to enforce its antiloitering laws. “The streets belong to all of us,” Symons said. “We should all feel comfortable there.”

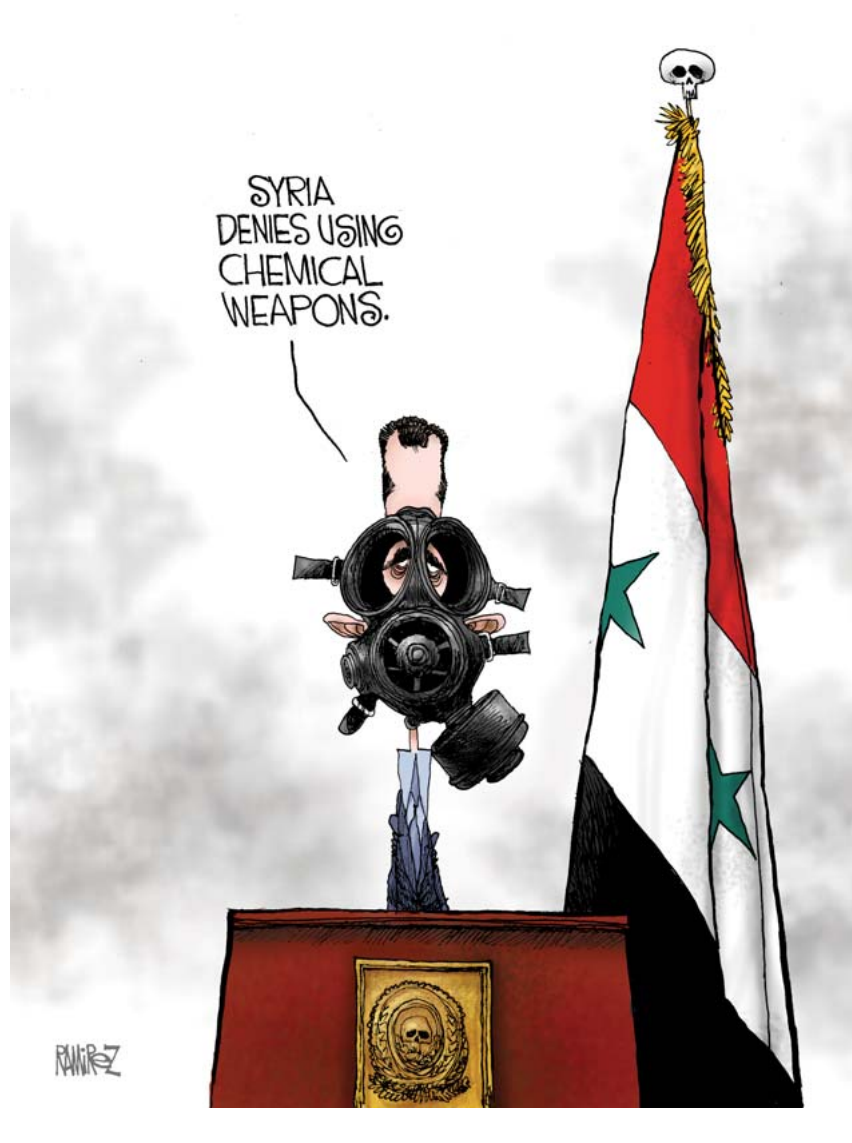
We salute the honorable Judge Symons, though fear that the voters of Santa Cruz may try to recall her, now that she suffers from an acute case of common sense. ♦

The Mural Police

It’s not often that THE SCRAPBOOK finds itself defending “graffiti artists.” But when they find themselves on the barrel end of silly and borderline extortionate government regulations, we can’t help but feel solidarity.

Here’s what happened: A few weeks ago, a “graffiti artist” in Portland, Oregon, was commissioned to paint a pen-and-ink-style mural on the side of two buildings. He had completed one, and was about halfway through the other, when the Portland police department ordered him to paint over them—even though he was creating the art at the express wishes of the buildings’ owners. It seems neither the artist nor the buildings’ owners had filed a “mural permit” with the city. According to the local media, “the mural permitting process includes submitting three full-sized copies of the site plan drawn to scale and hosting a neighborhood meeting, which must be advertised 21 days beforehand at the site of the proposed mural.”

And—you guessed it—the city of Portland also demands a \$50 “basic mural permit fee” and a \$142 “structural plan review fee.” Because, really, what’s the point in having art in your city if you can’t tax it? ♦



He Said, She Said

THE SCRAPBOOK was a bit taken aback to read a recent AP news report that began “Army Pvt. Chelsea Manning . . .” It was announced two weeks ago that Bradley Manning, recently sentenced to 35 years in a military prison for espionage and theft of classified documents, wanted a sex change and henceforth to be addressed as Chelsea. Still, it was jarring to see the nation’s biggest news organizations—including the AP, *New York Times*, and *Washington Post*—snap to attention and comply with Manning’s request, no doubt baffling more than a few readers.

Manning has neither legally

changed his name nor undergone any relevant medical treatment. Regardless, adopting the preferred, though inaccurate, nomenclature of transgendered people has long been the policy of news organizations. THE SCRAPBOOK dusted off its 13-year-old edition of the *AP Stylebook* and looked up the entry on sex changes, which advises: “Use the pronoun consistent with the way the individuals live publicly.”

Now if you declare that you are a pirate king, rechristen yourself Blackbeard, and insist anyone quoting you dutifully record that you punctuate your sentences with “Arrr”—good luck getting news organizations to honor your request.

We're not being entirely flippant with the comparison. The idea that we no longer inquire into the mental health of a seemingly functional adult who announces a desire to change the most essential fact of one's corporeal existence can't be a good thing. This obvious point was driven home when on August 5, an ABC News editor in New York, Dawn Ennis, woke up after a two-day bout of amnesia and decided that after two months of being Dawn he would go back to being Don. "I accused my wife of playing some kind of cruel joke, dressing me up in a wig and bra and making fake IDs with the name 'Dawn' on it," said Ennis, who by this point had actually undergone hormone therapy.

The unthinking eagerness to accept abrupt shifts in sexual identity seems enabling rather than empowering—and in some cases, there's a question of victimization. Last year, the *Washington Post* ran the cover story "Transgender at Five." There's a suspiciously sudden glut of parents insisting that their precious snowflake has an unorthodox sexual identity and is supremely confident about it, despite being at an age where storks and cabbages are the preferred explanation for their existence.

This may be deeply cynical, but we suspect journalists are just doing

their part once again to further the cutting-edge causes of liberalism. Manning gets deference on this matter, despite an appalling betrayal of the American people that should raise questions about his character and his mental fitness. ♦

Snowden in Exile

There are reasons to worry about NSA surveillance. Civil servants have all the usual human frailties, and when they abuse their power, it's good to know about it—that's why we have extensive whistleblower protection laws. But whistle-blowing is different from stealing state secrets and absconding to an unfriendly power, as Edward Snowden did this summer.

For the moment, Snowden's treachery has brought him a certain celebrity. Shortsighted libertarians think he's a hero; Matt Damon thinks he did "a great thing." A Chinese auto company plans to name its new electric car after him. The beautiful Russian spy we deported three years ago offered to marry him. But the good times may not last past the proverbial 15 minutes of fame.

We note the coincidence that August 30 marks the 50th anniversary of Guy Burgess's death. For the uninitiated: Burgess was part of the Cambridge spy ring. Along with Kim Philby and Donald Maclean, Burgess leaked British and American secrets to the Soviet Union for half a decade following the Second World War. In 1951, he defected. Living in the Soviet Union, he became miserable: He wanted to visit home but the U.K. wouldn't let him in and the KGB wouldn't let him out. He shopped mail order from London, and had his suits tailored on Savile Row; by 1963, he was an inveterate alcoholic and died of liver failure, 2,000 miles from his family and friends.

Snowden may have been well intentioned, and he may have some fun in Russia before his 30 pieces of silver are spent. But we wonder how well he thought through his plans: Celebrity doesn't always last, but being an expat traitor can be a lifetime investment. ♦

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Standard

Live Free or . . . Ouch!

Living in rural New England with four dogs teaches important political lessons—to the dogs.

Paraphrasing a thought from Michael Oakeshott (to the extent one ever could tell what Oakeshott was thinking), politics is “the activity of attending to the general arrangements of what-the-heck.” That is, everything’s a political system. Politics exists even in lonely fields and forests where the nearest neighbor is an exercise-of-a-Second-Amendment-right away.

Out here in the woods with the O’Rourke family it’s a democratic political system. Our dogs have the franchise. They get a vote on what’s for dinner. “Not asparagus,” say the kids. “The dogs don’t like leftover asparagus.”

It’s a libertarian political system. The commander in chief herself, my wife, can’t tell our dogs what to do. Not “sit,” not “stay,” and not “roll over and play dead” unless there’s something foul nearby and they roll over and *smell* dead.

And it’s a conservative political system. Or, at least, it’s a political system exhibiting a prominent feature of conservatism. There’s a lot of barking at the moon.

But even the best political system contains endogenous evil. No mode of governance is safe from the public corruption of entitlement policies (canned dog food instead of dry), the private corruption of graft and spoils (those were my new shoes!), and the spiritual corruption of, for lack of a better term, Bill Clinton humping the babysitter’s leg. Politics is forever prey to ambitious egotists, officious place-holders, professional bureaucrats, frustrated authoritarians, and—where our dogs live—porcupines.

We have two Brittany spaniels, a Labrador retriever, a Boston bull terrier, and a lot of porcupines. Each dog has gotten into a porcupine. Once,

Except for Pete, the Boston bull terrier.

Pete had two bad encounters with porcupines, bad enough that he had to be anesthetized for quill removal. The other dogs, under protest, will submit to having porcupine quills extracted with needle-nose pliers. But Pete is, essentially, a miniature pit bull. I commend the breed to Crips, Bloods, meth dealers, and unreformed friends of Michael Vick who live in studio apartments or otherwise lack space to exercise their pets. Not that Pete isn’t



a sweet-natured dog. When I tried to pluck a quill from Pete’s muzzle he gripped my pliers-wielding thumb between his jaws and gave it the gentlest of squeezes, just a reminder that he could snap the digit like an Oscar Mayer (or Anthony mayoral campaign) wiener.

After Pete’s two bad porcupine experiences he had a much worse one in the middle of the night on a holiday weekend. Pete had to be driven 50 miles to the nearest 24-hour emergency veterinary care facility, where more than a thousand quills were removed at the cost of approximately a human kidney transplant.

Last Sunday Pete bit yet another porcupine. This time I let him wait—an unhappy but unrepentant pin-cushion sulking in his kennel—until

my local veterinarian’s office opened on Monday morning.

This veterinarian is a man of sound good sense. His practice is devoted more to sporting dogs, riding horses, beef cattle, and other full citizens of the domesticated animal body politic than to gerbils, house cats, or anacondas owned by tattooed baristas.

I said to the vet, “Pete isn’t stupid. He figured out how to open the latch on the cupboard where the Milk Bones are kept and pry the lid off the Tupperware container. What’s his problem?”

My veterinarian explained that the other three dogs were bred for hunting (or, I guess, gathering, in the case of the retriever). He said, “They learned to pick their quarry. But Pete was bred for mortal combat. He learned to pick a fight.”

Porcupines do bad things. Every time Pete catches a whiff of porcupine he attacks it. Pete has been radicalized by porcupines. *What defeats painful for my dog / When he became ideologue.*

The other canines, like the children and their parents, understand what should be done when evil arises within our little nation-state. We’re staunch individualists, but we know we can’t always go it alone. Sometimes the right response to evil is an appeal to powerful and effective social organization, an appeal to civilization itself.

At our house, I am civilization itself—in one matter. I am powerful and effective social organization—in one way. The matter is porcupines, the way is a 12-gauge shotgun. I’ve blasted four of the damned things so far. Once the porcupine is dead I shovel it into the tractor bucket and dump it on the ash heap of history or, actually, on the brush pile behind the barn.

And this is the political lesson that my two Brittany spaniels and my Labrador retriever would like to teach Republicans as they begin the process of choosing GOP House and Senate candidates for the 2014 mid-term elections.

Pete is addressing a Tea Party rally.

P.J. O’ROURKE

‘Barbarians Are Barbaric’

Is President Obama going wobbly on Syria? No. He’s always been wobbly on Syria—and on pretty much everything else.

Still—despite everything, despite the infuriating incompetence and the irresponsible leaking and the weak-kneed hedging and the endless equivocating; despite the great likelihood that Obama will do much less than he should, much less effectively than he could; despite the ridiculous disavowal of regime change when he has previously called for regime change, and when regime change is the only serious way to deter prospective users of chemical weapons; despite his failure to articulate an easily articulated American national interest in punishing and indeed removing Assad—despite all this and much else besides, it would be disastrous for an American president to back off from the just and necessary use of military force when he has threatened it and prepared for it.

We therefore feel an obligation to persuade the president to follow through on his promises and threats. And since it’s unlikely President Obama will suddenly come to agree with THE WEEKLY STANDARD on the desirable character of American foreign policy or the general nature of the Middle East, it occurred to us that maybe he could be convinced by a man of the left. But the American left, as Harvey Mansfield has put it, “has become hardly more than a trembling in the presence of illiberalism.” So here is one of Israel’s most prominent columnists, Ari Shavit, a self-described “left-wing journalist” and “anti-occupation peacenik.”

Shavit’s August 22 column in the left-wing Israeli newspaper *Haaretz* bore the headline “The end of the world is starting in Damascus.” Its subhed was, “If civilians can be gassed to death in 2013, we face the end of the world that purports to be moral and enlightened.” Here’s what Shavit had to say:

Can this really be happening? In the 21st century? Only a few hundred kilometers from where I’m sitting writing this piece? Can it be that only hours ago a tyrant used chemical weapons against his own people who were rebelling in the capital’s suburbs against his tyranny? . . . The eye refuses to believe the pictures the iPad is transmitting. The mind cannot grasp the reports the iPhone is delivering. After the taboos of using artillery, helicopters and missiles on civilians have been broken, the taboo of using unconventional weapons has apparently been shattered as well. . . .

No decent person can ignore what’s happening. What is supposed to be an enlightened world cannot remain silent. Each day, the Syrian civil war is taking on the chilling connotations of the Spanish Civil War. It heralds the end of an era and delineates the coming era.

It’s not only innocent victims being buried in Damascus, but the concept of enlightened Arab nationalism and the hope that the West has a conscience. Women and children who were apparently gassed to death are being buried in Damascus, along with the ideal of an international community and the illusion of international law. . . . It’s the end of the world that purports to be moral and enlightened. It’s the end of the world that sought to establish a reasonable international order of which the Middle East would be part.

Many in the West and Israel despise Prime Minister Benjamin Netanyahu. But what’s happening in Syria proves the validity of Netanyahu’s warning that the greatest danger to world peace in the 21st century is the combination of unconventional weapons and unconventional regimes.

Lunatics really are insane. Barbarians are really barbaric. Huns will be Huns.

Those who act mercifully toward Huns bear direct responsibility for the fact that nuclear weapons are being built in Iran, chemical weapons are being used in Syria and doomsday weapons threaten the future of the Middle East. Those who underestimate the inherent danger of the Huns bear direct responsibility for the deaths of today’s victims, the Syrians, and tomorrow’s victims, the Israelis, Europeans and Americans.

It’s time to break free of the moral relativism, multicultural hypocrisy and political correctness that prevent us from seeing our evil neighborhood as it really is. A terrible warning siren is being sounded in Damascus. Do we hear it? Does the world hear it?

And, we might ask, does President Obama hear it? Shavit’s (metaphorical) use of “Huns” couldn’t help but remind us of Obama’s speech earlier this summer in Berlin. There the president said that “we are not only citizens of America or Germany—we are also citizens of the world. And our fates and fortunes are linked like never before.” Obama nowhere in that speech mentioned Syria, where 75,000 citizens of the world had by then died in a war about which Obama had talked much but done nothing. Indeed, one might conclude from Obama’s inaction that those who do nothing but talk about how they are citizens of the world tend to lack the courage to come to the aid of their fellow citizens of the world.



But perhaps that is too harsh. Perhaps Obama will, belatedly, hearken to the pleas of Ari Shavit. Perhaps he will break free of “moral relativism, multicultural hypocrisy and political correctness.” Perhaps he will realize not just that he has to act, but that he has to act decisively.

It may be that the president believes he ought to get congressional approval before acting against Assad. There is merit to this view. The solution is to ask Speaker John Boehner and Majority Leader Harry Reid to call the House and Senate back to Washington as soon as possible. A full debate in Congress would be appropriate and desirable. It would focus the American people on what is at stake, instead of leaving the public a bystander watching media commentary on the administration’s rhetorical zigs and political zags. We suspect at the end of the day Congress would pass legislation authorizing the use of military force against the Assad regime. And if Congress refused, at least we would have had the considered judgment of the duly elected representatives of the American people.

The worst outcome would be for Obama not to call Congress back, or not to act at all, but to falter and retreat. For his retreat would be America’s retreat, and his humiliation America’s humiliation.

—William Kristol

Worse Isn’t Better

‘It’s a pity they can’t both lose.’ So Henry Kissinger famously said about Iran and Iraq during their long and ugly war in the 1980s. Having squandered the many opportunities created by the uprising in Syria against the regime of Bashar al-Assad, and with the Syrian opposition increasingly dominated by al Qaeda-associated fighters, this has now become the de facto policy of the Obama administration.

Even accounting for Secretary of State John Kerry’s finely crafted expression of outrage at “the indiscriminate slaughter of civilians, the killing of women and children and innocent bystanders by chemical weapons,” actions he called a “moral obscenity,” the White House remains strategically and militarily ambiguous. Interviewed on *PBS NewsHour*, President Obama repeatedly struck a “jaw-jaw” tone that undercut Kerry’s “war-war” speech. “I have not made a decision” to attack Syria, he told Gwen Ifill and Judy Woodruff.

The president also promised that, even if he does decide on military action, it won’t have much effect in Syria. The president is content to see Assad kill his own people—which he has done in the tens if not hundreds of thousands—as long as Assad doesn’t do so with chemical weapons. Obama intends to take “limited, tailored approaches,” firing a “shot across the bow.” Most of all, he assured the two anchors, he

was “not getting drawn into a long conflict, not a repetition of, you know, Iraq.”

While the president’s purpose in the interview clearly was a domestic political one, his message reinforces what is, in effect, a strategy of stalemate. It’s not exactly that Obama wants both sides to lose, but he clearly doesn’t want either the Syrian regime to survive—his original “red line” in Syria was not the use of weapons of mass destruction but that Assad “must go”—or a jihadist-led opposition to replace it. And, as his otherwise gratuitous Iraq reference made plain, he’s not willing to do what it takes to achieve a better outcome.

On the surface, this appears to be not a replay of Kissingerian wit but a cold kind of “realistic” strategic wisdom. The case for prolonging the war as much as possible was summarized by Edward Luttwak in the *New York Times*: “By tying down Mr. Assad’s army and its Iranian and Hezbollah allies in a war against Al Qaeda-aligned extremist fighters, four of Washington’s [Middle East] enemies will be engaged in war among themselves and prevented from attacking Americans or America’s allies.”

If only it were so simple. Long-running, unresolved wars are extremely difficult to contain, to “limit,” or otherwise manage. They have a way of getting out of hand, particularly when one or more of the combatants is divinely inspired, as at least the al Qaeda fighters are in Syria. Take the Kissinger example, which consumed Iraq and Iran for just eight years, but the consequences of which endure to this day. In Iran, the war helped solidify the Khomeini regime and clerical rule; Mahmoud Ahmadinejad’s formative experience was as a *basij* fighter—the fanatically devoted troops thrown away in hopeless “human wave” attacks. Iran’s new president, the supposedly moderate Hassan Rouhani, served in a variety of senior command posts during the war. In Iraq, the war entrenched and further militarized the rule of Saddam Hussein. Left with an army he could not afford to stand down, Saddam turned it toward Kuwait and the long road of confrontation with the United States. The Iran-Iraq war truly had no winners.

It is also true that there are no easy answers to the war in Syria—the opportunities of the last few years are gone. But America’s failure to act has allowed things to get worse, if not actually made them worse. Letting things get still worse is not merely a moral obscenity but a grave strategic miscalculation. And, by intervening fecklessly for the narrow purpose of upholding a “norm” observed only by ourselves, we are very likely to make things worse.

The Syrian war is no longer a “civil war” between Syrian factions. It has become a struggle for regional power—with an Iranian-Shia axis facing off against a more disparate Sunni Gulf states-al Qaeda axis—that is limited mostly by the incompetence of the combatants. It’s a danger that only a realist could fail to see.

—Thomas Donnelly

Creative Destruction

Obamacare versus artists, writers, musicians, actors, et al. **BY BEN SCHACHTER**



Nancy Pelosi waxed rhapsodic in 2010 as she imagined the benefits of Obamacare: “Think of an economy where people could be an artist or a photographer or a writer without worrying about keeping their day job in order to have health insurance.”

Ben Schachter is a professor of visual arts at St. Vincent College.

Well, that was the economy we used to have. But as Obamacare begins to kick in, artists, photographers, writers, and other members of the “creative class” who have access to health insurance programs through numerous professional organizations will lose that coverage.

Up until now professional organizations have worked with insurance providers to craft reduced-rate plans

for their members. But thanks to the fine print in the Patient Protection and Affordable Care Act (PPACA), on January 1, 2014, many of these plans will fail to pass legal muster.

The College Art Association website posted a notice this month: “The New York Life Insurance Company recently informed CAA that it will no longer offer catastrophic healthcare coverage previously available to CAA members.” Why? Because it “is no longer an option” for “associations whose members reside in different states” to provide such coverage. These members will have to seek help from their home states’ newly formed Obamacare exchanges. Plans offered to Modern Language Association (MLA) members will suffer a similar fate.

Other insurance providers are reporting cancellations. The Entertainment Industry Group Insurance Trust (TEIGIT) website posts the following notice: “All individual and/or Sole Proprietor Health Insurance will terminate January 1, 2014. This includes plans acquired as Members of our Affiliated Associations & their groups.” Those affiliated associations include the American Federation of Television and Radio Artists, the Dramatists Guild, the Graphic Arts Guild, NY Women in Film and Television, and many others.

David Rubin, plan administrator, explains the effect of the Obamacare rules: “In TEIGIT’s case this insurance is limited to sole proprietors (i.e., self-employed) who are members of affiliated guilds/associations/unions, and are working at least 20 hours a week (averaged out because performers often work intensely and then have slow periods) in the fields of art and entertainment.”

Twenty hours? This will affect huge numbers of freelance artists, musicians, disc jockeys, and so forth. This is not a matter of penalties, mandates, or a business’s ability to absorb the cost, but rather a change in definition. Freelancers are losing their collective purchasing power because they are now considered “individuals.”

But don’t worry, everyone will be

GARY LOCKE

covered, right? As the College Art Association notes in a “Brief message” to its members on its website, “Here’s the good news: PPACA includes comprehensive reform that is designed to provide affordable health coverage for all individuals. The average premium for individuals who purchase coverage directly today (i.e., they do not receive coverage through their employer) is expected to decline significantly.”

But the membership of these organizations *should* worry. Unless they are older or suffer from some preexisting condition that made coverage hard to obtain, freelance artists, designers, and musicians forced to enter the state-run exchanges are far more likely to see their rates go up—or to face the individual mandate penalties. This will be especially true, as alert observers of Obamacare implementation have noted, for those under the age of 30.

Professional organizations should also worry. Once they can no longer offer discounts on health insurance, might prospective members have second thoughts about joining? Sure, the MLA, perhaps the largest professional association of academics with a 2012 membership of 28,563, can withstand losing a few hundred members. And the CAA attracts over 6,000 attendees to its annual conference. But smaller organizations do not have such cushions. Even as some current plans are grandfathered in under the new rules, future members might think twice about joining. After all, why should they, when one of the prime benefits of banding together with their peers has been removed? TEIGIT and similar insurers will almost certainly lose a lot of clients not because their customers were unhappy but because of Obamacare.

Pelosi’s vision of a world full of carefree artists, musicians, and writers is a mirage and becoming fainter the closer we get to January 1. The unfortunate freelancers out there who are losing their insurance because of Obamacare now have one more thing to worry about. They may want to start looking for a day job. ♦

Island of Tranquility

Israel in the eye of a hurricane.

BY ELLIOTT ABRAMS

Jerusalem

Egypt is an unruly military dictatorship, Syria is at war and will soon be hit by American bombs, the government may fall in Tunisia, Libya has no real government, Lebanon is now seeing growing Sunni-Shia strife, Jordan has a half-million Syrian refugees and the flow continues—one could go on. The “Arab Spring” seems to have led to a summer of tornadoes.

And there in the middle sits an island of tranquility, Israel—indeed one could even say Israel and the West Bank. No political instability, no terrorism, no war. One good way of measuring the mood in Israel is just how alert or relaxed the guards at every restaurant entrance appear to be. And they are *very* relaxed these days. The economy is okay, the prime minister looks like he’ll last a few years even if he isn’t beloved, and relations with many key Arab neighbors are good.

There are secret but obvious contacts with the Egyptian Army and cooperation against the Muslim Brotherhood and Hamas in Gaza and Sinai, cooperation with Jordan that keeps the border along the Jordan River dead quiet, coordination between Israeli and Palestinian security forces against terrorists in the West Bank, and a new alignment of Israel with the Gulf states that fear the Muslim Brotherhood, Syria, and Iran. Right now, Emirati, Saudi, and Israeli interests in the region are as close as

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they have ever been—and top officials all know it.

There are those, of course, who think the Israeli-Palestinian conflict remains the key, central, main, critical (or whatever term is in fashion) issue in the entire region. But even John Kerry, long a paladin of that line, recently said of the chemical weapons use by Syria’s Bashar al-Assad that “nothing today is more serious and nothing is receiving more serious scrutiny.” This, after all his trips to Ramallah!

Obviously this portrait of Israel as the calm eye of the hurricane is a snapshot, but watching the movie doesn’t change much. Few analysts think the Arab states are soon to become stable democracies or even stable autocracies. And as long as Iran is seen as a threat by the Sunni world, Israel’s relations with those states will not collapse. Objectively speaking, Israeli, Saudi, Kuwaiti, and Emirati interests will overlap for years to come. When I meet with Gulf Arab diplomats they don’t even mention the Palestinians until we get into the second hour of chatting. First things first, and that’s not Ramallah.

Moreover, there is no reason to think Israel will grow weaker in the coming years. Her gas discoveries will enrich her and make her self-sufficient in energy, and the high-tech sector north of Tel Aviv shows no signs of weakening.

But what worries Israelis (like pro-Western Arabs) most of all is not Iran; that’s second. First comes us, the United States. We are not only seen to be losing influence in the region but to be doing it willfully, purposefully. A strike at Syria might help reverse that

perception, but not too much unless it is far larger than anyone now anticipates. The receding United States is not a topic of debate; it is mentioned in conversations the same way people mention the expanding Iranian nuclear program or the turmoil in Egypt, as a fact rather than as a debating point or new discovery.

For Israelis, tied so closely to the United States and dependent on us in many ways, this is all hard to understand. They (some of them, anyway) know about our budget squeeze, and they can appreciate that Iraq and Afghanistan left Americans tired of wars in the Middle East. They do not fully appreciate how much events in Libya, Egypt, Syria, and elsewhere after the first hopeful moments in 2011 leave Americans thinking the Middle East is hopeless—a rabbit hole down which no more American treasure or blood should be poured.

But whether they approve or understand America's declining power, they see it before their eyes, and know they must adjust. Just like the Arab allies of the United States, they look to local partners when interests overlap, and realize they must all act to protect themselves if we won't. Thus has Israel hit Syria a minimum of four times (there appear to have been some other, unannounced strikes) while the United States dithered, just as the Gulf Arabs have been pouring money and guns into Syria, and money into Egypt, to protect their own interests when we were not protecting them through continuing efforts at regional dominance.

Syria is a proxy war with Iran, but the real Iranian challenge—nuclear weapons—remains ahead. Unless the American strike at Syria is far more robust than White House language today suggests, it will not reassure our allies in the region that America plans to solve their Iran problem. A year ago, in the summer of 2012, I thought Israel was about to hit Iran, and what I hear in Israel indicates that Netanyahu may well have wanted to but could not get a consensus among the key security

players. Many people now doubt that Israel has the guts (in another version, that Netanyahu has the guts) to strike at Iran's nuclear sites, but that is not the impression a recent trip to Israel leaves. On the contrary, it seems that a consensus is growing that an Iranian bomb is truly unacceptable, and that as a last resort Israel must act to prevent it. "Last resort" means they still wish the Americans, with our vastly greater firepower, would do it, but one meets few Israelis who believe that will happen.

So this island of stability may not be so tranquil down the road if the confrontation with Iran comes. But as one retired general of very high rank said to me, Iranian missiles and Hezbollah rockets may kill a few hundred people but not more, and it is a price we have to pay—and

is worth paying—to stop the Iranian bomb. When I said Hezbollah had made Israel pay a real price in 2006 and had no doubt rearmed even more thoroughly since then, he laconically replied that Israel hadn't stood still either.

To Israelis, surrounded as they are by a region in complete turmoil, and with both a regime using chemical weapons and a concentration of 5,000-7,000 jihadists to their north, today's smooth sailing is obviously not permanent. It is especially worrying to them that American prestige and clout in the region are at a historic low. But whatever the future holds, let's not overlook the remarkable present: Ten or twenty years ago, who would have predicted that Israel and the West Bank would be the only tranquil places within hundreds of miles? ♦

The Holder-Jindal Collision

The federal government attacks Louisiana school choice. **BY MICHAEL WARREN**

Baton Rouge

Louisiana governor Bobby Jindal found out late on Friday, August 23. Attorney General Eric Holder was suing to block the state's school voucher program, which aims to give low-income kids in terrible schools the opportunity to attend better public schools and even private schools. The Justice Department claims the two-year-old program could interfere with federal desegregation orders in several Louisiana parishes, holdovers from the Civil Rights era.

"This was a complete shock," Jindal says. "A complete surprise."

Maybe it shouldn't have been.

Michael Warren is a staff writer at THE WEEKLY STANDARD.

Liberals have been fighting the Louisiana voucher initiative, officially called a "scholarship" program, from the beginning.

"The teacher unions took us all the way to the state supreme court, and the program's still here," says Jindal. In May, the court ruled the voucher program was constitutional but that funding it through the general education budget wasn't. Jindal and the legislature made it a line item in the state budget instead.

Many in the education establishment in Louisiana—Jindal calls them the "coalition of the status quo"—protested the voucher program and other education reforms like charter school expansion and tenure reform. Some even hoped to recall him, the Republican speaker of the house, and

other legislators, but the movement went nowhere.

"We're still here," Jindal says, a little defiantly. So is the voucher program, at least for this school year. What started as a pilot program in New Orleans during Jindal's first term as governor expanded to school districts all over Louisiana in 2012.

Here's how it works: Public schools receive grades, from A to F (another Jindal reform), that tell teachers, parents, and policymakers how those schools are performing. A school that receives an F has, among other problems, at least half of its students performing below grade level. Schools that receive a C or lower are considered failing schools. Low-income students attending a failing school are eligible to apply for a voucher, and money that would otherwise go to their local school can instead be used to pay for tuition at a private school or a better-performing public school.

Parents like the program, according to the governor's office, with 93 percent approval from parents (mostly single moms) whose kids were awarded vouchers. Ninety percent of the recipients are minorities, which in Louisiana means they are overwhelmingly black. While most of the program's students are in New Orleans, there are recipients everywhere from urban areas like Baton Rouge and Shreveport to the rural parishes north and south. Early results for the statewide program show improvement: From 2011 to 2013, students in "scholarship schools" did better on literacy and math tests than they did in their old schools, with a 7 percent increase in students performing at grade level in those areas.

Last year, 10,000 students applied for vouchers, and 5,000 received them. This year, the applicant pool jumped to 12,000, and 8,000 vouchers were awarded (the awards are made by lottery). The program's growth may explain why the feds are suddenly interested.

"It's successful," Jindal says. "The average cost is roughly about 60 percent of what we'd otherwise

spend, so we're saving millions of dollars for taxpayers. Maybe they saw the growth, maybe they saw the success, maybe they saw the attention it was getting, and they decided they wanted to send a message to any other state thinking about copying this or doing this."

Other states are going down the same path as Louisiana. According to the Friedman Foundation for Educational Choice, 23 states and the District of Columbia have a total of 48 voucher and tax-credit programs designed to help poor kids in bad schools get out, including 9 new programs and 10 expanded ones in 2013.



Bobby Jindal

So why is Louisiana in the crosshairs? The Justice Department claims in its petition that the voucher program violates federal desegregation orders. The motion stems from a 1975 equal protection case decided in the Fifth Circuit. The court found that the state of Louisiana could not provide money to private schools in certain school districts "in ways that further or support discrimination or segregation."

"That injunction is still in effect," DOJ's petition reads.

But as Jason Bedrick, a policy analyst at the Cato Institute's Center for Educational Freedom, put it in a blog post, DOJ cites just two examples as evidence the vouchers have reversed desegregation in public schools. The first, the predominantly black

Independence Elementary in Tangipahoa Parish, lost five white students to other schools. The second, the predominantly white Cecilia Primary School in St. Martin Parish, lost six black students. The resulting changes in racial makeup, Bedrick calculates, were less than 1 percent in both schools. For DOJ, though, these changes "reversed much of the progress made toward integration."

"Though the students," Bedrick writes, "almost certainly would not have noticed a difference, the racial bean counters at DOJ see worsening segregation."

Furthermore, school choice proponents argue the data indicate voucher-accepting private schools are often less segregated than the public school systems surrounding them. Studies comparing voucher schools with public schools in Milwaukee, Cleveland, and Washington all showed higher integration in the private schools.

"Voucher programs are achieving integration in private schools voluntarily," says Robert Enlow, CEO of the Friedman Foundation.

For Jindal, DOJ's use of civil rights laws to fight the school choice effort misses the point.

"I think it's ironic the Obama administration and the Holder Department of Justice would actually try to use our civil rights laws and the same protections that were put in place to help protect minority kids to actually try to force them to fail in public schools," he says. "I think this is an abomination. I think it's ridiculous."

The state has until September 10 to respond to the motion, and Jindal says his lawyers are still discussing the best path forward to maintain the voucher program for the 2014-2015 school year and beyond. With education reform as the two-term governor's signature achievement and a potential presidential run for him in the next cycle, Jindal appears to welcome the fight. There's another reason, too, one that turns DOJ's segregation argument on its head. "I think education is the civil rights issue of our day," says Jindal. ♦

A Different Immigration Mess

The debate in Australia over who gets in.

BY FRED BARNES

A century ago, Australia used a “dictation test” to keep non-whites and selected others from entering the country. It required an immigrant to write 50 words in any language chosen by the customs official who administered the test. The most notorious example occurred in 1934, when a Czech immigrant was told to write a passage in Scottish Gaelic. The test was abolished in 1958.

Australian immigration policy has changed repeatedly since then—three times in the past decade alone. In 2010, nearly 190,000 immigrants were admitted legally, more per capita than entered the United States that year. But it’s illegal immigrants that are a problem in Australia. An average of 3,000 “boat people” were arriving monthly this past spring, and roughly 30,000 await rulings on their requests for asylum.

So America’s immigration mess is not unique. But while Australia’s situation is similar, it’s not exactly the same. The countries are different. Australia is thinly populated—23 million occupy an area almost as large as the continental United States. It’s an island continent. It has no land borders. Illegal immigrants must arrive by sea. They risk life and limb on rickety boats to reach the Australian shore.

It would be nice if Australia offered hard lessons to guide reform of America’s immigration laws. It doesn’t. But

Sydney

its experience, more than any other country’s, is still worth examining.

■ *Deterrence.* The key to stemming the flow of illegal immigrants is deterring them from attempting to enter in the first place. This was achieved under the “Pacific Solution” adopted by Prime Minister John Howard in 2001. The Australian



Australian officials with asylum-seekers, August 2013

Navy interdicted boats and forced them either to return to Indonesia or deposit refugees seeking asylum on islands outside the Aussie “migration zone.” The year after the policy was introduced, “arrivals dropped from 43 boats carrying more than 5,000 people, to one boat carrying one asylum seeker,” reported Bridie Jabour of the *Guardian*.

In 2007, Howard’s Liberal party was defeated. And the new Labor government installed a more relaxed policy that proved to be highly unpopular. Howard’s detention centers on Christmas Island were shut down and a new one was established in Australia. The refugee boats returned.

When Labor’s Kevin Rudd became prime minister for a second time two months ago, he immediately imposed

a harsher policy. “From now on, any asylum seeker who arrives in Australia by boat will have no chance of being settled in Australia,” Rudd announced. If found to be legitimate refugees, they would have to settle in Papua New Guinea, a former Australian colony.

■ *Credibility.* When Howard announced the Pacific Solution, he proclaimed Australia’s sovereignty on immigration. “We will decide who comes to this country and the circumstances in which they come,” he said, rejecting claims his policy fell short of Australia’s international obligations for treating refugees.

Rudd, however, appears to lack credibility in halting illegal entrants, perhaps because he has flip-flopped on the issue. In the 2007 campaign, he promised to stick with the Pacific Solution. But as prime minister, he quickly replaced it with a softer policy. Then this July, he imposed the no-asylum-in-Australia plan. This time, the boats continued to come, bringing approximately 3,000 refugees since Rudd’s announcement.

■ *Deportation.* Once an illegal immigrant sets foot on Australian soil, he usually stays. “In reality, almost no one ever goes home from Australia against their will, no matter what their refugee status determination is,” according to Greg Sheridan of the *Australian*.

There are reasons to doubt whether most asylum seekers would really suffer persecution if they stayed home. They linger for months in Indonesia without asking for asylum there. They’ve been cleverly trained in making the case for asylum. “The illegal immigration problem essentially reflects a desire by people in poor countries to live in a rich country,” Sheridan wrote.

Nor do they want the “temporary protection visas” (TPV) that Howard offered. These were given to immigrants who’d gained official refugee status. TPVs lasted for three years, but didn’t guarantee permanent visas

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or allow families to join refugees in Australia. The refugees wanted permanent status.

■ *Predominance of Muslims.* Today most boat people are Muslims from Iran, Iraq, or Afghanistan. They are largely unskilled people for whom there is little work in Australia. Legal immigration policy prioritizes those with education and skills. They come mainly from India and China and have smoothly assimilated into Australian society.

The chief fear about Muslims is that they won't assimilate and instead will live in the kind of insular neighborhoods where, in other countries, Islamic extremism has flourished. The other worry is welfare. Even after five years in Australia, Muslim households have a high rate of reliance on government support.

Tony Abbott, the Liberal party leader who's likely to become prime minister after the September 7 election, plans to revive Howard's Pacific Solution. Indeed, he sounds like Howard. "We run this country and we decide who comes here," he said. "If you want to stop the boats, you've got to change the government, and if you can't stop the boats, you're not capable of governing this country."

As prime minister, Abbott says he "will immediately give new orders to the Navy to tackle illegal boat arrivals and 'turn back' the boats where it is safe to do so." Otherwise, refugees will be steered to offshore processing areas from which transit to Australia is unavailable. Also, TPVs will be issued a work requirement for welfare and no chance of family reunion. And Abbott vows to provide \$67 million for joint operations with Indonesia, Sri Lanka, and Malaysia "to disrupt people smuggling through international deployment of specialist Australian Federal Police Officers."

"It is my commitment to make a difference from day one," Abbott told a radio interviewer. It's quite an agenda. And it's bound to prompt protests from the refugee rights crowd, Amnesty International, and left-wing groups. But Abbott shouldn't be fazed. We await the results. ♦

The 'Human Rights' Juggernaut

Does the First Amendment protect wedding photographers? **BY MARK HEMINGWAY**

On August 22, the New Mexico supreme court unanimously ruled that a wedding photographer broke the law by refusing to photograph a same-sex commitment ceremony. While gay rights advocates are celebrating this latest in a string of legal and political victories, the out-

their vocation to support gay unions.

According to the New Mexico supreme court, that isn't sufficient reason for a business owner to deny someone its services. "We conclude that a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the [New Mexico Human Rights Act] and must serve same-sex couples on the same basis that it serves opposite-sex couples," reads the decision. The court further suggested that Elane Photography's owners "retain their First Amendment rights to express their religious or political beliefs" even as they are compelled to photograph gay weddings because it is still



'Wedding Party at the Photographer's Studio'
by Pascal Adolphe Jean Dagnan-Bouveret

come of *Elane Photography v. Vanessa Willock* has alarmed religious liberty advocates. And it could end up having a profound influence on First Amendment jurisprudence.

The New Mexico court ruling upheld a previous judgment of the New Mexico Human Rights Commission that Elane Photography would have to pay \$6,637 in legal fees to Vanessa Willock, who brought the complaint against them for refusing to photograph her commitment ceremony in 2006. Elane Photography is owned by a husband and wife who are evangelical Christians and have a moral objection to using

within their rights to "post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."

Critics of the decision challenge the court's simplistic reasoning. The New Mexico supreme court has an awfully narrow view of what a wedding photographer does, in both legal and practical terms.

For one thing, it's hard to argue that wedding photographers provide the same service to all customers, as is typical under public accommodation laws. "When you order public accommodation, you have to sell your hamburgers to everybody, you have to rent your hotel rooms to everybody. That's just a uniform product being

Mark Hemingway is a senior writer at THE WEEKLY STANDARD.

sold to everyone without discrimination,” Jordan Lorence, a lawyer for the Alliance Defending Freedom, the Christian legal group representing Elane Photography, told THE WEEKLY STANDARD. “There are some commercial professions—like a videographer, a speechwriter, a website designer—where there’s no standard product. The product is inherently expressive. Then when you add to that a ceremony that’s expressing ideas, going to a wedding photographer and saying I want you to use your photojournalistic skills to tell the story of my event in the best way possible, you have this huge freedom of speech issue.”

Wedding photographers certainly don’t see what they do as providing a standardized, mundane product to every customer. They commonly interview clients to ascertain what qualities the couple want their unique wedding pictures to capture. And wedding photographers almost always retain the copyright to their work, making their product intellectual property in the eyes of the law. In this respect, there’s a strong legal argument that wedding photographers are closer to artists than simple service providers.

Lorence’s use of the term “photojournalist” is also telling. Professional photojournalists sometimes moonlight as wedding photographers. It seems odd that First Amendment protections would apply to a person being paid to document events in some circumstances and not in others. “I think the New Mexico supreme court totally blew it, because they keep talking about photographers like they’re

segregated lunch counters dispensing hamburgers,” said Lorence.

As for the notion that business owners are free to express their opinions about same-sex marriage even as they are forced to accommodate it, this supposed compromise seems likely to trip up business owners—as the Catholic proprietors of the Wildflower Inn in Lyndonville, Vermont, found out.

In 2005, the owners of the inn told a same-sex couple that the establishment would host their civil union ceremony in compliance with Vermont’s Fair Housing and Public Accommodations Act, but that they personally believed marriage to be limited to the union of a man and a woman. The owners of the bed and breakfast were subsequently investigated by the Vermont Human Rights Commission, which concluded they had acted lawfully, and they continued to respond to requests to host same-sex ceremonies in the same fashion.

Then last year, the Wildflower Inn’s wedding coordinator flatly turned down a request to host a wedding reception for a same-sex couple. The employee further encouraged the person making the request to call her at home so she could make arrangements for the same-sex couple through her own private wedding planning service. The employee later admitted she had lied to the same-sex couple when she told them she had discussed their request with the owners and that she alone was responsible for refusing their request. Because of this (now former) employee’s misconduct, the Wildflower Inn ended up reaching

a settlement with the state Human Rights Commission under which the inn paid a civil penalty of \$10,000 directly to the commission and \$20,000 to a charitable trust controlled by the same-sex couple who had been denied services.

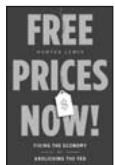
Had the owners of the Wildflower Inn never publicly asserted their religious beliefs to begin with, it seems unlikely the state would have forced them into such a hefty settlement, given that their rogue employee admits the owners had no role in failing to accommodate the couple. In the end, “small businesses like ours cannot match the limitless resources of the government,” said Wildflower owner Jim O’Reilly in a statement.

Increasingly, state governments are using their considerable resources to go after business owners who don’t approve of gay marriage. Earlier this year, after a florist in Richland, Washington, refused to provide flowers for the wedding of a gay customer, the small-business owner was sued by no less than the state attorney general for allegedly violating the state’s consumer protection laws. And on August 14, it was announced that a bakery in Gresham, Oregon, is being investigated by the state Bureau of Labor and Industries civil rights division for declining to provide a wedding cake for a same-sex commitment ceremony.

While there’s certainly an argument to be made that bakers and florists are expressive and artistic professionals, the First Amendment case is less obvious than it is with wedding photographers. “There are some businesses that I think do not have an expressive component—the only religious argument they can make is under a state religious freedom restoration act or the federal or state free exercise clause,” noted Lorence. “The cake thing is an intriguing argument. It depends on how they’re using the cake. If they call up and say, ‘We want to feed cake to our people,’ there’s nothing expressive there, just as if you called up a barbecue place and said we want pulled pork sandwiches. . . . But there’s a point in the reception where the married couple cut the cake and shove cake in

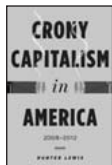
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their mouths. Then they're using cake not to feed people, but for its symbolic communication that these two people are legally married."

By contrast, there's little evidence that those enforcing discrimination and public accommodation laws are making even basic distinctions between free speech and free exercise of religion, which are protected, and basic services available to all under public accommodation laws. The Christian owner of Hands On Originals, a printer in Lexington, Kentucky, declined to produce T-shirts for a gay rights event last fall because he explicitly disagreed with the message he was asked to print. Lexington-Fayette Urban County Human Rights Commission is investigating him, even though he has gay employees and regularly serves gay customers. "We'll work with anybody," said Blaine Adamson, the owner of the press. "But if there's a specific message that conflicts with my convictions, then I can't promote that."

State governments also have a lot of tools at their disposal to fine and otherwise make life difficult for businesses, and they're not shy about using them. In response to the investigation of the bakery in Gresham, Oregon, labor commissioner Brad Avakian told the *Oregonian*, "The goal is never to shut down a business. The goal is to rehabilitate." While Avakian was trying to be reassuring, the idea that the state would "rehabilitate" business owners with illegal opinions sounds more than a little ominous.

For now, state governments continue to get away with pushing the envelope on public accommodation despite the First Amendment questions. That's largely because of a little-noted 1986 Supreme Court decision, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* The court ruled that a legal doctrine known as the "Younger abstention" applied to state human rights complaints. Essentially, federal courts won't interfere to remedy questions involving constitutional rights as long as there's an ongoing state proceeding that addresses the question.

Now, however, after seven years of

wending its way through New Mexico's legal system—seven years marked by a great deal of aggressive legal campaigning across the country in support of gay marriage—the recent New Mexico supreme court ruling means that Elane Photography has exhausted its appeals at the state level. The New Mexico decision can now be appealed directly to the Supreme Court.

It's an excellent opportunity for America's highest court to ensure that

the First Amendment's free speech and free exercise clauses remain meaningful. If the Court declines to hear the case or arrives at a ruling that echoes New Mexico's decision, then state and local governments—and their unaccountable human rights commissions, where full legal protections for the accused do not apply—will suddenly become powerful arbiters of which classes of Americans enjoy constitutional protection and which do not. ♦

Who Gets Sent to Federal Prisons?

The attorney general doesn't know what he's talking about. BY JOHN P. WALTERS

Several weeks ago in San Francisco, Attorney General Eric Holder told the American Bar Association that our criminal justice system is too harsh, too costly, and gives convicted African-American males sentences 20 percent longer than others for similar crimes.

According to Holder, while the U.S. population has increased by about a third since 1980, the federal prison population has grown eightfold. "It's clear—as we come together today—that too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason."

In fact, all federal inmates added together (219,000) constitute less than one-tenth of 1 percent of the U.S. population, and state prison populations are down for the third straight year.

John P. Walters is chief operating officer of the Hudson Institute and former director of the Office of National Drug Control Policy under President George W. Bush.

Still, it is time, according to Holder, "to implement common-sense changes that will foster safer communities from coast to coast."

The attorney general called for a National Forum on Youth Violence Prevention. In addition, he announced: "We have assembled a new task force to respond to the extreme levels of violence faced by far too many American Indian and Alaska Native children. Next month, we will launch a national public awareness campaign—and convene a Youth Violence Prevention Summit—to call for comprehensive solutions."

With the national forum, task force, and summit, Holder wants to foster a broad discussion about the state of American criminal justice, but meanwhile he is especially concerned about drug convictions, singling out mandatory minimum sentences for drug crimes as a root cause of injustice. He will direct U.S. attorneys to reconsider the charges they bring in federal cases, in which mandatory



Eric Holder

minimum sentences are involved, charging “low-level, nonviolent drug offenders” with lesser violations to avoid the mandatory minimum penalties under federal drug laws.

The attorney general spoke as if he were unaware that federal law has no mandatory minimum sentences for simple possession of illegal drugs of any amount. The lone exception is crack, and there a special “safety valve” provision lets any such “low-level, nonviolent offenders” off with lighter sentences. Holder is therefore talking about individuals charged with trafficking, not possession of illegal drugs.

So who are the less than one-tenth of 1 percent of Americans languishing in federal prison? The latest U.S. Sentencing Commission data reveal that drug offenses are actually not the best way to get a cell at Allenwood or Marion. For the past four years, immigration cases have edged out drug crimes as the largest single type of federal offense (in fiscal year

2012, 46 percent—almost half—of those sentenced to federal prison were *not* U.S. citizens). Drug convictions have actually been trending down, from a majority of all cases to less than one-third.

Holder said he is troubled that we are “coldly efficient” in our incarceration efforts. Of course, the accused stand trial and must be found guilty before they go to prison, and as the Sentencing Commission notes, the federal criminal justice system seems to be doing quite an efficient job of convicting the guilty. In fiscal year 2012 (under the Obama administration), 97 percent of all offenders pleaded guilty, the highest rate since fiscal year 2002. Many of these guilty pleas are to lesser charges than the actual offense or offenses warrant, and thus there is already a reduction in the penalty built into this process for most offenders.

At points in his speech, Attorney General Holder seemed to blend references to federal sentencing and sentencing by the states. While Justice Department figures on state sentencing are less timely, the 2012 report by the Bureau of Justice Statistics, *Prisoners in 2011*, noted that over half of the nearly 1.4 million state prisoners were sentenced for violent offenses (53 percent), 18 percent were serving sentences for property crimes, and 17 percent were serving sentences for drug crimes.

Just this week, Newark mayor and Senate candidate Cory Booker followed Holder, announcing his plan for criminal justice reform, featuring the elimination of mandatory minimum sentences for low-level drug offenders. Although some news reports noted that violent crime in Newark has been surging, Booker and the attorney general seem unable to face the fact that violent and repeat offenders have long been the vast majority of state prison inmates and the overall inmate population of the United States.

Drug enforcement is certainly an important part of the federal and state criminal justice systems, but it is not the center of gravity. Drug offenders are not “filling” either the federal or the state prison.

The attorney general also spoke as

if federal judges do not already have and use discretion in sentencing drug offenders. As the Sentencing Commission report notes:

In fiscal year 2012, judges in 18.2 percent of all drug cases determined that the applicable guideline range should be lowered because of the offender’s minor or minimal role in the offense. In marijuana cases, this adjustment to the guideline range occurred 23.0 percent of the time. In contrast, courts found such an adjustment warranted in only 5.0 percent of crack cocaine cases. In another 6.6 percent of drug cases, the court determined that the applicable guideline range should be increased because of the offender’s role in the offense as an organizer, leader, manager, or supervisor.

The federal sentencing process actually does adjust punishment to fit the offense. As noted, the system even makes allowances in offenses related to powder and crack cocaine. In fiscal year 2012, the commission explains:

Powder cocaine offenders obtained relief from a mandatory minimum sentence at a higher rate (32.3 percent) through the statutory “safety valve” exception to such sentences, which requires courts to sentence an offender without regard to any otherwise applicable mandatory minimum punishment when certain conditions are met. In contrast, 7.6 percent of crack cocaine offenders obtained this relief.

Why do crack cocaine offenders—many with smaller quantities of illegal drugs and a majority of whom are African-American males—receive so little relief from mandatory minimum sentences? Isn’t this precisely what the attorney general cited as unjust in the present system? Here the Sentencing Commission also thought an explanation was in order, and it reported: “Overall, crack cocaine offenders continue to have, on average, a more serious criminal history than any other category of drug offender.”

In a democracy, a conversation about the ways and means of justice should always be welcome. Too bad the attorney general’s misleading rhetoric and shoddy statistics have us off to a rocky start. ♦

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A Very Quiet Alliance

The burgeoning friendship between Azerbaijan and Israel. BY ALEXANDROS PETERSEN

A number of Israel's former foes share its concerns about Iran's nuclear program, but this is mostly on the principle that an enemy of one's enemy is a friend. Israel can claim to have a genuinely close partnership with only one majority-Muslim country. It is said that Azerbaijani-Israeli relations are like an iceberg: nine-tenths below the surface. But more and more of this iceberg is becoming visible; the Azerbaijani foreign minister's recent trips to Israel and Washington are the most overt demonstration of the connection to date. The United States should encourage this relationship as an example of pragmatic, interests-based cooperation, devoid of the emotional rhetoric that typically characterizes Middle Eastern politics.

Azerbaijan's foreign minister, Elmar Mammadyarov, gave a strong speech to the American Jewish Committee's annual forum in Washington earlier this summer. He denounced anti-Semitism and emphasized his country's "close, friendly" relationship with Israel.

Even putting oratory aside, his visit to Israel a month earlier indicated that the growing bond between the two countries could have significant geopolitical consequences for the Greater Middle East. On the question of Iran's regional ambitions in particular, the Azerbaijan-Israel link provides important, but underappreciated, geographical leverage for the United States.

Alexandros Petersen is the author of The World Island: Eurasian Geopolitics and the Fate of the West and coeditor of chinaincentralasia.com.

Israeli president Shimon Peres, in his discussions with Mammadyarov, praised Azerbaijan's religiously tolerant society. It's long been a haven both for Ashkenazi Jews and the country's own ancient population of so-called Mountain Jews, commonly considered part of the Sephardic community. But the last couple of decades have produced more direct links between the Caucasus and the Middle East. Energy-rich Azerbaijan provides a major portion of Israeli oil imports, and there has been discussion of building a pipeline for Azerbaijani oil across Israel to the Red Sea for export to East Asia. Azerbaijan's state energy company is part of an offshore oil drilling project in Israel. In return, a number of Israeli companies have been key investors in Azerbaijan's economy, from oil services to telecommunications, since the breakup of the Soviet Union.

It is the security and defense technology relationship between the two countries, however, that is surprisingly comprehensive. Last year, the pair signed a \$1.4 billion defense agreement, in which Israel Aerospace Industries provides aircraft, drones, and missile defense technology to the Azerbaijani military. This is on top of a joint venture in which Israeli drones are manufactured in Azerbaijan, as well as past provisions of antitank, antiaircraft, and anti-infantry technologies.

A lot of this has to do with the shared threat posed by Iran. In 2008, Azerbaijani police foiled an Iranian-sponsored bomb plot targeting the Israeli embassy in Baku, Azerbaijan's capital. Immediately to Azerbaijan's south, Iran is home to many

more ethnic Azeris than Azerbaijan, a result of the Azerbaijani-populated territories being divided between Iran and Russia in 1828. That history helps explain why Tehran sided with Armenia during the Armenian-Azerbaijani war over Nagorno-Karabakh in the 1990s.

Just this spring, a number of Iranian lawmakers called for the annexation of Azerbaijan and the destruction of its Turkic heritage. It seems that Israel is not the only country Tehran wants to wipe off the map.

Understandably, both governments want to keep details of sensitive security collaboration quiet, but rumors persistently circulate that their cooperation on drone technology has expanded to shared basing for surveillance of Iranian activities. This may be partly in response to Iranian agents aggressively trying to export their brand of revolutionary Shia ideology to Azerbaijan. For Iranian citizens, especially the Azeris making up a majority in the north of the country, the Republic of Azerbaijan appeals as a secular society very different from the oppressive religious authoritarianism under which they live. This by itself makes the mullahs nervous, and official Tehran is not shy about its distaste for Baku, with one senior Iranian official declaring recently that Azerbaijan's leaders are "sick with Zionism."

Given that the United States already has close relations with both countries, it would behoove American strategists to take advantage of Azerbaijan-Israel ties when crafting strategy on Iran. While Azerbaijan has repeatedly said that it opposes military action against Iran, expanded U.S.-Azerbaijan and Azerbaijan-Israel partnerships send a signal to Tehran that it will face a united front on three different geographical axes.

Azerbaijan is increasingly assuming Turkey's Cold War-role as a pivotal secular majority-Muslim ally of both Israel and the United States. And at just the right time. Its support may prove invaluable if tensions with Iran escalate. ♦

The Constitutionalist

Utah's freshman senator makes his mark

BY TERRY EASTLAND

When I asked Mike Lee, the freshman Republican senator from Utah, how he identified himself politically, he said, “A constitutional conservative.” Note the adjective “constitutional.” It’s not surprising that the senator uses it.

Lee is the son of the late Rex Lee, Ronald Reagan’s solicitor general from 1981 to 1985. Rex Lee dedicated his 1981 book, *A Lawyer Looks at the Constitution*, to Mike and his brother Tom. Despite their young age, they often watched their father argue cases before the Supreme Court. Conversation around the dinner table, Mike Lee recalls, centered on law cases, many involving the Constitution, such as *INS v. Chadha* (1983), a landmark separation of powers controversy in which the Court found the legislative veto unconstitutional. At the time of the *Chadha* discussion, Mike was 12 years old.

Mike graduated from Brigham Young in 1994 with a major in political science and then from its law school. He clerked for U.S. District judge Dee Benson and then for Third Circuit judge Samuel Alito. He joined the Washington office of Sidley Austin, working in its appellate practice, before becoming an assistant U.S. attorney in Utah for three years, handling cases on appeal. He served for a year as counsel to Utah governor Jon Huntsman and then clerked again for now Justice Alito. “Being 35 at the time, I was the geriatric law clerk,” he jokes.

None of those jobs, you’ll notice, was in a legislature. But once Lee returned to private practice in Utah, “things started to happen in 2008 and 2009 that got me very concerned about the direction the country was heading in,” he says, recalling how he came to run for the Senate.

Congress was passing bills that expanded the size and reach of government, he says, citing the Troubled Asset Relief Program enacted in October 2008 and the economic stimulus package a few months later. And yet there was “little debate” in Congress about what in the Constitution “makes it okay . . . or gives you the authority” to pass those measures. Congress “was spending trillions of dollars” and “had no idea how [it] would pay for this, except to send the bill to our children.”

Lee says that in 2009 a friend invited him to his home to give a talk to people who were “concerned about public affairs and what was happening in Congress. So I went and gave . . . a speech about federalism and separation of powers and how we’ve drifted far from them. . . . I thought these people would be bored stiff;” but they told other friends. And so there were more invitations to speak, the audiences grew, and a candidate for Senate was born. Lee challenged fellow Republican Bob Bennett, an incumbent seeking a fourth term.

The themes Lee ran on—federalism, separation of powers, and the rule of law—are key aspects of what *The American Constitution*, the classic work on the document’s origins and development (by Herman Belz, Winfred Harbison, and Alfred H. Kelly), calls “constitutionalism,” which it defines as “the theory and practice of conducting politics in accordance with a constitution.” Lee thus offered himself to Utahans as, in effect, a constitutionalist, and he did so in the first federal election in which voters could respond to the Obama administration’s big government agenda. In addition to the fiscal stimulus, that included the Affordable Care Act—“I raised it in almost every campaign speech,” Lee says—and financial and energy regulation. Associated with the nascent Tea Party movement yet resonating in many other quarters, constitutionalism figured in the midterm elections, boosting candidates contending for principles of limited



Mike Lee leaves the Supreme Court following Obamacare arguments, March 2012.

Terry Eastland is an executive editor at THE WEEKLY STANDARD.

government. That happened even in very red Utah, helping Lee upset Bennett.

During the campaign, Lee's answer to the outsized deficits and increasing debt and the burden future generations would have to shoulder was a constitutional amendment requiring a balanced budget (BBA). Soon after taking his seat in January 2011—at age 39, the youngest senator in that session of Congress—Lee went to work on an amendment with his state's senior senator, Orrin Hatch, who has pushed for a BBA for more than a quarter-century. “He had a proposal, and I had a proposal, and we had a number of senators who joined mine and a number who joined his. We combined the two in order to unite the entire Republican conference.”

Like its many predecessors, the Hatch-Lee BBA would require that outlays for any fiscal year not exceed receipts. The purpose is to recover, as *The American Constitution* puts it, “measures of balance and political discipline as essential elements in limited constitutional government.”

Lee traces the loss of political discipline and the rise of the big, expensive federal government to the New Deal, but he does not seek its repeal. “We start with the government we have rather than the one that might have been, had things not unfolded the way they did,” he says, recognizing that some of the government we have was created by constitutionally dubious legislation. Lee's concern is “the perpetually expanding federal government” we have now. “We should all come to agreement not to allow this perpetual expansion to continue.”

The BBA debated in 1995 during the Gingrich “revolution” is the one that's come closest to passing and being sent to the states for ratification. More than two-thirds of the House approved it, while the Senate fell just a single vote short. Since then, support for a balanced budget amendment seems to have waned some. In 2011, the Hatch-Lee BBA failed on a 47-to-53, party-line vote, with all the yeas cast by the 47 Republican senators (67 votes being needed for passage). Lee remains an ardent advocate of the amendment, but with more immediate issues competing for his attention, it's unlikely it will be voted on during this Congress. “We're not pushing it,” a Lee aide told me.

Because the president has no constitutional role in the amendment process, a decision to propose (or not) the Hatch-Lee BBA to the states for ratification falls entirely to the Senate and the House. As Lee's brief career shows, however, the work of a constitutionalist senator is not simply an intramural matter. Sometimes the other two branches of government—the executive and the judicial—take actions that

affect the Senate's authority and demand response. A case in point: On January 3, 2012, President Obama appointed the director of the Consumer Financial Protection Bureau and three members of the five-member National Labor Relations Board. Obama made the four appointments pursuant to the recess appointments clause, which provides that the president may appoint officers “during the Recess of the Senate.” Such appointments are temporary since they “Expire at the End of [the Senate's] next Session.”

Lee immediately and persistently opposed the president's actions. In statements in the Senate, testimony before the House, op-eds, and media interviews, Lee contended that the president had violated the Constitution and in particular the separation of powers, because the Senate was not in recess when the appointments were made. Moreover, he argued, it is not for the president to decide when the Senate is in session. “The Senate's institutional prerogatives demand that we be allowed to make our own rules,” said Lee, “and yet President Obama's actions would deprive our body of even that basic right.”

Lee invoked the Federalist Papers in explaining that the Constitution provides the necessary means by which one department of the government may resist encroachments by the others. For Lee, the Senate's “advise and consent” function offered just such a means of resistance to the president's actions, and he announced that he would no longer be as deferential to the president's judicial and executive nominees as he had been in the past and that there would be “a new standard” for confirmation until Obama rescinded the four appointments and restored “the Senate's full constitutional right to advise and consent to his nominees.” While the president sought to justify the recess appointments as necessary to overcome partisan opposition to his selections, Lee said that to the contrary the issue was one of principle, and that if a Republican president had used the recess appointments clause as Obama had when the Senate was not in recess, he would have made the same constitutional objections and found a way to resist.

During the six months from February 2, 2012, to August 2, 2012, Lee voted against 53 nominees, approving only 3, with the latter votes coming in the summer, when, following custom in a presidential election year, the Senate shut down its advise and consent function. To be sure, as the Senate finished up its business in the 112th Congress, Obama never did “rescind” the four recess appointments. But neither did he make any further recess appointments, notwithstanding Senate majority leader Harry Reid's remarkably anticonstitutional urging that the president should recess-appoint all of his nominees.

Lee had touched a Democratic nerve, as was evident also from a weekly address in which the president referred to “one senator [who was] gumming up the whole works for

the entire country.” The “one senator” was, of course, Lee, who was, according to White House press secretary Jay Carney, “hold[ing] up all nominations.” Carney was wrong. Lee was not holding up “all nominations,” but only voting against most nominations. And, with only a handful of Republicans typically joining Lee in opposition, all of the nominees were confirmed.

Meanwhile, Lee followed the progress of a lawsuit contending that the three NLRB recess appointees had been unconstitutionally appointed, thus undermining the board’s authority to act. Early this year the U.S. Court of Appeals for the D.C. Circuit agreed with the plaintiff, a company against which the NLRB, with the three recess appointees sitting, had taken enforcement action. Now before the Supreme Court, the case is likely to prove one of the most important in the term that begins in October.

While Lee agrees with the appeals court decision, he wishes that his colleagues—Republicans and Democrats both—had been able to see their institutional interest more clearly and had joined him in opposing the president’s encroachment on the Senate’s prerogatives. In a press release responding to the Supreme Court’s decision to hear the NLRB case, Lee said: “I believe members of the Senate should have guarded their role in the confirmations process and upheld the Constitution’s separation of powers by taking actions that would have ensured the president could not bypass the Senate and unilaterally make appointments with political impunity.”

Lee may be naïve to think that could have happened, since the president who made the four appointments is a Democrat and the body that has advise-and-consent authority, the Senate, is controlled by Democrats. But the larger point is that Lee sees constitutionalism not just in the legalistic or judicial terms in which courts treat the Constitution, but also in political terms: Officials in the elective branches have crucial roles to play in determining what is constitutional.

Both Lee’s judicial constitutionalism and his political constitutionalism are evident in the e-book he published this summer on *NFIB v. Sebelius*. That was the landmark decision handed down more than 15 months ago in which the Supreme Court upheld the Affordable Care Act. It’s not unusual for a senator or representative—or a president, for that matter—to criticize a Supreme Court decision. But what’s rare is for one of those elected officials to offer his views in a piece of writing longer than an op-ed. Clearly, Lee is serious about pressing his view of the case and undaunted by the task of taking on the chief justice, who wrote the Court’s opinion. The book’s title: *Why John Roberts Was Wrong About Healthcare*.

The ACA’s most controversial provision is the individual mandate, under which Americans who lack health insurance are subject to a penalty. The mandate’s constitutionality was challenged in *NFIB*, and it was hard to see how the ACA could survive were the Court to strike down the provision.

Roberts in his opinion for the Court, joined by four other justices in a separate opinion written by Justice Scalia, said that the individual mandate could not be sustained under the commerce clause, which grants Congress “the power to . . . regulate Commerce . . . among the several States.” The five justices’ essential point was that the power to regulate interstate commerce does not reach *inactivity*, the focus of the individual mandate. Roberts then asked whether the mandate might instead be upheld as a valid exercise of the congressional power to tax. And, joined by the four judicial liberals in an opinion written by Justice Ginsburg, and over the objections of the Scalia foursome, Roberts decided it could be, notwithstanding, as the chief justice himself acknowledged, that the ACA describes the payment as a penalty, not as a tax.

The other critical issue in *NFIB*, pressed by the states, concerned whether the Medicaid-expansion provisions of the ACA exceeded the authority of Congress under the spending clause. Roberts, joined by all the justices except Ginsburg and Sotomayor, found those provisions unconstitutional because they would have allowed the federal government “to force the states to implement a federal program” that would have threatened “the political accountability key to our federal system.” Or, as Roberts more vividly put it, the means of coercion Congress chose is “much more than relatively mild encouragement—it is a gun to the head.” But instead of striking down the Medicaid provisions, as the Scalia foursome would have done, Roberts effectively rewrote them, curing them of their constitutional infirmity and ensuring the ACA’s survival.

That, in brief compass, is *NFIB*. And why was John Roberts wrong? Lee’s answer—essentially the same as Scalia’s—is that Roberts construed the individual mandate and the Medicaid-expansion provisions in ways that the statute cannot bear, in violation of the principles of federalism and separation of powers. Of federalism, Lee writes, because “the power of the federal government is limited, and not open-ended”; and of separation of powers, he says, because “the power to legislate . . . is vested in Congress, and not in the courts.”

As one might expect of a former Supreme Court law clerk with experience as an appeals court litigator, Lee treats with care the legal issues in *NFIB*. But he also writes as the political actor he is, concerned with the consequences of the decision for Congress. Thus, he

observes, “Now that the Court has indicated its willingness to go beyond deciding questions of constitutionality, and to make substantive changes to an otherwise-unconstitutional act in order to save it, the dangerous view that ‘lawmakers need not worry about the Constitution because that’s the Supreme Court’s job’ will become far more prevalent.”

Lee closes his book by calling for “a full repeal” of the ACA, “sweeping and dangerous legislation” that has been “rendered even more problematic by the Supreme Court’s decision to rewrite it.” Lee concedes that full repeal is unlikely, given Democratic control of the White House and Senate. So he offers “a different strategy,” noting that “strong Democratic majorities in both Houses of Congress refused to pass [the individual mandate] as a tax,” while the Supreme Court upheld the ACA by turning the mandate into a tax. “This irony,” Lee writes, “is only compounded by the fact that many of the ACA’s biggest champions in Congress are still insisting that the mandate is *not a tax* [Lee’s emphasis].”

Hence the strategy: calling members’ bluff by putting to a vote a bill that would “repeal any and all language in the ACA suggesting that the penalty attached to the individual mandate might properly be viewed as an exercise of Congress’s power to tax.” Lee has such a bill—S. 560—and its text is included in *Why John Roberts*. “If enacted,” writes Lee, it would “make doubly clear” what was evident “the first time around: that the people’s elected representatives in Congress are unwilling to enforce the individual mandate through a burdensome new tax.” And “if enacted,” it would “gut the individual mandate provision,” without which “the entire ACA would become unworkably unstable, thus setting the stage for the statute’s inevitable . . . demise.”

The key words are, of course, *if enacted*, and it is hard to imagine how a Democratic Senate would ever take up such a bill, much less pass it. Lee acknowledges as much but says that “the effort to pass it” would be worth it politically. So far, there’s been little effort to get it passed. In fact, if at this moment you are reading about S. 560 for the first time, you’re not alone. It’s largely unknown even in the Senate. When I asked Minority Leader Mitch McConnell about the bill, which I had to explain in some detail, he said that he wasn’t aware of it. While Lee insisted to me that the bill remains very important, he seems to have moved on, having teamed up with Texas senator Ted Cruz

in the effort to defund Obamacare, which, at this writing, has the support of 14 Republican senators.

Almost halfway through his term, Lee is still establishing his identity as a U.S. senator. His constitutionalism is well developed, centered as it is in the Constitution’s structure and thus in federalism and separation of powers. But Lee has also taken positions with respect to civil liberties that make his constitutionalism more complex. Most notably, he opposes any policy that allows for the indefinite detention of American citizens without trial or proper constitutional process and has joined with Senator Dianne Feinstein in legislation to that effect that would amend the National Defense Authorization Act.

While Lee’s efforts in behalf of constitutionalism have so far yielded few tangible results, they have affirmed the Constitution as the essential guide to how we should conduct our political life. When I asked Lee whether there’s more interest in constitutionalism these days, he said, “In general, probably so,” but credit for this, he added, goes to Obama, who’s “pushed the envelope so far that some people are starting to wake up.”

What is less developed is the politics that a constitutional conservative might best pursue. In recent months, however, Lee has given two major speeches calling for a “new conservative agenda of reform,” centered on middle-class families and addressing taxes, higher education, transportation, and welfare. As Lee said in one of the speeches, “The great challenge of our time is the challenge of the forgotten family: the honest noble parents across the country trying to make ends meet in a society, economy, and democracy increasingly rigged by Washington against them and their children. . . . Building a new conservative agenda of reform around these moms and dads and kids . . . is the ‘Road to Majority.’”

Clearly, Lee is thinking about that road. He knows from experience how hard it is to legislate your proposals when the other party holds the presidency and the Senate. And he appears willing to take on the task of crafting a reform agenda that, while respecting the Constitution, appeals beyond the usual GOP precincts. The details are due to be rolled out this fall and winter—in time for debate as the midterm elections draw near. ♦

As one might expect of a former Supreme Court law clerk with experience as an appeals court litigator, Lee treats with care the legal issues in *NFIB*. But he also writes as a political actor, concerned with the consequences of the decision for Congress.

Signs of the Zodiac

The streets of San Francisco, 1969

BY RICHARD CARLSON

It was a cold Saturday night on Columbus Day weekend 1969 when Lance Brisson and I pulled up behind a Yellow cab parked at a crazy angle on the corner of Washington and Cherry Streets, an expensive area of San Francisco called Presidio Heights.

Our headlights glanced off the swirling fog. The taxi's front passenger door was open. The cab driver, whose name turned out to be Paul Stine, was sprawled on the seat on his back, his head on the floor, his left arm sticking out the door, palm up. A watch with a brown leather band was on his wrist, the crystal covered in blood. He had been shot in the head at point blank range. Paul Stine was 29 years old. He was the last known victim of the publicity-obsessed serial killer who called himself the Zodiac.

San Francisco in the 1960s was the place to be for two young guys in reporter pursuit of colorful news events of the shallow but endlessly entertaining variety. Lance and I fit that bill. We were the overnight news crew at KGO-TV ("Killings, Guts & Orgies—you stage it, we cover it," would have been on our business cards if we had ever thought to have them). This was an ABC-owned TV station, and the then-small ABC network used our film stories frequently to build its national audience.

By the end of the sixties, thousands of kids had been drawn to San Francisco and its Haight-Ashbury district, fired by the imagined odor of musk and patchouli, media images of the banging of tambourines and finger-cymbals, of long hair, garlands of daisies, exotic roach clips and hash pipes, pretty girls in headbands dancing with one hand bouncing, and the promise of cheap dope, free sex, and no carping parents. The reality was far more sordid.

Richard Carlson, a former ambassador and former director of the Voice of America, is writing a book about San Francisco in the sixties.

At the scene of Paul Stine's murder, two famous SFPD homicide detectives, Dave Toschi and his partner Bill Armstrong, drove up in their battered gray Ford. They joined a knot of folks around the Yellow cab—motorcycle cops, a tow truck driver, a couple of neighbors, the Yellow cab supervisor, and a half-dozen police dogs and their handlers who had been called to hunt for the suspect. We filmed the scene, and I did an interview with Toschi. The enormous mansions of Washington Street loomed darkly above.

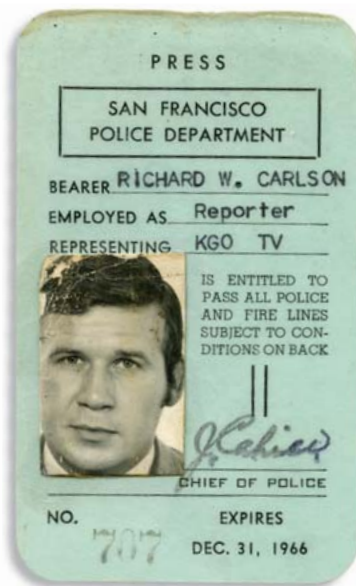
A little boy looking out of his third-floor window had seen two men "fighting" in the front seat of the cab. His sister called the police to say the driver was being robbed and the thief was still at the scene, "wiping" the car doors with a cloth. The girl stayed on the phone and told the dispatcher the man was walking down Cherry Street towards the Presidio, a wooded Army base that was unguarded at night.

Toschi and Armstrong were in charge of the Zodiac investigation for the SFPD. Their presence at the Stine murder that night was a coincidence—they happened to be the homicide team on weekend call. They assumed the killing was the result of a simple robbery. It would be a few days before the Zodiac made clear his responsibility for the killing of the cab driver.

Lance and I were the only TV news crew working in San Francisco that Saturday night. We had heard the police dispatcher's call on our car radio—"a possible robbery of a taxi, the driver appears injured"—on our way back to the office.

We had just finished interviewing the tearful father of 15-year-old Geoffrey Zachariah, a San Francisco boy who had disappeared the previous Saturday. Geoff was last seen swimming fully clothed in the Pacific Ocean.

He and another 15-year-old had gone to Haight Street that afternoon to "look at the hippies." According to Geoff's friend, a little boy about 10 years old offered them each a chocolate Necco Wafer as they walked into Golden Gate Park, hinting it had been dipped in LSD. He apparently was



The author's KGO-TV credentials

telling the truth. Both boys ate them and soon began hallucinating. They ended up hours later, still disoriented, at a grim amusement park called Playland at the Beach.

Dozens of witnesses said they saw Geoffrey Zachariah run across the sand into the cold, heavy surf and begin swimming out to sea until they watched him disappear in a wave. He surely drowned, but his devastated father was holding out hope.

There was no hope for poor Paul Stine. He had come up from working-class Fresno, had a wife and a day job selling insurance, and lived in a cheap apartment in the Mission District. Paul was also a student at San Francisco State and would soon have completed his Ph.D. He had planned to teach college-level English.

A few days after his killing, the *Chronicle* received a letter from the Zodiac claiming responsibility for the murder of Paul Stine and blasted the story across page one.

Hell broke loose with this news. Just a few weeks before, at the end of September, Lance and I had driven to Lake Berryessa to the north of San Francisco, in the Napa Valley, to cover the murder of a 22-year-old girl named Cecilia Shepard and the terrible stabbing of her boyfriend, 20-year-old Bryan Hartnell, both students at a nearby Christian college.

The pair had been sitting at the water's edge on a late Saturday afternoon when a large man wearing a black hood with a white circle painted or stitched on the front walked out from a copse of trees. He was carrying a foot-long butcher's knife and a gun. He tied their hands behind their back and made them lie on their stomachs. They didn't resist, thinking they were only going to be robbed. Without a word, he began stabbing them.

Bryan was stabbed 15 times but survived. Cecilia was stabbed more than 20 times and died. The killer left a message written in the dust on the side of Hartnell's car—"Sept. 27, 6:30 P.M. (by knife)" and the symbol he used.

Lance and I usually came in to the TV station on Golden Gate Avenue, at the edge of San Francisco's Tenderloin District, around 7 P.M., six nights a week. We hit the streets by dark, tooling around in an unmarked Ford station wagon

with police radios and a radio telephone, and covered crime—the weirder the better, fires, Black Power meetings, transvestite smackdowns, police raids, and other timely cultural phenomena—for the rest of the night. We usually worked until about 4 A.M., when even the strangest of San Francisco's night folks had slithered or slid into their beds. Then we'd head to the newsroom.

We would type up our news logs for the morning assignment

to use on the two-hour show *AM San Francisco* that started at 7 A.M. I had been doing the news on that show for two years. It was hosted by Jim Dunbar, a smooth-talking KGO radio disc jockey. He read the newspaper aloud, interviewed guests, and chatted with phone callers. These are more difficult TV tasks than they sound, and Dunbar was very good at them. He made the show hum, and it was top-rated. He was very well paid and drove his Ferrari in from his waterfront Marin County manse early every morning.

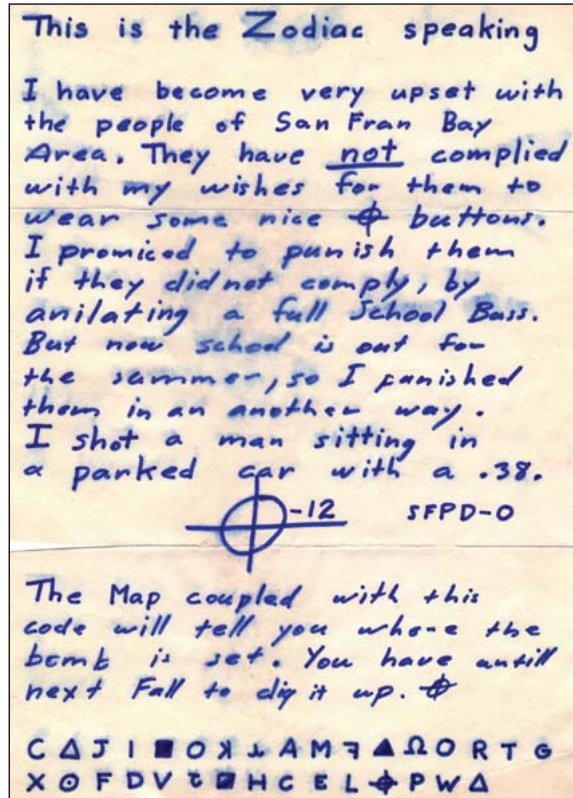
A couple of days after the killing of Paul Stine, the *San Francisco Chronicle* received a letter from the Zodiac claiming responsibility. Included in the envelope was a torn section of Stine's bloodstained shirttail. Zodiac had taken it, along with the keys to Stine's cab. The

paper ran a huge banner and a photo of the letter and shirt. The letter contained this dramatic threat:

School children make nice targets. I think I shall wipe out a school bus some morning just shoot out the front tire and pick off the kiddies as they come bouncing out.

A wave of panic struck the Bay Area, fueled by media visions of Zodiac mowing down little kids with rifle fire, kindergartners clutching book bags and teddy bears, falling wounded or dying to the ground. Police, the California Highway Patrol, and sheriffs' deputies tailed school buses in San Francisco and every nearby town. Many parents kept their children out of school and off the streets of their neighborhoods as well.

About a week later, in the wake of all this craziness, *AM San Francisco* was happily called upon to inspire even further paranoia.



A Zodiac letter with symbol and coded message

Early on the morning of October 22, Lance and I were sprawled at desks in the otherwise deserted KGO newsroom. We had divvied up our beat checklist and were making calls to Bay Area police and sheriff's dispatchers looking for news leads, something we did two or three times every night.

The Oakland police department desk officer, a fellow we talked to many times a week, said, "We've been getting phone calls from a guy who says he is the Zodiac. He just called again. He sounds really crazy," said the deskman, "probably too crazy to be the Zodiac." The bottom line is, he said, this whack job wants us to arrange for F. Lee Bailey, the defense attorney, to be on *AM San Francisco* so he can call in and talk with him. But, if we can't arrange that (Bailey lived in Boston), said the sergeant laughing, he'll settle for Melvin Belli of San Francisco.

We chuckled over the possibility that the crazy caller had actually been hired by Belli, a publicity hound of truly gargantuan proportions, to get him on TV more often now that the media interest he had received for representing Jack Ruby in the murder of Lee Harvey Oswald had significantly waned. This will work, we told the police deskman. A perfect KGO-TV nutcase story.

Mel Belli was nothing if not flamboyant. Every time he won a case (he lost the Ruby trial) or made a large tort settlement, he fired a cannon from the roof of his Montgomery Street office and hung a piratical skull and crossbones from his building's flagpole. He billed himself the King of Torts but to those not in his fan club he was known simply as Melvin Bellicose.

I called an ABC vice president named Dave Sack at home and woke him up. He was a friend of Belli. A few hours later, Belli was on the *AM* show. Soon, the same fellow who called the Oakland police called the KGO switchboard. He was patched through live to the studio.

He told Dunbar and Belli that he was the Zodiac killer and his name was "Sam." Sitting a few feet away, listening to the man on the speaker, I thought it was obvious that he was a phony—too deranged—and so did the entire stage crew.

At one point the caller began screaming, "I'm going to kill those kids," referring to the Zodiac's well-publicized pronouncement about the school bus. There was much eye-rolling and silent chortling in the studio, but not from Dunbar and Belli, who seemed to have been transported

to Media Idiots Heaven. Here is an exact transcript:

DUNBAR: Talk to us. Just, tell us what's going on, inside you, right now. Please.

CALLER: I have headaches.

DUNBAR: Right.

BELLI: How long have you had those headaches, uh, Sam? Been a long time?

CALLER: Since I killed a kid.

BELLI: Well, was it before December that you had the headaches?

CALLER: Yes.

BELLI: If, did, were you in service, that you might have had an injury in service, did you ever fall out of a tree or down stairs? Were you ever unconscious?

CALLER: I don't know.

BELLI: You don't remember. Does aspirin do you any good?

CALLER: No.

BELLI: Doesn't do you any good?

CALLER: No.

DUNBAR: Sam—

BELLI: Damn stuff never did me any good either.

DUNBAR: Sam, let me ask you a question. Did you, um, did you attempt to call this program one other time when Mr. Belli was with us? And, you called—

CALLER: What?

DUNBAR: Did you try to call us one other time about, oh, two or three weeks ago when Mel Belli was with us?

CALLER: Yes.

DUNBAR: And you, uh, well—

BELLI: You couldn't get through, and we were talking?

DUNBAR: And you couldn't get through, the phones were tied up, is that it?

CALLER: Yes.

BELLI: Sam, let me ask you this. There's some reason why you go to a particular doctor or a particular priest, and some reason why apparently you wanted to talk to me, or Lee [F. Lee Bailey]. Is it that you feel we have compassion for people who get in trouble? Or is it that you feel that we can do something for you? Or is it that you feel that we're, we're, have enough integrity that if we promise you something, that we're gonna stick to it?

DUNBAR: Well, let's find out why he wanted to talk to—Why did you want to talk to Mr. Belli, Sam?

CALLER: I don't want to be hurt.

Belli pleaded with the caller to surrender: to Belli. He promised that "Sam" wouldn't face the gas chamber for the murders if he gave himself up. "Sam" said okay.

Off camera Belli set the meeting place behind the St. Vincent de Paul's charity shop on Mission Street, in two hours. Belli was practically delirious over his pending coup.

Feverish efforts by police and the phone company to trace the call were unsuccessful. A surviving victim and two police dispatchers who had heard the real Zodiac's voice listened to a tape and all agreed "Sam" was an impostor, though the Oakland police dispatcher said it was definitely the same loony who had called early that morning.

The scene at the St. Vincent de Paul's store was otherworldly, with a portly Belli, long white hair flaring in the breeze, waddling to and fro like a walrus with a weak



Melvin Belli in 1967

bladder, his broad, handsome face both expectant and nervous, being watched by dozens of news crews, who'd discovered the "surrender point" from cop friends or the talkative Belli, all of them being watched in turn by police snipers on surrounding rooftops and uniformed cops barely hidden all over the seedy block.

"Sam" never showed. Police learned later that his real name was "Eric" and he was locked up in an Oakland mental hospital and had court-ordered access to a telephone.

Over one thousand leads came to police from that KGO broadcast. None of them panned out or even came close. Some were from people pointing the finger at a troublesome tenant (some guy they couldn't evict any other way) or an irritating ex-husband or neighbor or ex-boyfriend. Hundreds of people thought they knew someone who looked like the drawing of Zodiac that Dunbar and Belli showed.

The taped segment with "Sam the Zodiac" ran on hundreds of radio and TV stations, including on Walter Cronkite's *CBS Evening News* that night. So far as I know, none of this was accompanied by irony or cynicism.

We took a call in our newsroom after the Cronkite show from an excited couple in Florida who said they had three reasons why they were certain Zodiac was their son: (1) He had visited California a couple of times, (2) he was

"a pervert," and (3) he looked exactly like the drawing.

One viewer who watched our *AM* show called the newsroom and said, "I just saw the killer. He's in the men's room at the downtown Sacramento bus station right now."

The San Francisco police chief of inspectors Martin Lee held a news conference to say emphatically that the *AM* show caller was not the Zodiac, but he was a sick puppy, for sure. The national media ignored this.

Reporters and news crews not hiding in doorways or cruising the neighborhood near St. Vincent de Paul's on the Mel & Sam watch flocked to the offices of San Francisco district attorney John J. Ferdon to hear Ferdon beat up Belli because Mel had promised "Sam" he wouldn't be sentenced to the gas chamber if he surrendered to Belli.

Ferdon, normally a colorless bureaucrat, was happy to cooperate with reporters. He was indignant. He said Belli couldn't make any such promise to a possible murder defendant, he had no authority. Who did he think he was? In an aside to the last reporters at his desk after the news conference ended, Ferdon said about Belli, "The man is crazier than a shithouse rat, and just as principled."

The crowd around his desk erupted in laughter. "That's off the record," said the DA.

Postscript: The Zodiac killings have never been solved. ♦

Honoring the American Workforce

By **Thomas J. Donohue**

President and CEO
U.S. Chamber of Commerce

For more than 100 years, our nation has set aside the first Monday in September to pay tribute to American workers and acknowledge the vital role they play in our economy and society. Our workers are the most innovative, creative, productive, and industrious on the planet. And they deserve a whole lot more than just a day off and a pat on the back!

The most important way we can honor our employees is to make sure that on the other 364 days of the year they are fulfilled in their work, earn a good wage, are able to provide for their families, and have the resources and support to lead healthy and comfortable lives.

Contrary to what some anti-business forces suggest, the relationship between the business community and American workers is healthy and thriving. It's built on a strong foundation of trust, support, and mutual

benefit. And it's overwhelmingly achieved without the involvement of intermediaries, such as labor unions, which have seen their enrollment rates fall to 11.3% overall and 6.6% in the private sector.

Business leaders know that our workforce is our most valuable asset, and it's smart to invest generously in the hardworking men and women who drive our economy.

Last year, U.S. employers spent \$8.6 trillion on total compensation, including \$6.9 trillion on direct wages and salaries. In 2012, nearly 150 million Americans received employer-sponsored health insurance from the private sector. Employees received an average of \$10,558 in health care benefits. Almost 50% of companies with 500 or more workers offered workplace wellness programs and provided financial incentives to encourage employees to lead healthier lifestyles. This year, 61% of companies are making undergraduate educational assistance available, and another 59% are helping

employees pay for graduate school.

Businesses also help workers save and plan for the future. Private employers spent \$218 billion on retirement income benefits in 2012, including the popular defined contribution plans, profit-sharing structures, and investment advice. Life insurance is also offered to more than half of all employees in private industry, enabling them to protect their families in the event of tragedy.

A final way we can honor the American worker is to ensure that anyone who wants to work can find a good job and reap the benefits of steady, meaningful employment. There are still some 23 million Americans who are unemployed, underemployed, or have given up looking for work. With the right policies and real leadership from Washington, we can drive stronger growth that will allow U.S. businesses to add to the payrolls and create more opportunities for all workers.



U.S. CHAMBER OF COMMERCE
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'The Lobby of the House of Commons, 1886' by Liborio Prosperi

Meet Mr. Bagehot

How 'the greatest Victorian' speaks to us. BY GERTRUDE HIMMELFARB

Walter Bagehot (1826-1877)—“the greatest Victorian,” as an eminent historian of that period memorialized him, editor of the *Economist*, author of *The English Constitution*, and a prolific essayist—is almost unknown today. (Even the pronunciation of his name is unfamiliar; it rhymes with gadget.) The publication of his *Memoirs*, dated October 1, 1876 (six months before his death), and signed by the author with the

Gertrude Himmelfarb is the author, most recently, of The People of the Book: Philosemitism in England from Cromwell to Churchill.

The Memoirs of Walter Bagehot

by Frank Prochaska
Yale, 224 pp., \$38

request that it not be released until after he died, is surely a great coup, an invaluable addition to the 11 volumes of his *Collected Works*.

Well, not quite. The title page contains a less familiar name, Frank Prochaska, and the foreword (do all readers read forewords?) elicits the fact that the *Memoirs* are not by Bagehot, not even edited by Prochaska, but by Prochaska himself.

Fictionalized memoirs—a red flag to a pedant like myself. Prochaska explains that he chose to write about Bagehot in the first person in the hope of portraying his life and mind more vividly than he could have done in a conventional biography. The pseudo-Bagehot is indeed vivacious. Yet the pedant in me regrets the absence of quotation marks and footnotes attesting to the real Bagehot. I supplied some of them by tracking down the sources and was pleased to find that the *Memoirs* consist, in large part, of long, almost verbatim extracts from Bagehot's writings.

If the *Memoirs* cannot be appended to the *Collected Works*, they can serve as a

NATIONAL PORTRAIT GALLERY, LONDON

brief and eminently readable introduction to a stimulating writer and thinker, a man for whom the term “public intellectual” may have been coined.

The *Memoirs* remind us that it is not a psychoanalytically obsessed biographer but Bagehot himself who found in his personal life the source of his distinctive character and mind. He must have been thinking of himself when he described St. Paul as a “divided nature.” He came by that nature honestly, genetically, so to speak. From his banker-father, reserved and austere, and his mother, “by turns gay and distraught,” he inherited the “hybrid sensibility” that persisted throughout his life, permitting him to indulge the love of poetry and literature acquired from his mother while exercising the boldness and rigor of mind of his father. It was to his “divided nature” that Bagehot attributed his ability to retain equanimity while coping with the “dark realities” of life.

Those realities were dark indeed. His mother, to whom he was deeply attached, lived in varying stages of insanity much of her (and his) life. (Not mentioned in the *Memoirs* is his half-brother, who was feeble-minded.) “Every trouble in life,” he once remarked, “is a joke compared to madness.” It is no wonder that Bagehot, like his mother, was subject to “bouts of melancholy” and that his “melancholy search for truth” intensified his “qualms about human motive and precipitous action.” This lifelong experience (both his mother and his half-brother predeceased him by only a few years) colored the whole of his life. “We see but one aspect of our neighbor,” he wrote, “as we see but one side of the moon; in either case there is also a dark half, which is unknown to us. We all come down to dinner, but each has a room to himself.” That aphorism is reflected in much that Bagehot did and thought, about political and social as well as private life. There is always a dark side, an unknown, perhaps irrational and unconscious side that has to be taken into account.

After graduating from college (University College London, not Oxford as his mother would have preferred, because his father objected to its reli-

gious requirement), Bagehot started the study of law, but found that uncongenial—starving, he complained, his “higher half thoughts, half instincts.” A visit to Oxford acquainted him with the followers of John Henry Newman and prompted him to read and admire the man, although not to agree with him. Reflecting on the division in his own life between his mother’s Anglicanism and his father’s Unitarianism, Bagehot came to a view of religion that transcended any doctrinal creed: “In religious matters, it is prudent to venerate what we do not comprehend. . . . We cannot prove that God is infinite, omnipotent and good, but we require the assumption that He is so or all is dark.” “Despite my doubting temper,” he concluded, “I sought a rational, consoling creed.”

Another visit, this time to Paris, brought to the fore the political side of his “doubting temper.” He came there in 1851, at the age of 25, just in time to witness the coup d’état of Louis-Napoleon and report upon it in a series of articles for the *Inquirer*, a Unitarian weekly. In a mood that might be interpreted, he confessed, as “satiric playfulness,” even “cynicism,” he proceeded to shock his “high-minded” liberal readers by defending the coup. “I am pleased to have seen a revolution, but once is enough,” he told them.

That “revolution” turned out to be for the young Bagehot what the momentous French Revolution was for Edmund Burke, moving him to entertain ideas that were at odds not only with those of his friends but with those of most of his countrymen. Unlike Burke, however, Bagehot approved of this revolution. “The first duty of society is the preservation of society,” he reminded his readers. It was in the face of a threatening social anarchy that Napoleon was justified in taking over the government and asserting a strong executive power tantamount to dictatorship.

Almost apologetically, Bagehot introduced another theme to account for the coup: “national character . . . the least changeable thing in this ever-changeful world.” It was the distinctive national characters of the two countries that

made French politics so volatile and the English so stable. It was at this point that Bagehot “provocatively,” as he said, used the word “stupidity” to explain the character of the English people and thus the stability of their regime:

The most essential mental quality for a free people whose liberty is to be progressive, permanent, and on a large scale, is what I provocatively call *stupidity*. . . . Stupidity [is] the round-about common sense and dull custom that steers the opinion of most men. . . . Nations, just as individuals, may be too clever to be practical, and not dull enough to be free. Dullness is the English line, as cleverness is that of the French.

Many years later, expressed somewhat more delicately, but still provocatively, this was to be one of the leading themes of *The English Constitution*.

Returning from Paris, Bagehot took a position in his father’s bank, a three- or four-day-a-week job that he performed dutifully but unenthusiastically and that permitted him to devote his “spare mind,” as he said, to writing: “Variety is my taste, and versatility my weakness.” In essays about politicians and historians, poets and philosophers, he revealed his ironic sensibility and subtlety. Robert Peel was “a man of common opinions and uncommon abilities, who understands our real public opinion.” Lord Palmerston was “not a common man, but a common man might have been cut out of him.” Gibbon’s history exemplified the “masculine tone” of the age, when men “ceased to write for students, and had not begun to write for women.” Macaulay’s mind was “eminently gifted” but unfortunately wanting in the necessary “uncertainties” and “gradations of doubt.” Burke had been a great man with “the highest gifts of abstract genius,” but for him “great ideas were a supernatural burden, a superincumbent inspiration.” Wordsworth described “the world as we know it,” while Shelley described “not our world, but that which is common to all worlds—the Platonic idea of a world.” These are not merely clever aphorisms. They go to the heart of each man and of his work.

Bagehot's marriage in 1858 to Eliza Wilson, daughter of James Wilson, the editor of the *Economist*, brought him into another world. Urged by his mother to marry, he had flightily responded, "A man's mother is his misfortune, but his wife is his fault." In fact, his marriage was a happy one, Eliza and her cheerful sisters providing a satisfying "mixture of chaff and currency . . . sense and non-sense . . . the medley of great things and little, of things mundane and things celestial," which appealed to his double nature. With the death of James Wilson two years later, Bagehot succeeded him as editor of the *Economist*.

But the editor of the *Economist*—or at least this editor—was occupied with subjects other than economics. One of the issues that dominated public discourse was the movement for parliamentary reform. The Reform Act of 1832 had given the suffrage to much of the middle classes, and, in retrospect, Bagehot saw this as a mixed good. But a new bill, proposing to extend the suffrage much further, was altogether bad. The "admirable dullness" of English government was giving way to the passions of theorists who, invoking doctrines of equality and natural rights, would give power to people unfit for power.

The "fitness to govern," however, was not an absolute quality adhering to every individual. "That fitness is relative and comparative; it must depend on the community to be governed and on the merit of other persons who may be capable of governing that community." In mid-19th-century English society, it resided, for the most part, in the well-educated rather than the poorly educated. "Justice," Bagehot concluded, "is on the side of a graduated rule, in which all persons should have an influence proportionate to their political capacity."

The other great public affair confronting Bagehot was the American Civil War. Again, it was the absolutist nature of the issue that exercised him. He was as opposed to slavery as the abolitionists, he insisted, but was "less than sanguine" about the "easy eradication of such an entrenched institution." A negotiated agreement

declaring the independence of the Southern states would have limited the extent of slavery and led naturally to its decline. What was fatal was the North's insistence upon the Union, a union sanctified by a constitution regarded as providential, carrying the moral weight of a religious doctrine.

Critical of Abraham Lincoln during the war, Bagehot came to admire him toward the end. After the assassination, he paid a moving tribute to him: "It took a President of genius to overcome the imperfections of the very Constitution to which he swore an oath. . . . We do not know in history another such example of the growth of a ruler in wisdom as he exhibited." But about the Civil War itself and the American Constitution Bagehot remained firm. The war was unnecessary and the Constitution deeply flawed: "A rigid document unsuited to changing social conditions," it was incapable of coping with any crisis, let alone one provoked by slavery.

It was against the background of those two constitutional crises—the American Civil War and the campaign for parliamentary reform at home—that Bagehot wrote the book for which he is now best known, *The English Constitution*. Originally a series of articles, it was published in book form early in 1867, shortly before the passage of the Second Reform Act. The title itself is anomalous. In view of his criticism of that "rigid document," the American Constitution, one might have expected Bagehot to argue that England, in her wisdom, did not have a constitution, still less a capitalized "Constitution" (as the word appears throughout his book). Instead, this constitutional "skeptic," as he described himself, redefined the idea of a constitution:

The English Constitution, though a source of useful political habits, is a mass of fictions that usefully disguise inconsistent practices, an ingenious hypocrisy with an array of outmoded relics on the surface and an efficient modern machine below. It is not a cathedral of government constructed by English genius, but the work of a careless race which captures the imagination of the ignorant and satisfies the reason of the educated.

Much of *The English Constitution* is an implicit, sometimes explicit, critique of the American Constitution, particularly of the separation of powers, which belies the "sovereign authority" required of government in the ordinary course of events, let alone in critical times, like that of the Civil War. England has something resembling this in its three branches of government, king, Lords, and Commons. But the reality is different: a government comprising two parts, the "dignified" and the "efficient," working together in harmony. It is this "double government," a "disguised republic," that is the genius of the English constitution. And it is the monarch, the visible head of the dignified part of government, who sustains the disguised republic. "We have made, or rather, stumbled on, a marvel of intelligible government, which superimposes the poetry of monarchy upon a burgeoning democracy."

The term "stupid people" does not appear here, as it did in Bagehot's account of the Napoleonic coup, but the concept does. It is the "ignorant," "simple" people, the "lower orders" and "common folk," the "unthinking mass of common people" who appreciate the "poetry of monarchy," revering the queen and respecting her authority. And they do so not because it is in their best interest, but because she appeals to their higher instincts, elevating them above the mundane conditions of their lives. By the same token, these people respect, even revere, the "dull, traditional habit of mankind," the customs and beliefs that govern their public as well as personal lives. "Other things being equal, yesterday's institutions are by far the best for today; they are the most ready, the most influential, the most easy to get obeyed, the most likely to retain the reverence to which they alone inherit, and which every other must win." To be sure, the world changes, and with it the efficient parts of the government—which is how "a republic has insinuated itself beneath the folds of Monarchy."

A second edition of *The English Constitution*, released five years later, permitted Bagehot to rethink some

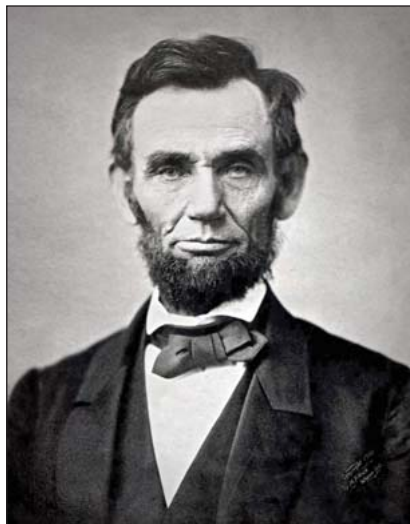
of his judgments, about the Second Reform Act, for example. While reaffirming his objections to the act itself and his qualms about the “ignorant multitude” that made up the new electorate, he observed that even if there had not been such an act, succeeding generations would have brought about changes in society and thus in politics: “A political country is like an American forest: you have only to cut down the old trees, and immediately new ones come up to replace them.”

In another article, he went so far as to propose the enfranchisement of women on the same basis as men: “It would have removed an anomaly in our electoral system and the balance of probabilities was that it would have done some good by bringing a wholly fresh element into political life.” In the same spirit, he supported the granting of university degrees to women: “The frivolity of women is one of the greatest causes of vice and frivolity in men. If we can but have a generation of women somewhat less dull, and somewhat less inclined to devote themselves to silly occupations, we hope that not only their children but their husbands and brothers will be the gainers.”

Bagehot had always been tempted to become an active participant in politics rather than a mere reporter, “albeit calmed,” he typically added, “by a measure of ironic distance.” While writing *The English Constitution*, and encouraged by William Gladstone and others in the Liberal party, he made two attempts to stand for Parliament, both unsuccessful—for good reason, as he had publicly expressed a want of faith in the “unlettered elector” whose votes he was now seeking. He once described himself as a historian *manqué*; so he was a politician *manqué*.

For a man of doubting temper, hesitant to adopt a creed, suspicious of haste and ardent for moderation, a career in today’s politics, however agreeable to one’s self-esteem, is fraught with difficulty. I am a moderate Liberal, rather between sizes in politics—too conservative for many Liberals and too liberal for many Tories. A want of faith in political action is unusual in Parliament today, and I am wanting in zeal.

Bagehot may have been wanting in zeal, but not in intellectual curiosity. Soon after the publication of *The English Constitution*, he embarked upon quite a different subject. Inspired by Charles Darwin, Herbert Spencer, and others, *Physics and Politics* (1872) described the progress of society from the “yoke of custom” to the “age of discussion,” from the “age of status” to the “age of choice.” Just as the physical world evolved by a process of natural



‘It took a President of genius to overcome the imperfections of the very Constitution to which he swore an oath.’

selection, so did the political world, calling upon all the social, psychological, and material resources of mankind. And just as the evolution of species depended upon individual and group traits, so the evolution of the polity depended on national character. Bagehot did not conceal his conviction that England, by virtue of its national character, was the end product of this process, its unique quality of “animated moderation” giving it an energy and balance of mind superior to all other nations, permitting it to sustain a “government by discussion,” a “free government.”

In all of his “variety and versatility,” Bagehot never lost his interest in economics. One of his earliest articles, written in 1848 at the age of 22, was “The Currency Monopoly”; this was followed four years later by “Money and Morals.” A long series of articles on banking

appeared in the *Saturday Review* and the *Economist*, and his last book, *Lombard Street* (1873), was on the money market and banking system. Two memorable essays on Adam Smith, marking the occasion of the anniversary of *The Wealth of Nations*, appeared in 1876, the year before Bagehot’s death. These writings reflected the same practical, temperate, meliorative spirit, “a suspicion of abstract speculations in commerce,” as in all affairs. “Ideologies,” he insisted, “can be dangerous things.” On the much-disputed subject of the Bank of England, for example, he recognized its faults but proposed to deal with them not, as some recommended, by abolishing the bank, but with “remedies” and “palliatives.”

He also cautioned against making an ideology of laissez-faire. Although he shared many of the views associated with that doctrine, he did so with reservations and qualifications: “I do not belong to that uncompromising tribe of economists who condemn the intervention of government in the nation’s business as a heinous crime and contrary to reason, for in an economic crisis the government has a duty to intervene in the national interest.”

Above all, he warned against equating economics with the totality of life and reducing man to the level of an economic being.

Economics, dealing with matters of business, assumes that man is actuated only by motives of business. It assumes that every man who makes anything, makes it for money, that he always makes that which brings him in most at least cost . . . that every man who buys, buys with his whole heart, and that he who sells, sells with his whole heart, each wanting to gain all possible advantage. Of course, we know that men are not like this, but we assume it for simplicity’s sake, as a hypothesis.

“Liberated from the ‘siege of the social sciences’”—from academics and theorists—political economy could then be restored to “the real world inhabited by real men, men who are moral beings even as they engage in the business of buying and selling.”

The title of the final chapter of the *Memoirs* may be a misnomer. “Valedictory” is too triumphal. The memoirist, true to his divided nature, is more cautious, more tentative.

My nomadic mind has never settled on a single subject; waiting for truth to come, I have followed the truth that came my way. My moderate Liberalism shrinks from difficult dogma and imperious superstition, from facile abstraction and precipitous action. It has more to do with tolerance, steady judgment and genial enjoyment than advocacy or creed. . . . I have sought to encourage a greater communion between literature and commerce; to restrain our reckless enterprise through culture and common sense; to give expression to a philosophy of equanimity; to translate the truths discovered by the dead into the language of the living.

Bagehot is his own best critic. If fault may be found with him, it is because he sometimes seemed to betray his own principles and go against the grain of his own temper. Why was he so adamant about excluding the “stupid people” from Parliament—the people who had the common sense, sound instincts, and respect for tradition that made them so supportive of the monarchy, the “dignified” part of government that was the necessary complement to the “efficient” part? And why, having made “stupidity” the unique virtue of the English people, “the most essential mental quality for a free people,” did he feel it necessary, after the passage of the Second Reform Act, to take up the call of “Educate! Educate! Educate!?” On other occasions, he disparaged the educated classes as being too prone to theorize and generalize, to mistake abstractions for realities.

Bagehot confessed to being “between sizes in politics”—but perhaps not sufficiently between sizes. He might have taken a lesson from the Conservative Benjamin Disraeli, who supported the Second Reform Act—indeed, almost any reform (£6, £7, £10 rating, he did not care)—because he had confidence in his own party as the “national party,” and in the people, who were naturally conservative. Bagehot might

also have been more appreciative of Disraeli’s interventionist and imperialistic foreign policies and less enthusiastic (as he was) for William Gladstone’s “little Englandism,” which was wary of Europe and distrustful of the British empire. He might have regarded the empire—the very idea of an empire—like the monarchy, as elevating the nation, giving it a purpose and dignity lacking in an isolated, insulated England.

On America, too, Bagehot may be faulted, again, for not being faithful to himself. Why did he deny to the American Constitution the “anomalies” he so readily granted the English? The principle of the separation of powers did not deny, as he thought, the “sovereign authority” of government. The federal system provided the kind of dual loyalties that were akin to the Englishman’s king and Parliament. And the country emerged from the Civil War with the Union, the United States of America, intact. These criticisms, and others one might cite, have the perverse effect of confirming Bagehot’s wisdom, for it is he who provides the grounds for them.

A biography of Bagehot might well be entitled *The Wit and Wisdom of Bagehot*. Commenting once on the frequent quotation of a sentence in *The English Constitution*—“We must not let daylight in upon magic”—Bagehot remarked, “Am I to be remembered, like a Frenchman, simply for *bon mots*?” There are not many authors, French or English, whose *Collected Works* contain separate indices of “Epigrams.” In Bagehot, wit and wisdom are one and the same. “*Bon mots*” and “epigrams” hardly do justice to such gems as his pronouncement that “taken as a whole, the universe is absurd”:

How can a merchant be a soul? What relation to an immortal being has the price of linseed or the brokerage on hemp? Can an undying creature debit petty expenses and charge for carriage paid? The soul ties its shoes; the mind washes its hands in a basin. All is incongruous.

Or his comment on the professional

writer who read and wrote without thinking or feeling about what he was reading or writing:

He wrote poetry (as if anybody could) before breakfast; he read during breakfast. He wrote history until dinner; he corrected proof sheets between dinner and tea; he wrote an essay for the *Quarterly* afterwards.

Or his description of the new genre of popular literature well-suited to the railway age, so that a traveler could pick up a magazine at a railway stall, peruse it enroute, and dispose of it at the end of the line: “People take their literature in morsels, as they take sandwiches in a journey.”

If these epigrams are so often double-edged, it is because this duality was, for Bagehot, at the heart of reality. Double-edged—and sharp-edged as well, for his readers were not so much amused as challenged by ideas and sentiments that violated the received wisdom. The Victorians are often decried as hypocritical and mealy-mouthed, given to euphemisms to prettify the “facts of life.” Bagehot went to the opposite extreme, deliberately putting matters in their harshest terms. He sometimes prefaced his comments by words like “mischievous,” “playful,” “provocative,” as if to disarm criticism. But his intention was serious enough: to focus upon the difficulties and ambiguities, the hard realities, of politics and society.

There is a bravado in his language, as in his views. He could have made his point about the “stupid people” less offensively, especially because he attributed to them a redeeming common sense, indeed, a wisdom that made democracy viable. There is a strong Tocquevillean streak in *The English Constitution*. But Bagehot, although he quoted Tocqueville and recalled a “memorable” (as he said) meeting with the man, either lacked Tocqueville’s felicity in propounding his unconventional views or thought that the time required something more blunt, more audacious.

Today, in an era of political correctness, Walter Bagehot is all the more

welcome. He was ironic but not cynical, skeptical but not fatalistic. “Between sizes in politics” as in much else, he may be the right size today. Economists have rediscovered Bagehot. Political philoso-

phers and sociologists should as well. If he was not the greatest Victorian, he was surely a very great Victorian, as instructive and provocative today as he was a century and more ago. ♦

BCA

Mission Accomplished

The Americanization of the Red Cross.

BY MARTIN MORSE WOOSTER



Sewing for European orphans on New York's East Side, 1918

Study the history of the American Red Cross and you'll find that the most dramatic change in that organization's history was between 1910 and 1920, when it was transformed from a relatively small organization into the lumbering giant it is today. Until now, this inflection point in Red Cross history has largely remained unexplored by scholars. But Julia F. Irwin shows that the Red Cross's rapid growth during World War I is a significant event that

Martin Morse Wooster, senior fellow at the Capital Research Center, has written about the American Red Cross in By Their Bootstraps (Manhattan Institute).

Making the World Safe
The American Red Cross and a Nation's Humanitarian Awakening
by Julia F. Irwin
Oxford, 288 pp., \$34.95

raises deep questions about the role charities should play in our country's diplomatic efforts.

When Clara Barton founded the Red Cross in 1881, she kept it a small organization under her personal control. This led to a titanic feud between Barton and the Red Cross board of directors during 1901-04. The details of the feud do not matter, except that

the arguments on both sides had some merit and Barton had clearly stayed on too long. She ultimately was forced to resign from the Red Cross in 1904, at the age of 83. (Her successor, Mabel Boardman, was 39 years younger.)

After Barton's ousting, the Red Cross reorganized. In 1905, it obtained a congressional charter that turned it into a quasi-governmental organization, and, as part of the deal that led to the charter, an 18-member central committee would be in control. The federal government was allowed to appoint 12 members, and the Red Cross had to submit annual audits of its activities to the War Department. The organization also hired its first full-time national director, Ernest Bicknell, who promised that, in contrast to the disorganized voluntarism of the Clara Barton years, the Red Cross would “carry on its works . . . in a thoroughgoing, scientific manner.”

An early test came in 1908, when an earthquake struck southern Italy. Bicknell vowed that the Red Cross would help and that all victims would be scientifically investigated before they received aid. Americans donated \$1 million to help the Italians, but the Red Cross, at the time, had a paid staff of only three and an endowment of \$50,000. After the Red Cross struggled in Italy, President William Howard Taft personally launched a fundraising drive.

The Red Cross steadily grew, thanks to individual contributions and substantial grants from the Russell Sage and Rockefeller foundations. By 1916, it had 286,000 members and an endowment of \$1 million. But its greatest growth came during World War I: By 1919, 33 million Americans—one-third of the U.S. population—had paid at least a dollar to join the Red Cross; the organization raised \$400 million and had a \$2.5 million endowment.

Part of the reason for this dramatic growth was the Red Cross had become an instrument of American foreign policy. When the United States declared war against the Central Powers in 1917, President Woodrow Wilson said that America had entered the war “for the liberation of its peoples,” and that the war aims of the United States included “no conquest,

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no dominion.” The Red Cross became an integral part of America’s humanitarian mission. On April 6, 1917, the day President Wilson declared war, he announced that, in order to eliminate “confusion, duplication, delay, and waste,” all foreign relief work would be under the control of the American Red Cross. Thus, the Red Cross became, for the duration of the war, an instrument of American policy: “A small proportion of our people can have the opportunity to serve upon the field of battle,” said Wilson. “But all men, women, and children may serve and serve effectively by . . . giving to your Red Cross.”

Flush with funds, the Red Cross filled America’s newspapers and magazines with articles and advertisements stating that giving money and time was the highest form of patriotism. “Show me your Red Cross membership button,” went one jingle, “and I’ll tell you what kind of American you are.” A poster showed two men in uniform, one holding the American flag, the second holding a red cross: “Loyalty to One is Loyalty to Both,” read the poster’s caption. Critics of the Red Cross were condemned and occasionally silenced.

In 1917, the Red Cross began to receive letters from antivivisectionists claiming that animals were being abused in tests of infectious disease in Europe. One high-ranking Red Cross executive warned that such criticism “is in reality giving aid and comfort to the enemy.” Louis Nagler’s criticism of the Red Cross War Council was so fervent that he was found guilty under the Espionage Act, a move (Irwin notes) that “more than likely convinced a number of would-be critics to toe the line” and keep quiet.

Nor were all Americans welcome as volunteers. The Red Cross did block military requests that Americans of German, Austro-Hungarian, Turkish, or Bulgarian descent not serve in Europe; but although no formal order was given from national headquarters, many local Red Cross units barred African Americans from volunteering. “The president has instilled in all of us the belief that the present war is one for democracy,” said Tuskegee Institute trustee Charles E. Mason in 1918.

“It is almost criminal that all classes cannot share in the relief work.”

Red Cross volunteers in Europe did far more than feed the hungry or aid the wounded: They were supposed to teach Europeans the virtues of the American way of life. Most volunteers accepted this mission, but a few grumbled. “We will be used in the most conspicuous way possible,” said John Dos Passos, who volunteered with the Red Cross in Italy. “We are here to help cajole the poor devils of Italians into fighting.” When the war ended, the Red Cross’s global mission began to crumble, and, in 1919, War Council chairman Henry Davison declared that his organization was no longer capable of feeding starving Europeans. The task of helping the hungry, he said, “could only be coped with by the governments.” In February 1919, President Wilson created the American Relief Administration to administer food aid in Europe, and he appointed Herbert Hoover to head it. Hoover’s efficiency in aiding the malnourished throughout the

war made him an international figure.

But returning to its prewar task of helping in emergencies ensured that Red Cross revenues and membership plummeted. While 20 million Americans were members in November 1918, membership had plunged to 5.7 million by November 1920. The Junior Red Cross became increasingly important, because, while adult Americans weren’t always willing to support adult Europeans, children eagerly pooled their nickels and dimes to aid other children.

The role the American Red Cross played in World War I won’t be repeated, because most of the tasks performed by the Red Cross are now done by international development agencies. But the questions volunteers had to answer—What’s the best way to help? How *are* we representing America?—are ones every volunteer for the Peace Corps, or any internationally minded nonprofit, has to answer. And Julia F. Irwin reminds us that the role Americans play overseas is complex and deeply rooted in our nation’s history. ♦



Keep It Simple

Some ‘much-needed pushback’ to the myth of the noble savage. BY DANIEL LEE

Fantasies of the “noble savage” are nothing new, of course. There were Jean-Jacques Rousseau’s state-of-nature imaginings in the 18th century, and something similar appears even in the ancient epic *Gilgamesh*. In 1580, Montaigne compared holy-warring Europeans (unfavorably) with Brazilian cannibals, and the phrase itself first turns up in English in John Dryden’s 1672 play *The Conquest of Granada*.

Typically, the idea is that the natural man is the virtuous man, living in small, happy, family groups, treading lightly upon Mother Earth, taking

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Paleofantasy

What Evolution Really Tells Us About Sex, Diet, and How We Live

by Marlene Zuk

W.W. Norton, 337 pp., \$27.95

only what he needs, and returning himself gratefully to her enfolding bosom after, one supposes, a decently short interval. It’s become one of the left’s foundation myths, as well as a congenial foil to the modern free-market industrial culture it blames for many of the world’s woes.

Marlene Zuk now lends weight to some much-needed pushback.

Although she doesn't tackle the doubtful politics behind this striving for a primitive past, she does provide a welcome corrective to the "newspaper articles, morning TV, dozens of books, and self-help advocates promoting slow-food or no-cook diets, barefoot running, sleeping with our infants, and other measures large and small claim[ing] that it would be more natural, and healthier, to live more like our ancestors."

Some, for example, insist that since man evolved eating a particular diet—imagined as fruits, roughage, meat, bone marrow, and whatever else nature deigned to provide—many of our modern maladies can be traced to our more wide-ranging menu. But beyond our sheer overconsumption, Zuk doubts this claim. There has been ample time to move beyond the elemental hunting and gathering diet endorsed by fans of a paleo-lifestyle. And modern DNA studies demonstrate that evolution doesn't require eons to play out.

Change is always underway, she says: "In just the last few years we have added the ability to function at high altitudes and resistance to malaria to the list of rapidly evolved human characteristics, and the stage is set for many more." For instance, the ability of some groups, so far mostly Northern European, to digest cow's milk into adulthood is relatively new, but likely continuing: "[A]s little as a 3 percent increase in the reproductive fitness of those with lactase persistence (which allows digestion of the milk sugar lactose) would result in the widespread distribution of such a gene after only 300 to 350 generations. That's about 7,000 years—a blink of the evolutionary eye," she writes.

Agriculture itself—considered the source of early prosperity, settled communities, and civilization—takes heat for its supposed successes from people like Jared Diamond. "With agriculture came the gross social and sexual inequality, the disease and despotism, that curse our existence," he writes. Yet anthropologist Napoleon Chagnon has vividly chronicled remarkably similar behavior in primitive peoples like South America's

Yanomami, who know nothing of settled agriculture. Chagnon is controversial, of course. Meanwhile, "environmental writer and activist" John Feeney observes that "as hunter-gatherers, we were a species that lived in much the same way as any other, relying on the whims of nature to provide us with our food and water." He considers this a good thing.

Zuk concedes that there was a downside to early agricultural settlement—at first: The new European



Te-Po, a Rarotonga chief, Cook Islands

Global History of Health project "suggest[s] that people living in early urban settlements were indeed of poorer health than their hunter-gatherer ancestors." She blames living at close quarters with larger numbers of people and domesticated animals, disease vectors all. But the same data indicate that "health improved later, after trade networks allowed the exchange of goods and food became more diverse." Higher death rates likely stemmed from infant mortality associated with increased birth rates, a sign of prosperity.

Tuberculosis is also high on the exhibit list for the anti-agriculturists among us. Early cattle wranglers supposedly suffered from a bovine form of the disease, *Mycobacterium bovis*, which mutated into the human

disease, *Mycobacterium tuberculosis*. But advanced DNA studies have now dated *Mycobacterium tuberculosis* to about three million years ago, when little hominins like *Australopithecus afarensis* and *sediba* were likely just trying to avoid being trampled by Bessie's ancestors, not swapping germs with them as domesticated livestock.

Of course, modern life gets blamed for cancer as well. Zuk discusses the Egyptologists Rosalie David and Michael Zimmerman, who claim to find almost no cancer in ancient peoples, concluding that "cancer was rare in antiquity." Zimmerman, in fact, links cancer directly to modern lifestyles, since "there is nothing in the natural environment that can cause cancer." This must come as a surprise to anyone shelling out four bucks for a tube of SPF 50 sunblock, or \$30-\$60 for a radon test kit.

In fact, says Zuk, many cancers leave no skeletal evidence, and many ancient skeletons are incomplete anyway. She cites biologist Caleb Finch, who finds a source for cancer in our longevity: "Our long life spans have come at a price," explains Zuk. "Our immune systems can keep us going for many decades by fending off viruses, bacteria, and other onslaughts, but they also make us prone to inflammation, heart and neurological disease, and cancer."

A good deal of Zuk's argument depends on what she sees as a key misunderstanding of evolution: namely, that there was some point when we reached a perfect adaptation to the environment, a state of grace from which we have since lapsed.

We all wish we could be healthier, and it is easy to fantasize that before Big Macs, or roads, or houses, we were. But evolution doesn't work that way, with the accomplishment of perfect health or perfect adaptation after some arbitrary period of time. Instead, diseases perfectly demonstrate that life is an endless series of checks and balances, with no guarantees of a happy ending.

Or, as she says elsewhere, "We all have to die of something." She makes a good case that hiding in an imaginary past won't save us. ♦

The Write Stuff

*How paperwork validates power—
and obscures meaning.* BY PETER LOPATIN

When we bemoan some bureaucratic atrocity—and the paperwork in which it so often finds tangible expression—we are likely to do so with world-weary, unreflective resignation. A well-known passage from Edna St. Vincent Millay comes to mind: *So it is, and so it will be, for so it has been, time out of mind.*

Ben Kafka argues, however, that paperwork, together with the bureaucracies that generate it (and which—in reciprocal fashion—are sustained by it), have both a discernible historico-political origin (specifically, in post-revolutionary France) and a complex structure. Indeed, Kafka—a historian and media theorist at New York University—argues that paperwork itself, like the people who produce and consume it (and who, at times, are consumed by it), has its own “psychic life,” which he has set out to elucidate.

Kafka notes that although it was only in 1764 that the word “bureaucracy” (*la bureaucratie*) made its first appearance in print, by the 1850s it had become all the rage, and was denounced (“in remarkably similar terms”) by Marx, Tocqueville, and Mill. Bureaucracy came to be recognized as a new regime of government (literally, “government by desks”) over and above “the classic three regimes” of democracy, aristocracy, and monarchy:

This piece of furniture was expandable, metonymically, to include the men who sat behind it, the offices in which they found themselves, and ultimately the entire state apparatus.

Kafka examines the meaning and

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The Demon of Writing
Powers and Failures of Paperwork
by Ben Kafka
Zone Books, 208 pp., \$28.95

implications of this new regime, intertwining threads of historical narrative, psychoanalytic theory, and intriguing anecdotes into a thoroughly absorbing read.

His argument is that paperwork (which he defines as “all those documents produced in response to a demand—real or imagined—by the state”) frustrates the intellect by its unpredictability and its inherent contradictions. If that were all there were to it, however, the study of paperwork, though intriguing, would be merely an interesting historical sidelight.

However, Kafka proffers the bolder thesis that “modern political thought was both founded and confounded by its encounters with paperwork.” The latter component of Kafka’s claim is certainly true; as to the former (foundational) claim, I remain unconvinced. But Kafka clearly has a case to make, and it is a pleasure to follow him as he makes it. Although the ideas of such postmodern luminaries as Roland Barthes and Jacques Lacan, among others, inform Kafka’s narrative—we are told that Lacan characterized bureaucracy as a “rattling of the semiotic chain”—Kafka nonetheless presents his arguments with a minimum of academic cant and with admirable concision and subtle wit.

The French Revolution did not merely bring about the end of the monarchy; it purported, as well, to institute a form of government whose legitimacy was founded on its claim to be, at all

times, the representative of every one of its citizens. Necessarily, such a government would have to be accountable for its every action and transparent in its functioning. This notion was embodied in Article 15 of the *Declaration of the Rights of Man and Citizen* of 1789, which asserted: “Society has the right to ask all public agents to give an accounting of their administration.”

In Kafka’s view, this principle reflected a “transformation in the culture of paperwork that was to have permanent consequences for modernity.” Governmental accountability was henceforth to be “recognized as an inalienable, individual right [and was to become] the foundation of representative government.” Since paperwork and its attendant bureaucracy were necessary for that accountability, the former became, as it were, a pillar of legitimate government: Actions undertaken by or on behalf of the state were to be meticulously documented, in the expectation that eventually there would be a public accounting of those actions.

The devil is in the details, however. The power of a bureaucratic regime is intrinsically problematical in a representative democracy of the sort to which the French Revolution had purportedly given birth. In a far-flung nation of 26 million, “how could the general will express itself . . . without destroying its liberty, without endangering its very existence?”

Emmanuel-Joseph Sieyès (the *abbé* Sieyès), one of the principal theorists of the revolution, had thought that the resolution of this riddle would be achieved by combining a division of governmental labor into numerous areas of narrowly demarcated responsibility, together with scrupulous attention to recordkeeping—which is to say, *paperwork*. As Kafka notes, however, its praxis in the revolutionary period involved an intrinsic contradiction: The greater the revolutionary regime’s attempts to wield its power, the more impeded it was in the exercise of that power by the need to precisely document its every deed with the requisite paperwork.

Nowhere is this contradiction more

compellingly shown than in the case of Charles-Hippolyte Labussière, a clerk in the Committee of Public Safety (that quintessentially murderous arm of the Reign of Terror), who secretly subverted the bureaucracy he claimed to serve, saving more than 1,200 souls from the guillotine. His heroic, if bizarre, sabotage of the bureaucratic machinery of the Terror would, in the years to come, earn him the admiration of his nation and a plaque in his honor on the wall of the Académie Française.

If *The Demon of Writing* can be said to have a hero, it is surely Labussière. His method was directed at the very materiality of paperwork: He would hide those documents whose correct processing was a condition precedent to execution, soak them in water until they were pulp, and form them into balls of paste which he would then surreptitiously toss into the Seine. Without the necessary paperwork, the condemned could not be executed. The wrench in the works was the regime of paperwork itself, a problem that had led Saint-Just, the public face of the Terror, to complain that “the demon of writing is waging war against us; we are unable to govern.”

On Kafka’s reading, the machinations of the Terror had fallen under the influence of “the agency effect”:

The political relation between men had taken the form of a material relation between things. . . . This material relation did not simply eliminate individual agency, however. Rather, it refracted agency through its medium.

Paperwork presented a means of resistance to the power of the state, while remaining the means of the state’s assertion of that very power.

The refractory power of paperwork drew the serious attention of Tocqueville, Marx, and Freud, each of whom receives Kafka’s extended attention. Tocqueville struggled with the contradictions of bureaucracy to the point of eschewing the very use of the word, though not its substantive import. He asks: “How to reconcile the extreme centralization that [the bureaucratic regime] consecrates

with the reality and morality of representative government?” Tocqueville’s comments on the relative absence of paperwork in America—and on the greater appeal to ambitious Americans of trade and industry over service in “official appointments”—are timely, and Kafka’s discussion of the evolution of Tocqueville’s thoughts on bureaucracy makes for fascinating reading.

From a lesser-known early work of Marx concerning a dispute between the Prussian tax authorities and winemakers of the Mosel region—a dispute that was to generate innumerable notes, dossiers, and reports, but no just resolution of the winemakers’ claims—Kafka educes a theory of the praxis of paperwork. Here, we have Karl Marx as media theorist, propounding a conception of paperwork as “a refractive medium [in which] power and knowledge inevitably change their speed and shape when they enter it.” In its unpredictability, paperwork “accelerates and decelerates power [and] syncopates its rhythms, disrupts its cycles, which is why paperwork always seems to

be either overdue or underdone.”

Kafka finds in Sigmund Freud the beginnings of a “parapractical theory of paperwork.” Kafka’s Freud is the Freud of *The Psychopathology of Everyday Life* (1901), but as critiqued by the Marxist philologist Sebastiano Timpanaro and refracted through the semiotic lens of Roland Barthes. Seen in this light, Freud had failed to grasp the materialist basis of the Freudian slip, which should be seen not as the expression of repressed unconscious motives but as a reflection of “the mechanical and cognitive challenges involved in producing and reproducing texts” or as resulting from “material, cognitive, or institutional conditions.”

Yet, though Kafka reads Timpanaro sympathetically, he recognizes that the individual’s struggle with bureaucracy is not so much a struggle for resources or recognition as it is for the satisfaction of a desire. It is, moreover, “a struggle . . . that both theoretical wisdom and historical evidence suggest is insatiable.”

And where, if not in the unconscious, is the insatiable to be found? ♦

BCA

Prisoner of Love

An American girl grows up quickly in Afghanistan.

BY BRUCE BAWER

Phyllis Chesler has had a curious career. Back in the 1970s, along with Betty Friedan, Germaine Greer, Kate Millett, and company, she was a leading “second-wave” feminist, whose 1972 book *Women and Madness* sold 2.5 million copies. Yet, in some respects, she always differed from her activist sisters. For one thing, she didn’t idealize non-Western cultures, or seem deluded

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An American Bride in Kabul

A Memoir

by Phyllis Chesler

Palgrave Macmillan, 256 pp., \$27

into thinking that she and her fellow middle- and upper-class American women were the most oppressed creatures on earth. For another, she didn’t hate men. On the contrary, far from buying into the notion that women are morally superior to men and that they get along with one another in deep, rich, and wonderful ways that

men cannot, she wrote a whole book, *Woman's Inhumanity to Woman* (2009), about the manifold ways in which women hurt, exclude, judge, and abuse one another.

There was always some distance, then, between Chesler and the feminist establishment, and, over the decades, it has only widened. While the women's movement of the 1970s at least boasted some tough, smart leaders who stood up for their less privileged sisters around the world, today's feminism is first and foremost an academic phenomenon—rife with caution, careerism, and conformity, drenched in political correctness, steeped in rhetoric about capitalism and American hegemony, and at least as focused on race and class as on gender.

The professors who dominate it still rant on about the patriarchy, but they're careful to target only white Western men, having learned from Gayatri Chakravorty Spivak, a "theorist" of "postcolonialism" based at Columbia, that it's racist, neo-imperialist, and (yes) postcolonialist for white Western women to try to "save the brown woman from the brown man." Hence they tiptoe around, relativize, or even overtly defend the planet's most patriarchal societies while savaging white American men.

Chesler—to her immense credit—doesn't buy it. Quaintly enough, she's opposed to the violation of women's rights wherever she sees it, and doesn't hesitate to say so. Her reaction to 9/11 was to pay even greater attention than before to abuses in the Muslim world, including honor killings and other "honor"-related violence, as well as to the increasing demonization of Israel—subjects that she has researched in depth and written about with a thoroughly justified indignation.

As a result, she has become *persona non grata* in the groves of academe. When I attended a women's studies convention a couple of years back, Chesler's name came up in more than one session, always pronounced in the same contemptuous tone by the ambitious young grad students and junior faculty who dismissed her as a "white Western hegemonic feminist" who doesn't realize that

ticklish matters like honor killings need "to be positioned within a transnational postcolonial feminist perspective" (a fancy way of saying "hands off").

One reason Chesler refuses to take a "transnational postcolonial feminist perspective" on the mistreatment of women in Islamic cultures is that she's been there. She was a mere teenager—a nice, New York Jewish girl, very intelligent but also very naïve—when she fell head over heels for a wealthy, exotic, sophisticated fellow student at Bard, tied the knot in a trice, and, her head filled with romantic images of a lifetime of international travel, bookish conversation, and passionate love-making, moved with him in 1961 to his family home in Kabul.

But as she recounts in this remarkable memoir, her glamorous beloved—who, in the United States, had been a staunch supporter of sexual equality—metamorphosed in Afghanistan into a stern enforcer of traditional gender roles. Deprived of her passport, denied freedom of movement, and severely reprimanded for the slightest sign of insubordination, she spent her days locked up with the clan's other females (including the mother-in-law from hell), in a harem where there was nothing for them to do except gossip, bicker, plot against one another, and consume the endless pots of tea and little cakes that the servants kept bringing in on trays.

Chesler's account of this period of captivity, during which she endured an illness that brought her close to death, is never less than riveting. But it's more than just (as they say) one woman's remarkable story: Chesler brings to her material—the raw experiences she underwent as an unworldly girl—a half-century of personal reflection about that episode of her life, decades of professional work in human psychology, and years of research into Muslim (especially Afghan) history and culture. In addition to providing ample excerpts from the diaries she kept at the time—juxtaposing, to striking effect, the voice of the callow girl with that of the wise and erudite woman—Chesler quotes from a great many books, some of them over a century old, by other Western-

ers who visited Afghanistan, including Western women who, like her, made the mistake of marrying into a culture about which they knew next to nothing.

The result is an utterly enthralling work in which every page is rich with insight. But the real triumph here is that Chesler's account of her Afghan sojourn—which makes up the first half of *An American Bride* and feels untoppable—is, in fact, overshadowed by what follows. For it turns out that Chesler, after making it back to America against her husband's wishes, gradually reestablished a unique, if consistently tense and uneasy, friendship with him that has endured to this day.

One hardly knows what to make of this. On the one hand, Chesler's compassion for her ex-husband—who, eventually, also had to flee Afghanistan for America, and whom she now regularly hosts in her Manhattan apartment—speaks extremely well of her. On the other hand, her readiness to forgive him, not only for his long-ago deception and tyranny, but also for his continuing patriarchal arrogance and condescension, almost makes one want to see her behave like a real hardcore feminist and kick him in the pants before tossing him out the door.

But that's not all. Before the book ends, Chesler shares a dark fact about her ex-husband's family history that she discovered relatively recently—and that forced her to sit down for a few moments to catch her breath. The revelation, which is also guaranteed to shake up any sympathetic reader, underscores just how dark and treacherous the waters were into which a young girl once, long ago, so eagerly, ignorantly, and recklessly dove.

In the final analysis, this is not only the extraordinarily engaging and moving story of a young woman and the man she once loved—and still, now, despite her formidable intelligence and instincts, clearly continues to love in some mysterious way. It is the story of two civilizations: one of them ancient, and yet considerably less than civilized; and the other, for all its newness, perhaps too civilized to acknowledge just how far short the other falls of true civilization. ♦

Lifetime Achievement

Feeling good about feeling bad, ca. 1977.

BY JOHN PODHORETZ

The horrendously titled *Short Term 12*, a no-star independent film about a young woman working at a foster-care facility in Los Angeles, is receiving rapturous notices of a kind its young writer-director Destin Cretton could hardly have dreamt of. It has a 98 percent positive rating on Rotten Tomatoes, and almost all of the reviews the site aggregates are unqualified raves.

The film's leading player, a 23-year-old named Brie Larson, is getting the same treatment the then-20-year-old Jennifer Lawrence got for her breakout role in another dreadfully titled indie, *Winter's Bone*, in 2010. That part secured Lawrence an Oscar nomination and set her on the path to her unrivaled present standing as a prestige Oscar winner (*Silver Linings Playbook*) and action-movie superstar (*The Hunger Games*). Watch Larson rise.

She's very good, no question, but the fascinating thing about *Short Term 12* is how utterly false it is—and how its affectedly raw and unvarnished “indie” style has masked its meretriciousness in the eyes of critics who really ought to know better. *Short Term 12* resembles nothing so much as those 1970s television shows in which committed young teachers work with disadvantaged youth—*Room 222*, *Lucas Tanner*, *The White Shadow*. In those shows, which congratulated themselves on showing a part of America TV viewers had never seen before, every dramatic situation is resolved happily by the time the final credits roll.

The same is true of *Short Term 12*, which reserves its tragic stories for anecdotes told by characters and makes

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Short Term 12

Directed by Destin Cretton



Brie Larson

sure the characters we do meet are all pretty much fine. Even the most dramatic moment—a suicide attempt—is basically taken back in the movie's final moments as we're told the person who attempted it was seen only a few weeks later drinking cappuccino with a beautiful girl. In fact, I wouldn't be at all surprised if *Short Term 12* becomes a television series; its concluding scene has the exact rhythms and style of the end of a pilot.

The falsity is probably necessary, because there can be no more depressing subject than the one the film concentrates on—children so abused and broken they cannot even be sent into foster homes. To tell the story of a dead-end facility like this one without any leavening would be to make something unwatchable.

Even so, the degree to which Cretton pretties it all up is kind of stunning. There are many people who would kill to live at Short Term 12. Everybody who works there is nice; the kids are pretty gentle and kind to each other;

everybody gets his own room; there's drawing, TV if you behave, and whiffle-ball games. The counselors make you cupcakes for your birthday. It's like a summer camp, only indoors.

Grace, played by Larson, is the chief counselor. She's nice and calm but tough when she needs to be. She is harboring several deep secrets that keep her from being completely open and honest with her dream-of-a-boyfriend, Mason—a perfect, unthreatening, loving, self-effacing, sexy fellow who cooks for her and watches out for her and loves her. All he wants is for her to “let him in,” but she won't. It would be more believable if she were resisting him because he's such an incredible wimp where she is concerned, but of course the explanation is far more clichéd than that.

Anyone who has watched a mere 15 minutes of the programming on the Lifetime channel since 1991 can write the script: Grace was abused as a child and now has trust issues, and the trust issues have reached a crisis level because she has found out she is pregnant; meanwhile, a teenage girl has moved into Short Term 12 who brings up all the past emotions Grace has been struggling to subdue . . .

If *Short Term 12* had been made as a Lifetime movie, no one would have paid the slightest attention to it. Moreover, the moment that reduces everyone to jelly—when a crying Grace sees her unborn baby on a monitor—is exactly the same moment that makes anyone cry in any movie in which there's a scene of a woman getting an ultrasound.

But *Short Term 12* was shot using Red Digital Cinema, the revolutionary system that allows filmmakers to shoot in natural light with tiny and relatively inexpensive equipment while retaining a cinematic look. Though the Red camera is used on major productions—by A-list directors Steven Soderbergh and David Fincher especially—the slightly grainy and washed-out appearance gives off a handmade, do-it-yourself, passion-project vibe. This vibe, more than anything else, is what has tricked cineastes into thinking they're seeing something profound when they're just seeing tonight's episode of *Grace the Social Worker*. ◆

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