The Clarence Thomas Dilemma: Nomination and Confirmation
by Robert Gaudet, Jr.

An American Renewal
by Senator Bob Kerry of Nebraska

The Case for Gay & Lesbian Marriage
by Mielle Abbey-A Schwartz

It’s Time to Reinvigorate American Democracy
by Robert Abrams,
New York State Attorney General

Democracy in New York
by Brandon Mitchell

Commentary on the Clarence Thomas Nomination
by Ruth Messinger,
Manhattan Borough President

Law School Profiles:
Harvard, Yale, Duke, and Columbia’s AILE Program
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Looking back to the Clarence Thomas confirmation hearings, one must reconsider the entire nomination process—from Thomas's laments of "high-tech lynching" to senators' frustrations with his evasiveness, in order to make sense of deliberations that seemed "out of control" (Senators A19) to most Americans. An examination of past nominations can also help us answer the questions, "What was wrong with the confirmation picture?" and "Whose fault was it?" The Senate, that white monolith of indifference, suffered from a damaged reputation as much as Anita Hill or Clarence Thomas. The only winner, it appears, is President George Bush. Bush and the Republican Party got their man confirmed.

The Senate suffered on multiple counts. First, as Senator Edward Kennedy stated, a "tidal wave of anger among the women of America" (Other) erupted upon the discovery that little had been done, originally, to investigate Anita Hill's sexual harassment charges. This reinforced the Senate's image of white male insensitivity. Second, the Senate was not nearly as charismatic or photogenic for Clarence Thomas as during the Gulf War debates:

For every occasion when a Senator seemed to be pressing to understand the truth, there were two or three more when a lawmaker came across as a self-important windbag. (Senate's A20)

For all their persistence, senators have the darndest time getting a nominee to answer their questions. Like a military strategist, Thomas pulled out all the moves: coached by the Commander-in-Chief's Administration, he evaded questions on his personal beliefs, retreated from potentially damaging thoughts he held in the past, and went on the attack against senators for making a circus of the hearings. During the David Souter hearings, senators had difficulty extracting a response from Souter concerning abortion rights. The complete lack of candor directing many candidate's responses seems to violate the intent of the hearings, yet also appears necessary for winning approval. Senator George Mitchell observed

it is now widely believed that a nominee who agrees with the President on abortion and is willing to say so cannot be confirmed [and, as a result] with each nomination the process has become more elaborate and less informative. (Excerpts A18)

While Senator Byrd expressed distaste for Thomas's "stonewalling the committee" (A18), no senator was able to penetrate the rhetorical wall that Thomas and the Administration built to hide Thomas's personal ideology. Since the President undoubtedly chooses his nominees on the basis of the nominee's personal beliefs, the Senate should be allowed the same considerations in deciding confirmation. Senator Edward Kennedy (D-MA) was frustrated by Rehnquist's evasiveness in the 1986 hearings, proclaiming

it is historical nonsense to suggest that all the Senate has to do is to check the nominee's IQ, be sure he has a law degree and no arrests, and rubber stamp the President's choice. (Mason 8)

No matter what Senators Byrd and Kennedy may feel, nominees will probably continue stonewalling their Senate questioners. And to make Thomas's confirmation matters worse, our Senate lacked control. Described by the New York Times as being "as raw as it gets" (Senate's A1), the confirmation debate pitted senator against senator.

Like Thomas, Justice William H. Rehnquist claimed an ability to reject his past, when questioned in 1971 hearings for Associate Justice: "My fundamental commitment, if I am confirmed, will be to totally disregard my own personal belief." (Mason 5) If this remark was intended to comfort any senator's fears, it must have worked; Rehnquist was approved 68-26 in a contested confirmation process. In his 1986 confirmation hearings for the vacated Chief Justice seat, Rehnquist, like Thomas, was also targeted with unproven allegations (of intimidating Phoenix voters in 1962 and 1964 as a worker for the Republican Party), but he too denied the charges. Senator William Cohen's (R-ME) feelings about Hill's accusations may illuminate the thoughts of senators' deliberating accusations against Rehnquist in 1986:
Thus, unproven doubts should not block confirmation—our ideal of innocent until proven guilty. Thomas’s opponents reasoned just the opposite; if there is any doubt concerning Thomas, they would err on the side of caution by rejecting his nomination rather than risk placing a "pornographic" sexual harasser on our nation’s most venerable Court.

The nomination process of filling vacant Supreme Court seats can be likened to a game between the President and the Senate, with rules established by Article II, Section Two of the United States Constitution:

*The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court.*

The Senate’s "Consent" is apparently obligatory, but whatever happened to "Advice"? By requesting the Senate’s advice on nominations, the President could reduce the chances of an embattled process and eliminate the risk of his candidate’s rejection. President Richard M. Nixon struck out twice with Clement Haynsworth and G. Harrold Carswell before finally nominating a successful candidate, Harry A. Blackmun, in 1970. Haynsworth and Carswell are not alone: of 141 Supreme Court nominations between 1789 and 1986, 26 were not approved (12 confirmed nominees declined to serve). (Mason 8) A politically-empowered President like Bush or Reagan may choose to push his nominees through the Senate, regardless of the risk. Even so, Reagan’s first two nominees, Robert Bork and Douglas Ginsburg, were not confirmed. Since Bush, like Taft, Franklin Roosevelt, Nixon, and Reagan, knows that Court appointments effectively extend a President’s ideology beyond the four-year term, he chooses nominees that fit the conservative Bush mold. Vice-Dean of the Columbia School of Law Vivian Berger says "Bush should stop daring God" with controversial appointments and refrain from deliberate "court-packaging" of conservative ideology. (Professors 6) Both the President and the Senate are aware that the nomination process is not a one-shot deal, but rather an attempt to fill a vacated seat. The entire process of nomination and rejection could theoretically go on forever.

But doesn’t anyone care about qualifications? Critics charged Thomas with being underqualified, and even the American Bar Association refrained from marking Thomas "highly qualified"—not a good sign for a

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*Supreme Court nominee. Qualifications are usually based upon the American Bar Association’s scores of the candidate in conjunction with the nominee’s published Law Review articles and literary contributions, and the length of his or her judgeship. According to Senator George Mitchell:*
Judge Thomas is not the best qualified American to be on the Supreme Court, as claimed by the President. Judge Thomas is not the best qualified African-American to be on the Supreme Court. (Excerpts A18)

Then perhaps the President should only offer perfect nominees, such as "senior politicans...or widely admired judges" (The Week in Review, K) in order to reduce confirmation difficulties; a highly-qualified candidate would offer one less sticking point. Exogenous effects such as the President's popularity, and whether or not the party that dominates Congress is the party of the President, may provide further ground-rules in the nomination game of qualifications, confirmations, and rejections.

While it is possible to create a smoother confirmation process, disagreement may be desirable. According to Phillipa Strum, CUNY Graduate Center political science professor:

The Judiciary Committee and the Senate become arenas in which political differences are expressed, sometimes bitterly. Lack of disagreement may indicate only that the nominee has views that are largely unknown. (Senate, Editorials/Letters)

The "political differences" engage debate over the nominee's merits. Mr. Strum offers the confirmation hearings of Louis D. Brandeis (which lasted for six months up till his 47-to-22 confirmation) as evidence that the inherent problems lie in a committee that is unable or unwilling to ask nominees and witnesses the right questions and to insist on answers, and in a President who cynically chooses a nominee so far from the best. (Senate, Editorials/Letters)

Others believe that politics should not be a consideration in the confirmation hearings, but rather that senators should rely on their own best judgement—regardless of public opinion polls for their states. Senator

Harry Reid (D-NE) chose to disregard the immediate politics of his constituency:

The polls in my state heavily favored him; every newspaper in my state editorialized for him. From a political standpoint, I badly wanted to vote for Clarence Thomas. However, my conscience wouldn't let me do it (Senators A19)

While Senator Reid raises the question of politics within the Senate, other critics have charged President Bush with wrongly emphasizing political ideology over qualification. Senator Mikulski complained:

the Administration and their senators made a decision to treat the nomination of Clarence Thomas as a political campaign and not a nomination process...[They attempted to] mask the convictions and obscure the beliefs of Judge Thomas. He himself refused to answer questions or gave answers that were simply, plainly unbelievable. (Excerpts A18)

Senator Mikulski, one of three women in the Senate, was outraged with both the perceived insincerity of the nominee and the political motivations (neither of which was new to the Thomas hearings) that marked the confirmation process.

Beginning with Rehnquist's 1986 nomination, and erupting in Bork's hearings, "hesitations expressed...over close scrutiny of a nominee's judicial philosophy all but disappeared." (Mason 10) Senators were not afraid to question Thomas on judicial philos-
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US faculty signed a petition for his rejection. (Mason 10) Thomas was also opposed by the Leadership Conference on Civil Rights, as well a group of black American professors who signed a petition authored by Columbia Assistant Professor of Political Science Carlton Long and Vassar Scholar-in-Residence Luke Charles Harris denouncing Thomas's claims of racial persecution during the hearings. (Professors 1) Thomas's "injection of racism into these hearings," according to Senator Byrd, may have been "an attempt to fire the prejudices of race hatred [and] shift [the hearing] to a matter of race." (Justice) According to Senator Barbara Mikulski (D-MD), Thomas's "backers and handlers" wanted "to win at all costs." (Excerpts A18)

Whether or not they supported Thomas (most did), many Americans are trying to keep hope alive with thoughts that Thomas may not turn out to be so bad after all. Senator Bill Bradley praised Thomas for treating Anita Hill with "the greatest respect during the hearings," noting that Thomas was "considerate when he spoke of her amidst the anger that he spewed at the committee." (Justice A24) A 16 October New York Times editorial also praised Thomas's "restraint," saying that "there is reason to hope, after the pain and after the joy, for civility, precision, and justice." Even during the proceedings, Americans hoped that a Justice Clarence Thomas might remember his roots and not destroy decades of civil rights progress. Senator Exxon went so far as to say the hearings made Thomas a tougher, better person, and hoped that "he will not turn out to be the doctrinaire ideologue on the Court that he is projected to be." (Excerpts A18) Once they are finished hoping, perhaps Americans will nip the confirmation difficulties in the bud by taking President Bush to the polls.

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Commentary On the Thomas Nomination
By Manhattan Borough President Ruth W. Messinger

The following is an edited version of a speech given by Ms. Messinger to the Brooklyn School of Law.

Like many of you, I have been profoundly disturbed by the events surrounding the nomination and confirmation of Clarence Thomas to the United States Supreme Court, and I believe we need to talk long and hard to one another about their ramifications. I am haunted by Wyoming Senator Alan Simpson’s performance before the hearings, on Ted Koppel’s Nightline program, when he attempted to bullyrag National Public Radio reporter Nina Totenberg for her broadcast reports breaking the story of Anita Hill’s accusations against Justice Thomas. Simpson landed on Ms. Totenberg with both cowboy boots, claiming that, because of her reports, Anita Hill would now inevitably be "injured and destroyed and belittled and hounded and harassed."

I am mentally transfixed by this episode for three reasons. First, it offered a gruesome foretaste of the treatment that Simpson and his colleagues proceeded to dish out to Professor Hill. The second reason is the truly warped deflection of responsibility for impending violence embodied in those remarks. We expect these sorts of psychological evasions from serial killers, not United States senators. The third reason brings me to the purpose of the remarks today—a discussion of the unresolved political issues raised by the Thomas confirmation.

In his performance on Nightline and throughout the hearings, Senator Simpson was engaged in intimidation—of Professor Hill, of Nina Totenberg—and, I would argue, intimidation of every woman listening to him. "Speak out and we will destroy you." The message was that crude. Silencing that message—finally securing for women the full dignity and equality that is our due—is the greatest unresolved political question left over from the Thomas hearings.

I want to talk about that question on two levels: the personal and the political—but of course personal is political and vice versa. So let me instead divide my remarks into what could be called the traditionally personal and the traditionally political.

First the personal: most of you will be entering the legal profession within the next year or two. For those of you who are women, this is what you have to look forward to—and men, this is what your wives or girl-friends, should they become attorneys, can expect:

• If you go to work for a law firm, you will, going by current standards, be about half as likely as your male classmates to become a partner.
• You will, five years after graduation, likely be earning 40 percent less per year than your male classmates, and you will likely be stuck in such low-prestige specialties as probate work, domestic relations, or the legal problems of women and children. Salary differentials are even more pronounced for women of color.
• You will be tortured by the complications of deciding whether a desire to have children will consign you to the "mommy track." This decision will be made infinitely more difficult by the fact that your employer—like 99 percent of all private sector employers—will not have a child care program. Conversely, of course, if you decide not to have children, you will be regarded as unnaturally ambitious or perhaps infertile, or maybe both.
• If you choose to work in the public sector—perhaps for the federal government—don’t expect to go too high. The number of women in major policy-making positions is now half what it was in the 1970s.
• When you enter the courtroom, you will be subjected to intimidation, treated like little girls who really ought to be home changing diapers, and expected to endure crude remarks and passes.

Now here’s the good news: as professional women, you will be comparatively lucky. Women are two-thirds of all poor adults in the United States. More than 80 percent of all full-time working women in the country make less than $20,000 per year—for men the figure is about 40 percent. Working women are more likely to live in bad housing and lack medical insurance,
Helvidius

and are twice as likely not to draw a pension. They are, additionally, far more likely to shoulder most or all of the financial, physical, and emotional responsibilities of child-rearing.

This is crucially important information in light of the split among women that developed along class lines in response to Anita Hill's testimony and Clarence Thomas's defense. Certainly, some of that split is attributable to racial solidarity; many African-American women interpreted the Senate inquiry as an attack on a strong African-American male. Certainly, the hearing revealed how explosive the mix of race, gender and power is in our social and political lives. It suggests we have not begun effectively to address our underlying anxieties about these issues. The hearings also revealed something that women involved in politics prefer not to talk about—that the women's movement is perceived as a professional or upper-income women's movement.

Unless and until we recognize these splits and attempt to heal them, women will be politically divided and manipulated. The result will be that we professional women, as well as the great majority of working women, will remain trapped where we are.

You, as law students and as lawyers, can play a crucial role in healing that split. Brooklyn Law School is justly acclaimed for its extensive clinical practice programs. I'm sure many of you are enrolled in one of them, or plan to enroll. In those clinics, in your dealing with your clients, and in your performance in the courtrooms, you are in the trenches in the struggle to keep poor people in their apartments, to protect the social security benefits of the elderly and disabled, and to win adequate child support awards. I challenge you to think about that work politically as well as legally and to grasp the faulty public policy at the heart of the legal problems ensnaring the poor, the working women, and the children of this city.

Open your hearts and minds to your clients, not gullibly, but intelligently. Let them see you, not as an aloof, distant professional, but as a counselor, an advisor, and an advocate—as someone who understands the forces arrayed against them and who will help even those odds.

The personal is political—and making those personal connections day in and day out in your work will help tremendously in overcoming the resentments and distrusts that divide women from one another. That task carries over into what, for the purposes of this talk, I am calling the traditionally political.

A few days ago, my friend Haywood Burns, the dean of the CUNY Law School, spoke on the subject of Thomas's confirmation, noting that for most of its history, the Supreme Court has been a conservative body. We should not forget that it required a full sixty years of unremitting legal and political struggle before the court overturned its "separate but equal" Plessy v. Ferguson doctrine. With the confirmation of Justice Thomas, there is now a solidly conservative majority on the Supreme Court. That means that the court is not likely to be an arena in which to wage a struggle for justice and equality. Rather, the arena must now be the political realm: Congress, the state legislatures, and the hearts and minds of our fellow citizens.

We need to face up to the truth in the argument that over the last twenty years, political progressives have become overly reliant on the courts at the expense of remembering how to talk to our fellow Americans—that we have forsaken persuasion for litigation. Don't get me wrong. We will always need litigation, but it's time to sharpen up our skills in persuasion as well. We can and must start with healing up the splits I alluded to earlier—splits among people who should be natural allies.

On universal health care, on family and medical leave, on job training, on expanding heads tart, on funding shelters for battered women, on building affordable housing and increasing equity in education, and on federal legislation enlarging the right to sue to correct on-the-job discrimination and harassment, people need to know who their real friends are.

Our legislators must be made more accountable and more representative. A higher percentage of women than men vote and we must become more adept at mobilizing that political power. Obviously, that means changing the composition of that elite, all-white near men's club, the United States Senate. The next time an Anita Hill steps forward, she should not be required to face what Times columnist Anna Quindlen described as "an unbroken line of knotted ties."

Women's political power will have a salutary effect on the style, as well as the substance, of politics. I
was in Austin, Texas last month for a conference on
time to ask for more money. The Israeli
women in government, and talked with Ann Lewis, a
lent seat of government under the leadership of Yitzhak Shamir, 
former official in the national democratic party who is 
riding high on the wave of good-will earned for allowing
writing a book on women in politics. In her interviews,
she has found that male candidates typically speak in the 
usaha to suffer over forty Scud missile attacks during the 
imagery of war and sports while female candidates more 
Gulf War, should have had an easier time in securing ten 
often talk simply about achieving results, and achieving 
billion dollars in loan guarantees to alleviate the strain of
results usually means conciliation and compromise.

Much of the distaste people rightly found in the 
Thomas confirmation process arises simply from the 
stance of socialization, not genetics, but the fact is that women just aren’t as prone 
muscle-flexing, locked horns, "slash and burn" tactics 
my live fights with the state legislature. She answered that she 
used in the process. It’s certainly a result of socialization, 
didn’t feel the need to have a string of scalps on her belt.
not genetics, but the fact is that women just aren’t as prone

Of course, you can be tough and effective without being Alan Simpson. I’ll close with an example from
my own experience.

When I was first elected to the New York City 
Council in the mid-1970s, I was on a council committee 
questioning a city agency head. I was not satisfied with 
answering charges that she hasn’t been in enough 
the answers I was getting, and really zeroed in on him until 
her office. Afterwards, one of my 
I got the information I wanted. Afterwards, one of my 
colleagues said to me, "I thought you said you weren’t a 
the answers I was getting, and really zeroed in on him until 
I thought you said you weren’t a lawyer." "That’s right," I said, "I’m not." "Then where 
I got the information I wanted. Afterwards, one of my 
did you learn to cross-examine like that?" "Oh, that’s 
I thought you said you weren’t a lawyer." "That’s right," I said, "I’m not." "Then where 
easy," I said. "I’m a mother." I can’t help but think that 
did you learn to cross-examine like that?" "Oh, that’s 
if there had been a few tough mothers on the Senate 
easy," I said. "I’m a mother." I can’t help but think that 
Judiciary committee, the questioning would have been a 
if there had been a few tough mothers on the Senate 
lot sharper.

The Thomas confirmation process exposed the 
Continuing vulnerability of women in America. It also 
exacerbate that vulnerability. It reduced the already constricted hope 
shed light on the divisions among women that exacerbate 
of defending ourselves or enlarging our rights through the 
that vulnerability. It reduced the already constricted hope 
the federal courts. The great unfinished task left by the 
of defending ourselves or enlarging our rights through the 
hearing is the real maturation of feminist political power, 
the federal courts. The great unfinished task left by the 
and the sooner we get on with that task, the better.

When Will Israel Get a Fair Deal?
By Daniel J. Bases

What a time to ask for more money. The Israeli
Israelis to suffer over forty Scud missile attacks during the
government under the leadership of Yitzhak Shamir, 
Gulf War, should have had an easier time in securing ten
riding high on the wave of good-will earned for allowing
billion dollars in loan guarantees to alleviate the strain of
supporting 1,000 new Israeli citizens a day. The flood of

What better time, rather what
Soviet Jews into Israel was and still is considered an
more essential time, to ask for 
esential infusion of new lifeblood into the system. In just
loan guarantees from the United
over two years, over 350,000 Soviet Jews have emigrated,
States than now, when the reali-
in addition to the tens of thousands of Ethiopian Jews
zation of so many dreams of free-
airlifted at great expense. What better time, rather what
grants from the United
more essential time, to ask for loan guarantees from the
States than now, when the realization of so many
Soviet Jews have emigrated, in addition to the tens of thousands of Ethiopian Jews
freedom are coming true?

Israel is not asking for this money out of the
airlifted at great expense. What better time, rather what
American taxpayer's pocket. By co-signing the loans, the
more essential time, to ask for loan guarantees from the
US will enable Israel to borrow money from private banks
the United States than now, when the realization of so many
in the US at a lower rate, money which will be paid back over a 30 year period. The humanitarian requirements of
freedom are coming true?

The New Republic

Political-Economic Maneuvering

George Bush's request for a delay in granting the
the United States than now, when the realization of so many
loan guarantees amounts to little more than strong-arm
freedom are coming true?

tactics for political gain. By creating a connection be-
more essential time, to ask for loan guarantees from the United
between loan guarantees and housing settlements in the
between loan guarantees and housing settlements in the
"occupied territories," Bush has created a climate in 
"occupied territories," Bush has created a climate in which the US's greatest ally, Israel, is being made the
which the US's greatest ally, Israel, is being made the
scapegoat for all the problems of Arab-Israeli relations.
scapegoat for all the problems of Arab-Israeli relations.
As Martin Peretz of The New Republic points out, Bush's
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attempt to force Israel into making concessions on so significant an issue in advance of the talks and without any reciprocal concessions from the Arabs has tainted the peace process. The US has stated unequivocally that the international community. Lebanon is perhaps in the weakest position to represent its own interests now that Syria has been given almost complete control over the country and will no doubt follow the Syrian line.

The process, which initially had limited positive results, has actually succeeded in getting all parties concerned down at the same table for the first time in many years. This in itself is a triumph. But for whom? The triumph is for Mr. Bush and Mr. Baker who have bullied their way to Madrid. According to Ze'ev B. Begin, a Likud member of the Israeli Knesset, in the latest issue of Foreign Affairs this "conflict cannot be ended by a quick fix." Although statement was made before the actual conference, the meaning is clear: there can be no real long-lasting peace if the opponents are thrown into an environment where no room has been made for real compromise. Preconditions were not allowed, yet Syria insisted before the conference that "they would not strike separate deals with Israel". They said that the "exchange of land for peace must be part of the package that would include all of the occupied territories and be approved by all neighboring Arab countries and the Palestinians."(Go/an) These conditions seemed less than optimal, yet Syria isolated itself when the other Arab participants seemed amenable to new ideas. Perhaps for the first time, the Arabs and Palestinians are realizing that this is by far their best chance for

GRAPH A

continued building of Jewish settlements in the Israeli-occupied territories is a direct hindrance to peace. In fact, fewer than two percent of the new immigrants choose to live in the occupied territories. The Israeli government has no specific program to settle any citizens, anywhere. (See Graph A) But Bush held all the cards in getting the Middle East peace conference started. He knew that Israel desperately needed humanitarian aid. As a result of the Gulf war and waning Soviet influence in the area, the Arab states lined up, more or less, to take part in the talks at James Baker’s request. Israel lined up too and felt as if it was being led into a narrow "killing field." (New York Times 16 OctJ. This was the "Window of Opportunity" George Bush talked about, and Secretary of State James Baker III worked to open wide.

How Could They Refuse?

How could they refuse? The Palestinians and Jordanians saw this as an opportunity to fix the terrible mistake they made in backing Saddam Hussein in the Gulf War. The Syrians are now without their major arms supplier and political ally, the Soviet Union. They see the Bush-Baker efforts as an opportunity to make nice with the US, by following up on the alliance struck during the Gulf War, as well as the chance to improve their standing in the

Now for the hard part...
Approaches

Debate Over Loan Guarantees

Where does Mr. Bush now stand on the loan guarantees? He has his peace conference with all the major players involved. Are we to assume that Israel will have to wait until she has a real peace treaty with each of its Arab neighbors—a process that could take years? Meanwhile over one million immigrants will have poured into the country and found themselves at the mercy of a desperately overloaded system. The Israeli people will make the absorption of the Soviets and Ethiopians a successful reality no matter what Bush decides to do.

More importantly, President Bush is encountering heavy opposition to his policy of delay. 70 US Senators have co-sponsored legislation introduced by Senators Robert Kasten (R-WI) and Daniel Inouye (D-HI) which would provide Israel with $10 billion in loan guarantees over the next five years. (Veto-Proof) Although it cannot be said that Bush wants to cancel the guarantees, his call for a delay damages an increasingly frail relationship between the US and Israel. When the proposed vote comes up in early January or February, 1992 it will be passed, but at what cost to the relationship between the US and Israel?

A Slap In The Face

The delay in loan guarantees has shown the Israelis the ugly side of American diplomacy. A leaked Bush Administration report that questioned Israel’s ability to repay its debts (Israel Approaches) was the final slap in the face for the Shamir government.

In reality, Israel’s ability to pay back its debt is strong. It has, for starters, never defaulted on a loan. How many of our Arab friends can boast that? Since 1985, when ambitious economic reforms were introduced, Israel’s foreign debt has been reduced to 36 percent of its Gross Domestic Product by 1990. (See GRAPH B) This figure is encouraging since the debt in 1985 stood at 80 percent. Some critics charge that this reduction has been caused by government-sponsored debt reduction programs and is not really due to a growing economy. They see the economy as benefiting from a reduction in government owned industry (which stands at roughly 90 percent), and the transferal of funds to private enterprises. What must be noted according to a Salomon Brothers report is that "a gradual change toward freer markets, less regulation and orthodox macroeconomic policies is underway in Israel." In essence almost all subsidies have been done away with except for those to companies dealing with water and public transportation.

The infusion of loan money, along with the infusion of a rich and diverse human capital, will lead to success for Israel. "Already a world leader in research on semiconductors, biotechnology, lasers, fiber-optics, electrical energy, robotics, software technology, and many other growing fields," the infusion of new minds and new perspectives in the form of the immigrants will begin to thrive, produce, and become self-supporting. (Israel’s Ability)

A large percentage of the money Israel will receive will return to America as purchases and contracts for housing and industrial products. Under the US-Israel Free Trade Agreement, Israel imported over $3.2 billion worth of goods from the US in 1990 alone. This benefit of aid to Israel is not readily apparent.

GRAPH B

Conclusions

It is time for a change in the Bush attitude towards Israel—no ally has done more for the US over the years. The problem lies in a double standard where Israel and its Arab neighbors are concerned. As A.M. Rosenthal writes, "For almost a half-century Israel has been bombarded with filth—from the ceaseless and still-continuing anti-Israel and anti-Jewish campaign in almost every
Muslim country worldwide. Filth from the mouth, the press and the airwaves is meant to dehumanize a nation and make its extinction desirable. The world says nothing, does nothing. (New York Times 22 Oct.) When the Foreign Minister of Israel spoke before the United Nations, the Saudi president of the General Assembly would not stand and listen as a representative of the world's nations. Instead, he walked out of the Assembly hall, insulting Israel as well embarrassing his country and the entire UN. Nothing was said. If Israel had made such a stupid move, there would surely have been a call to arms and a vote to censure immediately. With no one to answer to, the White House is able to get away with treating a friend and ally harshly. Mr. Bush must be weaned away from the illusion that by not treating Israel with the respect she deserves as a sovereign country, the peace process will run smoothly and the Arab states will conform—a sorry miscalculation at the least. Bush and the American people must not forget that Israel is a democracy and not a military or royal dictatorship. American ideas will be better received in Jerusalem than in other states in the region where censorship and suppression is the rule of thumb. In the end, peace or no peace, President Bush will have succeeded only in wounding himself and his Mid-East ally, by leaning hard on Israel. Israel is not the root of the problem.

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Can Poor Schools Look to the Court?

By Mark Leonard

The educational system in the United States deprives poor and minority children of an equal opportunity to succeed. In many states, districts with low property values cannot adequately provide for their students; they cannot afford textbooks, maintain school buildings, or recruit capable teachers. The classrooms are overcrowded; the libraries are empty; the faculty is either uninterested or overworked, and often unable to keep track of all its students. America's drop-out and illiteracy rates have reached staggering heights in districts such as the North Bronx, Selma, Camden, East St. Louis, and South Chicago. Inadequacies in the educational system reinforce the already strong link between race and poverty, deprive some children of opportunities, and predetermine class by residency. Despite the many pleas to elevate educational standards, both the state and federal governments continue to buy America's prosperity from the future and to neglect large segments of the youth.

Encouraging both levels of government to uphold minimum standards in education has become more difficult than ever in light of today's economic hardships; as the proportion of voters with children in public schools decreases, the public eye looks further away from education. The federal government absolves itself of almost all responsibility and holds education to be strictly a state issue. The states pass much of the fiscal burden onto local districts to provide for their own educational systems, resulting in huge disparities in funding and expenditures among the school districts. Areas with low property values often cannot bear the burden. They devote a much higher percentage of their local tax to the educational
system, yet have schools unacceptably inferior to those in their property-rich counterparts.

Because of their slight political and economic leverage, parents in property-poor districts are virtually without recourse in either the executive and administrative branches. The judicial branch, however, has the power, and possibly the incentive to promulgate educational fairness. In this piece, I intend to explore the judiciary's response to constitutional challenges of local finance schemes and the strategies involved in the battle for equity in public education.

In 1968, Demetrio Rodriguez filed a class-action lawsuit challenging the constitutionality of Texas's educational funding scheme under the "equal protection" clause of the Fourteenth Amendment. The ten wealthiest districts in Texas averaged nearly three times the total state and local revenue per pupil than the four poorest districts. Rodriguez's district, Edgewood, a 96 percent non-white, property-poor district, could only raise $231 per student with state and federal aid. Alamo Heights, a predominantly white, property-rich district, raised $543 per student with state and federal aid. Strangely, parents in Edgewood district paid a much higher tax rate than parents in Alamo Heights, in fact, a rate higher than most other districts in Texas.

The federal district court held that Texas was in violation of the equal protection clause of the Constitution and ordered the Texas Legislature to redistribute educational funding in a more equitable manner. The US Supreme Court, however, reversed the lower court's ruling in what is probably the most significant case challenging a state's educational finance law, San Antonio Independent School District v. Rodriguez. In a five-to-four vote, the Court ruled that the equal protection clause does not extend to students in property-poor districts and that education is not a constitutional right.

Justice Lewis Powell, writing the majority opinion, argued that the Texas financing schemes did not create a "suspect class" based on wealth:

[The plaintiffs] made no effort to demonstrate that [the financing scheme] operates to the peculiar disadvantage of any class fairly definable as indigent" (Rodriguez 478)

To strike down a law as unconstitutional under the equal protection clause, the courts have designed a three-tier classification system which establishes distinctive degrees of scrutiny that an allegedly discriminatory law requires:

- Laws that discriminate against a "suspect class" like racial or ethnic minorities. These require the strictest scrutiny; the state must show that such a law has a pressing public necessity to prevent court action. (Korematsu)
- Laws discriminating against an "intermediate suspect class," such as women. Here, states must show that the law is substantially related to public good. For example, laws exempting women in the armed forces from front-line combat have been upheld under this standard.
- Laws that do not discriminate against a suspect or indigent class. The courts do not permit scrutiny of these laws. They fall under the "rationality test" in which the state must only prove that there is some rational basis for upholding the law.

Justice Powell applied the rationality standard to Texas's finance law, for he felt that children in property-poor districts did not constitute either a suspect or an indigent class. By this standard, Powell accepted the state's desire to preserve local autonomy over education to ensure that "...each locality is free to tailor local programs to local needs." (Rodriguez) He went a step further and claimed that in order to apply strict scrutiny, the children must be faced with "absolute deprivation of education." Finally, Powell argued that "[education] is not among the rights afforded explicit protection under the Federal Constitution."

The Effects of Rodriguez

Needless to say, Rodriguez firmly established that property-poor districts with inadequate educational facilities can find no expedient in Federal Court. There is little doubt that with today's the current Court, the ruling would not be much different. Only one month after Rodriguez, however, the New Jersey Supreme Court struck down the state's educational finance law as unconstitutional under a provision in the State Constitution that requires the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools." (Robinson 482) Most state constitutions, fortunately, offer similar educational provisions. Consequently, the entire debate shifted focus to state constitutions, and challenges to education finance laws are now brought to state courts.
The days of the Warren Court are long gone; lawsuits aimed at protecting civil liberties are filed under state jurisdictions more than under federal jurisdiction, ...

...state courts have increasingly interpreted their own constitutions to guarantee greater protections than the federal constitution in a wide range of areas—from free expression, to reproductive rights, to housing for the poor. Justice Brennan hailed this blossoming of state constitutional law as 'the most important development in constitutional jurisprudence of our times.' (Hershkoff)

Not all state courts, however, are as receptive as New Jersey's. Pennsylvania, for example, interpreted the "thorough and efficient" clause in the Pennsylvania Constitution:

[Everythings directly related to maintenance of a thorough and efficient system of public schools' must at all times be subject to future legislative control. (Danson 139)]

The Court reasoned that the "thorough and efficient" clause was intended to be used as a positive model, not grounds for court action. The contradictory views of New Jersey and Pennsylvania are permitted and in fact welcomed in the new judicial system centered on state constitutional law.

When Ohio's educational financing scheme was challenged, the Ohio Supreme Court followed Justice Powell's lead in *Rodriguez* and applied the "rationality test:

[Because the case deals with difficult questions of local and statewide taxation, fiscal planning, and education policy, we feel this is an inappropriate case in which to invoke 'strict scrutiny' (Board 140)]

The Wyoming Court, on the other hand, accepted the argument that the wealth of an individual school district is a suspect classification, and consequently applied the scrutiny standard.

One consistency in the state constitutional challenges is that in almost every case, the trial courts have ruled that the states' financing schemes are unconstitutional.

More than any other factor, the irrationality of school finance systems allocating funds fortuitously appears to explain the nearly unanimous conclusions of those trial judges closest to the facts that these systems are discriminatory and constitutionally untenable. (Long 482)

On appeal, the issues become more abstract. Higher courts explore whether or not education is a "fundamental interest," whether the unequal distribution of funding deserves strict scrutiny, and how important it is to preserve local control.

The most prominent recurring issues in challenges to educational finance laws are the "magnitude of disparities in revenues and expenditures among school districts... and the inequalities in educational opportunities that result from them." (Long 483) Challenges appealing to the equal protection clauses of various states' constitutions can seldom stand solely on evidence of a large discrepancy in funding between school districts. Plaintiffs are often required to show a direct correlation between the unequal funding and the unequal education. While the point may seem painfully obvious in light of the clearly disparate quality and quantity of educational facilities, staff, course offerings, equipment and instructional materials, plaintiffs are often asked to go to great lengths to illustrate the relationship.

The notion that "slapping money at the issue will not solve any problems" dates back to the Coleman Report commissioned in 1966 by the Department of Education. James A. Coleman surveyed the conditions of public schools, paying special attention to the adverse effects they had on minority and poor students. Coleman came to the conclusion that these students fared poorly in school not because of underfunded school systems, but because of problems at home or outside of school:

variations in the facilities and the curricula of the schools account for relatively little variation in pupil achievement. (Coleman 22)

Coleman's theories remain to this day a part of political discourse. In a 31 March 1989 issue of the *Wall Street Journal*, a columnist wrote: "Big budgets don't boost achievement. It's parental influence that counts." (Savage 134) As a result, studies revealing large discrepancies between the academic achievement of students in inad-
equately funded schools and those in wealthier schools tend not to convince courts that inadequate revenues have an adverse impact on students.

Many critics of the report believe that Coleman's findings are based on racist stereotypes and imply that some children can never succeed regardless of how much is spent on their education. One hopes that Coleman's critics will be able to rely on some future survey quantifying a significant change in pupils' academic achievement in school districts that have benefitted from court action. If the dramatic change in academic achievement occurs in the same student body, Coleman's findings would become invalid, and a direct relationship between funding and achievement would be established.

To combat Coleman in the mean time, plaintiffs have used surveys like the one recently published in the Journal of Education Finance. It explores the effect that large disparities in entry-level teacher salaries have on the school districts' abilities to recruit choice teachers. The report found a direct relationship between entry-level wage and the degree level of teachers recruited. While this does not necessarily indicate the relative abilities of the teachers, it does describe the relative abilities of the schools to attract desirable teachers:

The findings presented suggest that when districts improved their entry-level salary ranking, they subsequently improved their ability to recruit the most highly educated candidates available in their regional pool. (Change 413)

One can infer from this report that insufficient funding plays a significant role in the quality of the teachers, and quality teaching most certainly affects students' ability to succeed.

New Problems in Inadequately Funded Districts

A recent backlash has occurred in response to the courts which have struck down unequitable finance schemes, a response which criticizes such actions as having a "levelling" effect and sacrificing quality in education. The backlash has spawned efforts to raise "standards" in education through "Minimum Competency Tests" (MCTs). These must not be confused with minimum standards that require a minimum number of books in the library, a maximum teacher-student ratio, or a maximum number of students in a classroom. MCTs are imposed on students, not schools, and in effect deny diplomas to those who fail to exhibit basic reading and mathematic skills through standardized tests. Efforts to raise these standards, purportedly to improve the quality of education, can only hinder disadvantaged students:

[A] majority of the 'reform' states, in essence, have moved up the high-jump bar from four to six feet without giving any additional coaching to the youth who were not clearing the bar when it was set at four feet. (Putting 2)

Increasing standards on the MCTs punishes students who have been deprived of adequate educations; the tests are socially and economically debilitating:

MCTs compound the tragic consequences of denying disadvantaged children the diagnoses and remedial services they need by stigmatizing them as functionally illiterate and by denying them the credentials that largely define socio-economic and political status in this country. (Putting 60)

In spite of the many setbacks facing the struggle for equality in public education, there is still movement in the right direction. At the moment, state courts are proving to be the best promulgators of change, as some are providing constitutional protection. Once the benefits from an equitable system become more evident, a chain reaction could occur, and sweeping protections could be granted to children across the United States.

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It's Time to Reinvigorate American Democracy

By New York Attorney General Robert Abrams

The following is an edited version of Mr. Abrams's commencement address to the graduating class of Pace Law School on 9 June 1991.

This year marks the 200th anniversary of our Bill of Rights, a landmark document in the history of human freedom. Defending and protecting the Bill of Rights is the responsibility of every citizen of this democracy.

The founders of our nation understood from the beginning that democracy means much more than just voting for one candidate over another. The real substance of a democratic society lies in the basic protection of individual and political rights that are so eloquently expressed in our Bill of Rights; the right of every American to speak his or her mind without fear of political reprisals; the right of every individual to practice openly the religion of his or her choice; the freedom to publish and to read newspapers, magazines, and books that are not subjected to government-imposed censorship; the right of people to hold rallies and marches to lobby the government on behalf of political causes they believe in; and the right to a fair, public trial when a person is accused of a crime. It is these guarantees of freedom of thought, expression, and political participation which have made this nation a beacon of hope and opportunity to people around the world.

In visits to Eastern Europe and the Soviet Union over the past year, I was able to witness first hand the role of our Bill of Rights and our constitutional system of government as models for newly emerging democracies and democratic forces in that part of the world.

In meetings with lawyers, government officials, and ordinary citizens in Hungary, Poland, and Czechoslovakia, our delegation of State Attorney Generals were met at every turn with intense interest in all aspects of our legal system, from its overarching principles and structure to its most mundane practical details. The power of our Constitution as a symbol of freedom can never be more powerfully expressed than through the hope it inspires in the hearts and minds of people who are emerging from years of tyranny and oppression.

In every country we visited, people were deeply and urgently concerned with precisely the kinds of questions that motivated the founders of our nation to establish a constitutional government 200 years ago. In Poland, our delegation had dinner with a group of young professionals who were engaged in a lively debate and discussion on the appropriate relationship between church and state. While they had high praise for the role of the Catholic Church in helping them to break the shackles of communism, they were also concerned about the extent to which the beliefs of the Church should be allowed to determine the new government's social policy in sensitive areas such as a woman's right to choice. In Czechoslovakia, the issue was federalism—how to achieve appropriate checks and balances between the central, local, and regional governments. This is a critical issue due to Czechoslovakia's ethnic diversity and strong desires for regional autonomy. The Czech lawyers and officials we spoke with were extremely interested in our
governmental structure, the careful allocation of power between the federal and state governments, the separation of powers among our different branches of government, and the limits placed on the powers of our federal government under the Tenth Amendment of our Constitution. In Hungary, we met with a special constitutional committee of the Hungarian parliament, whose members received our gift of copies of the United States Constitution with keen interest and extraordinary gratitude. This surge of interest in our Bill of Rights among government leaders and everyday citizens alike has led to a wave of constitution writing across Eastern Europe, with the majority of these new charters drawing heavily upon our example.

In the Soviet Union, democratic forces face a much more difficult situation, and the prospects for realizing enduring reforms are much more problematic than in Eastern Europe. The remarkable gains of recent years in religious freedom, the right to emigrate, and other areas of political and social life have been counterbalanced in recent years by harsh crackdowns against democratic movements in the Baltics and other Soviet republics. But I am convinced that this time, the people of the Soviet Union will not be intimidated—not by guns, not by tanks, and not by secret police.

When I visited Riga, the capital city of Latvia, I was impressed and inspired by the level of popular outrage and resistance to government repression. Farmers and peasants from the countryside had driven their trucks into the center of the city and created a protective cordon in front of the major government buildings of the Latvian Republic, to serve as a symbolic shield against Soviet troops. Citizens were keeping a 24-hour vigil on behalf of democracy, sleeping in their trucks, and huddling in sub-zero weather around six-foot-long fires. A few blocks away, a similar set of barricades had been set up in front of the local radio station, as citizens in white arm bands stood guard in hopes of keeping Soviet troops from taking over this vital communication link. As one of the protesters told me, "This morning, I said to my wife and children, 'Look at me. This may be the last time you see me.' I have no weapons. I will lift my hands and be shot. I am prepared to die." These courageous people were willing to give their lives, if necessary, to defend freedom of the press, freedom of association, and other democratic rights that have long been established in this country—and that frankly, too many of us take for granted.

The courageous response of the Soviet people to the attempted coup d’etat in August of 1991 was just the latest indication of their determination to move forward on the road toward freedom and democracy, regardless of the obstacles.

Although our democratic system rightly serves as an inspiration and an ideal for the people of Eastern Europe and the Soviet Union, that does not mean that we can rest on our laurels. No democracy can continue to flourish without the active engagement of its citizens. While the establishment of democracy in Eastern Europe and the Soviet Union is threatened by the legacy of totalitarianism and the threat of military repression, the continuing vitality of our own democracy is imperiled by a much more mundane threat: complacency. We need look no further than our last presidential election, in which barely half of the electorate even bothered to go to the polls to vote, to see that our own democratic system is in need of renewal and reform if we are to sustain it into the next century. The most important force for reinvigorating our democracy to confront the challenges of the 21st century must be an engaged citizenry, poised to give meaning to the principles inscribed in our Bill of Rights, both in their work and in their day-to-day activities.

We need the active involvement of citizens from all walks of life to keep our democratic traditions alive and well. There are three areas where the talents and commitment of a new generation of citizen activists are urgently needed: securing equal access for all citizens of this country to our system of justice; combatting discrimination and prejudice in all of their manifestations; and protecting and preserving our precious natural environment.

Our nation has more lawyers—both per capita and in absolute terms—than any other country in the world. It is a troubling irony that we have over 700,000 lawyers, one for every 430 Americans, yet many of our fellow citizens can’t get legal help when they need it. Three years ago, New York State’s Chief Judge Sol Wachtler appointed a panel to study this pressing issue. The Committee’s findings were a shocking indictment of the inadequacy of current measures for providing legal counsel to the poor. Their final report concluded: "our society has evolved so that the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it." They found that three million households in New York have no legal help in dealing with basic problems like the threat of eviction or qualifying for essential government benefits. In New York City’s housing court, to cite one particularly stark example, landlords are represented by lawyers more than 80 percent of the time, while tenants have legal representation only
Helvidius

15 percent of the time.

At the same time that most low-income individuals are being routinely denied access to adequate legal representation, many middle-class individuals have been priced out of the market for legal services as well. To borrow a phrase from Robert Raven, the former President of the American Bar Association, we simply cannot afford to let justice become a luxury good. What good is the greatest justice system in the world if large numbers of poor and middle-class people are denied meaningful access to it because they cannot afford a lawyer? This situation can and must be changed.

First, all citizens of good will must speak out in support of restoring adequate government funding for legal services for the poor, which was battered by an unrelenting series of federal budget cuts throughout the 80’s. But in addition to making sure the government does its part, lawyers must also be encouraged to take it upon themselves to engage in pro bono activities that expand access to our justice system. That means representing indigent clients, providing volunteer assistance to public interest and social service organizations, and crafting reforms in the legal system itself to make it more accessible to the public. These are the kinds of activities that every lawyer must be involved in if we are to fulfill the promise of our remarkable system of justice.

Another area in which citizen involvement is urgently needed is in the ongoing battle to eradicate prejudice and discrimination in our society. While we have made enormous progress in the wake of the civil rights movement and the landmark civil rights legislation it helped to spark, we are still far from realizing Dr. Martin Luther King’s dream of a colorblind society. One hundred and twenty-five years after the abolition of slavery, and nearly three decades after the passage of the Civil Rights Act of 1964, people are still discriminated against in this nation simply because of the color of their skin. As an agency charged with enforcing our civil rights laws, we the Attorney General’s office have seen the countless ways in which discrimination persists in our society.

We have seen ongoing discrimination in housing, through the pernicious practice of “racial steering,” in which real estate brokers refuse to even show homes or apartments in predominantly white communities to qualified minority customers. A black couple of similar income and employment history will all too often simply not be shown properties that are routinely made available to a white couple. This shameful vestige of racial discrimination must be eliminated once and for all.

We have also seen continuing discrimination in employment, in which minority applicants are denied access to well paying jobs or promotions. A few years ago there was a blatant example of this in the operations of several New York City employment agencies in which interviewers placed secret codes on the files of minority applicants as a signal that they should not be offered the opportunity to interview at certain major corporations.

Finally, and perhaps most startling of all, people in this nation are still subjected to violence and even death simply because of their race, religion, ethnic background, sex, or sexual orientation. Surveys by organizations such as the Anti-Defamation League and government agencies like the New York State Department of Criminal Justice Services indicate that these hate crimes are on the rise in New York and nationwide. We need stronger criminal penalties to deter these profoundly anti-social acts, which are a stain on our society. But beyond tougher law enforcement, we need every citizen of good will, every government official, every religious community, and business leader to speak out forcefully against this tide of prejudice and bigotry. We must drive home the message that such behavior is simply unacceptable in a democratic society.

Finally, at this stage in our history it is everyone’s responsibility to take steps to ensure that we don’t destroy the environment. Acid rain is killing our lakes and forests, the garbage crisis is overflowing our landfills. Global warming threatens the very habitability of the planet. These are just a few of the warning signs indicating that we must act now to stop pollution of our air, our water, and our soil.

We have to recognize once and for all the essential truth that we do not own this fragile planet—we are merely trustees charged with maintaining and preserving it for the generations yet to come. If we don’t act now to reverse a long history of environmental neglect and degradation, the ability of the earth to sustain life itself may be undermined, resulting in a tragedy of epic proportions. The actions we take in the next few decades could well determine the fate of the earth for generations to come. Every citizen has a role to play in this essential battle to save our precious natural environment.

The law is a powerful tool in the battle to preserve and protect our environment. That has been my own experience as Attorney General. Over the past decade, New York has used all of the legal tools at its disposal to go after polluters large and small, from small fly-by-night toxic dumpers to Fortune 500 corporations: lawsuits, injunctions, court-ordered cleanups worth hundreds of millions of dollars, and even criminal sanctions that have put violators in jail.

But punishing polluters with penalties, fines, or
The Fundamental Underlying Concerns

We need every citizen of good will, every government official, every religious community, and business leader to speak out forcefully against this tide of prejudice and bigotry.

way we live, work, and do business in order to prevent pollution.

A preventive approach can be applied to resolving each of our major environmental problems, from hazardous air pollution to the solid waste crisis. In curbing air pollution, a preventive approach means, encouraging companies to follow the lead of firms like Dupont and IBM by committing themselves to drastic reductions in toxic emissions and elimination of toxic substances from their production processes. In resolving the garbage crisis, a preventive approach means promoting the three R’s of solid waste management — recycling of as much of the waste stream as possible; reduction of unnecessary packaging and other sources of garbage; and reuse of as many products as possible, rather than using throwaway items.

In these and many other areas of environmental concern, changing our industrial practices, our habits, and our very lifestyles is the key to preventing pollution in the first place. This approach is not only better for the environment, it is better for the corporate bottom line. It will be up to a new generation of legal practitioners to forge innovative strategies for using the law to encourage pollution prevention.

These are just a few of the issues that can and must be addressed if this nation is to survive and prosper in the 21st century. There are many others — the need for affordable housing; the provision of quality health care for all; reproductive freedom for all women; the need to carry on the quest for arms control; the need for a real war on drugs, not one waged with rhetoric alone — and the list could go on and on. As Robert Kennedy said a generation ago, “the future may be beyond our vision, but it is not beyond our control.” It is time for a new generation of citizen activists to put their skills to work in addressing the fundamental issues of our times. By doing so, they will be giving continued life and meaning to the principles underlying our Bill of Rights.

THE ASSAULT RIFLE CONTROVERSY

By Glen Morgan

The gun control debate rages in America today, as it has since the early 20th century. After the assassination of President John F. Kennedy in 1963, this debate increased in urgency and ferocity. In the years since that tragedy, the debate has often been a major domestic issue, one that refuses to quietly go away. Huge lobbying interests on both sides of the issue have recently been locked in political and ideological battle in the legislature, in the courts, and in the media. The focus of these arguments has ranged from the definition of the rights provided by the Second Amendment to the ownership of "Saturday Night Specials," but nothing in this debate has captured the imagination and the focus of national attention more than the recent "assault rifle" controversy.

This new twist in the gun control debate revolves around whether people should be allowed to own "assault rifles." Before entering into an analysis of the controversy, the term "assault rifles" must be defined. Handgun Control Inc., as the chief lobbyist for the prohibition of these weapons, defines assault rifles as any automatic rifle designed to be spray-fired in combat. According to the Department of Defense (105), an assault rifle is a selective-fire military rifle, capable of firing on fully-automatic, burst, or semiautomatic, at the option of the shooter. True assault rifles are thus machine guns, which have been heavily restricted since 1934. The gun prohibition lobby, however, has managed to capture the media’s attention by expanding the "assault rifle" category to encompass any weapon they see fit. The firearms upon which this article will focus are these semiautomatic rifles that have been targeted.

The weakest aspect of the prohibitionist argument is the question of the constitutionality of this type of regulation. Handgun control literature usually avoids this
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question, or mentions it in passing as unimportant to the anti-gun lobby. The most common argument used against the Second Amendment is that the Militia clause, in modern terminology, actually means the National Guard. On the surface, this argument makes sense because the National Guard was created to defend the nation against foreign invasion, one of the original purposes of the Militia. However, the Militia in the Second Amendment could not refer to the modern-day National Guard for several reasons. The Bill of Rights was written in order to decrease and limit the absolute power of the government over the individual. The Second Amendment follows this purpose in that it was written to protect the people from the government, not just foreign invasion. The National Guard is under the jurisdiction of the federal government, a hierarchy which was recently upheld by the Supreme Court in Perpich v. Department of Defense (1990). Current federal law defines the Militia in Title 10, US Code section 311, as all able-bodied males between the ages of 17 and 45 who are US citizens. The Militia is thus the common people; the same people referred to in the First, Fourth, Ninth, and Tenth Amendments are protected by the Second Amendment as well.

When talking about assault rifles, people commonly ask, "Why does anyone need one?" This question is the cornerstone in the foundation of the argument in favor of the prohibition of assault rifles—it is referred to in every piece of handgun control literature written on the subject. The basic reasoning behind this simple question is that owning an assault rifle is unnecessary, therefore it should be illegal. They claim assault rifle ownership must be treated like a privilege and not a constitutional right. An example of this kind of thinking can be found in a current case in Denver County District Court which challenges the constitutionality of the Denver City Assault Weapons Ban. Those supporting the ban claim that the Second Amendment is an extremely limited right provided by the government for the people. In approaching the problem this way, one avoids the fact that governments do not give people rights, rather the people give the government power in order to protect their preexisting rights. The Second Amendment provides the people with the power to prevent the government from usurping their rights by force of arms. Private ownership of weapons with which the people can defend themselves or resist tyranny if forced to do so is a right for Americans, and the ultimate reason for owning an assault rifle. This ownership is like an insurance plan—one hopes it will never be needed, but if the situation arises it will be important to have.

Politicians and powerful zealots have no place to demand the elimination or severe restriction of these assault rifles, since they are exactly the people whose excesses and abuse of power assault rifles are meant to defend against. Fortunately, America has been relatively stable and free from domestic tyranny for hundreds of years, but the most cursory examination of history would reveal that periods of peace and stability like this are very rare. We cannot accurately predict the future, but by studying history, we can attempt to prevent the repetition of mistakes. The framers of the Constitution realized that when government obtained absolute power, the liberty and freedom of the people would ultimately be lost. If the people have no power on which they can fall back to protect themselves, force can easily be used to abridge their rights. Recently, this scenario has occurred in some countries. One can only wonder if the Chinese government would have attempted to crush the students at Tiananmen Square if the students had had firearms. Adolf Hitler used gun control very effectively in strengthening his governmental rule. Even in America, gun control was first used in the post-Civil War South to disarm and control blacks. In New York, the Sullivan Law was passed in 1911 to keep guns out of the hands of immigrants and other "undesirables." Today, the New York firearms restrictions allow the rich and powerful elite to own and carry firearms, but explicitly deny that same right to the poor (indirectly encompassing most minorities), who may need these weapons for self-defense the most. This inequity is effected by requiring the applicant to submit copies of his or her Federal Tax Return form and bank deposit slips. (Instructions, 2)

The common response to the question of the constitutionality of assault rifles by anti-gun proponents is that the Founding Fathers meant citizens could use only muskets, not modern day assault rifles. They argue that the Founding Fathers could not have imagined the destructive power of modern weapons. They are correct in observing that the modern day assault rifle is capable of causing more damage than a musket, but this approach is contrary to the genius of the Constitution. No Founding Father at the Constitutional Convention could have imag-
ined the modern day telephone, yet the Fourth Amendment protecting against unreasonable search and seizure still applies to phone conversations. No one could have imagined television, yet the First Amendment still protects the freedom of the press on television. Telephones have made organized crime and drug trafficking more efficient today than in the 1700s, a single journalist on television can cause much greater damage to reputation than one could in the 18th Century, and modern day firearms are more efficient today than they were then; however, the Bill of Rights still applies to these advancements in technology. The most important Second Amendment decision by the Supreme Court was US v. Miller (1939):

> the Militia comprised all males physically capable of acting in concert for the common defense. And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the land in common use at the time.

One notes that the rifles of the citizens were the same common rifles used by the professional military. Assault rifle ownership is thus exactly what the Second Amendment was designed to protect.

The next major argument used against the legal private ownership of assault rifles is that they are the "weapons of choice" of organized crime, drug dealers, and criminals. This "weapons of choice" phrase has been applied to every category of firearms that the gun prohibitionist lobby has attempted to ban over the last decade: first pistols, then "Saturday Night Specials," then "plastic guns," and now assault rifles. The anti-gun lobby should make up its mind about what the "weapon of choice" is for criminals and should then attempt to determine if prohibition will stop the criminals from obtaining these weapons. Prohibition of illegal drugs has failed to prevent the widespread drug problem in America, what makes these people believe that banning assault rifles will stop criminals from obtaining them as well? If only law-abiding people follow this law, and they disarm themselves, in what way will this ban affect crime? Why would violent criminals, who defy the most fundamental laws daily, follow a law restricting their choice of methods? It is quite obvious that only the law abiding are hurt by this type of prohibition.

Are assault rifles the "weapons of choice" for criminals? According to the New York Police Department's 1989 Firearms Discharge Assault Report, out of 339 perpetrators who possessed or used a firearm in incidents involving the police, only two of those guns could be considered assault rifles. (9) According to this report, a New York police officer was more likely to shoot himself accidentally (nine officers did just that) than to be fired upon by a criminal with an assault rifle. (New York 11) It should be noted that according to a report by The Institute for Research on Small Arms in International Security (1989), 3,706,810 assault rifles were legally owned by Americans. Are there this many deranged criminals intent on killing as many people as possible in America? Obviously, the vast majority of these people are law abiding citizens exercising their perceived constitution right to own assault rifles. According to Lt. James Moran, commander of the ballistics unit of the New York City Police Department:

> A rifle is not what is usually used by the criminals. They'll have handguns or sawed off shotguns... We haven't come across an Uzi...These drug dealers are more inclined to use the...pistol than go to a cumbersome AK-47 rifle. (Where)

Of course, not all police officers believe this. Baltimore County Police Spokesman Leonard Supinski once stated, "We're tired of passing out flags to widows of officers killed by drug dealers with Uzis." If one consults FBI statistics, however, one finds that only one officer in the history of US law enforcement had ever been killed by an Uzi.

According to the FBI's 1987 Uniform Crime Report (the most recent available), only 0.5 percent of all homicides in America were caused by assault rifles. The report makes no distinction between murders and self-defense killings. Knives, blunt instruments, hands, feet, and strangulation killed 35 percent of all homicides victims that year. According to the Los Angeles Police Department, less than three percent of the confiscated firearms were assault rifles in 1987. In San Francisco 2.2 percent of firearms seized by the police were assault rifles. Why are so few criminals using their "weapons of choice"? There are many simple reasons:

- Assault rifles are expensive, they cost anywhere from $350-$1500 or more.
- Assault rifles are difficult to conceal because they are large and cumbersome.
- Assault rifles are not as powerful at close range as a sawed-off shotguns, or even an ordinary hunting rifle.
* Assault rifles require the user to be trained in order to use them effectively, and very few criminals train or practice with their weapons.
* Assault rifles are simply not practical for most criminals outside of Hollywood.

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Should assault rifles be outlawed to keep them out of the hands of homicidal maniacs? This question centers around the idea that the government can legislate behavior by controlling inanimate objects. The worst mass murder in America's history was caused by a homicidal maniac with a can of gasoline and a book of matches who murdered 84 people in the Happyland Social Club Fire in New York in 1990. Does anyone believe that outlawing matches would prevent tragedies like this? The response to this question is that matches have many common uses in everyday life. However, the mere presence of an assault rifle does not cause someone to go insane or murder. If it did, what are the Americans who own the assault rifles waiting for? Out of the AK-47s owned in America in 1989, only two were used in mass murders. The simple fact is that most people who own these weapons are law abiding people who are exercising their Constitutional right to own an assault rifle.

The tragedy that propelled the assault rifle debate to the front pages was Patrick Purdy's murder of five children and wounding of 29 others with an AK-47 in Stockton, California on 17 January 1989. By exploiting this tragedy, the gun prohibition lobby successfully promoted their prohibition platform in New Jersey, California, and several major cities. After reading the original study by the California Department of Justice on Purdy and the Cleveland School Killings, one discovers that this prohibition movement missed the point of the tragedy. The incident highlighted the failures and flaws of the judicial system, not the tool Purdy used. Although handgun control literature on the subject often associates which he purchased the weapon he used to commit the murders. In some sense the incident can be viewed as a government subsidized mass murder. Rather than serving as a justification for more gun prohibition, this Patrick Purdy incident points to the failure of the judicial and mental health systems to deal with an acknowledged danger to society, a man who was often put back on the streets despite clear indications of his danger to society. These facts were relegated to obscurity in the clamor for assault rifle prohibition.

These facts were also left out of the media and the legislative debate. A California state Congressman wildly stalked into a legislative meeting brandishing an AK-47 for the media, demanding that these evil weapons be outlawed, a demand that was fulfilled in California. At the same time, the nightly news was showing pictures of watermelons apparently disintegrating when shot by assault rifles. It was later revealed that the newsmen were disappointed when the AK-47 bullets only punched unimpressive holes in the watermelons, and in order to fulfill their desires of portraying these weapons as the evil force they were, showed watermelons exploding when shot with a common hunting rifle, while the shooter falsely wielded an AK-47. This biased news coverage helped to hype the assault rifle ban, but the assault rifle ban had no effect on crime. Instead, people who had never committed a crime before were arrested for owning these weapons.

The lesson one learns from all this is that gun control in general, and specifically the assault rifle prohibition, misses the point entirely. Trying to legislate against an inanimate object that has legitimate uses for self-defense and ultimate protection against tyranny as guaranteed by the Second Amendment will do very little to decrease crime. This type of legislation provides a very dangerous precedent for further restrictions on personal liberty. Instead, one must focus on the root causes of crime like poverty and drug abuse, and the methods used to deal with criminals. Gun control is often just a convenient scapegoat for politicians whose crime policies have failed. When over half of the nearly 50,000 people who die in car accidents each year are caused by drunk drivers, law enforcement and the legislature focus on the drunk drivers, not their cars. (It should be noted that car ownership is a privilege, not a right like gun ownership.) One must not focus on the tool used by the criminal, but the criminal himself. This is the only way America will solve its gun crime problem. America can have either a completely free society or a completely safe society, but not both. The closer this country moves towards one of these goals the farther it gets from the other. A lack of crime is usually only guaranteed by a totalitarian state where one actually has very little safety or freedom. With the correct focus on the root problems of crime and

Assault rifles are simply not practical for most criminals outside of Hollywood.

Purdy with assault rifles, it mentions neither his previous criminal history, nor the diagnosis by the mental health system that he was homicidal and suicidal before he was approved in late 1984 for disability support from the Social Security Administration because of his alcohol and drug dependency. (Kempsky 4) This support provided most of his income, and was probably the money with...
criminals, safety in a free society can coexist with personal liberties and individual checks on governmental tyranny.

One must not focus on the tool used by the criminal, but the criminal himself. This is the only way America will solve its gun crime problem.

This concept is captured in a slight modification of a popular slogan used by the pro-gun lobby—if guns are outlawed, only the government will have guns.

The assault rifle controversy is only one aspect of the gun control debate in America. Both sides of the issue have persuasive arguments and many facts to support their views. This article attempts to persuade people to support legal assault rifle ownership, however the reader should be challenged to do research on the subject and test these arguments. Do not be convinced or persuaded by this article alone, but let it encourage the reader to find out what is true. One must avoid believing sensationalism and becoming caught up in emotional waves of panic without discovering the facts behind the headlines. This article will end with a few statements from people who know best about the power of gun control.

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. (US Supreme Court Justice Joseph Story, Commentaries on the Constitution of the United States 1833)

Americans have the right and advantage of being armed-unlike the citizens of other countries whose governments are afraid to trust the people with arms. (James Madison, Federalist Papers #46)

...to disarm the people; that it was the best and most effectual way to enslave them... (George Mason, 3 Elliott Debates on the Constitution) 380

The most foolish mistake we could possible make would be to allow the subjected people to carry arms, history shows that all conquerors who have allowed their subjected peoples to carry arms have prepared their own downfall. (Adolph Hitler Edict of March 18, 1938)

Make searches and hold executions for found arms; unless this is done the victory of socialism is impossible. (Vladimir Lenin March 4, 1919)

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The Case for Gay and Lesbian Marriage
By Mielle Abbey-A Schwartz

Courts and legislatures grant a heterosexual couple the legal right to marry. (Krause 37) Why has this legal right not been extended to include gay and lesbian couples? The legal definition of family has no doubt broadened:

In Moore v. City of East Cleveland, for example, the Supreme Court granted constitutional protection beyond nuclear families to extended families. Despite this social and legal evolution, [however,] courts and legislatures continually have refused to grant gay and lesbian couples family status. (Harvard ed. 94)

Even the legal substitutes for marriage, common-law marriage and marriage by contract or declaration, have been denied to gay and lesbian couples, while available under some jurisdictions to heterosexual couples. (94) Is this prohibition of same-sex marriage constitutionally justifiable? Are the proposed interests of states in prohibiting same-sex marriage justifiable by the stan-
The importance of extending the marriage right to gay and lesbian couples is unassailable.

The Advantages of Marriage

Before delving into both a legal justification for same-sex marriage and a consideration of the opposed interests forwarded by states, the question must first be asked: Why is it important to extend the marriage right to include gay and lesbian couples? Why is it important that there be a legal declaration of married couple status? There are two answers to the preceding questions. First, marriage is considered a central institution of American society, one of serious symbolic meaning to the couple. (95) It certainly cannot be peremptorily concluded that same-sex couples have less interest in the symbolic meaning of marriage than heterosexuals. Second, marriage affords critical economic and legal advantages to a couple. Married partners are entitled to tax, insurance, and housing benefits, succession benefits upon death of a spouse, and worker's compensation (which provides benefits to dependents of covered employees), to name a few. (95,102,108)

In terms of legal advantages, housing law serves as a clear example. New York City's Rent and Eviction Regulation 2204.6[d], for instance, holds that:

no occupant of housing accommodations shall be evicted...where the occupant is either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant. (104)

In 1988, a New York appellate court prohibited a gay partner from remaining in an apartment of his deceased lover pending further litigation. The court asserted that the regulations did not protect homosexual partners in this respect, since according to the state legislature, the partners were not legal spouses; they were not legally recognized as a family. (104)

Hence, the importance of extending the marriage right to gay and lesbian couples is unassailable. Denial of this right is of serious concern and certainly merits inquiry. The first of the two questions posed earlier may now be addressed: Is the prohibition of same-sex marriage constitutionally justifiable? The following argument will demonstrate that denial of the same-sex couple's right to marry falls far outside the ambit of the Constitution. The denial of this right does not merely border on the unconstitutional; it wallows in the unconstitutional.

The Right to Privacy: Personal Choice and Intimate Association

The right to marry freely derives from the constitutional right to privacy. (96) To marry freely implies first not being forced to marry, and more importantly to the issue at hand, retaining the freedom of personal choice in terms of whom to marry.

As an implied constitutional principle, the right to marry is understood only as part of the right to privacy and not vice versa. As such, it is a substantive right of individuals. Therefore, regulations of those who are married as well as those who would marry are equally suspect as impinging on the right to marry. (Mohr 130)

Although the right to privacy has no explicit mention in the Constitution, the Supreme Court has often found a penumbra of privacy in the First, Third, Fourth, Fifth, and Ninth Amendments. For example, in the 1965 case of Griswold v. Connecticut (to be discussed in greater detail shortly), Justice Douglas described the Fourth and Fifth Amendments as containing references to privacy:

The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment...The Fourth and Fifth Amendments were described in Boyd v. United States, 116 US 616 (1886), as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." (Gunther 505)

Based upon Supreme Court precedent, a right to privacy certainly exists.

It must now be asked whether or not the right to marry whom we want to is inherent in the general right to privacy. In Loving v. Virginia (1967), this right was clearly articulated:

The Court firmly established marriage as a 'basic civil right of man'
Helvidius
[ie., of human beings]. (Harvard ed. 95)

Justice Warren handed down the decision in Loving v. Virginia:

The case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by [Virginia] to prevent marriages between persons solely on the basis of racial classifications violates [the] 14th Amendment...we conclude that these statutes cannot stand. [The Virginia appellants, a black woman and a white man, were married in the District of Columbia, returned to Virginia, and convicted of violating Virginia's ban on interracial marriages.] (Gunther 626)

This case marked a step toward a recognition of freedom of personal choice in marrying. Loving protected "intimate adult unions from societal prejudice." (Harvard ed. 95)

The concept of personal choice in marriage, however, was not explicitly articulated until Cleveland Board of Education v. LaFleur (1974). (Harvard ed. 96)

In Loving, the decision was cast more in terms of racial equality, while in Cleveland, the Court declared:

The states mistakenly suggest that same-sex couples cannot reproduce and that they are therefore unable to give birth to or raise children.

It has long recognized that freedom of personal [emphasis mine] choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. (Harvard ed. 96)

Should not homosexuals thus be allowed to choose homosexual marriage partners, as heterosexuals are legally allowed to choose heterosexual marriage partners? Courts and legislatures, however, continue to presume that a man-woman pairing is legally necessary for marriage, even though the Supreme Court has affirmed marriage as a personal choice. Typically, the requirement that marriage be between members of the opposite sex has not even been explicitly written into marriage statutes. The statutes have only implied the dictionary definition (Krause 37) that marriage involves the union of "husband and wife." (Webster's 869) Thus, the freedom of personal choice has been clearly legitimized within the general right-to-privacy framework; choosing a partner in marriage is a personal choice, a private choice.

Legal grounds for same-sex marriage can further be justified in terms of intimate association, which falls under the right-of-privacy framework as well. In Roberts v. United States Jaycees (1984), the Court explained that:

the freedom of association extends to "certain kinds of highly personal relationships" that "act as critical buffers between the individual and the power of the State."

Under this theory, the state simply has no authority to pressure individuals into heterosexual relationships by giving only those relationships the benefits and protections of the law. (Harvard ed. 97) Marriage can assuredly be considered a highly personal relationship.

Standards of Scrutiny

The second question posed earlier may now be addressed: Is a state's interest in prohibiting same-sex marriage justifiable? States have claimed that prohibiting same-sex marriage encourages procreation, encourages traditional values, and promotes societal and familial stability. (99-100)

Before delving into the interests at hand, it is first important to briefly discuss the manner in which state interests are addressed within constitutional law. Since marriage is considered a fundamental right under Zablocki v. Redhail (1978), "critical examination of the state interest advanced [is] required [by constitutional law]." (Gunther 554) Judges must apply strict scrutiny in assessing state interests since marriage is of fundamental importance. In the Zablocki decision, Justice Marshall explained that Griswold:

established that the right to marry is part of the fundamental 'right of privacy' implicit in [the] Due Process clause ['nor shall any state deprive any person of life, liberty, or property without due process of law']. (Gunther 554)

Any state interests restricting this right must therefore be strictly scrutinized. A "fundamental" right triggers strict scrutiny (554), as opposed to regular scrutiny. The state's interests must not simply be rationally related to its goals; they must be compellingly related.

Countering State Interests

The states mistakenly suggest that same-sex couples cannot reproduce and that they are therefore unable to give birth to or raise children. Before considering if this interest in procreation is rationally or compel-
Marriage and procreation have in fact been separated from one another in Supreme Court precedent. In *Griswold v. Connecticut* (1965) (503), the Court struck down a Connecticut statute which prohibited the use of contraceptives and held that married couples should be allowed to use them. Just to note, the Court did extend this right to unmarried couples in *Eisenstadt v. Baird* (1972). (Gunther 514) Hence, the Court has historically supported contraception within and without marriage. How, then, can states possibly claim a necessary linkage of marriage with procreation, when the two have historically been separated? As Mohr writes, "...marriage is not morally or legally contingent upon the ability to have children..." (131)

Nevertheless, we can proceed to ask: Is the state interest in encouraging procreation compelling?

*The prohibition on same-sex marriage cannot withstand any (emphasis mine) level of scrutiny because states cannot articulate legitimate interests that are [even] rationally related to the restrictions they impose.* (Harvard ed. 99)

Although, the fundamental status bestowed upon marriage requires that the state's interest in restricting marriage be compelling, this interest is not even rationally related to the restriction imposed: gay and lesbian couples can have children through surrogacy and artificial insemination. Moreover, many heterosexual couples either cannot or choose not to have children. In fact,

*the prohibition on same-sex marriage may in fact discourage procreation; some same-sex couples may elect not to have children precisely because their relationship is not sanctioned by the state.* (98-100)

States also claim that prohibiting same-sex marriage encourages traditional values. This interest is:

nothing more than an appeal to eliminate diversity, an interest explicitly rejected by the Supreme Court. As Justice Blackmun has noted:

> [a] nuance is added by litigation involving 'transsexuals' who have been held unable to contract marriage before a sex change operation was performed...but whose marriage has been held valid if contracted after the operation. (Krause 38)
Helvidius

If one partner of a gay couple, for example, undergoes surgery to look like a woman, the state will allow the couple to marry. According to the state's purported interest of encouraging procreation, however, this decision is irrational. The internal reproductive organs of the transsexual, after all, are not altered in such an operation. Procreation, as the state wrongly perceives it, would not be enhanced, since both members of the couple would still have male reproductive organs. The fact that states contradict their own purported interest shows that the courts and states are mainly interested in creating and perpetuating a view of the world as heterosexual. As long as one member of a couple is perceived as male and the other is perceived as female, the guise of heterosexuality has been perpetuated, the states are satisfied, and the union of the partners is legitimized.

Classifying Sexual Orientation

The equal protection clause does not prevent the states from classifying people into different groups when the classification bears a relation to the ability to perform or contribute to society. (Reed) People are classified on the basis of intelligence and physical ability, for example. It has been held that since these kinds of classifications can indeed bear a relation to how a person may perform or contribute to society, they are nonsuspect classifications. (Frontiero 646) Some classifications, however, are deemed suspect; that is, they bear little if no relation to the

ability to perform or contribute to society. Race is a suspect classification, for example, while gender has been treated as semi-suspect. (Gunther 642) A suspect classification must endure a stricter test than does a nonsuspect classification. The former must not only bear a clear relation to the state's purported objective; the interest which calls upon such classification must also be compellingly important, "with no less invasive means available" of satisfying the interest. (Thomas 71)

Sexual orientation, however, has not achieved suspect classification status. (Harvard ed. 99) Thus, it must only pass the rational basis test in order to be used as a legitimate classification. Unwittingly or not, the courts imply that sexual orientation bears some relation to a person's ability to perform or contribute to society. Is this really the case, however?

The courts must raise sexual orientation to suspect status if prohibitions against same-sex marriage are to be lifted. In the midst of prohibition, homosexual couples have done what they can: "...gay men and lesbians have sought to adopt their partners in order to leave them property" under adult adoption plans. (116) Jurisdictions are beginning to change the rules, although slowly.

Berkeley, California has...passed domestic partner legislation giving gay couples the same rights to city benefits asmarriedcouples... (Mohr 43)

Given that much homosexual conduct remains criminal (Krause 38), however, it may take a while before homosexual marriage is given serious consideration.

Conclusion

As has been shown, no clearly articulated constitutional justification exists for prohibiting gay and lesbian marriage. It must be assumed, then, that states and courts have engaged and continue to engage in their own moral prejudices, stigmatizing same-sex marriage as a threat to the supposed sexual normalcy of heterosexuality. Courts and legislatures should start accommodating the Constitution rather than their legally unsubstantiated values. Clearly, same-sex marriage is legally justifiable. The sooner this legal right is recognized, the better.

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Affirmative Action's Influence on the American Work Ethic
By Chris Tucker

In a large embassy outside the United States, a vacancy has occurred for supervisor of the typing pool. A civil service examination is administered to all interested in qualifying to fill the vacancy. The passing score on the exam is 70. The current clerical and secretarial staff of the embassy is overwhelmingly white, and of the fourteen supervisors only one is black and one of Asian descent. Of those eligible by reason of seniority and superior performance in their current positions, the top score is earned by a white woman—89. The next two scores are also achieved by a white woman—one 86 and one 83. A black woman earns a score of 79 and a Chinese man earns a score of 69.

The position will go to...

(A) The white woman who scored highest, the 89

(B) Any one of the top three scorers, whomever the personnel officer likes best

(C) The black woman who scored 79

(D) The Chinese man who scored 69.

(Floyd 68)

If one were to believe that the United States government still rewarded hard work and achievement with awards and promotion then common sense would lead you to choose answer A. It is painfully obvious, however, that this is no longer the case. The appropriate answer is C. Yes, the black woman, although ranked fourth by test score, would receive the position solely because of her ethnicity or race.

As taken from a practice American Foreign Service Officer Examination, one of the many US civil service exams, this question exemplifies the influence that the affirmative action program has had on the performance of our government. Affirmative action was conceived during the Eisenhower administration with the express purpose of advancing members of under-privileged minorities toward leadership positions. Although the rationale behind this program is quite noble, what affect is it having on our nation as a whole? Prior to the conception of this program, our nation operated, ideally, with a policy of "advancement to the most deserving." Unfortunately racism and the nepotism of "old boy networks" were improprieties in the system that needed to be eradicated. If the goal of the program's creators was to force-feed minorities into the establishment with total disregard to both level of qualification and the efficiency of the bureaucracy then, in effect, they were successful. But most would maintain that this was not the intention.

Another motivating factor behind the implementation of affirmative action was the relatively small number of minority role models in high-level positions in corporate America and the government. Without such models, it was thought that there would be no motivation for any member of a minority group to aspire to reach such high plateaus in American society. The attempt to create ethnic role models was also clear through the admissions policies of many universities and colleges. But in actuality, does this social advancement program achieve its goals?

It has been found that racial discrimination has not been reduced but rather shifted against the majority rather than the minority.

It has been found that racial discrimination has not been reduced but rather shifted against the majority rather than the minority. Just as this sample problem suggests, a person included under the 'white' or Caucasian racial heading could be passed up for promotion indefinitely even though he or she a quite clearly proved
Helvidius

herself better qualified for a given position. Similarly, an institution of higher learning may deny acceptance to a member of America's ethnic majority in favor of one of a minority even though it was clearly choosing against the more qualified person.

When considering the 'role model' topic some questions should be asked. Is it necessary to advance potentially less qualified people across the board in order to create role models for minorities to look up to? Should the quality of those minorities in high positions be sacrificed for the quantity? Should the standards by which "white America" lives be lowered for minorities? One would hope not on all three accounts. By doing these things, role models are cheapened and the racial majority is repeatedly taunted when forced to watch less qualified and possibly less motivated candidates receive jobs that they didn't deserve.

On the whole, affirmative action has not improved the plight of minorities, but merely provides the illusion of fairness and equality. If it is to be credited for anything, it is for leading our nation's work ethic toward and into the waste receptacle. Instead of telling a son, "Work hard and more times than not your diligence, achievement, and quality of work will be recognized," a parent must now express this in different terms: "Work hard and be the best and even when you become the best, hope like hell that someone of a more underprivileged racial grouping doesn't barely pass the cut." A work ethic requires the hope that effort yields success or advancement. This hope can not be generated unless a more fair system is devised. If the government would like to aid minorities it should raise them by their bootstraps rather then drag them by their hair.

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Chris Tucker is a Columbia College first-year student and an Associate Editor of Helvidius.

There's No Business Like Show Business: The Legal Implications of Hollywood's "New Math" and its Impact on Unsuspecting Artists
By Paris Hampton

The Rockford Files, one of the most successful syndicated shows in television history, did not make a dime according to the studio that made it. This is an example of the accounting procedures that have a significant bearing on the focus of this article, Art Buchwald v. Paramount Pictures. First, let us consider that consistent growth in revenues with the growth of ancillary markets (video, cable, and foreign television) has increased the percentage of studio films that break even or make a profit from about 20 percent a decade ago to up to 70 percent today. However, below the line costs (the increase of the daily production outlay on a studio film) and above the line costs (gross participation deals or inflated upfront salaries demanded by big talent) have rendered net profit, the pool of funds that pays the remaining talent pool (actors with less clout and writers), meaningless:

All percentage participation is added to the studio’s expenses on a film. So no matter how big a hit the film is, it never moves into "net profits"—the crux of the current Art Buchwald "Coming to America" case... The virtual non-existence of net profits, in turn, makes more players fight for upfront deals. Mindful of the diversified revenue stream, players like Eddie Murphy, Arnold Schwarzenegger, and Ron Howard have opted for much larger upfront cash outlays rather than for gambling with the backend or waiting the five to seven years for all sources of ancillary interest to be returned. This too has added to the overall budgets of films. (Natale)

Art Buchwald learned about this gamble the hard way.
BIG DEALS-SMALL PROFITS?

Paramount Pictures Corporation released *Coming to America*, a big budget film that was found by the courts to be based upon Buchwald's manuscript *King for a Day*. Paramount asserted that the film, which has generated sales of almost $300 million, garnered Paramount at least $160 million, and cost less than $40 million to make, has not only been unprofitable, but has run up an $18 million deficit and will never turn a profit. Paramount retained $73 million out of the $160 million it received from the picture and their true cash profit was at least $553 million, thus boosting the earnings of the parent company for 1988. (Plaintiffs' statement 1) Paramount's attorney, Charles Diamond, admitted on the *Michael Jackson Show* on KABC radio that:

*Coming to America* was very profitable, it was a huge success, no one has ever denied that it's returned handsome profits. (Michael)

According to standard Hollywood practice, Buchwald or any other writer is not promised a share of the true profits in a contract. Royalties to writers and other creative people under contract are paid out only after the movie company deducts from gross revenue their distribution fees (a percentage based on what the company thinks is appropriate—usually about 30 percent) leaving an adjusted gross revenue. Against roughly 70 percent of the revenues the studios apply 100 percent of the costs for purpose of determining the participation rights of writers and performers. Because there are essentially two categories created by this accounting system (what the studio makes and what the film makes), the studios profit handsomely while the film shows a loss — meaning no royalties for actors, directors, and writers. Using this formula, Paramount could claim that *Coming to America*, the second-highest grossing movie in 1988, was $18,000 in the red and would never show a profit. This calls into question whether the system that is being used in the drawing up of movie contracts is fair and equitable.

Money ...Money ...Money!

Paramount's Richard Zimbert reflected on the major motivating force in the movie industry that influences dealmaking and negotiations with talent:

Since the movie business boils down to one thing, money, everything in the deal revolves around that. As is frequently the case in a real estate transaction, the buyer—the studio in the motion picture business—wants as many rights and protections as possible for his money. The seller—the filmmaking or creative entities—frequently wishes to give as little as possible. (Squire 177-178)

Zimbert goes on to explain that although some companies make money on their distribution fees, sometimes there is a loss. Paramount has not provided any specific information on the cost of distributing *Coming to America*, but a generous estimate would be $7 million. Paramount has collected $42 million in distribution fees for theatrical and cable distribution and another $23 million for videocassette distribution—amounting to a grand total of $65 million or 40 percent of all the money received. (Plaintiffs' Statement 61) Paramount's rationalization for this generous cut of the profits is that the movie business operates like a game of Russian roulette where there are so many box office bombs that the success of the winners must subsidize these losses.

Even if this were an economic reality, there is no legal stipulation in the contracts that the winners must pay for the losers. In fact, one could question the legitimacy of an unprofitable system when so many ancillary sources of revenue have made the industry more profitable in recent years. Paramount may be pleading poverty but their shareholders reports show impressive earnings. Don Simpson, a senior executive for eleven years and current top producer at Paramount said:

*The truth is that with ancillary sales...very few pictures lose money. Most break even...the studio can't lose. I've been at Paramount for eleven years, and I can only remember two pictures losing money...We always got our money back...[The studios] try to make Time and Newsweek believe in the poor beleaguered movie business.* (Litwak 86)

Taking these numbers and the variables into consideration, it is difficult to justify Paramount's denial of compensation for artistic ideas. When the plaintiffs Art Buchwald and Alain Bernheim filed a complaint against
Indeed, it seems that when Paramount was choosing analogies to describe the movie system, a game might have been more appropriate—Monopoly.

Paramount Retaliates

Using the concept of moviemaking as a game of Russian roulette, Paramount launched a media offensive insisting that one court ruling would change the structure of dealmaking in Hollywood for the worse. The studio defended the legality of their net profit formula by invoking a "risky business" defense, claiming that Paramount alone bore the risk of producing the picture and hence its success or failure was a product of their investment. This risk factor allows them to extract a large dividend from the overall profits, they argue. When the court and the Plaintiffs requested additional evidence concerning its profitability, Paramount withdrew the "risky business" defense. They declared the ruling on 21 December a "threat to the free market system" and called the judge "the Commissar of Industry contracts." (Writ of Mandate 18) Paramount claimed that the trial court's preliminary decision has had a devastating effect on the daily business of the motion picture industry. Remarkably, Paramount has not been able to get any other studio representative, agent, entertainment lawyer, or other executive to file a supporting declaration to substantiate their claim. (Writ of Mandate 25) Indeed, it seems that when Paramount was choosing analogies to describe the movie system, a game might have been more appropriate—Monopoly.

The Undeniable Power of the Studios

Motion pictures are primarily produced by seven major studios. It is understood that the potential for successful marketing is significantly enhanced if a picture is distributed by one of the major studios. Couple this with the intense competition in Hollywood to get one's ideas marketed and the result is incredible leverage for the studios over the creative community. The studios have used this power before for their financial benefit. In United States v. Paramount Pictures (1948), Paramount, Columbia, Twentieth Century Fox, Warner Bros., United Artists, and Universal, as film distributors, were found to have conspired to restrain and monopolize and to have restrained and monopolized interstate trade in the distribution and exhibition of films. (Plaintiffs' Statement 52) In the same spirit of antitrust, the studios have devised this standard net profit participation formula. These terms are non-negotiable unless one has the clout of a megastar, who would be able to draw from the true gross profits almost immediately. Otherwise, if one wants to work in the film industry, he or she must do so on the studio's terms—period.

Paramount rationalized that Buchwald's contract was the same as any other, and contracts had been drawn this way for many years. Buchwald's case is long overdue then and may be able to breathe new life into an industry riddled with inequitable traditions. In a town where might makes right and studios aren't bound to honor contracts in good faith, it's miraculous that anyone gets paid.

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Paris Hampton is a Columbia College senior with a strong interest in Artists' rights and the entertainment industry, and an Executive Editor of Helvidius.

**An American Renewal**

By Senator Bob Kerrey (D-NE)

**Biography**

Senator Bob Kerrey, in his personal life and political career, is a study in overcoming odds and demonstrating inspiring leadership.

A Navy SEAL in Vietnam, Kerrey was severely wounded and earned a Congressional Medal of Honor for "Conspicuous gallantry and intrepidity." Home in Nebraska, he put his life back together, and built a successful business.

As Governor, Kerrey turned Nebraska's budget deficit into a surplus. With an eye for long-term needs, he insisted on improved access to health care, investment in technological development, environmentally sound farming, and creativity in education.

In the Senate, Kerrey is recognized leader on health care and education and is a respected voice on issues of the day.

I want to lead a process of renewal which will open up new possibilities not only for Americans of this generation, but also for generations to come. I want to lead because I believe almost everyone but our present leadership knows what we must do. I believe Americans know deep in their bones that something is terribly wrong and that business as usual—the prescription for the 80s—cannot work for our future. What we need is a renewal, a willingness to act upon the idea of building for great

better than their own. My parents' generation had taken this nation to the forefront of world leadership. They had defeated fascism, and were in the process of implementing a network of arms and alliances that would eventually contain communism.

My parents' generation was also doing great things for us at home. In 1961 they were in the midst of building a brand new interstate highway system to be paid for with cash. The schools they provided us with were respected throughout the world. They gave us a thriving economy that enabled us to double our standard of living within a single generation; to buy a house; to purchase health care; to afford higher education for our own children.

Next year, my own son will graduate from high school. What kind of legacy will he inherit? My generation understands that the power of those earlier gifts is dwindling because our leadership simply has not renewed them.

I am thankful that the threat of communism has receded, and that my son does not face the likelihood of war. But the benefits of this historic victory have not been brought home to the people who deserve to claim them and unless we do things differently now, he will assume title to a far different inheritance than I received in 1961.

It is time for leadership committed to posterity rather than popularity and focused on the next century instead of the next election. We can build a future full of promise and hope for the turn-of-the-century Americans. We can leave them a legacy of greatness. But it requires us to believe. It requires us to risk. Most of all it requires us to look towards and work for the future.

To begin building for the future, we must make certain our base is solid. After a decade of unchecked greed and cynicism, we must reaffirm our commitment to fundamental rights and values, including civil rights, quality education, and health care for all.

We must ensure that all Americans receive full protection of our laws. Extending to women the same legal protections received by other minorities was one of the most important aspects of the Civil Rights Bill we
Helvidius worked so hard to get past the White House. The establishment of such legal protection is crucial at a time when the President and his men can choose to trivialize the charge of sexual harassment as they did during the Thomas hearings. Standing up for civil rights is critical in an era when the Republican party can water the tree of racism and then attempt to disown its fruit—a nut called David Duke.

Slow to defend our civil rights and liberties, President Bush was quick to defend our flag at the expense of First Amendment rights. The polls showed support for a constitutional amendment, and so the President yielded to his political advisors. Even though most Americans had not read the decision prior to being polled, even though they did not understand what was potentially at stake if our Bill of Rights was altered, the President chose the path of least resistance and greatest political gain.

This controversial incident led me back to the writings of John Stuart Mill. In his 1859 essay, On Liberty, Mill offered several reasons why the expression of opinion should rarely be limited. In particular, Mill pointed out that, even if the opinion to be silenced is completely wrong, in silencing it mankind loses "what is almost as great a benefit as that [of truth], the clearer perception and livelier impression of truth, produced by its collision with error." Flag burning fits into this category. It does not persuade us that the burner holds an opinion that is true. It persuades us that his opinion is untrue. And it gives us the opportunity to see what true freedom and patriotism are. I give thanks that America, the home of the free and the brave, does not need our government to protect us from those who burn a flag.

The Bush Administration has chipped away at another right—a woman's right to choose. I believe that abortion is a personal, moral decision to be made by a woman, her family, her doctor, and her clergy. I oppose a constitutional amendment to prohibit abortion and would support codification of a woman's right to choose should Roe v. Wade be overturned.

As we look to the future, the base that we build from must include opportunity—yet another fundamental American ideal forgotten or overlooked by our leadership for the last decade. Unless we do things differently now, the turn-of-the-century graduates can expect lives in which college tuition, home ownership, and even adequate health care will be beyond the reach of all but the wealthiest.

In the 80s, we retreated on universal health care. We sat idly by as the cost of health care to the working poor forced more and more of them into the ranks of the uninsured. We must create a health care plan that would let us cover more people, for more services, at our existing quality, at a far lower cost to our families. My proposal, Health USA, is that plan. I developed this plan during almost three years of study and meetings with health care experts. Health USA guarantees universal access to high quality basic health care while controlling runaway health care costs.

I believe that in failing to provide all Americans with the opportunity to obtain a good education, we endanger our country's ability to prepare for the challenges we will face in the 21st century. I have proposed the Education Capital Fund Act to Renew America's Schools. The legislation creates an independent board to administer $1 billion, with state matching funds, to provide funding for the most innovative, long-term local reform initiatives.

Building for greatness will also require a new economic policy. We can begin with making government more responsive and effective by reducing its size and cost. We must invest in our people and our businesses not only by reforming health care and education, but also by embarking on an aggressive campaign to apply advanced technology at home. In addition, we need a communications policy to bring us into the information age.

Finally, we must pursue economic and diplomatic strategies relevant to the Post-Cold War world. We can begin by establishing new global structures to encourage free and fair trade. We also need a new strategic concept, sustaining our position of military superiority while cutting unnecessary costs.

The year 1992 offers us a chance to break from a decade in which our leaders invited a season of cynicism. They invoked morality but winked at greed. They criticized the public sector but robbed it blind. They spoke of balanced budgets but never submitted one. The railed against taxes but raised them on the middle class. They called for civil rights but practiced racial politics. They
wrapped their cause in motherhood out tried to strip motherhood of meaningful opportunities.

My campaign is grounded in the belief that we can and should trust again. As such, it is not so much a fight against George Bush as a fight for what America can be.

People continually underestimate our youth, forgetting that, in many ways, the government of the last ten years has sold it short — leaving the tab to our youth for a federal deficit that threatens our standard of living and that of our children.

I know that it is your generation that must answer this most critical question: Are we headed in the right direction? If you answer no, I invite you to join in the good work of rebuilding greatness in America.

### Trusting Your Institution: A Challenging Proposition to a Difficult Issue of Racist Speech on College Campuses

By Jin Song

*It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried.*

— Eleanor Holmes Norton, chair of the National Advocacy Council for the ACLU

If the attempt to regulate speech is such an impossible endeavor, why does our society repeatedly strive to do it? It is not as if we live in a country that enjoys suppressing our individuality and liberty. On the contrary, the United States is one of the only countries in the industrial world that has not created some form of hate speech law; France, England, and others have had them for years. We hail our democratic foundations as the hallmark of all our progress and prosperity, standing firmly behind our notion of governance as a true symbol of virtue. We cherish our Constitution and clutch dearly to our Bill of Rights with the intense grip of a nation utterly dependent upon these concepts.

What then, is Norton’s point in stating that we have "tried and tried and tried" to ban speech in our society? The quotation above should not convince the reader that the "impossibility" of writing an anti-speech code proves its uselessness. Rather, it should raise the larger question of why a society whose structure is based on a document as great as the Constitution would keep returning to the drafting table in search of a fair speech code as a solution to a conflict that appears in the guise of different issues. The answer lies somewhere in the First Amendment. One way to evaluate the issue is to examine the direct applicability of the definition of the First Amendment to a specific situation.

Today, the First Amendment finds itself under great scrutiny due to a fierce resurgence of racial incidents on university campuses across the nation. When hateful words and equally offensive symbolic expressions pass between students, a wide range of viewpoints arise concerning the actions that should be taken against them. While some feel that a speech code should be integrated into the university’s community for the protection of the victims, others believe that the First Amendment should not be compromised and that a speech code violates basic constitutional rights.

These viewpoints will be further discussed and as one becomes more engrossed in the intricacies of this issue, one will realize that the regulation of racial speech is undeniably a double-edged sword. Both sides present compelling arguments, but the only way to reconcile the two sides is to analyze and understand two underlying factors: the university’s responsibility as an educator, and the student’s basic and essential rights. With these factors in mind, the most fundamental question remains: does racist speech enhance or degrade the values protected by the First Amendment?

**Presenting Both Sides of the Issue**

Although many people would agree that racial insults have little or no social value, those who oppose speech regulations of any kind are more concerned with protesting the “stifling” of their opinions than advocating a more general principle of free speech. These staunch supporters of First Amendment rights feel that regulating free speech would inevitably become an expression of the political goals of the group that controls the censor’s office, and that any form of regulation would be sup-