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REFLECTIONS ON SOCIAL CHANGE AND LAW REFORM

JOHN D. LESHY*

Our dear friend David Getches was deprived of a full opportunity to take a reflective look back at his life of good works. However, as Charles Wilkinson has noted, David led by example. His career provides rich material for reflecting about law and social change. In particular, how we—and particularly rising generations—might deal with the challenges that lie before us. This brief essay offers some thoughts along that line.

The story of David's career is the story of an entire generation of activists who came of age during what is rather quaintly called the "sixties." It was the era of Martin Luther King, civil rights, Vietnam, and, a little later, the first Earth Day and the emergence of the modern environmental movement.

It was an era when a significant number of people, especially the young, became disaffected from the mainstream "establishment" because they thought that government was deaf to mighty forces of change coursing through society. Some followed Timothy Leary and tuned in, turned on, and dropped out. Others chose not to drop out and instead work to reform the established order.

Lawyers like David became advocates for people and causes underserved or disadvantaged by the status quo. One such cause concerned the rights of Native American tribes and peoples. Another concerned how we managed natural resources, particularly lands and waters.

These reform efforts were, by many measures, remarkably successful. Today, tribal sovereignty is better protected, and Indian tribal governments are stronger, than they have been in many, many decades. And, considering Native American rights

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as a part of a broader movement, the depth of change is profound. An African-American President, unfathomable in the sixties, is only the most obvious indicator. Today, most of America's major institutions not only tolerate, but welcome—indeed, celebrate—racial, ethnic, cultural, religious, and many other forms of diversity in America.

There is more to do, of course, but the victories in the struggles for civil rights, tolerance, and respect for human dignity might rightly be called the greatest moral achievement of the last hundred years.

Gains are also apparent in managing natural resources and protecting the environment—the other major focus of David's professional career. The legal system governing these resources once served a relatively narrow range of interests, neglecting broader concerns. Today, by contrast, the idea that impacts on the natural environment must be taken into account is deeply embedded in our legal system.

In short, in a myriad of ways, the law now routinely incorporates considerations of Indian sovereignty and environmental protection in ways that could barely be imagined in, say, 1967—the year David graduated from law school.

As a nation, we can, and should, take great pride in this. It is a credit not only to reform advocates like David, but more generally, to the capacity of our politics and our legal system to accommodate broad currents of change, to meet new challenges, and to translate legitimate concerns into effective policies and rules.

What can we learn from these experiences as we turn toward the future? One lesson is that reforms sometimes veer off in unanticipated ways, with unexpected benefits and costs. Who could have predicted that promotion of tribal sovereignty would help create an enterprise—gaming—that would grow into the most important economic engine ever devised for Indian country (generating some twenty-five billion dollars in revenue annually)? And who could have foreseen how, along the way, the politics of national Indian policy-making would be transformed in profound ways? The effects were not totally positive; gaming has weakened national political support for tribal aspirations, especially for that substantial proportion of tribes who do not reap its financial benefits. But on balance, gaming has been beneficial. Most tribes, most of the time, have handled their economic success well, using it to reinvigorate

tribal culture and traditions and, smartly, to reduce economic dependence on gaming.

Another lesson is that successful reform strategies and tactics can sow the seeds of counter-reformation. For example, the efforts of David and his colleagues on behalf of Native Americans initially depended heavily on litigation, on persuading judges to apply old, or invent new legal concepts to advance their cause. In this way, they were emulating the classic strategy adopted by the NAACP, whose long campaign to end “separate but equal” culminated in *Brown v. Board of Education*.¹

Defenders of the established order responded to these successes by launching efforts to recapture the courts (through the appointments process) and by establishing organizations like the Mountain States and Pacific Legal Foundations to counter groups like the Native American Rights Fund and Earthjustice.

Our political system has been plastic enough to allow these counter-efforts to work. In recent decades, they have made considerable headway on issues like affirmative action, protection of property rights, limiting government’s regulatory reach, and restricting legal standing to sue.

American courts today are more sympathetic to conservative arguments than progressive arguments. This posture reflects a return by the courts to their more traditional, and more comfortable, position, for they—and indeed the law itself—have a cultural conservative bias. Grounded in rules, orderliness, and stability, they inevitably tilt toward the status quo. The courts’ relatively brief role in the vanguard of reform efforts a few decades ago was, in other words, more of a historical aberration than a secure path. This means that a reform strategy based primarily on litigation may not be easy to sustain, at least unless political support for its objectives is engendered along the way.

To be sure, David’s generation of activists fostered, and tapped into, political support for their causes. Just as *Brown v. Board of Education* led to the civil rights legislation of the 1960s, court decisions promoting tribal sovereignty helped pave the way for a spate of legislation in support of tribal self-determination. In the same way, early environmental litigation

1. 347 U.S. 483 (1954). The saga is well told in RICHARD KLUGER, *SIMPLE JUSTICE* (1976).

helped pave the way for an outpouring of environmental legislation.

The wheels of political change continue to turn. Organizations are created to counter the counter-reformers, proving once again that imitation is the most sincere form of flattery. The Federalist Society's success in moving judicial selection and legal scholarship to the right gave rise to the American Constitution Society, which seeks to move them back to the left. On social and economic issues, the success of right-leaning advocacy think tanks like the American Enterprise and Cato Institutes gave rise to the Center for American Progress on the left.

Regardless of where one stands on the political spectrum, all this back and forth activity is hardly a bad thing. It illustrates the genius of America's complex, pluralistic political system, where power is diffused and many levers can be pulled to affect the course of events. That our society not only tolerates, but also encourages the clash of ideas and perspectives is one of its great strengths, helping make it the envy of the world.

In recent years, however, a new, grave challenge to our political system has emerged—the increasingly dominant role of money in politics, particularly electoral politics. For a variety of reasons, the cost of campaigning for people and causes has become astronomical. The money to pay for it is increasingly coming from a relatively small group of people. This infusion of large sums of money from a comparative handful is overwhelming the public policy-making process. Its effects are visible every day, not only in campaigns, but in the gridlock that paralyzes our government, making compromise next to impossible.

Perhaps most pernicious is how just about everyone aspiring to, or running for, significant public office is required to spend the great bulk of his or her time and energy in an unseemly effort to raise ever-larger sums of money. The magnitude would shock the average American. The way things stand now, if you are elected to the United States Senate in a populous state in November and aspire to more than a single term, you must, in order to mount a credible re-election campaign, raise on the order of twenty-five to fifty thousand dollars *every single day for the next six years*.

This endless chase for campaign money leads politicians to develop, as Harvard Law School Professor Larry Lessig has put

it, a “sixth sense, a constant awareness of how what they do will affect their ability to raise money.”² The need to fundraise overwhelms the time lawmakers have to discharge their basic responsibilities—learning issues, listening to reasoned advocacy, pondering the public good, getting to know constituents and colleagues, looking for common ground among competing interests, and building bridges across partisan divides.

These are not original observations. A number of recent books have made this case effectively, like Lessig’s *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*.³ Lessig points out that the problem is not Tammany Hall-style graft and corruption. It is that the money-dependent political system does not allow politicians—who, whatever their ideology, are mostly good people—to do the public’s business. In short, the tsunami of money, and politicians’ need to get it, are corrupting our nation’s capacity to govern itself effectively. They are making the political system more rigid, more protective of established interests, and less accommodating to emerging needs.

This rise in the role of money, ironically, owes a considerable debt to the activism of the sixties. That era strengthened our society’s commitment to free speech, primarily to protect advocates for change in the civil rights and anti-Vietnam War movements. This helped open the door for a slim majority of the current Supreme Court to take the simple—and to my way of thinking, simplistic—view that money equals speech. It would be wrong to place the entire blame for our current problem on decisions like *Citizens*

2. Lawrence Lessig, Professor, Harv. Law Sch., Speech at Harvard University (Mar. 19, 2012), *quoted in* Katie Koch, *A Cleanup Plan for D.C.*, HARV. GAZETTE, Mar. 21, 2012, <http://news.harvard.edu/gazette/story/2012/03/a-cleanup-plan-for-d-c/>.

3. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2012). Lessig is a former libertarian and law clerk to Richard Posner and Antonin Scalia. Several other books developing this and related themes have recently been published. *E.g.*, LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2010); ROBERT KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009); JEFF MADRICK, *AGE OF GREED: THE TRIUMPH OF FINANCE AND THE DECLINE OF AMERICA, 1970 TO THE PRESENT* (2011); TIMOTHY NOAH, *THE GREAT DIVERGENCE: AMERICA’S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* (2012); JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012).

*United*⁴ and its kin. But in these decisions, five Supreme Court Justices have sharply limited the power of government (at every level across the country) to control or neutralize the role of money in electoral politics.

Equating money with speech could not have come at a worse time. In the last thirty years, the gap between the very rich and everyone else in our country has steadily widened. It is now a chasm, bigger than it has been in many decades—bigger, indeed, than in almost every other developed nation on earth.

Many statistics tell that tale. Here are just two: Over the last three decades, out of every dollar of increased national income, twenty cents went to the *top 1/10 of 1 percent* of Americans. Only 13.5 cents went to the *bottom 60 percent* of Americans. In that same period, the compensation of the CEOs of America's largest companies rose from thirty to three hundred times the salary of the average worker in that company.

Meanwhile, as I have noted, the cost of running for office has vastly inflated. The result: campaigns are increasingly dependent on the wealthy. A mere 1 percent of Americans contribute two-thirds of all federal campaign money. The top 1/100th of 1 percent contributes one-quarter. Put a little differently, for *every one hundred dollars* that the wealthiest 1/100th of 1 percent of Americans give to political campaigns, the bottom 99 percent gives *one penny*. This amazing imbalance does not reflect altruism at the top. Every study I know of shows that lower-income Americans give a higher percentage of their income to charity than the wealthy do.

In the 2012 presidential election cycle, of the many millions of dollars spent by groups technically not affiliated with any candidate—I am referring to the so-called “super PACs” and similar organizations—something like 80 percent came from *fewer than two hundred individuals* out of a country of some 310 million souls. As one wag suggested, if you are looking for a handy slogan, that would be the “63 millionth of [1] percent.”⁵ The late conservative commentator William F. Buckley once famously said he would rather be governed by the first two hundred individuals listed in the Boston telephone

4. *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Our system was “already broken” by prior events and decisions; that is, *Citizens United* “may have shot the body, but it was already cold.” LESSIG, *supra* note 3.

5. Koch, *supra* note 2.

directory than by the faculty of Harvard University. Maybe he was right about the Harvard faculty (he was a Yale, after all), but is it any better to have two hundred wealthy individuals wield such influence, especially when most of this money is being raised through devices that shield the identity of the donors?

The problem will not be easy to fix. The first step is to agree that there is a problem, and we are not there, yet.

Another current challenge to our governing system was also unwittingly fostered by sixties reformers—the low esteem in which government is held by the citizenry. Like all reform movements, sixties reformers tended to paint government as an enemy of change. This is natural. Reformers want to change government policy, and government, like any large institution, has built-in resistance to change.

The crisis of confidence in government in America today is, of course, related to the first problem. The chase for campaign funds feeds the popular notion that politicians are “bought” by moneyed interests, which in turn feeds disillusionment with the government. Recall what Ronald Reagan said in 1977: “Politics is supposed to be the second oldest profession. I have come to realize that it bears a very close resemblance to the first.”

Is it any wonder Congress’s approval rating is in single digits and 80 percent of Americans say they have lost trust in government? On this point, I would nominate as one of the most wrong-headed statements ever to appear in a Supreme Court opinion, this statement by Justice Kennedy for the five-justice majority in *Citizens United*: “The appearance of influence or access [when persons and corporations give money to organizations not technically affiliated with political candidates] . . . will not cause the electorate to lose faith in our democracy.”⁶

This breathtaking lack of vision brings to mind Federal Reserve Board Chair Alan Greenspan’s stubborn belief that the self-interest of the financial wizards on Wall Street, and elsewhere, would prevent them from using their freedom from government regulation to lead the world economy off a cliff. After the financial sector seized up in the fall of 2008, Greenspan famously confessed the error of his ways in testimony to the Congress. Justice Kennedy and his allies on

6. *Citizens United*, 130 S. Ct. at 910.

the Court have yet to follow suit; indeed, there is no sign that they have any second thoughts.

Attacking government is a staple of reform advocacy—indeed, of American culture. But there is, to my way of thinking, a profound difference between saying that governmental policies need to be changed so that government can help solve problems and saying that government cannot do anything to solve problems but can only make them worse.

As sixties reformers were attacking government from the left for being unresponsive, another group of reformers was doing the same from the right. They were promoting free markets and private property, and their objective was to unleash the private sector from as much government control as possible.⁷ The sentiment was neatly captured by President Reagan in his first inaugural address: “Government is not the solution to our problem,” he said. “Government is the problem.” The promise was that if the government simply got out of the way, the private sector would lead the country to ever-greater prosperity.

As Greenspan, Richard Posner, and many others have noted, we now understand that this policy paved the way for the financial meltdown of 2008 and the most severe economic distress in three-quarters of a century.

Even before that meltdown, loss of confidence in government had set up a kind of vicious cycle. Large tax cuts destroyed the budget surplus the country briefly enjoyed at the turn of the millennium. “We ought to hand people’s money back to them,” said President Bush in the 2000 campaign—a far cry from Holmes’ “taxes are what we pay for civilized society.” The ensuing deficits, compounded by two wars carried “off the books” at the Treasury, further impaired the capacity of government to govern.

One reason “government is the enemy” rhetoric succeeds is because of ignorance—“keep the government’s hands off my Medicare” was a refrain sometimes heard during the health care reform debate. In 2008, more than half of the Americans surveyed in a Cornell study said they had never used a government social program. It turned out 94 percent had, with the average respondent having used four different ones. The problem of ignorance is made worse by the atomization of the

7. Except, of course, for vigorously enforcing laws that establish and protect private corporations and private property and enforce private contracts.

media. There are no widely trusted, avuncular figures like Walter Cronkite around to provide relatively unbiased information.

Bashing the government is easy. We have all seen its shortcomings up close. Witness the recent antics of General Services Administration personnel in Las Vegas or the Secret Service in Colombia. But we need to keep governmental failings in perspective. The United States remains one of the freest countries on the planet. Our government is, moreover, more protective of private property rights than almost any other nation on earth. And, even though the political process is awash in money, our government is remarkably free from old-style graft and corruption.

Capitalism and free markets can do wondrous things, bringing us wealth, consumer products, and a standard of living practically unimaginable to our forebears. But they alone cannot solve our problems any more than prayer, meditation, drugs, or diet and exercise can.

History shows that government must play a critical role. At some level, most Americans seem to agree, as only a tiny fraction support libertarian candidates. Yet too many Americans take government achievements for granted. Consider the vast decline in water-borne diseases after the government built public water supply and sanitation systems. Or the vast improvement in the economic status of senior citizens since the government implemented Social Security. Indeed, one of the government's biggest successes was its use of educational, social, labor, and health policies to facilitate a vast expansion in America's middle class in the half century leading up to 1980. It is ironic that this was followed, in the last thirty years, by a seemingly ever-expanding disparity in the distribution of wealth.

Because the government does and will continue to do essential things, it needs to have not only resources but also people capable of doing the job. Unfortunately, the loss of faith in government has led to disparagement and devaluation of public service. Working in government (and not just in the military) ought to be honored, not scorned. Rebuilding faith in government and in the value of public service is one of the biggest challenges before us.

Nowhere is the need for effective governmental engagement more apparent than in the biggest problem the earth faces today. I refer, of course, to greenhouse gas

emissions and climate disruption. This is the problem that our grandchildren, and maybe even our children, will be least likely to forgive us for insufficiently addressing.

As I noted earlier, on the environmental and natural resources issues that David devoted attention to, there is much that can be called a success. Compared to when he graduated from law school in 1967, natural resources are, generally speaking, much better managed. Not only is the air and water cleaner, but we no longer log, drill, and mine with scant regard for their effects on other interests and values. We pay a good deal of protective attention to species besides our own.

But if the climate “crisis” Cassandras—and many credible earth scientists fall into this category—turn out to be correct, all these achievements might be looked back upon, in just a generation or two, as accomplishing little more than rearranging the deck chairs on the Titanic.⁸

A destabilizing climate could change everything in very significant, and mostly deleterious, ways—all within the life span of many people living today and certainly within the life span of my new granddaughter, born earlier this year. Noted climate scientist James Hansen said, “It would be immoral to leave . . . young people with a climate system spiraling out of control.”⁹ But that is exactly what we are on a path to do.

This challenge could dwarf all the others that mankind faces. It requires action by governments at all levels, around the globe. If we do not act soon to remake our infrastructure to minimize greenhouse gas emissions, we will find ourselves, in the words of one climate scientist, “back in the [late] Cretaceous, except this time *we* will be the dinosaurs.”¹⁰

But our government is paralyzed, and our political system is severely incapacitated, in large part because of the problems I have mentioned—the corrupting effects of money, the loss of

8. The Titanic analogy also works for the income disparity I mentioned earlier. On that doomed ship, first-class men survived at a higher rate than third-class children.

9. James Hansen, TED Talk, Why I Must Speak Out About Climate Change, Feb. 29, 2012, available at http://www.ted.com/talks/james_hansen_why_i_must_speak_out_about_climate_change.html.

10. Joe Romm, *Ken Caldeira: Natural Gas Is 'A Bridge To A World With High CO2 Levels', Deployment Is To R&D As Elephant To Mouse*, THINKPROGRESS (Mar. 12, 2012), <http://thinkprogress.org/climate/2012/03/12/442484/ken-caldeira-natural-gas-is-bridge-to-a-world-with-high-co2-levels-deployment-is-to-rampd-as-elephant-to-mouse/> (emphasis added). The Cretaceous was from 140 million to 65 million years ago, characterized by the emergence and then extinction of the dinosaurs.

confidence in government, and the devaluation of public service.

Among other things, a small number of wealthy people and institutions have worked to create a false, but effective, impression that no scientific consensus exists on the perils of greenhouse gas emissions. By some polls, the number of Americans who believe in anthropogenic climate change has substantially diminished in the last few years, despite steadily mounting evidence to the contrary. Practically all the significant figures in one of our two major national political parties now seem, lamentably, to subscribe to this view.

The “lamestream media,” to borrow Sarah Palin’s phrase, too often fail to report the existence of that overwhelming worldwide scientific consensus. Commercial media companies shrink from the obvious. Not long ago, the New York Times reported that the Discovery Channel had aired a documentary on the melting polar ice caps without once mentioning greenhouse gas emissions because, the producers said, they did not want to create controversy and alienate those who simply refuse to believe humans have anything to do with it. The result was, as Bill McKibben said, like “doing a powerful documentary about lung cancer and leaving out the part about the cigarettes.”¹¹

Young people obviously have the most at stake in this struggle. There are some hopeful signs they are beginning to engage, for there is no time to lose.

Let me close by suggesting that—instead of all joining hands and jumping off the nearest cliff (or, remembering that this is Boulder, the nearest Flatiron)—we ponder three of David’s notable strengths. They can help guide us out of this corner in which we find ourselves—if we have the wisdom to follow his example.

One is that he was engaged—he did not simply sit in his office and write. He knew that it is rare for a law review article or a book to contain ideas powerful enough to change the course of events. That usually happens only as a result of active, committed, indeed strenuous, engagement.

David’s form of engagement is also instructive. He did not toil away on problems where success is measured only in dollars. He represented underserved interests. A good portion

11. Brian Stelter, *No Place for Heated Opinions*, N.Y. TIMES, Apr. 20, 2012, at B1.

of his talents and energy were devoted to helping to craft constructive solutions to broad policy problems. He did a turn in government, running the Colorado Department of Natural Resources. He helped build and guide nonprofit institutions doing good works.

Second, for much of his career, David was an educator as well as public servant. Education is essential for a well-functioning economy and a good society. It remains an important responsibility of government at practically all levels. David helped educate younger generations about how our legal and political systems operate, and he equipped many with the zeal, advocacy skills, and other tools to go out and make a difference.

Finally, David was an optimist. He believed that people are mostly of good will, that they can be persuaded to work together to fashion a better world, and that the political system can be made to work to lift us all to higher ground.

Although our system seems to be doing its best to avoid confronting the challenges we face, history shows us that dramatic turnarounds are possible in a relatively short period of time. The Progressive Movement, which crafted many innovations we now take for granted, followed quite abruptly on the heels of what Mark Twain dubbed the "Gilded Age"—when American politics and society were corrupted by narrow moneyed interests.

We are all deeply privileged to have known David and to have shared his fellowship through times of great change. He maintained his spirit of engagement; his commitment to education, learning, and improvement; and his irrepressible optimism to the end. We should let his example sustain and guide us as we confront the challenges ahead.