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## Taking Responsibility

Robert M. Ackerman

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OPINION PIECE

TAKING RESPONSIBILITY

Robert M. Ackerman\*

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

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

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

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

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

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

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## I. DELUGE AND DELUSION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

<sup>45</sup> The practice was repeated in other sectors of government. Most notably, staffing at the Justice Department, which traditionally had been the bailiwick of career professionals, took on a partisan edge during the administration of George W. Bush. *See* CQ Transcripts Wire, *Goodling Testifies Before the House Judiciary Committee*, THE WASH. POST, May 23, 2007, *available at* [http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling\\_testimony\\_052307.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html); Margaret Talev & Marisa Taylor, *U.S. Attorneys Saga Exposes Weakened Justice Department Independence*, THE NEWS-SENTINEL, June 18, 2007, *available at*

<http://www.fortwayne.com/mld/newssentinel/news/editorial/17386647.htm>. Federal legislation prohibits appointment of certain federal employees on the basis of political affiliation. 5 U.S.C. § 2302(b)(1)(E) (2007).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

## II. COUNTERPOINT: THE CHERNOBYL DISASTER.

### A. *A nuclear whirlwind.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *B. Averting Collapse.*

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

Comments Diamond:

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

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

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

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

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

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

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

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

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

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

#### A. *A nation of tax protesters.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**D. “Painless” solutions.**

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

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

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

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

#### IV. RECURRENT COMMUNITARIAN THEMES.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *E. Individual responsibility.*

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

cated in a 2006 editorial<sup>148</sup>), or should we leave it to parents to act responsibly and monitor the dietary intake of their children? Must the State of California subsidize protection from mudslides for coastal communities, or should people be left to decide whether they will themselves pay the price of living in a dangerous environment (through exposure to danger or the cost of protection), while enjoying the benefits of an ocean view? Reasonable people will disagree about these issues; in the very least, we should try to develop a framework for their principled consideration, rather than defaulting to “squeaky-wheel-gets-the-grease” nostrums.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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