

# ON CHRIS HAYES & AMERICA'S FALLEN HEROES

I will admit I was watching the F1 Grand Prix de Monaco this morning and not *Up With Chris Hayes* on MSNBC. It turns out I missed some controversy. I was referred to the matter by Doug Mataconis of Outside the Beltway. Mataconis argued that it seemed like the wrong tone for Memorial Day.

The key quote from the article Doug cited, which was from Mediate, quoted Hayes where he says he feels:

...uncomfortable, about the word because it seems to me that it is so rhetorically proximate to justifications for more war. Um, and, I don't want to obviously desecrate or disrespect memory of anyone that's fallen, and obviously there are individual circumstances in which there is genuine, tremendous heroism, you know, hail of gunfire, rescuing fellow soldiers, and things like that. But it seems to me that we marshal this word in a way that is problematic. But maybe I'm wrong about that.

Chris Hayes is a young and very smart talent in the progressive media, and his show has been a beyond rare breath of fresh air generally in what is the pitiful morass of cable news programming. Hayes quickly showed why by referring critics to the video at right, which does indeed present a much fuller and more nuanced take on the issue. As Jeremy Scahill noted, Hayes is being mauled for taking such a deeper and more nuanced look at the issue of praise for war. I agree wholeheartedly with Jeremy.

But, still, I have some, granted also nuanced, qualms.

Contrast Hayes tact with that of Olivier Knox of Yahoo News on Friday:

Memorial Day Weekend: My thoughts inevitably drift to visits to the Normandy Beaches. More moving each passing year. Merci.

...

When I was a kid, it was hard to appreciate the "full measure of devotion." Also my French grandparents hadn't fully briefed me.

There is a palpable difference in tone between the initial takes of Knox and Hayes. While I originally instinctively gravitated toward the Knox take, the more I chew on it, I think Scahill has a point, and the more I think my knee jerk reaction to Hayes was a bit too reflexive and shallow. Here is why.

It is a generational thing to some extent, and the wider the age gap in people reacting to this, the generally wider the potential for adverse reaction. That, of course, is not totally the crux of the biscuit (as Frank Zappa would say), but I think it may be a large part of it.

Chris Hayes touched on a critical and under appreciated point: there is far too much cheerleading for war propagated through obligatory honor of the souls the powers that be send to fight the wars. It does cloud and mask the reality of what is transpiring on the greater moral and humanitarian stage, and does so very much to the detriment of society and the relevant discussion. That is just a fact in my book.

By the same token, the older voices among us, even those of us who grew up with the mess that was Vietnam, still grew up in the halo years of WW II, with the remnants of WW I that preceded it. When I think of Memorial Day, it is under a

mental framework cast in those terms, that was still the framework conveyed in the 60's and, even if lesser, still in the 70's and 80's. Vietnam was the aberration, not the norm, for a very long time when considering war and "war heroes".

And that was me, a kid who mercifully avoided the draft and never served. I think the feelings could, and may well be, even stronger among those who did serve or, like Olivier Knox, who have land and families free today because of the last devotion expended on the beaches of Normandy or Okinawa.

To an older generation, and the differently situated, Memorial Day exists to honor true heroes. American soldiers who died so that you, me, Chris Hayes and everyone else may all have the discussions we do. The fact they gave what they did allows that. And, yes, they ARE heroes.

It is indeed a complex dynamic. Could Chris Hayes have exercised a bit more rhetorical discretion; no question. And he would be wise to not paint it quite as much as he does so primarily in terms of Afghanistan and, presumably, if not mentioned, Iraq (leaving aside Yemen and our other, um, areas of interest/conflict); there is a much larger and older framework, as Hayes himself cogently noted in his lead in.

But move beyond the patina of insensitivity, and Chris Hayes was quite right. We need desperately to unhinge the valor of our troops from the moral squalor of our leaders. Memorial Day may be a touchy time to hear that, but it needs to be said.

[Notice of Erratum: I would like to make quite clear that I do not think Chris Hayes and Olivier Knox are at any odds here; not at all. I simply found their initial takes demonstrative of the greater depth of the issue and discussion here, and illustrative of the point. Thanks to my friend Olivier for pointing that out]

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# ACA AT SCOTUS: SOME THOUGHTS ON THE MANDATE



As you likely know by now, we stand on the cusp of historic oral arguments this week in the Supreme Court on the Patient Protection and Affordable Care Act (ACA),

otherwise popularly known as “Obamacare”. The arguments will occur over three days, for a total of six hours, Monday through Wednesday. Yes, they really are that historic, as Lyle Denniston explains in SCOTUSBlog. The schedule is as follows: Monday: 90 minutes on whether the Anti Injunction Act (AIJA) prevents consideration of a challenge to the individual mandate until it takes effect in 2014; Tuesday: Two hours on the Constitutionality of the individual mandate; and Wednesday: 90 minutes on severability of the main law from the mandate and 60 minutes on state sovereignty concerns of Medicaid reform.

There are two areas of particular interest for me and which really are the meat on the bone of the overall consideration. The first is Monday’s technical argument on the AIJA, which I actually think may be much more in play than most commentators believe, because the Supremes may want to punt the politically sticky part of the case down the road until after the 2012 elections, and the AIJA argument is a ready made vehicle to do just that. Judge Brett Kavanaugh’s dissent in *Seven Sky v. Holder* explains how that would go should the Supreme beings decide to

punt. This is by no means likely, but do not be shocked if it occurs; can kicking down the road is certainly not unknown at SCOTUS on politically sensitive cases.

By far, however, the biggest, and most contentious, kahuna of the healthcare debate is the individual mandate, and that is where I want to focus. The two sides, pro (predominantly liberal left) and con (predominantly conservative right), have been selling their respective wares since before the law was passed and signed by the President. As we truly head into the arguments, however, the pro left have crystallized around a matched pair of articles by Dahlia Lithwick and Linda Greenhouse, and the con right around response pieces by James Taranto and Ed Whelan.

Now this hardly seems like a fair fight, as Taranto has no degree, nor legal training, whatsoever; that said he and Whelan actually lay out the contra to Dahlia and Linda pretty well. Each side effectively accuses the other of being vapid and hollow in argument construct. I will leave aside any vapid discussion because I think both sides genuinely believe in their positions; as to the hollowness, though, I think both sides are pretty much guilty. Which is understandable, there is simply not a lot of law directly on point with such a sweeping political question as presented by the mandate.

"Unprecedented" may be overused in this discussion, but it is not necessarily wrong (no, sorry, *Raich v. Gonzales* is not that close; it just isn't).

In short, I think both sides are guilty of puffery as to the quality of *legal* support for their respective arguments, and I believe both are guilty of trying to pass off effective political posturing as solid legal argument. Certainty is just not there for either side. This is a real controversy, and the Supreme Court has proved it by allotting the, well, almost "unprecedented" amount of time it has to oral argument.

All of the above said, I join my friend Dahlia (and, more nebulously, Linda) in predicting the mandate will be considered (i.e. the AIJA argument discarded) on its merits, and the mandate will survive by either a solid 6-3 or 7-2 vote. There is one caveat to that, however. I have long maintained John Roberts will never be the fifth, and swing, vote to uphold the mandate/Obamacare by a narrow split of 5-4. If it comes down to that, Tony Kennedy would have had to have thrown in with the conservatives, and Roberts will never be the swing, nor would Alito or Scalia. But, if Kennedy goes with the liberal bloc, so that 5-4 is already there, Roberts will sign on to make it 6-3 and there might even be one more that signs up to make it 7-2. So, Obamacare either wins by 6-3 or 7-2, or loses by 5-4, and I think the former. You heard it here.

Now, I want to explain why, at least in my eyes, the mandate is no slam dunk and why I think even my friends on the liberal side are perhaps a little rah rahed and puffed on how awesomely clear cut the mandate is. In that regard, a couple of examples of just how important the mandate consideration is, because of how largely writ it can be extrapolated out, should be considered.

The first analogy comes courtesy of David Bernstein at Volokh:

But let's say the Federal government decided to pass legislation, modeled on longstanding state laws, requiring all residents of the United States to attend school until age 18 or face [some penalty—a fine, or being drafted into “national service” or whatever]. A resident of a state where schooling is only mandatory until age 16 sues, claiming that this is beyond Congress's enumerated powers.

The government claims that it has the authority under its Commerce power to require school attendance. After all,

not only is education is a huge percentage of the American economy, the federal government already regulates the education market to a substantial degree and spends tens of billions of dollars annually for education, money that will to some extent be wasted if children don't continue their education at least through high school. Thus, it's both necessary and proper that the government impose an education mandate to ensure that it's education policies will be successful.

To the argument that a sixteen year old dropout isn't engaged in economic activity, the government argues that staying out of school is itself an economic activity, because, among other things, it reduces the amount of federal and state aid to one's school, makes one less marketable in the employment market, reallocates resources that would otherwise be spend on the dropout's education, and makes it more likely that one will need to spend money on education in the future. Moreover, no one is really "out" of the education market, because everyone is learning things all the time, whether from t.v., one's friends, Facebook, or formal schooling. Finally, by dropping out of school, a sixteen year old is raising the expected costs to the government and society of future crime, welfare payments, and the like.

Anyone think the government should win?

Actually David, yeah I wouldn't have a real problem with that. As a sage friend related to me this morning, there is a direct correlation between a nation's ability to compete in a world market and the level of education provided to it's citizens. Citizens with less, or poorer, education harm the entire nation – it's welfare, it's defense, its very liberties and it's

ability to defend itself against threats and enemies, foreign and domestic. I think that is exactly right; if you accept the individual mandate is constitutionally agreeable, it would be hard to see how you could disagree with an "education mandate".

I would hazard a guess, contrary to David Bernstein's point, most liberals, and maybe even many from the right, might have no problem with mandatory education as a corollary act to the healthcare mandate under the Commerce/Necessary & Proper Clauses (though they may, of course, want vouchers and church school subsidization).

Problem is, the analogies can get harder. Much harder. Let's try this one of my own construct:

Guns and armament are necessary for the national defense, as is a strong and robust domestic weapons industry. It is important to not only encourage adequate arming of the citizenry for protection from terrorists and foreign agents, but to also encourage the manufacturing capability here in the homeland.

Ergo, every citizen, regardless of their age, shall from here forward be mandated to buy a gun (parents will be in charge of, and responsible for, the guns on behalf of the minors until they reach the age of majority). You will, of course, be able to opt out and pay a \$750.00 per person, per year, tax penalty for not complying with the mandatory gun purchase and ownership.

You okay with this one too? If so, is there any mandatory purchase legislation you would not be okay with? What would be the threshold discrimination for a compelled commerce purchase law that would *not* be appropriate to you be then?

The question of whether one believes there is any limit whatsoever on the commerce power of Congress, and whether that is a good or bad



thing, exists irrespective of SCOTUS, at least until they rule on this ACA extravaganza. This stuff matters. A lot. I personally find the analogies extremely useful to explore just how committed people are to the political blarney that has been casually cast about as legal argument on this issue – by both sides.

Are the liberal proponents of the mandate, who bellow “it is absurd to even question the issue, obviously the mandate is within the Commerce power!” really willing to follow the import and implication of their arguments out to their conclusion?

Are the conservative opponents of the mandate, who screech “this is unprecedented, and of course Article III courts have the innate power and authority to ban a facially valid law of Congress under the Commerce/Necessary and Proper Clauses!” really willing to accept that authority, control and micromanagement of Article I Congressional will by the Article III courts? Because that is not exactly what they normally say.

There is actually a bit of a paradox in both side’s positions vis a vis their normal views; liberals usually accept more control and regulation by courts on Congressional action as a check and balance, conservatives usually vehemently argue courts have no such proper role.

This is about far more than Obama’s questionably cobbled together ACA law; the law is inane in how it soaks Americans to benefit craven insurance companies. Either way, sooner or later, healthcare as constructed and/or mandated by the ACA will die a painful death, but will continue to decimate American families for years, irrespective of the ruling by the Supreme Court on its nominal constitutionality. At some point, single payer, such as “Medicare For All” is inevitable.

However, the pervasive effects of the Commerce/Necessary & Proper Clause determination

on the individual mandate, caused by the nightmarishly cobbled together Obamacare, will shape the direction of the Supreme Court in relation to commerce, business interests and, indeed, potentially American life across the board, for decades, if not lifetimes, to come.

That is what is at stake this week. Yes, it is *that* big. No, it is not *that* easy or clear cut. I do not know how it all sorts out for sure, but I do I do think, unlike the vast majority of the political commentators opining in the ether, the Supreme Court understands the consequences for the long run and the gravity of what they are considering. That said, it is still a very political decision for the Supreme beings, and how they calculate that, vis a vis history, is anybody's guess.

One thing IS certain, when the dust has settled, one side will say the Supremes are beautiful minds, and the other will say they are craven activist tyrants. That is life in the modern Article III existence. Game on!

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## THE SCOTUS MERRYGOROUND: IS GINSBURG SHUFFLE COMING?



The UPI has an article up with the startling headline "Ruth Bader Ginsburg stepping

down in 2015". The article, which is really more of a pondering question, is bylined today by Michael Kirkland and paints the scenario of a Ruth Bader Ginsburg retirement in 2015 so that Obama has sufficient time left in his second term to appoint and confirm a successor.

Although referenced rather obliquely in his article, Kirkland's basis is premised entirely on the thoughts and predictions of SCOTUS, AND SCOTUSblog, longtime pro Tom Goldstein in a SCOTUSblog post he did last Tuesday, February 14th. Goldstein may be only one voice thinking out loud, but he carries the bona fides to warrant serious consideration here.

Goldstein points to the confluence of Ginsburg's age, health, and personal career tracking with that of Justice Louis Brandeis. And the thought that Ginsburg will want to see that her replacement is chosen by a Democratic President. Goldstein's thought process, originally laid out in the comprehensive February 14th entry at SCOTUSblog, is worth reading. Assuming Obama is reelected, which is still a pretty decent bet at this point (certainly capable of changing though), it is hard to find fault with Goldstein's logic; in fact, it is rather compelling. I also agree with Tom that none of the current conservative bloc, including swing man Tony Kennedy, are going anywhere anytime soon.

Where I do differ from Goldstein, however, is in his prediction for what would transpire upon the theorized Ginsburg tactical retirement:

Assuming that President Obama is re-elected and that Justice Ginsburg does retire at some point in the next Administration, who will be the next nominee? One thing is certain: it will be a woman. It is inconceivable that a Democratic administration with any reasonable choice would cause the gender balance of the Supreme Court to revert to seven men and two women. Relatedly,

appointing three women in a row to the Court is excellent politics.

President Obama will also have a strong desire to pick an ethnically or racially diverse nominee. It would be disappointing for the nation's first African-American President to make two white appointments, leaving the Court with seven white members. A more diverse Court is a better legacy. Given that the President already appointed the first Latina Justice, most likely is an African-American or Asian-American nominee. That said, I think race and ethnicity are plus factors, rather than an imperative like gender.

I am not sure I buy Goldstein's certainty of yet another female Supreme Court nominee from Barack Obama. I am just not convinced Obama appoints a third woman in a row, color or not. It sure makes it easier that it would be to fill a "female seat", Ginsburg's, I guess, and Obama clearly wanted to see three women justices on the court. But he crossed said threshold, and knowing one of them may not be there so long into the future likely played into the strength of his desire to appoint a second woman after Sonia Sotomayor. Such is quite a different thing from having an abiding determination to insure there are *always* three women on the Supreme bench.

Further, it *really* restricts the pool of potential nominees and plays into a plethora of counter arguments and attacks of quota instead of merit based selection. The stereotyping criticism could be potentially brutal. So, while Tom Goldstein is convinced the field is so narrowed to women, and further narrowed to women of color, I do not think such is the case at all; in fact, Obama may arguably be more likely to appoint a man after having nominated two women in a row.

I will come back to the most likely candidates

in a minute, but would like to address Goldstein's musing and conclusion of the likely nominee. Tom inputs all the data into his cranial computer and spits out current California Attorney General Kamala Harris as the perfect choice. She is young, has proven electability politically, has a legal background and has the "color" factor. She also likely has some chits of cachet from falling in line for the unconscionable Foreclosure Settlement Obama and his Administration crave so desperately. But Harris has no judicial experience, but does have a reputation as an extremely aggressive Democratic political climber. That is a tough sell and, as Tom notes, Harris clearly has her eye on the California Governor's mansion.

Goldstein covers the list of other possibilities if the selection is indeed a woman, especially one of color. The list is not long or that great. Amy Klobuchar is a possibility I suppose, and Obama has never shown much care about raiding critical Democratic majorities in the Senate; so maybe. Two sleepers may be Mary Murguia, currently on the 9th Circuit and Jacqueline Nguyen, nominated for the 9th, but currently still a District judge in CDCA. Murguia seems very unlikely to me. Nguyen, however, would be especially intriguing as she is young, has an excellent educational and professional resume, and is Asian in lineage. Naming the first Asian American, male or female, to the court would be another notable first for Obama, and he looks for that.

Other women in the potential field that Goldstein does not mention are Teresa Roseborough, a lawyer in private practice in Atlanta, but with impeccable experience including a stint as DAAG in the OLC and Leah Sears, another Atlanta attorney who was formerly Chief Justice of the Supreme Court of Georgia. Both Roseborough and Sears are of color and are very well respected (Walt Dellinger is a huge fan of Roseborough's).

Which brings the discussion back to the main

point of this post, namely I think Goldstein's certainly of another woman nominee is wrong for the reasons stated above as to stereotyping and the relatively few candidates it leaves to choose from. And if the field is open to men, then there are too many possibilities to ponder individually.

I think Obama would love to appoint Cass Sunstein, and while Sunstein would be a difficult confirmation, Obama may be willing to fight for his friend. For any progressive, Sunstein would be a catastrophically bad choice, which is likely a positive to Obama and his "insider brain trust". The other possibility to fear is Merrick Garland of the DC Circuit, who has already been heavily vetted by the Obama regime (along with Elena Kagan for John Paul Stevens' seat). Garland is a horribly mushy, moderate centrist, and borders on being too old for lengthy service. Garland would be another Kagan in that, even though a Democratic selection, he would substantially move the Court to the right from the Justice he is replacing. Garland would be a safe, and confirmable choice (Orrin Hatch loves him just to give you an idea).

Garland is a real possibility, both because of his centrist appeal to Obama and his confirmability. And herein lies the other point I wish to make in this discussion, the flimsiness of Barack Obama's relentless mindset of dogged centrism and playing it safe compromise to chalk up any claim of victory, even if it is diluted to absurdity. It is the enduring hallmark of the "success" of the Obama Presidency.

One of the other hallmarks of Obama's Presidency is also, save for his two Supreme nominees Sotomayor and Kagan, dereliction of duty and attention to judicial policy and nominee confirmations. The state of rot and decay ongoing in the liberal federal judiciary is shocking, and Obama literally has abandoned the cause. All the way back in early August of 2010,

I noted:

In fact, reshaping the Federal judiciary away from the hard conservative Federalist society bent that has been installed and meticulously grown by the Reagan and two Bush Administrations was one of the primary rallying cries for Democrats, including the Obama campaign, during the 2008 election. And, yes, there has been significant and unified Republican obstructionism; that is absolutely a factor. The problem is that there has been little if any fight put up by the Obama Administration and instead mostly weak resignation.

There has been little, if any whatsoever, relative improvement since then, and none in terms of realizing what the Republicans have done to seed the overall ideology of the Federal Judiciary, and take affirmative steps to counter it. Over time, it may prove to be the biggest and most egregious failure of Barack Obama. Quite a thought for a man who made so much of his supposed background as a “professor of Constitutional law”. The truth, instead, has been more a flippant opportunism toward established Constitutional restraints and a malignant neglect of the judiciary composition and direction.

Republicans now have a deep and established bench of conservative jurists and shining stars to tap. Who is the liberal answer to Brett Kavanaugh? We had one in the making with Goodwin Liu, and Obama did not lift a finger to support Liu, he abandoned and hung Liu out to dry like Dawn Johnsen.

As my friend Dahlia Lithwick has pointed out:

The vast majority of disputes are resolved by the federal appellate courts, which are the last stop for almost every federal litigant in the country. And the one legacy of which

George W. Bush can be most proud is his fundamental transformation of the lower federal judiciary—a change that happened almost completely undetected by the left. At a Federalist Society meeting in 2008, Bush boasted that he had seated more than a third of the federal judges expected to be serving when he left office, most of them younger and more conservative than their colleagues, all tenured for life and in control of the majority of the federal circuit courts of appeals. The consequences of that change at the appeals court level were as profound as they were unnoticed.

...

The current administration has not done much to restore the ideological balance of the federal appeals courts. For one thing, this was never Obama's priority the way it was for Bush, his father, and Ronald Reagan.

That is exactly right, and it ingrains and serves the corporatist and authoritarian mentality corrupting this country at its fundamental core. The Republicans have a couple dozen Brett Kavanaughs teed up waiting in the wings, and liberals cannot muster even one Goodwin Liu.

Judicial policy matters. If progressives and liberals have any common sense in the least, they will start pressing hard for a better one from Barack Obama.

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## 9TH CIRCUIT PROP 8 DECISION: EQUAL



# PROTECTION NOT AT THE END OF THE RAINBOW

The highly anticipated Ninth Circuit decision on the appeal from Judge Vaughn Walker's groundbreaking opinion in *Perry v. Schwarzenegger* (now captioned "*Perry v. Brown*") has arrived! IT IS A VICTORY for supporters of marriage equality and constitutional protection of sexual identity interests!

The full text of the decision is here. Authored by Judge Stephen Reinhardt, it is a long opinion discussing several key issues of law. Generally, they break down into three areas: 1) whether Vaughn Walker was qualified to sit as the trial judge in light of the fact he is an acknowledged homosexual, 2) whether or not the proponents of Proposition 8 (referred to in the trial court as "Defendant-Intervenors" or "D-I's") have standing to bring the appeal, and 3) whether or not the merits of Judge Walker's decision trial court decision to grant constitutional due process and equal protection status to the plaintiffs Perry, and thus find that Proposition 8 is unconstitutional, should be upheld. We will take those in order.

## **Vaughn Walker's Qualification**

The new Chief Judge in the Northern District of California, James Ware, wrote a very strong opinion finding it completely proper for Walker to sit as the trial judge in Perry. And the 9th Circuit had already slapped down an attempt by the Prop 8 Proponents (hereinafter "Proponents") to disqualify Panel Judge Stephen Reinhardt because his wife worked for the ACLU. So, it would have been shocking for the 9th to bite off on the nonsense that Vaughn Walker could not impartially serve as trial judge for the case. There is no shock delivered today, the 9th has joined Ware in blasting this craven argument, in fact the court states that it adopts Ware's

basis effectively in full.

### **Standing To Appeal**

The issue of standing is arguably the most critical in the appellate case. Since the State of California made the calculated decision not to appeal and give the nominal cover their participation would provide to Proponents, if the Proponents do not have individual standing, there is effectively no appeal. There are actually two parties that have sought standing, the Proponents, and Imperial County of California through its court clerk.

As to Imperial County, I, along with others on the ECF mailing list got accidental notice of the court's ruling yesterday when the 9th Circuit slipped up and transmitted the separate ruling on their motion to intervene in the appeal. It is denied as being untimely brought.

The Proponent's intervention was certainly not untimely though, and it was unanimously certified by the California Supreme Court as being proper on the merits. In light of the strong decision finding standing for proponents by the California Supremes, after the 9th Circuit had asked them to make the determination, it would be pretty hard for the 9th to not follow the certified advice and grant standing. And they have done exactly that:

It is for the State of California to decide who may assert its interests in litigation, and we respect its decision in holding that Proposition 8's Proponents have standing to bring this appeal on behalf of the state.

### **Constitutional Merits Issues**

The big kahuna, of course, is whether or not Vaughn Walker's meticulously laid out and reasoned decision granting protection to plaintiffs Perry under the Equal Protection and Due Process Clauses would be upheld. And, as I have consistently predicted would occur, the 9th

has indeed upheld Judge Walker's ruling.  
WAH0000!

It is a narrower and shallower victory than I had hoped and predicted though.

All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and social recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those opposite-sex couples. the Constitution simply does not allow for "laws of this sort." *Romer v. Evans*, 517 US 620, 633 (1996).

As I said, this is much narrower than hoped for. By basing on *Romer* instead of the full constitutional protections of due process and equal protection, the court has likely increased the odds the decision stands up to further appeal, but has done a disservice to those seeking true equality, both as to marriage and otherwise, for gays and lesbians. In short, it does not move the ball nearly as much as it should have, and was hoped for. The decision of the 9th does not go nearly as far as Vaughn Walker did, and wastes much of the meticulous taking of evidence, making of findings of facts and law, and crafting of his decision. It was hand tailored to go MUCH further, and that now appears at least significantly squandered.

Also of note, it is a split decision, with Reinhardt and Mike Hawkins joining the majority, and N. Randy Smith dissenting. Although Smith is a Mormon, and reasonably conservative, the strength of his dissent is somewhat surprising compared to his seeming attitude at oral

argument of the appeal.

So, where does that leave us? With a good decision for those same sex couples wanting to marry in California, and one more likely than a broader decision to stand up to appeal. But, it is by no means certain that even this narrow ruling will maintain; if the case was going to go to SCOTUS, it should go with all the gusto and Constitutional protection afforded that it can muster for all the same sex couples, in all the states, not just California. Today's decision falls shamefully short of that. It is somewhat of an embarrassment for one of the last great liberal lions like Steve Reinhardt actually. I have to believe he was choked somewhat by Mike Hawkins, but, frankly, such is surprising to me based on my knowledge of Hawkins, even though he is not nearly the wild eyed liberal Reinhardt is.

Not only is the decision disappointing, but it will likely also be stayed pending further review as well. so not even relief for those in California is in the offing anytime soon. Sigh.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]

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## **THE FALSE REPORT OF BANNED BOOKS IN TUCSON: THE TEMPEST IN THE ARIZONA TEAPOT**

Last  
Friday  
afternoon,  
author  
Jeff  
Biggers  
published  
an article  
at Salon  
entitled



*Who's Afraid of "The Tempest"?* The cognitive lede, and framing for the article as a whole, is contained in the first sentence:

As part of the state-mandated termination of its ethnic studies program, the Tucson Unified School District released an initial list of books to be banned from its schools today.

Biggers goes on to report and discuss on a litany of books and textbooks – even Shakespeare's *The Tempest* – that were removed from Tucson Unified School District (TUSD) classrooms:

Other banned books include "Pedagogy of the Oppressed" by famed Brazilian educator Paulo Freire and "Occupied America: A History of Chicanos" by Rodolfo Acuña, two books often singled out by Arizona state superintendent of public instruction John Huppenthal, who campaigned in 2010 on the promise to "stop la raza(sic).

It is a rather stunning, and alarming, report fashioned by Mr. Biggers and, little wonder, it swept like fire across the progressive internet, and social media like Twitter and Facebook over the King Holiday weekend. Biggers' Salon article served as the basis for reportage of the banning of books, including Shakespeare's *The Tempest*, in a plethora of media sources from such internet venues as AlterNet, to mainstream media

like The Tucson Citizen, New York Daily News, and The Wall Street Journal.

There is only one problem with this story. It is categorically and materially false. No books have been banned in Tucson by the TUSD, much less Shakespeare's classic, *The Tempest*.

Sensing that Biggers' story did not sound correct, nor comport with my understanding of the law in this subject area here in Arizona, I was able to make contact with officials at TUSD over the Martin Luther King extended holiday weekend and spoke with an official on Monday, even though the school system was officially closed. It is an understatement to say they were dismayed and concerned; it is "disingenuous to say 'banned'" said Cara Rene, Communications Director for the TUSD.

Indeed, upon returning to their offices Tuesday, the TUSD put out, through Ms. Rene, an official News Release stating:

Tucson Unified School District has not banned any books as has been widely and incorrectly reported.

Seven books that were used as supporting materials for curriculum in Mexcian American Studies classes have been moved to the district storage facility because the classes have been suspended as per the ruling by Arizona Superintendent for Public Instruction John Huppenthal. Superintendent Huppenthal upheld an Office of Adminstriation Hearings' ruling that the classes were in violation of state law ARS 15-112.

The books are:

Critical Race Theory by Richard Delgado  
500 Years of Chicano History in Pictures  
edited by Elizabeth Martinez  
Message to AZTLAN by Rodolfo Corky  
Gonzales  
Chicano! The History of the Mexican  
Civil Rights Movement by Arturo Rosales  
Occupied America: A History of Chicanos

by Rodolfo Acuna

Pedagogy of the Oppressed by Paulo Freire

Rethinking Columbus: The Next 500 Years  
by Bill Bigelow

NONE of the above books have been banned by TUSD. Each book has been boxed and stored as part of the process of suspending the classes. The books listed above were cited in the ruling that found the classes out of compliance with state law.

Every one of the books listed above is still available to students through several school libraries. Many of the schools where Mexican American Studies classes were taught have the books available in their libraries. Also, all students throughout the district may reserve the books through the library system.

Other books have also been falsely reported as being banned by TUSD. It has been incorrectly reported that William Shakespeare's "The Tempest" is not allowed for instruction. Teachers may continue to use materials in their classrooms as appropriate for the course curriculum. "The Tempest" and other books approved for curriculum are still viable options for instructors.

Oh, my, that is fundamentally and materially different than what Mr. Biggers both stated, and inferred, isn't it? It was excessive and inflammatory hyperbole, and that is not a good thing as it paints the TUSD, and the Arizona school and educational system in a false, and prejudicially negative, light. I know many teachers and administrators in the Phoenix area, and they were outraged. "Banning of books" is an extremely negative concept both emotionally and legally; it is an extremely serious allegation, and *not* one to be made lightly or inaccurately.

There are a LOT of very good people in the State of Arizona, and the bad that is going on here (and there IS plenty of bad too) should be painted large and loud for what it is, but not in brush strokes so big and hyperbolic as to give a false picture of the story and state. I dislike the existence and effect of HB 2281, the law that has created this controversy over ethnic studies, every bit as much as Mr. Biggers honestly seems to; but do not want that to be used as a whipping post to make Arizona an ogre in ways it truly does not deserve. And that was the effect of his January 13, 2012 article in Salon.

You would probably think this particular story, and my report on it, ends here for now. It does not and, for once, that is a very positive thing. Over the King Holiday weekend, in addition to contacting the TUSD, I also contacted Salon regarding my concerns. They were, under the circumstances, both cordial and professional. Early this afternoon a notice of correction was placed at the bottom of the original story, and a new report by Jeff Biggers, far more accurately portraying the facts on the ground in Tucson, was published by Salon. Salon, and its editors, are to be commended and applauded for their willingness to listen and act responsibly.

Which brings us to the bigger picture. Demagoguery and hyperbole are something that all of us do who write on emotional hot button issues; which are about the only kind of issues we do here at Emptywheel. I have noticed the same phenomenon in the progressive blogosphere and media acutely prevalent on torture, Bradley Manning, Occupy Wall Street and, just recently, the NDAA. Emotion and illustration are good; facts and truth are better.

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# THE CORPORATIST FREE SPEECH SUPERIORITY OF THE ROBERTS COURT

Adam Liptak has a pretty interesting article up in today's New York Times on the relative free speech strength of the Supreme Court under the leadership of John Roberts.

The Supreme Court led by Chief Justice John G. Roberts Jr., the conventional wisdom goes, is exceptionally supportive of free speech. Leading scholars and practitioners have called the Roberts court the most pro-First Amendment court in American history.

A recent study challenges that conclusion. It says that a comprehensive look at data from 1953 to 2011 tells a different story, one showing that the court is hearing fewer First Amendment cases and is ruling in favor of free speech at a lower rate than any of the courts led by the three previous chief justices.

It is no joke that such has been the "conventional wisdom" about free speech in the Roberts era. The validity and veracity of that claim have always mostly escaped me though, and not solely, nor even predominantly because (as the eminent Floyd Abrams argues in Adam's piece) because of the dreaded progressive evil hobby horse, *Citizen's United*.

The root numbers derive from an article by Monica Youn at the American Constitution society's ACSBlog, which in turn were reviewed for NYT by Lee Epstein and Jeffrey Siegal, who previously wrote a comprehensive law review article (excellent I might add) on the topic in the Journal of Law & Policy. While the root numbers and percentages are interesting, and certainly support the proposition that the

Roberts Court is really not all that on the First Amendment free speech protection; they really do not tell the full story of how much, and why, this is really the case.

While both Liptak and Youn discuss some of this depth, I want to emphasize the real nature of the intellectual, and ideological, dichotomy of Roberts court jurisprudence. The Roberts Court has indeed engaged in some notable free speech engagement, but it has been almost entirely in the service of what I would call the “corporatist ideology”. The corporatist ideology is not limited to just corporations and their investors that underpin them, but also to the governmental and military/industrial complex that is now one with business power.

I do not know that I have ever seen a better description of the corporate/government linkage than that offered by Montana Supreme Court Judge Nelson in his dissent in the recent *Western Traditions* case:

The truth is that corporations wield inordinate power in Congress and in state legislatures. It is hard to tell where government ends and corporate America begins; the transition is seamless and overlapping.

Oh so true, and the same increasingly applies to the courts as well, especially via the Federalist Society mindset that courses rampant in federal courts, including at SCOTUS in the Roberts conservative bloc.

This manifests itself in the legal and factual nature of the Roberts Court’s free speech jurisprudence. As Liptak points out, a “majority of the Roberts court’s pro-free-speech decisions – 6 of 10 – involved campaign finance laws”, of which *Citizens United* obviously tops the list. And as Erwin Chemerinsky points out, that is likely not so much a preference for free speech as a conservative antagonism toward campaign finance restriction laws, and that is not really

a calling card of free speech at all. It is, instead, the hallmark of a corporatist ideology.

But the real proof of this pudding comes from an analysis of the four significant decisions *not* involving campaign finance. Youn described them this way:

Out of the four non-campaign finance cases in which the Roberts Court has supported a free speech claim, three – the animal cruelty videos case, the funeral picketing case, and the violent video games case – were what I will call free speech “slam-dunks” – that is, cases that were decided by an 8-1 or 7-2 majority, and in which (contrary to the usual Supreme Court’s certiorari practices) there was no split among circuit courts, and the Court affirmed the lower court decision. These free speech slam-dunks, with their colorful facts, were among the Roberts Court’s cases that have attracted the most press attention, but they are hardly indicative of a conservative majority with an expansive view of First Amendment freedoms. The remaining case in which the Roberts Court was willing to uphold a non-campaign finance related free speech claim was *Sorrell v. IMS Health Inc.*, a relatively low-profile commercial speech case in which a 6-3 majority of the Court struck down a state “prescription confidentiality” law, which barred sale or disclosure of doctors’ prescription practices to pharmaceutical marketers.

That is all true, as far as it goes. But take a deeper look. The “violent video games” case, *Brown v. Entertainment Merchants*, involved free speech, but also very much centered on regulations on content regulations on an extremely large and powerful entertainment industry, so the resulting decision was indeed supportive of free speech, but not so much

regulative authority and conduct. The same generally holds true for the “animal cruelty videos” case, *Brown v. Entertainment Merchants Assoc.* As Youn explained, *Sorrell v. IMS Health, Inc.* involved enhancement of commercial business speech, but it was at the direct detriment to personal privacy. And, lastly, “funeral protest” decision, *Snyder v. Phelps*, which rightly blasted tort liability on protected free speech, also very much reaffirmed time, place and manner restrictions on protected speech, on which corporations and governments rely on substantially to both blunt and restrict free speech (a reaffirmation, by the way, that is one of the reasons I consistently say the OWS protesters will never get any First amendment relief from *Clark v. CCNV* from the Roberts Court).

The net result is that, whether in the six campaign finance cases, or the other four cases, even where the Roberts Court has found in *favor* of free speech, there is always a pro-corporatist foundation beneath the surface.

But the “corporatist” tendencies on free speech issues with the Roberts Court do not end with the above, there is the governmental component of the corporatist ideology. As Chemerinsky describes in the Arizona Law Review piece linked above, this may be even more disturbing:

The Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government’s national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.

This fact really cannot be emphasized enough, it is of critical importance and lies behind much of what we do here at Emptywheel. Chemerinsky takes the reader through the gauntlet of blows to

free speech in this arena. *Garcetti v. Ceballos*, which involved retaliation for ethical disclosure speech and results effectively in whistleblowers who expose wrongdoing by others within their workplaces having little to no First Amendment protection. *Borough of Duryea v. Guarnieri*, where the Court held government employees may utilize the First Amendment protection of a right to petition the government for redress of grievances only if such speech involves a matter of public concern. And *Beard v. Banks*, where the Court gave effectively total deference to the government in regulating prisoner access to newspapers, magazines, or photographs.

But Chemerinsky saves, perhaps, his strongest words – and rightfully so – for our old favorite *Holder v. Humanitarian Law Project*.

Perhaps the most troubling First Amendment decision by the Roberts Court was in 2010 in *Holder v. Humanitarian Law Project*. Federal law prohibits providing “material support” to a “foreign terrorist organization.” Material support is defined to include such activities as “training,” providing “personnel,” and giving “expert advice or assistance.” Two groups of Americans brought a lawsuit seeking to establish First Amendment protection for their assistance to groups that had been designated by the Department of State as foreign terrorist organizations. One group of Americans sought to help a Kurdish group, which sought to form an independent state, use international law and the United Nations to peacefully resolve disputes. The other group of Americans sought to help a group in Sri Lanka, which similarly aimed to form a separate nation, apply for humanitarian assistance.

The Court, in a 6–3 decision, ruled that this speech could constitutionally be

punished.

...

In other words, the Court allowed the government to prohibit speech that in no way advocated terrorism or taught how to engage in terrorism solely because the government felt that the speech assisted terrorist organizations. The restriction on speech was allowed even without any evidence that the speech would have the slightest effect on increasing the likelihood of terrorist activity. The deference that the Court gave to the government was tremendous and the restrictions it placed on speech were great. (citations omitted; emphasis added)

Erwins entire law review article, which was also a keynote speech, is a great read if you want more depth on the different ways the Roberts Court has acted contrary to the founding ideals of free speech.

But, when you add up the blows to individual expression and blatant support for corporate and governmental interests in the Roberts Court Free Speech decisions, it is hard to conclude they are a free speech court at all, much less an admirably expansive one as is so often claimed in the media. No, rather, the Roberts Court is merely an expansive corporatist court.

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## **A NOTE ABOUT OWS AND PRE-TRIAL DIVERSION IN LOS ANGELES**

I have seen a lot of garment rending on Twitter

and in discussion forums I participate in about the Los Angeles Times report that a pre-trial diversion option is being offered to some Occupy Wall Street-Los Angeles protesters:

Many Occupy L.A. protesters arrested during demonstrations in recent months are being offered a unique chance to avoid court trials: pay \$355 to a private company for a lesson in free speech.

Los Angeles Chief Deputy City Atty. William Carter said the city won't press charges against protesters who complete the educational program offered by American Justice Associates.

He said the program, which may include lectures by attorneys and retired judges, is being offered to people with no other criminal history and who were arrested on low-level misdemeanor offenses, such as failure to disperse.

"Tin eared!" "Propaganda!" "Re-Education!"  
"Stupid!" "Tone-deaf!" "By a private corporation??" "Seriously, LA, this is the worst ever!" "Unbelievable!"

Those are a smattering of the responses I saw, and all are from people I know and respect greatly. And they are all wrong to take such umbrage at this report. Here is why.

Pre-trial diversion of criminal misdemeanor charges is an extremely common tool in municipal and other misdemeanor courts (and in some felon courts on the lowest grade offenses such as marijuana possession). It is, from a policy perspective, considered a win-win for both sides; the state and taxpayers avoid the cost of processing the defendant through the court system, and the defendant avoids having a conviction on their record (often avoid even having a formal charge lodged). But whether or not to offer pre-trial diversion lies entirely within the prosecutorial discretion of the

state's attorney. It is an option that can be offered, but certainly is not mandatory.

Just as pre-trial diversion is a voluntary option that does not have to be offered in the first place, the decision on whether to accept the offer is entirely up to the individual facing the charge. There is no punishment whatsoever for declining – none – they will stand in the EXACT same position vis a vis the state as if they had not been offered pre-trial diversion at all, i.e. there will be a municipal offense that has either been charged, or is pending charge, with a one year statute of limitation running.

There has been a hue and cry that – gasp! – the program will be administered by – gasp! – a private company. Well, they always are. I have never seen a diversion program with an educational component that was not farmed out to a private or non-profit outside entity. That is simply how it is done; cities and individual courts are not structured and funded to have classrooms, instructors and curriculum for these matters. And, being as it is a discretionary option to resolve outside of the criminal process (most are contractual, not court compelled) it just does not make fiscal or judicial sense to have it run by the court or state.

As to the content suggested for this particular diversion program offer, it is precisely what you would expect to be offered under the circumstances. Pre-trial diversion at the misdemeanor level almost always involves a perfunctory remedial/instructive class in the subject of the offense. This is the case with defensive driving class to get out of a ticket, it is the case with anger management for assault and domestic violence, it is the case for shoplifting and solicitation programs as well. For the OccupyLA cases, it is hard to imagine a more appropriate subject than a free speech centered program, as that lies at the heart of why the individuals face the prospect of



criminal process in the first place.

So, in sum, the offer of pre-trial diversion is but an extra option offered people that are facing the criminal justice system. It did not have to be offered, that it is should be considered positive not negative if the individuals are going to be facing the criminal system anyway. Whether or not one feels these individuals should be charged in the first place is a different discussion; since they do face the system, having an extra option should be cheered not jeered.

Lastly, a word about the "Free Speech" rights that are at issue here. The long and short of it is free speech has never been completely free nor absolute. Living in the west, and being still a little bit of a night person, I have seen a lot of the television reports and internet live stream coverage of the raids on various OWS camps including, notably, the infamous ones in Oakland and Los Angeles. I constantly saw protesters screaming about their First Amendment rights being trampled on. I have also seen a lot of very bright people I know repeating this mantra on Twitter, in discussion forums and in published articles. At least as to the actions that have been about the OWS tent encampments on public property, they have been wrong.

I support the intent and message OWS set out to propel into the public consciousness completely and with every fiber of my being. There is no more critical message right now than the burgeoning income inequality, financial suffering and human loss being caused by the rapacious elements in the global financial sector epitomized by Wall Street. That said, the simple fact of the matter is that there are, and long have been, time place and manner restrictions on free speech and that is what is at play here.

So, let's look for a moment about what the real state of the law is regarding the tent encampments that OWS keeps screaming are

protected by the First Amendment, because the simple truth is they most certainly are not if there are appropriate local laws and/or regulations prohibiting overnight sleeping and camping, as there have been in most all of these cases. These are called “time, place and manner restrictions” (TPM), and they are long engrained into the very heart of American First Amendment law.

The complete history of TPM restrictions is to long too go into in a blog post, but perhaps the key case for modern general TPM law is *Cox v. New Hampshire*, 312 U.S. 561 (1941) where the court stated:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for

parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

....

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.(citations omitted)

Time, place and manner restrictions thus having been ratified by the Supreme Court into modern law in *Cox*, the issue then becomes how this applies to the issue of tents in the OWS encampment paradigm. Well, it turns out the Supreme Court has an app for that too. SCOTUS, in the directly on point case of *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), addressed the free speech issues surrounding tent encampments on public property:

We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, cf. *United States v. O'Brien*, 391 U.S. 367, 376 (1968), but this assumption only begins the

inquiry. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.

....

Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. *United States v. O'Brien*, *supra*.

Petitioners submit, as they did in the Court of Appeals, that the regulation forbidding sleeping is defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct. We agree with that assessment.

....

The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content-neutral, and is not being applied because of disagreement with the message presented

There is a lot of discussion in *Clark* that is spot on point with the OWS situation. Suffice it to say, it has proven to be decisive in nearly every state and federal court challenge brought by OWS, and so long as there is some statutory or regulatory basis for camping and/or sleeping prohibition at a given locale, it will continue to so be decisive against the tent encampments of OWS. And, as demonstrated by, among others, Federal Judge Cameron Currie in South Carolina yesterday, this logic will stand even for regulations and laws passed *after* the encampments started, so long as the proscriptions are content neutral.

In conclusion, the OWS protesters, well meaning

as they may be, are flat wrong when they scream that their First Amendment rights are being trampled upon when cities and governments no longer tolerate the long term residence on public property. Similarly, there is nothing wrong whatsoever about a jurisdiction offering an appropriate pre-trial diversion program to folks that have been arrested in these dismantling raids.

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## **A RANCID FORECLOSURE FRAUD SETTLEMENT TRIAL BALLOON, HERBERT OBAMAVILLES, WHAT DIGBY SAID & THE IMPORT OF THE OCCUPY MOVEMENT**

I do not usually just post simply to repeat what another somewhat similarly situated blogger has said. But late this afternoon/early this evening, I was struck by two things

almost simultaneously. Right as I read Gretchen Morgenson's latest article in the NYT on the latest and most refined parameters of the foreclosure fraud settlement, I also saw a post

Don't go to work. Walk out of school. Say NO to Debt and Austerity!

**GENERAL  
STRIKE!**  
Ratified by the #occupyOakland General Assembly

**November 2**  
For our dreams  
For our community  
For our collective future

strike. resist. occupy everything.

by Digby. The intersection of the two was crushing, but probably oh so true.

First, the latest Foreclosure Fraud Settlement trial balloon being floated by the "State Attorney Generals". There have been several such trial balloons floated on this before; all sunk like lead weights. This is absolutely a similar sack of shit; from Morgenson at the NYT:

Cutting to the chase: if you thought this was the deal that would hold banks accountable for filing phony documents in courts, foreclosing without showing they had the legal right to do so and generally running roughshod over anyone who opposed them, you are likely to be disappointed.

This may not qualify as a shock. Accountability has been mostly A.W.O.L. in the aftermath of the 2008 financial crisis. A handful of state attorneys general became so troubled by the direction this deal was taking that they dropped out of the talks. Officials from Delaware, New York, Massachusetts and Nevada feared that the settlement would preclude further investigations, and would wind up being a gift to the banks.

It looks as if they were right to worry. As things stand, the settlement, said to total about \$25 billion, would cost banks very little in actual cash – \$3.5 billion to \$5 billion. A dozen or so financial companies would contribute that money.

The rest – an estimated \$20 billion – would consist of credits to banks that agree to reduce a predetermined dollar amount of principal owed on mortgages that they own or service for private investors. How many credits would accrue to a bank is unclear, but the amount would be based on a formula agreed to by the negotiators. A bank that writes down

a second lien, for example, would receive a different amount from one that writes down a first lien.

Sure, \$5 billion in cash isn't nada. But government officials have held out this deal as the penalty for years of what they saw as unlawful foreclosure practices. A few billion spread among a dozen or so institutions wouldn't seem a heavy burden, especially when considering the harm that was done.

The banks contend that they have seen no evidence that they evicted homeowners who were paying their mortgages. Then again, state and federal officials conducted few, if any, in-depth investigations before sitting down to cut a deal.

Shaun Donovan, secretary of Housing and Urban Development, said the settlement, which is still being worked out, would hold banks accountable. "We continue to make progress toward the key goals of the settlement, which are to establish strong protections for homeowners in the way their loans are serviced across every type of loan and to ensure real relief for homeowners, including the most substantial principal writedown that has occurred throughout this crisis."

Read the full piece, there is much more there.

Yes, this is certainly just a trial balloon, and just the latest one at that. But it is infuriating, because it is the same old sell out crap repackaged and trying to be shoved down the public's throat yet again. And who wants to sell this shit sandwich the most? Barack Obama and his band of Masters of the Universe, that's who. It is also, of course, the fervent desire of Wall Street and their bought and paid for pols like Chuck Schumer.

Which is exactly why elected state Attorney General politicians (Hi Tom Miller), who are also generally on the political make, are so focused on getting a craven deal done, no matter how badly it screws the public and economy. If anybody has ever had any doubt as to why California AG Kamala Harris has been so slow, and so weak, in the matter this is exactly why. Harris is a political climber, and her fortunes and fame ride with the 1% and the politicians like Obama and Schumer that they control like circus monkeys.

Which brings me back to what Digby said. Digby, playing a notably tin-eared editorial by the Los Angeles Times off of a scathing comment on the American elite by Frank Rich, said:

That the LA Times is clutching its pearls over fig trees and grass while nearly 3,000 people have been arrested at Occupations all over the country world says just about everything you need to know about disconnect between elites and everybody else.

Yeah, that about sums it up. Do go read the full description of the "Hooverilles" and what they really comprised, because it is far too close to home with the current time and place we occupy. By the same token, it is hard for many in the comfortably ensconced traditional middle class to see just how heinous the situation is, and how necessary the "Occupy" movement may really be.

Trust me. I know, I am one of the uncomfortable. My natural predilections are within the system and rules. That, however, is no longer perhaps enough. Many of you reading this post may not be on Twitter, and thus may not have seen it; but I have in the last couple of days straightened out more than one pundit on the, and sometimes unfortunately so, real protection reach of the 1st Amendment. It is far less a prophylactic protection than most, and certainly the vocal proponents of the Occupy Movement, think.



Without belaboring the minutiae, the clear law of the land for over 70 years, ever since the Supreme Court handed down its decision in *Cox v. New Hampshire*, is:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

....

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.

There is a long line of cases that ultimately extend the ability of cities and municipalities right to reasonably regulate time and place of free speech expression, so long as said regulation is content neutral, to public parks and all other sorts of publicly controlled spaces.

But those are “the rules”. When the politicians and corporate masters no longer are willing to play by the rules, how much longer can the “99%” afford to honor them? When the so called leaders will not abide by the norms and constricts of law, why should the average man still be held to

the same?

Again, I fully admit just how much I struggle with saying the above. I really do; it is uncomfortable and discomfiting. I could go on, but my own thoughts pale in comparison with those similarly situated who have experienced first hand what the import and truth of the Occupy movement is.

I ask, indeed implore, you read this long, but telling, account from The Awl by Lili Loofbrourow entitled *"The Livestream Ended: How I Got Off My Computer And Onto The Street At Occupy Oakland"*. There is literally too much to excerpt, and it would take away from the critically important slow progression the writer lays out for you, the reader.

So, while "the rules" may militate otherwise, and while "our Constitutional rights" go nowhere near as far as the psyched up Occupiers cry, there is something raw and necessary about the "Occupy" movement. It is necessary because the rules and "adults in the room" have sold their souls, and our lives, down the river of greed.

If not "the 99%", then who? If not now, then when? It is time.

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## **COMMERCIALIZING CAMPAIGN ADS: CALIFORNIA ROLL FOR MAYOR**

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here in Phoenix – the outright commercialization of political campaign ads. It is the handiwork of a Scottsdale sushi restaurant, Stingray Sushi. In short, a corporation is using a political race as a straight up advertising vehicle for their product, without officially supporting or donating to either candidate. The ploy started off just riffing on hot button political issues such as:

“Bill Clinton Likes My Sushi”  
“Larry Craig Likes Our Bathrooms”  
“Blagojevich is the Best Tipper”

Stingray then morphed into playing off of a local initiative drive on the ballot. But now they have stepped square into a heated political race between competing candidates.



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this novel activity by Stingray to date, is the current Phoenix Mayor's race, which will be decided on November 8. The race itself is supposedly non-partisan, however it pits longtime uber-Republican operative Wes Gullett, who was the chief of staff for disgraced (and convicted) Governor Fife Symington and has served in several administrative and campaign capacities for John McCain over the years, against a moderate, but fairly clear Democrat, former City Councilman Greg Stanton.

If the question is “is this legal”? Yes, it appears to be quite legal under both state and federal campaign law, although Stingray has had to put stickers on their signs advising that it is “Not authorized by any candidate or candidate’s campaign committee.”

The ad campaign is the brainchild of a local ad and political consultant by the name of Jason Rose. I will have to give Jason credit here, it is pretty inventive and has certainly captured the imagination of Phoenix residents. Everybody has seen them, even my high school daughter talks about them. My wife thinks they are hilarious catch phrases now. Anytime I mention politics, she blurts out “Mayors Are Yum Yum!”.

Now, here is the better question – where does this go from here? Stingray is playing both sides of the electoral race fence in this campaign, but it is hard to believe others necessarily will do the same. Will bigger corporations exercise their right to free political speech decreed in *Citizens United* by branding themselves to a particular candidate? Is it a good thing to have electoral races clouded by raw corporate advertising pitches as opposed to actually taking a side?

I honestly do not know the answers to the questions raised, not the plethora of others that arise from this ad campaign. But I doubt it is a one off deal, you can expect to see other similar ad campaigns attached to elections in the future. What do you think??

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## **TAKING BACK WALL STREET TRASH TALK**

Well we are a little late getting started on the trash talk this weekend, I apologize about that. I have been fixated on the Anwar Awlaki scenario

and, today, the Occupy Wall Street effort. In honor of the citizens trying to take back the Street in New York, this week's music is by Jimmy Cliff; you can get it if you really want it. But, you must actually try.

That, folks, is what is meant by the term "a democracy, if you can keep it". The people still have the power, the people still have the vote; but they must have the information, and they must have the desire to exercise their power. Our friends and colleagues at FDL, via Kevin Gosztola, are doing great work covering the protests. And, if you have seen what I have on Twitter, it really appears to be something significant starting to form in the Big Apple. I am told about 400 people have been arrested; let's hope they are replaced by 4,000 others.

Quite frankly it is a rather lackluster day in college football, the only 2 games I really had my eye on are Nebraska at Wisconsin, and 13th ranked Clemson at 11th ranked Virginia Tech. The Clemson game is already over, with the Tigers laying an unheard of whipping on Frank Beamer and the Hokies in Blacksburg. Not so for the Badgers however, the Cornfuckers are in Camp Randall right now with the Huskers up by a point 14-13. The rest of the game should be something fun, and the quarterback for Wisconsin, Russell Wilson is really a special kid.

On the pro end of things, it is really not a very enticing slate of games on tap. Seriously there are like three games worth watching. The first is the Steelers at the Texans. Normally, this would be an easy call; but Pittsburgh has not settled in yet this season, and Houston has a fine team and is at home. That is a pickem. The second decent tilt, and maybe my most anticipated game, is Detroit at Dallas. The Kittehs are THE hot team this year, and Suh is gonna be Romo rib hunting. But the 'Boys are a little tougher than people think, and are at the JerryDome. I am leery of this, but am still going to go with the Lions. The other game tomorrow of interest is the Pats at the Black

Hole to visit those nice Raider chaps. Darren McFadden got a bit nicked up in his huge day against the Jets, Jets, Jets last week, but looks good to go tomorrow. Marcy smells a Rayduhs upset here. So do I. Honorable mention to the Jets versus Ravens on NBC's Sunday Night Football. It's in Baltimore, gonna go with the home team there.

Lastly, it is October baby. Reggie Jackson time! and playoff baseball is in full swing. Unless the game is at Yankee Stadium, in which case it is in full swim. Tampa Bay just clocked the Rangers behind 22 year old rookie sensation Matt Moore to open the series, but Texas is up 7-3 in the 7th inning tonight. Oops, Eva Longoria just hit a three run tater to bring it to 7-6. Rays are like butter. On a roll. Diamondbacks got freaking smoked by the BrewCrew today in game one of the NLDS. Arizona has the youngest team in baseball and has been on a great run this year, but still may be a year and another starting pitcher away from being serious contenders. Never count out Kirk Gibson though, and the DBacks are Gibby's team through and through.