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- VI. Study of how people create and change structures of power, authority, and governance.
- IX. Study of global connections and interdependence
- X. Study of the ideals, principles, and practices of citizenship in a democratic republic.

National Standards for Civics and Government, from the Center for Civic Education
- I. What are civic life, politics, and government?
- V. What are the roles of the citizen in the American democracy?

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Law and the Common Good

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Director’s Note

The theme for Law Day 2011 was recently announced: The Legacy of John Adams: From Boston to Guantanamo. A Revolutionary leader and patriot, Adams was also a constitutional theorist. He wrote that “government is instituted for the common good.” He suggested that people have the right to institute and reform government for their “protection, safety, prosperity, and happiness.” Every day we encounter laws that both protect and restrict our individual pursuits. How do these laws shape the common good? What rights do individuals have within the common good? This issue of Insights explores the role of law within the common good and its relationship to individual rights.

As our issue opens, law and society expert Amy Swiffen leads us through four views for defining the common good and its relationship to law. Historian Yohuru Williams highlights how the Supreme Court developed standards for free speech—from “clear and present danger” to “imminent lawless action.” Law professor Lawrence O. Gostin discusses how public health laws and programs relate to the common good. He presents an action plan for public health as well as examples of how law is used to influence individual health decisions. Learning Gateways rounds out this discussion with a lesson plan focused on how copyright and other intellectual property laws not only contribute to the common good but also affect us in our everyday lives. Our Perspectives columnists debate the question: Should mandatory voting laws be implemented in the United States? And in Law Review, author Charles Williams examines possible effects of the recent Citizen’s United decision. Add to this rich roundup of topics Insights online, www.insightsmagazine.org, which offers teachers additional resources and supports, including articles, lessons, and primary sources.

Since this issue will reach you a couple months into the school year, we hope that it adds a lasting resource to your collection. Let us hear from you. We would like to have your feedback on the issue and how you might incorporate it into your classes this year. And let us know if there are topics that you would like to see us tackle in these pages.

As always, enjoy the issue, and best wishes in your new school year.

Mabel McKinney-Browning
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“...government is instituted for the common good.”

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Life, Law, and the Common Good

How do we define the “common good” with respect to law?

by Amy Swiffen

The role of law within a society to “protect the common good” is complicated by the role of law to also protect individual rights. Here, sociologist Amy Swiffen sketches four views of determining the balance between these two important goals.

Mapping the Common Good: Four Views

When asked the question “what is the role of law in society,” many experts would answer by saying that it is law’s role to protect and promote the common good. However, this answer is deceptively simple. For what is understood by the phrase the “common good” is not necessarily obvious or consistent, and defining it necessarily goes beyond the legal realm and into sociological territory. This is due in large part because of what is at stake. There are different ways of conceiving the common good and concomitantly different ways of deriving the role of law in society. This is important because when legal thinkers refer to the “authority of law,” what they mean is the sovereignty of law, its status as the ultimate power in society, and its monopoly on the legitimate use of violence. The clearest example of the law’s monopoly on violence is the criminal power of the state, including involuntary incarceration, and in some jurisdictions, the death penalty. Criteria for the legitimate exercise of legal authority are justified in relation to a certain conception of the common good. This essay discusses four different views of what constitutes the common good—aggregative, universal, integral and sovereign—as well as the associated conceptions of law that each suggests. The complexities behind the relationship between law and the common good are then further explored through the example of triage, drawn from contemporary public health and law policy.

Aggregative View

One way of thinking about the common good is in an aggregative sense. This is a view that originated in the 19th century in a form of legal theory known as utilitarianism, associated with such thinkers as Jeremy Bentham and John Stuart Mill. The utilitarian approach defined the common good as the sum of the well-being of all the individuals in a political community. The role of law is ensuring the right balance between good and bad so that the common good can be achieved in this way. Each individual counts as a single unit in relation to the good of all. For example, Mill argued that the common good can be derived by adding all happiness, subtracting all unhappiness, and dividing the result over the political community. That is to say, the common good can be divided among individuals in unequal measures; some may benefit relatively little and others not at all. For

“The utilitarian approach defined the common good as the sum of the well-being of all the individuals in a political community.”

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example, the measure of GDP per capita assumes the common good in an aggregative sense. The maximization of an overall quantity is the goal, not an even distribution of benefits. Thus, the aggregative common good is an egalitarian notion but not necessarily an equitable one. The argument for trickle-down economics assumed an aggregative notion to underlie policies that disproportionately benefited a small segment of society—the highest socioeconomic classes—more than others. In general, the quantifiable aspect makes the aggregative view amenable to cost-reduction policies and economic theory.

Universal View
Second, and conversely to the aggregative view, the common good can refer to things that all individuals hold in common but that cannot be divided into individual parts. This is known as the universal or “common common” notion of the common good. From this point of view, the role of law is custodial on behalf of a universal interest. The universal common good can have a possessive sense, for example, in reference to things such as air, water, and the environment, which are often seen as belonging intrinsically to all humans. The essay “The Tragedy of the Commons” by Garrett Hardin discusses the common good in this way. The notion of the common good can also refer to the idea that there are certain goals toward which individuals will aim in the course of their lifetime. This understanding is sometimes called the “teleological” notion and is often invoked in theological discourses. For example, Thomas Aquinas defined the common good as knowing the truth about God and living in a community of believers. Recently, some have drawn on Aquinas to argue that there are universal purposes to human life that are basic to human nature, such as survival, knowledge, aesthetic appreciation, play, friendship, practical reason, and religion. It should be noted that the universal common good tends to be rejected by liberal thinkers who believe that it is an impossible ideal.

Integral View
A third way of thinking of the common good is an “integral sense.” The notion of integral refers to something that cannot be divided into parts, making it incompatible with the aggregative view. The integral view argues that individual well-being depends directly on social interaction. Thus, the interests of one individual cannot be divided from the good of the whole. The role of law is to set and maintain the conditions by which political association where individuals are free to pursue their own interests can occur. That is to say, being a member of a political community in itself is the common good, which is defined as a “set of conditions which enables the members of the community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s).” The notion of civil rights is often seen as being an integral common good in this sense.

Both the integral and the universal views can be traced all the way back to Aristotle’s writings on ethics and politics: in particular, the idea that law is derived from a natural impulse to work together for the sake of the greater good. Aristotle suggests that it was a concern for basic survival that first drew humans into close proximity, which engendered language and eventually the shared systems of meaning necessary for complex social formations. He noted that human beings are not terribly self-sufficient in nature; most of us would not survive long if we tried to live alone as individuals outside of a group. However, Aristotle believed that unlike other animals that also live in groups (herd animals, bees), humans were connected to the gods; specifically, in our capacity for happiness. Without going into detail, suffice it to say that Aristotle believed that true happiness could only be achieved by imitating the life of a god, which consisted solely in philosophical contemplation. Humans could perpetually enjoy this activity as well if we were free of having to be concerned with the basic necessities of life. Such a state can only be approximated in the context of association with others. Thus, the well-being of each individual is inseparable from being part of a political whole.

Sovereign View
A fourth and final way of thinking of the common good is in a sovereign sense. This is the idea that a social body once constituted acquires an existence of its own, with interests over and above the individuals who make it up. The view is sometimes associated with the philosopher G. W. F. Hegel, who argued that...
there is an inner rationality to history (what he called ‘historical reason’) that will eventually culminate in a universal state. Particular laws and notions of the good (individual, cultural) are not completely disregarded by the process. Rather, their “spirit” is absorbed and fully actualized in a universal rule of law. This view is criticized by some liberal theorists who argue that it poses the danger of collapsing into totalitarianism. Today, the sovereignty of the common good is most often emphasized in times of war or national crisis. Formal legal orders, such as those of the United States and Canada, have provisions for the executive declaration of a state of emergency if the public good is under threat. This happens in the case of events of *force majeure*, which are unforeseen and uncontrollable events that prevent parties to a legal contract from fulfilling the obligations. Standard examples include a political crisis, such as a populist riot or international conflict; an economic crisis, such as the Great Depression or a general strike; or a natural disaster, such as hurricane Katrina or the BP oil spill. The role of law is complicated in these contexts because the legal protections that would normally apply may be legally suspended or curtailed by the government. Moreover, while traditionally states of emergency were short in duration, this is less the case today when terrorist attacks and threats of pandemics provoke more permanent states of exception in which the rule of law is suspended.

**The Principle of Triage**

An application of the concept of the sovereign common good is discernible in a new area in public health law known as *triage*. Triage is a technique for rationing resources, usually medical, during times of war or natural disaster when everyone cannot be given essential resources at the same time, for whatever reason. The practice first emerged in a military context. It was invented by Baron Dominique Jean Larrey, one of Napoleon’s surgeons, who was the first to implement a process of removing soldiers from the battlefield based on criteria related to the severity of their injury, their likelihood of recovery, and the quantity of care they would need to recover. The aim of Larrey’s system of triage was the efficient use of limited resources, and the goal was maximizing military fighting function. This meant treating soldiers first who could recover and return to battle while deprivoritizing those with injuries that would make them unfit for combat. Prior to Larrey’s innovations, wounded soldiers were simply collected at the end of battle. During the early period of the U.S. Civil War, wounded soldiers were treated without regard to the type of injury. However, by World War I, triage systems were being widely adopted. The American military used a system of sorting stations to prioritize wounded soldiers who could be treated and returned to battle. At times, those who could not recover sufficiently were allowed to die.

In military triage any particular individual’s interest is given limited or no regard compared with that of the social body. What is significant in recent years is the migration of the principle of triage into civilian settings. For example, since 1983 a triage system has been used in the United States to determine the priority sequence for rationing transplantable organs. The system factors in things such as an individual’s age, past alcohol and drug use, and willingness to seek treatment if they suffer from an addiction. Depending on the situation, the wounded that need the most treatment could be first or last in the priority sequence. However, in the civilian setting, “advanced” triage, which involves the decision that some individuals should not receive medical care because they are less likely to survive or will require relatively more resources, is reserved for the most extreme situations. It is the task of authorities with the aid of experts to decide whether some individuals are hopeless or whether one person should be denied care in order to provide treatment for several others. At the same time, scenarios of flu pandemics and biological terrorist attacks are the occasions for the development of priority sequencing of citizens. Furthermore, it is entirely possible that triage could be used to allocate goods other than medical resources; any necessity of life could be triaged, including food and water. The role of law is complicated.
is this situation because denying essential resources to one individual for the benefit of several can result in significant harm to that individual. In such a situation new governance problems emerge that are not covered by the rule of law as conventionally conceived. Would it make sense to develop a priority sequence in the case of a food shortage to ensure that the fittest members of society are kept healthiest, at the expense of some of the others? While this kind of decision might be expected by military personnel, in the civilian context it is only even possible in a state where the normal operation of individual legal protections has been suspended. It does not involve equality before the law but permanent priority sequencing of citizens in the name of the common good. Thus, the power dynamic that underlies the principle of triage, which is most explicit in warfare, is the force of law called forth to protect the common good in civilian contexts.

Remember to visit Insights online for additional resources on how the common good intersects with law.

**For Further Reading**


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**For Discussion**

1. What is the “common good?” What is the role of the law to promote the common good in society?

2. How does the author’s presentation of four different views help you think about the “common good” as a concept? As a value?

3. Do you think it would be right to apply the principle of triage to “civilian contexts,” such as public health? Would it be fair?

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In the movie *Minority Report* (2002), a futuristic police force is able to reduce crime through the use of precognition by arresting would-be criminals at the point of thought. But when the chief-of-the-operation is mistakenly targeted by the program, the movie forces the audience to grapple with the fragile line between liberty and public safety and between the common good of a low crime rate and the right of the individual to be safe and secure in, of all places, his or her thoughts.

While clearly fictitious, the film’s scenario illustrates one of the problems inherent in securing liberty in a democratic republic. Balancing civil liberties such as freedom of speech and freedom of the press with the need for security have always been complicated, especially in times of military conflict. The necessities of prosecuting a war, while preserving the right to dissent, have accounted for some of the most significant constitutional battles over the First Amendment.

While some maintain that these are the times when freedom of speech is most essential, others point out the necessity of ensuring national security by maintaining the highest support and morale for the military and the government. Upholding the decision of one of his generals to have a former Ohio congressman arrested for his virulent anti-war protests and despite his claims of freedom of speech, President Abraham Lincoln laid out the crux of the problem; “Must I shoot a simple-minded soldier boy who deserts,” he pressed one of his critics, “while I must not touch a hair of a wily agitator who induces him to desert?”

**Defining a Clear and Present Danger**

This delicate balance was most stringently put to the test during the First World War. In an effort to stifle political dissent and check the potential influence of foreign agitators, Congress passed the Espionage Act of 1917. The measure prohibited willfully making false reports with intent to interfere with the success of the military or naval forces, inciting insubordination, disloyalty, or mutiny in the military, and obstructing recruitment or the enlistment service of the United States. It further authorized federal officials to make summary arrests of people whose opinions “threatened national security.”
Almost immediately the new law fueled legal challenges from dissenters. The most well-known case involved the 1919 prosecution of the general secretary of the American Socialist Party, Charles Schenck. Imprisoned for his role in the production and distribution of 15,000 anti-war leaflets urging young men to resist the draft, Schenck appealed to the United States Supreme Court arguing that the leaflets in question were an exercise of free speech.

With the Court under pressure to set some type of standard for future legal action, Justice Oliver Wendell Holmes took up the challenge of crafting an instrument to help the Court define the boundaries of free speech. Writing for the majority, Holmes proposed that, whether in speech or print, any language that posed a “clear and present danger” or that had the potential to result in “substantive evils,” that the government had “a right to prevent,” was felonious and therefore subject to punishment. Under Holmes’s test, even though the government could not prove that Schneck’s pamphlets had a negative impact on the war, their potential to do so made his actions punishable. The majority ruled in favor of the lower court and Schenck’s conviction was upheld. The government’s interest in preserving national security, the Court seemed to affirm, took precedence over Schenck’s right to free speech. But the issue was far from settled.

**Clear and Present Danger in the Courts**

Not everyone was happy with Holmes’s test. Many prominent legal scholars including Holmes’s close friend, Harvard professor Zechariah Chafee Jr., were critical of the decision. They disapproved of the Espionage Act mostly because it gave the government powers that they thought were too broad and beyond the scope of the offenses they were intended to punish. They frowned on the Schenck decision specifically because they felt that it was the duty of the Court to provide balance.

Nevertheless, the Court applied Justice Holmes’s clear and present danger test again in 1919 in a case involving Socialist presidential hopeful Eugene Debs. Debs had delivered a speech in Ohio in which he likened the draft to slavery and criticized the government for trampling on civil liberties, including freedom of speech. Fixating on the possibly negative effects of Debs’s words, the Court also upheld the orator’s ten-year prison sentence.

In the lower courts, however, Holmes’s clear and present danger test was coming under assault. A number of justices and legal scholars questioned its soundness and saw it as rife with abuse. They further questioned the level of danger it sought to prevent.

Nowhere was this more evident than in the Eighth Circuit Court, which included Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakotas. Despite its relatively small population, approximately 476 or 22 percent of the 2,168 prosecutions under the Alien and Sedition and Espionage Acts nationally were brought from this region with nearly a quarter of these (103) originating from the remote and thinly populated areas of North Dakota.

This imbalance weighed heavily on Eighth Circuit Court Judge Charles Amidon. No fan of the Espionage Act, Amidon consistently expressed reservations about its ability to ensure national security. The vagueness of a law “which made it a crime to do anything that might hinder the nation’s war effort,” he complained, had the added perilous effect of turning, “every United States attorney into an angel of life and death clothed with the power to walk up and down his district, saying, ‘This one will I spare, and that one will I smite.’” “If the law leaves it to the district attorney to determine when an act shall be prosecuted as a crime and when it shall not be,” he pondered, “how is a citizen to know when he is exercising his constitutional right, and when he is committing a crime?”

The problem for Amidon was not just academic. He saw this angel of death...
Espionage Act of 1917, Section 3

The Espionage Act was passed by Congress on June 15, 1917, but Section 3, excerpted here, was amended and approved on May 7, 1918 as follows:

“SEC. 3. Whoever, when the United States is at war, ... shall willfully cause ... or incite ... insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, ... and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag ... or the uniform of the Army or Navy of the United States, or any language intended to bring the nation out of war. Even though the alleged offense had taken place before the passage of the Espionage Act, Hildreth nevertheless moved forward with the prosecution. The district attorney's opening statement powerfully illustrated the passions and prejudice Amidon described. “This human character that you have before you is a German character,” Hildreth addressed the court. Reminding the jury that Fontana conducted his services in German, he further cautioned them, “His soul is a German soul, while his body is here in America.” “Here,” Hildreth explained, “he has enjoyed constitutional liberty under a free government since this war has commenced; but his whole labor has been in one direction, that of aiding and abetting the land of his birth—Germany.” The fact that Fontana's congregation fluctuated wildly between some 50 and 200 persons and perhaps, more importantly, that there was no evidence that anything he said ever resulted in obstructing the draft and or fomenting insubordination as charged in the indictment seemed to be moot.

Fontana's attorney B. W. Shaw appealed not to the jury's sense of patriotism but diversity. “Gentlemen of the jury, the District Attorney tells you that my client is a German” he challenged, “Why make that as a statement of fact to the exclusion of all other facts? Is it a crime to be a German minister? Is he responsible for the accident of his birth? Is he responsible because 90 percent of the people in his community were Germans, or that the German language is used in the church? The Government of the United States has from its inception invited the people of foreign lands to this country. It has been our proud boast that we were the asylum for the downtrodden and oppressed of all lands; that we were the melting pot of the world. But, unfortunately, the Government has let the pot boil as it would.”

Once the jury had delivered its verdict, Judge Amidon took the opportunity to lecture not only the defendant but the nation. “I do not blame you and these men alone,” he told Fontana, “I blame myself; I blame my country. We urged you to come; we welcomed you; we gave you opportunity; we gave you land; we conferred upon you the diadem of American citizenship—and then we left
you.” “A clever gentleman wrote a romance called ‘America, the Melting Pot,’” he continued. “It appealed to our vanity, and through all these years we have been seeing romance instead of fact. That is the awful truth.” “The figure of my country stands beside you today,” he concluded in rhetorical flurry, “It says to me: ‘Do not blame this man alone. I am partly to blame. Punish him for his offense, but let him know that I see things in a new light, that a new era has come here.’” “Punish him,” he continued, “to teach him and the like of him, and all those who have been misled by him, and his like, that a change has come; that there must be an interpretation anew of the oath of allegiance.” “It has been in the past nothing but a formula of words,” he lamented. “From this time on it must be translated into living characters incarnate in the life of every foreigner who has his dwelling place in our midst. If they have been cherishing foreign history, foreign ideals, foreign loyalty, it must be stopped, and they must begin at once, all over again, to cherish American thought, American history, American ideals.”

After finishing his speech, Amidon imposed a merciful three-year sentence on Fontana to be served in the Federal Penitentiary at Leavenworth, Kansas. But the trials took a heavy toll on him, and he became increasingly more and more vocal about his opposition to the law. On the Supreme Court, criticisms like those offered by Chaffee and Amidon, eventually swayed the two most liberal justices, Holmes and Louis Brandeis to rethink their positions. Only six months after the Schenck decision, Holmes and Brandeis filed dissents in the case of five Russian anarchist immigrants who were convicted of handing out pamphlets critical of President Wilson’s handling of developments in Russia.

Balking at the twenty-year sentences that were imposed, Holmes challenged the essence of the Espionage Act to stifle dissent especially when it fell within the normal purview of political discourse. He further chastised the government for elevating the ramblings of a few insignificant political dissenters into a question of national security. “Even if I am technically wrong,” he explained in his dissenting opinion one has a right even to consider in dealing with the charges before the Court.”

The fevered debate over freedom of speech during the First World War at least helped to set some boundaries for discourse, but regulating speech and other civil liberties in the time of war remained a delicate balance.

**Clear and Present Danger Reconsidered**

After the close of World War I, the “clear and present danger” test continued to be used, especially in cases involving prosecutions for criminal syndicalism. Criminal syndicalism laws allowed for the prosecution of any person or persons who advocated the use of violence or any other malicious or criminal act that might result in injury to persons or property, as a means of accomplishing industrial or political ends. But even with the “clear and present danger” test in place, the justices considered alternate standards. This was evident in the case of *Whitney v. California* (1927), where the Court in a 7-2 decision, upheld the conviction of California native Anita Whitney for her role in helping to organize the Communist Labor Party, which was later found guilty of violating California’s Criminal Syndicalism Statute. Writing for the majority, Justice Edward T. Sanford cited Holmes’s “clear and present danger,” test but further acknowledged the power of the state to punish words if they had a “bad tendency.” As he conceptualized the problem, the state needed the power to punish speech which might “by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government … threaten its overthrow.” While Holmes noted that Whitney’s actions showed a step toward preparation, he rejected Stanford’s resurrection of
Healthy People, Healthy Places

How to Have a Healthy Life, Community, and Country

by Lawrence O. Gostin

The United States Congress recently passed legislation to overhaul its health care system—perhaps President Obama’s most celebrated domestic achievement. Under the reform, the goal is to reduce the number of people who are uninsured drastically—way down from the current 15 percent of the population.

But will health care reform actually make a significant difference to the health of the population? The truth is that although access to medical care is critically important in a healthy and fair society, it represents only a very small fraction of what makes a population healthy. This may become intuitively obvious when we think of the major health threats facing the nation. We are vulnerable to global epidemics such as tuberculosis and AIDS, to drug-resistant infections such as hospital-acquired infections, and to emerging diseases such as SARS and novel influenza. At the same time, the United States faces a crushing burden of noncommunicable diseases ranging from diabetes and cancer to cardiovascular disease and respiratory disease.

What causes these health threats? For the most part they are caused by social, economic, and behavioral factors outside the purview of the medical care system. These include the global spread of pathogens, poor diet, physical inactivity, tobacco, alcohol, and pollution, to name but a few. These are threats that require concerted action by government, business, and civil society. But the United States does not take public health seriously. We spend less than 5 percent of health dollars on public health. Both major political parties—Republicans and Democrats—are at fault. This is because both sides value individualism over the common good. The Democrats value civil liberties, and the Republicans economic liberty. But who defends the common good?

The “Public’s” Health

A systematic understanding of “health” in America requires an examination of the terms public health and the common good. The word public in public health has two overlapping meanings—one that explains the entity that takes primary responsibility for the public’s health, and another that explains who has a legitimate expectation to receive the benefits. The government has primary responsibility for the public’s health. The government is a “public” entity that acts on behalf of the people and gains its legitimacy through a political process. A characteristic form

“… the United States does not take public health seriously. We spend less than 5 percent of health dollars on public health.”
of “public” or state action occurs when a democratically elected government exercises powers or duties to protect or promote the population’s health.

The population as a whole has a legitimate expectation to benefit from public health services. The population elects the government and holds the state accountable for a meaningful level of health protection. Public health should possess broad appeal to the electorate because it is truly a universal aspiration. What best serves the population, of course, may not always be in the interests of all its members. And it is for this reason that public health is in fact highly political. What constitutes “enough” health? What kinds of services? How will services be paid for and distributed? These remain political questions.

The “Common”
If individual interests are to give way to communal interests in healthy populations, it is important to understand the value of “the common” and “the good.”

The field of public health would profit from a vibrant conception of “the common” that sees public interests as more than the aggregation of individual interests. A nonaggregative understanding of public goods recognizes that everyone has a stake in living in a society that regulates risks that all share. Laws designed to promote the common good may sometimes constrain individual actions (smoking in public places, riding a motorcycle without a helmet, etc.). As members of society, we have common goals that go beyond our narrow individual interests.

Individuals have a stake in healthy and secure communities where they can live in peace and well-being. An unhealthy or insecure community may produce harms common to all such as increased crime and violence, impaired social relationships, and a less productive work-force. Consequently, people may have to forgo a little bit of self-interest in exchange for the protection and satisfaction gained from sustaining healthier and safer communities.

The “Good”
We also need to better understand the concept of “the good.” In medicine, the meaning of “the good” is defined purely in terms of the individual’s wants and needs. It is the patient, not the physician or family, who decides the appropriate course of action.

In public health, the meaning of “the good” is far less clear. Who gets to decide in a given case which value is more important—freedom or health? One strategy for public health decision-making would be to allow each person to decide, but this would thwart many public health initiatives. For example, if individuals could decide whether to acquiesce to a vaccination or permit reporting of personal information to the health department, it would result in a “tragedy of the commons.”

One way forward is to promote greater community involvement in public health decision making so that policy formation becomes a genuinely civic endeavor. Citizens would strive to safeguard their communities by civic participation, open forums, and capacity building to solve local problems. Public involvement should result in stronger support for health policies and encourage citizens to take a more active role in protecting themselves and the health of their neighbors.

Public health, therefore, places special responsibility on government to serve the health needs of populations. It is highly political, so that public health advocates should not shy from energetic, ongoing involvement in the political process. It is also highly participatory, so that advocates should closely collaborate with affected communities.

The Future of the Public’s Health: From Personal Rights to Societal Obligations

Measures to improve public health, relating as they do to such obvious and mundane matters as housing, smoking, and food, may lack the glamour of high-technology medicine, but what they lack in excitement they gain in their potential impact on health, precisely because they deal with the major causes of common disease and disabilities.

—Geoffrey Rose (1992)

One reason for the decline in emphasis on public health in the United States has been that libertarianism flourished during the late 20th and early 21st centuries. This was a time when scholars had great influence in shaping ideas about the salience of the individual. Both ends of the political spectrum celebrated the values of free will and personal choice. The political left espoused the virtues of civil liberties, stressing autonomy, privacy, and liberty. At the same time, the political right espoused the virtues of economic liberty, stressing freedom of contract, property privileges, and competitive markets. Personal
interests in self-determination attained the status of “rights.” Citizens were transformed from passive recipients of government largess into rights holders. In this intellectual environment, the individual’s own interests often prevailed over the interests of family, community, or country.

Certainly, the power and importance of individual freedom is beyond dispute. However, acting alone, individuals cannot assure even minimum levels of health. Any person of means can procure many of the necessities of life—e.g., food, housing, clothing, and even medical care. Yet no single individual can assure his or her health. Certain benefits can be secured only through organized action on behalf of the people—e.g. environmental protection, hygiene and sanitation, clean air and surface water, uncontaminated food and drinking water, safe roads and products, and control of infectious disease.

Likewise, health is essential for the functioning of populations. Without minimum levels of health, people cannot fully engage in social interactions, participate in the political process, exercise rights of citizenship, generate wealth, create art, and provide for the common security. A safe and healthy population builds strong roots for a country—its governmental structures, social organizations, cultural endowment, economic prosperity, and national defense.

We need to recapture a classical republican tradition that emphasizes communal obligations as well as self-importance. As members of a society, we all have a common bond. Our responsibility is not simply to defend our own right to be free from economic and personal restraint. We also have an obligation to protect and defend the community against threats to health, safety, and security.

Each member of society owes a duty—one to another—to promote the common good. And each member benefits from participating in a well-regulated society that reduces risks that all members share. People may have to forgo a small sphere of self-interest in exchange for the protection and satisfaction gained from living in a community where public health is recognized as an important value.

If government has an obligation to promote the conditions for people to be healthy, what tools are at its disposal? Below we consider six models for legal intervention designed to prevent injury and disease, encourage healthful behaviors, and generally promote the public’s health. The interventions vary in terms of their coerciveness. Therefore, different interventions may be more or less justifiable as solutions to various problems. Although legal interventions can be effective, they often raise critical social, ethical, or constitutional concerns that warrant careful study. Public health law is intellectually enticing precisely because it is so difficult, involving complex trade-offs between individual and collective interests.

**MODEL 1:**
**The Power to Tax and Spend**

The power to tax and spend is ubiquitous, providing government with an important regulatory technique. The power to spend supports the public health infrastructure consisting of a well-trained workforce, electronic information and communications systems, rapid disease surveillance, laboratory capacity, and response capability.

The power to tax and spend provides inducements to engage in beneficial behavior and disincentives to engage in risk activities. Tax relief can be offered for health-producing activities such as medical services, child care, and charitable contributions. At the same time, tax burdens can be placed on the sale of hazardous products such as cigarettes, alcoholic beverages, and firearms.

Studies demonstrate that taxation policy has a significant influence on healthful or risk behaviors, particularly among young people.
The Power to Alter the Informational Environment

The public is bombarded with information that influences life’s choices, and this undoubtedly affects health and behavior. The government has several tools at its disposal to alter the informational environment, encouraging people to make more healthful choices about diet, exercise, cigarette smoking, and other behaviors.

First, government, as a health educator, uses communication campaigns as a major public health strategy. Health education campaigns, like other forms of advertising, are persuasive communications; instead of promoting a product or a political philosophy, public health promotes safer, more healthful behaviors. Prominent campaigns include safe driving, safe sex, and nutritious diets.

Second, government can require businesses to label their products to include instructions for safe use, disclosure of contents or ingredients, and health warnings. For example, government requires businesses to explain the dosage and adverse effects of pharmaceuticals, reveal the nutritional and fat content of foods, and warn consumers of the health risks of smoking and drinking alcoholic beverages.

Finally, government can limit harmful or misleading information in private advertising. The state can ban or regulate advertising of potentially harmful products such as cigarettes, firearms, and even high-fat foods. Advertisements can be deceptive or misleading by, for example, associating dangerous activities such as smoking with sexual, adventurous, or active images. Advertisements can also exacerbate health disparities by, for example, targeting product messages to vulnerable populations such as children.

The Power to Alter the Built Environment

The design of the built or physical environment can hold great potential for addressing the major health threats facing the global community. Public health has a long history in designing the built environment to reduce injury (e.g., workplace safety, traffic calming, and fire codes), infectious diseases (e.g., sanitation, zoning, and housing codes), and environmentally associated harms (e.g., lead paint and toxic emissions).

Many developed countries are now facing an epidemiological transition from infectious to chronic diseases such as cardiovascular disease, cancer, diabetes, asthma, and depression. The challenge is to shift to communities designed to facilitate physical and mental well-being. We know that environments can be designed to promote liveable cities and facilitate health-affirming behavior by, for example, encouraging more active lifestyles (walking, biking, and playing), improving nutrition (fruits, vegetables, and avoidance of high-fat, high-caloric foods), decreasing use of harmful products (cigarettes and alcoholic beverages), reducing violence (domestic abuse, street crime, and firearm use), and increasing social interactions (helping neighbors and building social capital).

The Power to Alter the Socioeconomic Environment

A strong and consistent finding of epidemiological research is that socioeconomic status (SES) is correlated with morbidity, mortality, and functioning. SES is a complex phenomenon based on income, education, and occupation. SES inequalities in health have persisted across time and cultures and remain viable today.

Some researchers go further, suggesting the overall level of socioeconomic inequality in a society affects health. That is, societies with fewer inequalities between the rich and poor tend to have superior health status. This phenomenon is apparent in comparisons of health indicators in Organisation for Economic Co-operation and Development (OECD) countries, where life expectancy is higher in countries with well-developed social welfare systems that assure greater equity in resource allocation. The explanatory variables are the lack of social support and cohesion in unequal societies. Some ethicists, relying on these studies, claim, “Social justice is good for our health.”

Direct Regulation of Persons, Professionals, and Businesses

Government has the power to directly regulate individuals, professionals, and businesses. In a well-regulated society, public health authorities set clear, enforceable rules to protect the health and safety of workers, consumers, and the population at large. Regulation of individual behavior (e.g., use of seat-belts and motorcycle helmets) reduces injuries and deaths. Licenses and permits enable government to monitor and control the standards and practices of professionals and institutions (e.g., doctors, hospitals, and nursing homes). Finally, inspection and regulation of businesses helps to assure humane conditions of work, reduction in toxic emissions, and safer consumer products.

Indirect Regulation Through the Tort System

Attorneys general, public health authorities, and private citizens possess a powerful means of indirect regulation through the tort system. Civil litigation can redress many different kinds of

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No, Compulsory Voting Laws in the United States Would Not Work

By Vassia Stoilov

Declining or stagnant voter turnout at elections is a problem in many democracies, including the United States, which has raised concerns that representatives are elected by only a fraction of the citizenry. It is in this context, and in the name of democracy, that proponents of compulsory voting have called for its introduction in the United States. They argue that governments elected by only a small percentage of the citizenry are unrepresentative of the population and consequently, may not be perceived as legitimate. While introducing compulsory voting would undoubtedly raise voter turnout in elections, as it has done in the past in other countries, it does not automatically result in the legitimacy or representativeness of the elected government. In addition, compulsory voting clashes with some of the defining features of American democracy—it infringes on individual liberties and the freedom to choose to participate, or not participate, in political or civic activities.

Compulsory Voting in the United States and Abroad

Compulsory voting laws conceptualize voting as a citizen’s duty and oblige eligible voters to participate in elections or be liable to sanctions. The United States already has a history of compulsory voting. Georgia and Virginia had statutes imposing fines for not voting in the 18th century, but the statutes were never enforced, and thus never came under judicial scrutiny. Also, North Dakota and Massachusetts amended their constitutions at the turn of the 20th century to allow for compulsory voting, but the state legislatures never enacted statutes to implement it. No such legislation has existed at the federal level though.

Internationally, about 37 countries currently have legislation that provides for compulsory voting either at the national or local levels. Compulsory voting laws are not uniform, and there is widespread variation in the severity of sanctions imposed for noncompliance. Sanctions can range: Australia, Cyprus and Chile impose penalty fines; Peru prohibits banking or other public administrative transactions for three months; Brazil prohibits nonvoters from taking professional examinations, receiving wages, or renewing enrollment in official schools or universities; and Cyprus even imposes jail sentences. There is also variation in the extent to which compulsory voting laws are enforced in practice. While Australia, Belgium, and Fiji, for example, strictly impose sanctions, enforcement of compulsory voting laws in countries such as France and Greece is weak. Cuba is an interesting case of a nation that does not have a mandatory voting law, but election commissions keep tabs on those who habitually do not vote and may label them as unpatriotic and subject them to a fine.

Compulsory Voting Clashes with Defining Features of American Democracy

Compulsory voting undoubtedly increases turnout. In national elections, compulsory voting has increased turnout on average by some 10 to 15 percentage points—and even more in regional and local elections.1 Australia, under compulsory voting, has had an average turnout of 94–95 percent since its adoption in 1945. In contrast, U.S. presidential elections typically have turnout rates in the low 50 percent; midterm senate and congressional elections turnout levels fluctuate between 30 percent and 40 percent; and state gubernatorial elections have seen voter turnout as low as 23 percent.2 Additionally, academics have identified that the American nonvoters tend to be younger, less educated, poorer, and less connected to either of the two major political parties than their voting counterparts.

What do you think? Vote at Insights online! www.insightsmagazine.org

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The deterioration of the center in American politics is one of the most distressing signs of dysfunction in our political system. It has been obvious inside Congress, where lawmakers (especially those in the middle) who deign to work toward the middle and across party barriers are often ostracized or punished. The polarization is even more apparent outside Washington, in campaigns and elections.

**Divided Political Landscape**

In contemporary American politics, the monomaniacal focus of many party leaders is on appealing to the party bases rather than on voters in the middle; it is all about mobilization and turnout, and that means harsh rhetoric, scare tactics, and appeals to issues that most motivate voters who tend to veer toward ideological extremes.

We can see the impact in elections. In 2006, Joe Lieberman, switched from Democrat to Independent after losing a primary challenge for deviating too much from his party’s orthodoxy. Conservative Republican House member Bob Inglis of South Carolina was bounced by his party earlier this year after his collapse in a Republican primary from a challenge from the Right.

The primary challenges—and the mere threat of a primary challenge—are joined by other tactics, such as the independent expenditure campaign the Club for Growth ran against the health reform bill in 2009 and 2010 that intimidated conservative Charles Grassley away from cooperation with the majority, and the frequent censure petitions brought up against conservative Lindsey Graham in various South Carolina county Republican enclaves. All are designed to purge the parties of non-purists or to bludgeon the potential apostates to toe the party line and not to sleep with the enemy.

The two parties are too tied to their activist wings to do anything to reduce the power of the electromagnets pulling candidates and elected officials to the edges and away from the middle, or to change the issue focus away from the things that excite or frighten their party base voters, or to change the extreme rhetoric and scare tactics used to frame the issues.

These dynamics are not just occurring within the parties and through their nominating processes; they are deeply rooted in our culture. Division, extreme rhetoric, and partisan rancor are reinforced by talk radio, the blogosphere, and cable news.

**A Reform to Unify the Political Landscape?**

One simple, powerful reform could transform our politics, our dialogue, and even our policy outcomes. That reform would be mandatory attendance at the polls. This has over time boosted Aussie turnout from less than 60 percent before the process was implemented in 1924 to well over 90 percent. The fine itself matters; it has also led to an ethos that there is an obligation for...
citizens to vote. Polls show overwhelming public support in Australia for their mandatory turnout system.

Australians do not have to vote for any candidates; they can opt for “None of the Above.” Two or three percent do just that. Another small share of the citizenry can petition for exemptions, on grounds of illness, travel, emergencies, religious, or other reasons. A few percent just pay the fine. But the other citizens do vote. With near-universal voting, the whole political dynamic changes. Australian politicians know that their base voters will all be at the polls—and so will the other side’s fiery partisans and ideologues. So the name of the game changes from trying to get your base into a frenzy to encourage their turnout into trying to appeal to the persuadable voters in the middle.

In Australia, politicians spend less time on the kinds of issues that excite single-issue voters, such as guns, same-sex marriage, or abortion, and more time on issues that appeal to the broad middle, such as deficits, energy, and education. Just as important, the rhetoric moves away from exaggeration and appeals to the extremes and more to moderation and reason. I don’t want to paint a wholly Pollyannish picture here—Aussie politics have plenty of rough-and-tumble—but politicians of all stripes tell me that the dialogue is better, richer, and more reasonable because there is a price to be paid for appealing to base instincts.

Imagine how our politics might change if the United States had a comparable system, where both parties’ professionals knew going into each election campaign that the two parties’ bases would both turn out in equivalent proportions. Huge sums of money now spent on get-out-the-vote efforts would no longer be needed. Consultants and pollsters who spend huge amounts of time and money trying to figure out the best ways to gin up turnout—testing divisive issues, doing focus groups to see what messages elicit the most anger or outrage—would instead have to find issues and rhetoric that appealed to persuadable voters in the middle. Bombastic political figures might still get attention for their fiery comments and get an infusion of campaign cash, but their appeal would also be sharply curtailed by their negatives with the most important voters, while more serious lawmakers would gain in traction. The incentives for mild rhetoric over fiery rhetoric would change significantly.

To be sure, the economic model that has made partisan news sources successful will remain, and a larger culture that emphasizes “info-tainment” over information will, if anything, get stronger in an age of media fragmentation. But the use of social networking to build larger communities would also expand to include more centrist and independent groups in a different election system with near-universal turnout.

One should be under no illusions about the likelihood of adopting this approach in the United States. Americans don’t like mandatory anything. An Associated Press survey in 2006 found 61 percent of Americans opposed to compulsory voting, with only 33 percent in favor. But it is worth positing the idea for more serious debate, especially since the political system’s culture has become so much more coarsened since 2006. If we had a system like the Australian one in place, we would have

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**Arguments for Compulsory Voting**

- Most nations require citizens to do things that are in the public interest, such as paying taxes, sending children to school, and serving as jurors. Voting is just as important.
- Democracy is based on the idea that everyone participates, is responsible for the common good, and actively selects who will represent you.
- If political parties do not have to spend money trying to convince people to vote, they can focus more on educating people about their ideas and candidates.

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The panacea for low levels of political participation is compulsory voting, as its advocates would argue. But democracy is more than just turnout at elections. Increased political participation can make a democracy more robust and legitimate elected governments, but proponents of compulsory voting should be reminded that more participation in elections does not automatically translate into more legitimacy for the elected government or into more representativeness in its policies and priorities. Let us not forget that the Soviet Union and the Soviet Bloc countries, along with Iraq under Saddam Hussein, were fervent believers in compulsory voting. But, needless to say, having a nearly 100 percent turnout hardly characterized them as democracies or legitimized their “elected” leaders. Compulsory turnout, in other words, does not guarantee legitimacy, political equality, representativeness, or inclusiveness.

Compulsory voting interferes with individual liberty and violates the principle of free elections. Compulsory voting violates the U.S. constitutional “right to refrain from speaking” famously set forth in West Virginia State Board of Education v. Barnette, which is widely held to be the classic statement of the belief that the First Amendment encompasses both the right to speak and the right not to speak.

The tools for enforcing compulsory voting, which in other countries, as described above, can range from denial of public services, to payment of fees and to imprisonment, are also something to consider. How is paying a fee for not showing up at the polls more acceptable than paying a fee to be able to vote? How is being imprisoned for not voting an appropriate inducement for political participation?

Voluntary voting has been a staple of American democracy. The ability to voluntarily and freely choose go to the polls on election day, as opposed to go there “motivated” by the sanctions that would ensue if you didn’t, has been a cherished value within the United States as well as one of the main tenets in U.S. democracy promotion abroad. The United States has long promoted free and fair elections around the world. And what has generally been understood as “free elections” are those where voters can cast their ballots freely, without fear or intimidation. This prerequisite for free elections is not met, however, if there are sanctions for showing up or not showing up at the polls.

Voters should be motivated to go to the polls based on the issues and candidates put forth before them during an election, not because the government demands their presence at the polls for the sake of increasing voter turnout and certainly not because they fear repercussions for not voting.

People should have the right to refuse to participate in politics. Just as the right of free speech includes the right to be silent, the right to vote should include the right NOT to vote.

Forcing people to vote in what they believe are fraudulent or meaningless elections breeds cynicism about democratic processes and betrays core democratic principles.

It is expensive for nations to establish and maintain compulsory voting systems. There are cheaper and better ways to encourage voter participation.
Students in Action

Future Civic Leaders Engage Young People

by Colleen Danz

Future Civic Leaders—Providing Young People with the Tools to Make a Difference

Learning about the political process and the way our government works is one thing. Doing something about it is another. The Washington, D.C., nonprofit organization, Future Civic Leaders (FCL), not only provides young people with knowledge, but empowers them to act and make a difference.

Through summer conferences and high school clubs around the country, FCL empowers students to take part in civic and political processes to improve their community.

“Our mission is to empower high school students and to focus on action and participation,” stated Allen Gannett, founder and CEO, Future Civic Leaders. “A lot of programs focus on getting people excited, but we want to channel the tools of simulation into action.”

Future Civic Leaders kicked off their 2010/2011 year in July with their inaugural Summer Leadership Conference held in Washington, D.C. Forty students from underserved school districts across the country arrived in D.C. this summer to gain the skills to make a difference in their community.

During the conference, students participated in campaign simulations in which they received direction from the experts in the field. John McConnell, President George W. Bush’s speechwriter, provided participants with insights on crafting an effective and well-versed speech. Students then put that knowledge to use during the mock election as they wrote speeches for their campaigns. Other hands-on lessons included creating advertisements and promos for their candidates and fund-raising to support their campaign.

“It was a really good experience, I didn’t know what to expect,” stays Reem Hashim, FCL Summer Leadership participant, who currently is a senior at Robert E. Lee High School in Springfield, VA. “I thought it would be boring lectures, but it really gives you a hands-on experience. A once in a lifetime experience.”

In the mock campaign, the young people organized into groups of five and each group had a candidate to support. Within the groups, the students rotated through various roles such as speechwriter, fund-raiser, and each represented the fictional candidate at some point.

Additional guest speakers included Ed Henry, CNN Anchor; Mark Halperin, MSNBC anchor, TIME editor, and author of Game Change; James Kotecki, writer, producer, and host of KoteckiTV, an award-winning online video series at Polticco.com; and Representative Frank Pallone (D-NJ). In addition, Brian Donahue, founder, CraftDC, a media firm in Washington, D.C., and occasional FOX News contributor, guided youth through creating campaign marketing materials. Also, Parag Mehta, former director, external communications for the Democratic National Committee and Allyson Schmeiser, fund-raiser advisor, Republican National Committee, offered tips on effective communication and raising campaign money.

“He [Parag Mehta] gave us good tips on how to encourage people to vote for a campaign and how to advocate for
our issues,” explains Reem. “It was very insightful.”

In addition to guest speakers and hands-on experiences, FCL Summer Leadership Conference participants also toured the Democratic National and Republican National Committee headquarters and had the opportunity to visit the House of Representatives. Congressman Frank Pallone (D-NJ) provided participants with a personal tour of the House and offered some insight on what life was like as a member of Congress. During the tour, students also took a moment to sit in the seats of Congress.

“It was a great honor,” Reem exclaims of her experience visiting Congress.

Fellow participant Zeni Saife–Selassie, a senior at Annandale High School, Annandale, Virginia, also commented about the opportunity to visit the House. “It was an absolutely amazing experience. I felt like I was a member of Congress and it opened my mind to possible future careers.”

**Future Civic Leaders—High School Chapters**

At the high school level, student leaders, such as Zeni and Reem, organize Future Civic Leaders’ High School Chapters with the assistance of a teacher advisor and resources from the FCL headquarters, specifically through Dan Morse, national high school director.

“We want to empower the students and teach them, and show them that politics isn’t too far out,” states Dan Morse. “Future Civic Leaders will enable them to take the next step of civic engagement and will provide them with a lot of paths to show that being civically active is easy.”

The FCL high school chapter program works in two phases. Once a teacher advisor has been selected and a group of students has committed to serve as an executive board to their chapter, the FCL high school chapter kicks of their school year with local speakers and debates. The students build up to a mock mid-term election in November, complete with fund-raising, voter registration, speeches, and designing political ads.

Students are evaluated on their mock campaign ad election from external sources through FCL. Headquartered in D.C., FCL calls upon various national political operatives to serve as judges. The mock campaigns are evaluated based on how effectively they communicate their message. FCL provides the chapters with tips and techniques, but it is up to the students on how to implement strategies and approaches in their campaign. As an incentive, student winners of the mock election will receive scholarships.

After the winter break, students return to tackle the second phase of their chapter’s mission: making a difference in the community. The skills they acquired at the Summer Leadership Conference and the lessons they learned through the mock election simulation and the guest speakers during the fall will be used to implement a plan of action. Student chapters will select an issue in their community to champion. Whether it is adding a bike lane downtown, fixing the sidewalks near the school or something more complex such as tax reform, the high school chapters will select a cause and pursue results through political and government channels.

“It’s a great way to make a difference in the community and learn about the political system,” emphasizes Zeni. “It’s also a way to see how young people can make a difference.”

While Zeni’s chapter has not yet identified a cause for them to address in the spring, her chapter has a solid plan for their fall semester and appreciates the support from the Future Civic Leaders’ headquarters. FCL provides the high school chapters with templates for letters to mayors and government representatives, as well as one sheet summaries on political and government processes. FCL chapter manager Dan Morse oversees the high school chapters and is in direct contact with student leaders. He also works with the chapter to identify a political mentor within their community.

While FCL provides the student chapters with the tools, resources and feedback to achieve success, it is the students who are responsible for their chapter’s success.

“We’re here to show that you can make a change now,” Dan says. “It’s incredibly empowering to realize that you can make a difference in your local government; an everyday citizen can make a difference. We’re also here to show that it’s a fun process and a great learning opportunity and a good experience.”

**Resources**

Visit Future Civic Leaders online at [www.futurecivicleaders.org](http://www.futurecivicleaders.org) for information about how to start a chapter at your high school. Be sure to watch the mini-documentary from the FCL Summer Leadership Conference in which students describe their experiences and thoughts on civic engagement. One 2010 participant explained, “Being politically driven is not only beneficial to me, but my community … it really does matter; you really do have to be a leader with yourself and within your community.”
Many people, particularly teenagers and preteens, probably don’t recognize the ways copyright and intellectual property laws affect their everyday lives or contribute to the common good. The following discussion guide will help leaders facilitate a discussion about the roles copyright and intellectual property laws play today, and how technology is forcing them to change.

### Who Owns That Song?

At this point, participants might offer suggestions focusing on ownership and control. Additionally, participants might discuss who should be eligible to make money from creative works or inventions. Using a definition from *Black’s Law Dictionary*, guide participants through these resources that lawyers might use to answer this question.

In *Black’s Law Dictionary*, copyright refers to “a property right in an original work of authorship (such as a literary, musical, artistic, photographic, or film work) … giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.” If you have the copyright to a work, you have the ability to control how it is distributed.

**Why is it important to have laws that protect these ownership rights?**

There are a number of possible responses participants might offer, including encouraging advancements in technology and creativity, and how copyright makes that possible; benefiting society by granting everyone access to assets such as medicines and creative works of great value; and protecting and clarifying the rights to ownership and control.

**Why would you want to control your creative works? How long should you be able to hold a copyright? What is fair?**

Participants’ answers might focus on the ability to make money and be compensated for time and effort. You might also highlight the issue of artistic control, for example, that artists may want their music to only be available for free or limit how and where the music may

### This lesson will ask students to:

- Examine the definition and purpose of copyrights
- Discuss the role of copyright laws in today’s society
- Consider the implications of everyday scenarios involving copyrights on individuals and the public

### Important Terms

**Copyright:** set of exclusive rights granted to the owner of an original work, including the right to copy, distribute, and adapt the work. Copyright does not protect ideas, only their expression.

**Fair Use:** legal doctrine that allows for the limited use of copyrighted material without permission from the copyright holder, such as for commentary, criticism, news reports, teaching, and research.

**Public Domain:** original works not protected by copyright, which may be copied, distributed, and adapted by members of the public.

### What Is Copyright?

Start the discussion by drawing the participants’ attention to the current issues.

With developing technologies and new mobile devices, many people don’t think twice about copyrights when it comes to downloading the newest chart-topping single or latest magazine story. However, copyright and ownership issues haven’t simply gone away as it has become easier to access creative works. Instead, it is the debates surrounding them that have changed and will continue to do so.
be used. On the other hand, a writer may want to charge for essays if they are being distributed to the general public but may want to distribute them for free to classrooms. Another writer may want to receive compensation regardless of the distribution channel.

Who Owns That Song?
To help participants understand practical issues involving copyright, present the following hypothetical situation and discussion questions.

(A handout for participants may be downloaded at www.insightsmagazine.org.)

There are two music groups receiving critical acclaim. The FrontStreet Boys is a group of young men who met in college and started singing together. A record executive from Mega Records was at an early performance, loved what she heard, and signed the FrontStreet Boys. Since then, the Boys have been led by Mega Records through training, “image consulting,” and recording. Mega Records covered all costs, and the FrontStreet Boys are now bringing in millions of dollars to the record company, with the Boys getting a share. The Boys gave up their college scholarships to pursue their music careers.

The Jim Brothers are three teenage brothers who have been singing together for years at family and community events. Their parents bought the Brothers all of their instruments and recording equipment. The Jim Brothers record their own music and release it through YouTube and their Web site. They never included copyright notices or restrictions on the site. The Brothers are on track to attend medical school and become doctors in their father’s very successful medical practice. They aren’t making music to make money; they merely want to share their passion with the world. Recently, the Brothers heard a FrontStreet Boys song currently climbing the charts that sounds, to the Brothers, like one they wrote, recorded, and released a year ago. They had their attorney contact the FrontStreet Boys’ agent to complain. However, the FrontStreet Boys say that the song is theirs and that they are the first to release it commercially.

The Jim Brothers are upset. Why? The discussion may include the fact that although the Brothers weren’t necessarily trying to make money, they probably aren’t happy that someone else is making a lot of money off of what they see as their creative efforts. They may also be upset about not getting the appropriate credit.

What should the Jim Brothers do next? You will likely get a variety of answers ranging from: “Sue!” to “Nothing—they were giving away their music for free!” Give participants an opportunity to explore different points of view.

The Jim Brothers are thinking about filing a lawsuit against the FrontStreet Boys. How might they prove owner-ship of the song? Do you think it would be different if the Jim Brothers had put any restrictions on their music or not released it for free? What if the Boys gave the Brothers credit? The discussion could include who “owns” the Jim Brothers’ music; that the Brother’s don’t charge for their music; how similar the Boys’ song has to be to show it “belongs” to the Brothers (one bar? a chorus?); whether giving credit to the Brothers is sufficient; whether the Brothers are entitled to monetary compensation; that because there are no copyright restrictions and no charges, any Jim Brothers’ music is “fair game” could be what the Boys argue; that Mega Records and the Boys are making money and the Brothers aren’t; and that the Brothers never intended to make any money.

How might the Boys and the Brothers have avoided this conflict altogether?
The participants may start to articulate the line copyright laws must walk: protecting the interest of those who create works but also allowing for an open market of creativity. If necessary, pose questions that help participants appreciate this crucial point. As for how the conflict might have been avoided, the FrontStreet Boys could have simply written a song that sounded nothing like the Jim Brothers’ song. They could have contacted the Brothers before using the song or given the Brothers credit. For the Jim Brothers, they could have included a copyright notice on their Web site, charged for their music, or communicated with the Boys after learning about the song and reached an agreement that pleased them both.

Wrap Up
Today, technology has changed the way we create and distribute creative and artistic works—it is easier and, often, instantaneous. As technology has changed, so too have our expectations. Many people expect to be able to listen to a song for free, share a book with friends, or paste music videos into personal projects. Copyright laws, however, restrict our ability to do so, often to protect the common good.

In many ways, the law is constantly changing to meet current and developing...
Editor’s Note: This article also appeared in the September 2010 issue of Social Education, in the “Looking at the Law” feature.

Federal law had long prohibited corporations and unions from using general treasury funds to make either direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate. It didn’t matter where the ads appeared—print, online, or TV. In any medium, corporations and unions were barred from printing or broadcasting political ads that said “vote for x” or “don’t vote for y.”

The rationale for these restrictions was plain: Congress believed that without them, rich corporations and unions could use their deep pockets to buy ads that would drown out other speech and unfairly influence federal elections. All that seemed specifically at issue in Citizens United, then, was the scope of some amendments to the Federal Election Campaign Act (FECA). The amendments were part of the Bipartisan Campaign Reform Act of 2002 (BCRA), more commonly referred to as “McCain-Feingold.” These provisions added several additional campaign finance restrictions beyond the original ban on express advocacy.

Under McCain-Feingold, corporations and unions were also barred from using their general treasury funds to make independent expenditures for so-called “electioneering communications.” This ban, which includes any corporate or union ad that “refers” to a clearly identified federal candidate even if it doesn’t expressly say “vote for x” or “don’t vote for y” was a broader prohibition than the preexisting FECA bans. Nevertheless, these new restrictions only applied in a few specified situations.

They did not apply to print or Internet communications, but only to “broadcast, cable, or satellite” communications—essentially, radio and TV ads. Even then, they applied only to advertisements that featured a candidate for federal elections, and in the case of presidential elections, only to communications that were distributed so as to be capable of reaching 50,000 potential voters. And they only kicked in 30 days before a primary election and 60 days before a general election.

In the run-up to the 2008 election, a seemingly narrow question arose: Could the McCain-Feingold restric-

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that the act’s disclosure rules also applied to the organization’s movie ads.

Through the special BCRA procedures, Citizens United then appealed directly to the Supreme Court. When the briefs were filed, Citizens United argued not only that its movie was not the “functional equivalent” of express advocacy but that it also was not a form of “electioneering” under McCain-Feingold.

Oral arguments were held on March 24, 2009. At the opening gavel, the order of battle looked like this: Justices Kennedy, Scalia, and Thomas were deeply skeptical of the constitutionality

The issue before the justices, then, was whether McCain-Feingold, which clearly barred corporations from funding a traditional 30- or 60-second political attack ad in the 30-day period prior to a presidential primary, should be read as also barring the same corporation from funding a 90-minute movie that, while not using the words, “please don’t vote for Senator Hillary Clinton,” was intended to convey that very message.

At the outset, the Citizens United attorney faced aggressive questioning as he tried to argue that, even if it might be constitutional for Congress to bar a 1-minute ad, it couldn’t bar a 90-minute one. Even Justice Kennedy, upon whose vote Citizens United was counting, seemed unpersuaded:

If we concede—and at the end of the day you might not concede this, but if we take this as a beginning point, that a short, 30-second, 1-minute campaign ad can be regulated, you want me to write an opinion and say, well, if it’s 90 minutes, then that’s different ... [I]t seems to me that you can make the argument that 90 minutes is much more powerful in support or in opposition to a candidate.”

So this didn’t look too promising for Citizens United. But the tide turned dramatically when, in the course of addressing hypothetical questions designed to gauge the government’s view of the scope of McCain-Feingold, the government’s attorney in this first round found himself sounding like he was defending the constitutionality of banning books that contained even small passages that could be construed as “the functional equivalent of express advocacy.”

Slate.com’s senior legal correspondent Dahlia Lithwick describes what happened:

But when Justice Samuel Alito asks whether the government—if it can regulate documentaries—might also regulate a book containing “express advocacy” prior to an election, Stewart agrees that it might.

“That’s pretty incredible,” splutters Alito. “You think that if—if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?” Not banned, clarifies Stewart. Congress could just “prohibit the use of corporate treasury funds” to publish it. Oh, Malcolm Stewart. … You did not just say the government might engage in a teensy little bit of judicious, narrowly tailored book-banning, did you?

At this point, a horrified Anthony Kennedy gets even paler than his usual pale self: “Is it the Kindle where you can read a book? I take it that’s from...
a satellite. So the existing statute would probably prohibit that under your view? … If this Kindle device where you can read a book which is campaign advocacy, within the 60- to 30-day period, if it comes from a satellite, it can be prohibited under the Constitution and perhaps under this statute?” Again Stewart clarifies that it wouldn’t be banned, but a corporation could be barred from using its general treasury funds to publish such a book and would be required to publish it through a PAC. The chief justice seeks to clarify that this would be so even in a 500-page book with only one sentence that contained express advocacy. Stewart cheerfully agrees. The chief justice wonders whether this would apply even “to a sign held up in Lafayette Park saying vote for so-and-so.” Stewart doesn’t quite say no.

Well, then, Justice Kennedy pointed out, if the government saw no distinction under the act between barring a 30-second attack ad and barring Citizens United’s 90-minute movie, that would seem to mean that if the Court thinks application of McCain-Feingold to a 90-minute film is unconstitutional, then “the whole statute should fall.”

Thus a case that had seemed to pose a relatively simple question regarding whether the McCain-Feingold regulations were broad enough to cover Hillary: The Movie veered into much bigger questions: was the McCain-Feingold Act a constitutional limitation on corporate spending on campaign ads and what was the continuing vitality of the Supreme Court precedents that had previously upheld such limits?

Citizens United then took another unusual twist when, rather than issuing a decision by the end of the term in June 2009, the Court ordered rearguments in September 2009—immediately before the traditional opening of the new term in October. Even more surprising, the Court issued an order asking for additional briefing on whether it should overrule its two precedents that had upheld the constitutionality of limits on corporate spending in federal elections.

The reargument before the Court had fewer surprises, but lots of firsts: It was the first Supreme Court case for the newest justice, Sonia Sotomayor, and it was the first Supreme Court argument by the then-new solicitor general (and, as this issue went to press, Supreme Court justice) Elena Kagan.

The attorneys for Citizens United and the government squared off on whether corporations should be viewed as having the same rights as people under the First Amendment, or whether as the Court had previously held, corporate speech could be limited in ways that individual speech could not. Justice Scalia, who is always good at making concise summaries of opposing viewpoints, did so here at oral argument, telling the attorneys who were urging the Court to overturn its decisions upholding corporate spending restrictions:

There are two separate questions that have been raised in opposition to your position. One is that we should not resolve a broad constitutional issue where there are narrower grounds and … an entirely separate question is the issue of stare decisis.

In the end, neither objection deterred a majority, led by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Alito, and Thomas, from overruling its precedents and striking down the McCain-Feingold limits on corporate spending.

In the majority’s view, the prohibitions amounted to an outright ban on speech that was backed by criminal sanctions and therefore in violation of the First Amendment. “If the First Amendment has any force,” Justice Kennedy wrote, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”

Justice Stevens filed a 90-page dissent joined by Justices Ginsburg, Breyer, and Sotomayor that hammered at the majority’s decision to treat corporate speech the same as human speech:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

Moreover, Justice Stevens noted, the idea that Congress could not regulate
corporate political speech ahead of elections would have been news to the Framers.

The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.

To Justice Kennedy, however, the briefings and reargument had clarified that at bottom this case involved the government’s attempt to censor unpopular political speech, which is the kind of speech that lies at the very core of the First Amendment.

When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

**What Effect in the 2010 Elections?**

Two points seem clear about the decision: (1) content restrictions on ads bought by corporations and unions are no longer permissible; (2) neither are time-period restrictions on when corporations may buy political advertising. Everything else—including the short- and long-term practical effects of the Court’s decision on political campaigns, remain hotly debated, and for a nonexpert, almost impossible to gauge with any confidence.

Critics believe as, President Obama does, that the Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans. This ruling gives the special interests and their lobbyists even more power in Washington—while undermining the influence of average Americans who make small contributions to support their preferred candidates.

Indeed, the critical reactions from (primarily) Democrats was immediate and unusually harsh. “By acting in such an extreme and unjustified manner, the (high) court badly damaged its own integrity,” said Senator Russ Feingold (D-Wisc.). “By elevating the rights of corporations over the rights of people, the court damaged our democracy.”

The decision’s supporters, on the other hand, agree with Justice Alito, who was caught mouthing the words “not true” at the State of the Union address in reaction to the president’s claim that the justices sitting just a few feet away from him had “reversed a century of law to open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”

On the one hand, said Floyd Abrams, the First Amendment attorney who argued part of the case on behalf of Citizens United, it was a sweeping decision that made it very clear that “the First Amendment protects corporate speech about politics and government. It is not for Congress to decide who can say what.” But on the other hand, he told Politics Magazine, the practical effects might not amount to all that much, noting that “in about half of the country’s states, unlimited corporate expenditures are already permitted and there isn’t much of a difference in corporate spending in those states compared with others.”

Other commentators have wagered that big corporations may be wary of alienating potential customers by associating themselves too closely with one political candidate or another. And Congress is moving quickly to toughen that deterrent by working to enact strict new disclosure requirements designed to ensure corporations cannot mask their identity by funneling their political ad money through other groups.

Meanwhile, the campaign ads have already begun. One of the very first appeared in Texas, when KDR Development Inc. ran ads in the Jacksonville Daily Progress, the Tyler Morning Telegram, and the Panola Watchman attacking a Republican candidate in a primary race for Congress, Chuck Hopson. (Hopson went on to win the race handily.)

Unions too may be getting into the act—in Arkansas, the Communications Workers of America has been preparing TV ads that seek to tie Senator Blanche Lincoln (D-Ark.) to “Big Oil” and the British Petroleum disaster in the Gulf.

In the near term, perhaps the biggest test of the campaign ground rules will be watching how the money flows this fall from corporations and unions affected by health care reform. “The most alarming part of Citizens United is that theoretically insurance companies could go to members and say, ‘Oppose health reform, or I am going to run a million-dollar ad campaign in your district,’” Dan Pfeiffer, the White House communications director, told Time magazine. “That’s the nightmare scenario.”

Time will tell!
of the bad tendency doctrine. To help make his point, Justice Brandeis penned what is still regarded as one of the most powerful defenses of free speech and its necessity in a democracy. Joined by Holmes, Brandeis reminded his colleagues that there was in fact a “wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy.” This, he continued, “must be borne in mind.” “In order to support a finding of clear and present danger,” he concluded, “it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.” Although Anita Whitney went to prison, Holmes and Brandeis had laid the groundwork for a reassessment of the clear and present danger test. Over the course of the next three and half decades their position slowly won out. Some thirty-seven years later, evidence of this shift would be clear as a new band of extremist voices came up against the old criminal syndicalism laws. During the 1960s, Holmes’s clear and present danger test was revised to meet a different type of challenge. In June of 1964, Clarence Brandenburg, a Ku Klux Klan leader near Cincinnati, Ohio, was arrested after footage of him making a speech advocating violence against Jews, Blacks, and elected officials who supported integration aired on national television. Ohio officials justified his arrest to prevent the spread of violence. He was charged with violating the Ohio Syndicalism Act. Enacted in 1919 to meet the threat posed by radicals during the First World War, the act made it a crime for anyone to “advocate or teach the duty, necessity, or propriety” of violence as a means of achieving “industrial or political reform.” It also sought to punish any person who might circulate, display, or publish any book or paper justifying such advocacy; or attempting to defend the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism.”

Under the terms of the law, Brandenburg’s case seemed hopeless. However the court’s view had changed substantially in a direction more consistent with Brandeis’s dissent in Whitney. After Whitney the Court more carefully scrutinized the line between advocacy and preparation, moving away from the bad tendency doctrine that sent Anita Whitney to jail. Citing its ruling in the 1951 case of Dennis v. United States, the Court overturned Brandenburg’s conviction; the majority holding that “the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” “A statute which fails to draw this distinction,” the court concluded “intrudes upon the freedoms guaranteed by the First and 14th Amendments.” In short the Brandenburg ruling allowed the government to punish the advocacy of illegal action only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Far more objective than the original clear and present danger test, the imminent lawless action doctrine remains the litmus test of the modern doctrine of free speech. Nevertheless, distinguishing between protected speech and action remains hotly contested.

In March of 2010 the United States Supreme Court agreed to hear the case of Fred Phelps, and his small Kansas based congregation, who gained national

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This one will I spare continued from page 11

For Further Reading


Strum, Philippa, When the Nazis Came to Skokie: Freedom for Speech We Hate, University Press of Kansas, 1999.

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F O R  D I S C U S S I O N

1. Do you think that freedom of speech should be regulated differently during times of crisis than “normal” times? Why or why not? If so, how?

2. What is the difference between the clear and present danger and imminent lawless action standards in determining when the government can regulate free speech? Which do you think is a more appropriate test? Why?

3. How do you think freedom of speech contributes to the common good? How do you think regulating speech contributes to the common good?
challenges and trends; the law of copyright and intellectual property is no exception. Of course, what is true with regard to our expectations and experiences today probably wasn’t true yesterday and might not be true tomorrow. Just as technology, our expectations, and our values change, so too must our laws.

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Learning Gateways
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attention when they began disrupting military funerals with protest signs, blaming U.S. military deaths in the Iraq War on the U.S. policy of toleration toward homosexuality. Apologists for Phelps attempted to cloak his actions in the blanket of free speech; however the families of those burdened by his disruptions viewed them as an invasion of privacy. In a similar vein, in September of 2010, the pastor of a small Florida Church came under the national spotlight after he announced his intention to burn copies of the Muslim Holy Book, the Quran, to commemorate the terrorist attacks of September 11, 2001. The proposed burning set off a firestorm of controversy with military officials in Iraq and Afghanistan warning that the performance of such a protest would put American forces at risk. Although government officials urged the pastor, Terry Jones, to reconsider, the state respected the boundaries between speech and action, acknowledging that the threat of such an act, while unseemly, was not the same as carrying it out. Government restraint in the end seemed to pay off after the pastor failed to go through with the proposed protest. But the Jones case and that of Fred Phelps helped to raise an interesting dilemma.

With the advent of new technology, the “puny anonymities” that Holmes dismissed earlier make a much larger impact than ever before. Like Clarence Brandenburg, anyone can beam his or her hopeful or hateful messages to the world. But limiting such dialogue in a democracy is problematic, as Justice Holmes discovered nearly a century ago, and the answer is far more complicated than reducing every scenario down to clear and present dangers, and more akin to balancing not always compatible freedoms in a large and diverse democracy. “The character of every act,” Justice Holmes observed in Schenck, “depends upon the circumstances in which it is done.” In some sense the imminent lawless action doctrine returns to that sage advice, by allowing judges to look at the particulars rather than painting in broad strokes as the clear and present danger test had done. By separating the unseemly and or unsavory aspects of a message away from its imminent potential to cause harm the Brandenburg decision and subsequent case law has found a way to preserve civil liberties while answering the call of public safety.

Remember to visit Insights online for additional resources on how the law regulates speech for the common good, including links to summaries and primary sources related to relevant Supreme Court cases.

2011 National Online Youth Summit

The government, advocacy organizations, corporations, and we as individuals play a role in making important decisions about our health. Join students across the country in critical analysis and discussion of health-related Supreme Court decisions and legislation, legal minors and youth privacy, regulatory institutions, food and nutrition, and global health issues.

For more information, or to register, visit: www.abanet.org/publiced, and click on “NOYS.”

It’s the Law: Guarding the Nation’s Health

This one will I spare
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Healthy People, Healthy Places
continued from page 15

public health harms: environmental damage (e.g., air pollution or groundwater contamination), exposure to toxic substances (e.g., pesticides, radiation, or chemicals), hazardous products (e.g., tobacco or firearms), and defective consumer products (e.g., children’s toys, recreational equipment, or household goods). For example, tobacco companies, in 1998, negotiated a Master Settlement Agreement with American states that required compensation in perpetuity, with payments totaling $206 billion through the year 2025.

Health and Life
The government, then, has many legal “levers” designed to prevent injury and disease and promote the public’s health. Legal interventions can be highly effective and need to be part of the public health officer’s arsenal. However, legal interventions can be controversial, raising important ethical, social, constitutional, and political issues. These conflicts are complex, important, and fascinating for students of public health law.

In the late 20th century scholars and politicians posed a key question: “What desires and needs do you have as an autonomous, rights-bearing person to privacy, liberty, and free enterprise?” Now it is important to ask another kind of question, equally important to human well-being: “What kind of a community do you want and deserve to live in, and what personal interests are you willing to forgo to achieve a good and healthful society?” Using law as a tool, we can create a community where health is a salient public interest.

For Further Reading


www.publichealthlaw.net

F O R  D I S C U S S I O N

1. Why does the author contrast individualism and the common good? Do you think that these views are always in conflict?

2. Do you agree with the author that “public health is, in fact, highly political”? Why or why not?

3. Do you think the government should implement public health laws that restrict individual freedoms? Why or why not?
The Legacy of John Adams

From Boston to Guantanamo

John Adams' role in the 1770 Boston Massacre trials is regarded as a noteworthy example of commitment to the rule of law and defense of the rights of the accused, even in cases when advocates may represent unpopular clients and become involved in matters that generate public controversy. Patriot, advocate, diplomat, constitutional theorist, and political activist, Adams became our nation's first lawyer-president in 1797. The 2011 Law Day theme provides us with an opportunity to assess and celebrate the legacy of John Adams, explore the historical and contemporary role of lawyers in defending the rights of the accused, and renew our understanding of an appreciation for the fundamental principle of the rule of law.

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Coming in the next issue of Insights
—Winter 2010

The Fourth Amendment in American Society: Searches and Seizures

Insights discusses the meaning and origins of the Fourth Amendment to the U.S. Constitution and how recent cases have defined legal protections concerning illegal searches and seizures.