

The New Metropolis: Social Change in California's Cities*

Keynote Address

Matt Gonzalez[†]

Whenever I get invited to an institution such as this, I'm reminded of something that happened to me in the year 2000. I was running for a post on the Board of Supervisors in San Francisco, and once I made it into the runoff, well, I decided to join the Green Party. It was a decision that was met with disapproval by my allies, to say the least. A couple of them even counseled me to immediately go to the Department of Elections and switch back. They thought I had made a terrible mistake. Some very prominent Democrats, including members of the Democratic County Central Committee, cancelled fundraisers they had planned for me, though invitations had already been mailed.

In the midst of all of this, Medea Benjamin, the Green Party nominee for U.S. Senate and the cofounder of Global Exchange, gathered a bunch of folks together at her home in Noe Valley for a fundraiser on my behalf, and I had the pleasure of speaking with Jello Biafra, who had stood as a candidate for the Green

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Party seeking the party's nomination for President of the U.S. the year Ralph Nader was ultimately selected. For those of you who don't know him, Jello Biafra is the lead singer of the punk band, the Dead Kennedys. And he said, "You know, Matt, joining the Green Party right now"—and he meant, of course, in the midst of the Ralph Nader/Florida debacle—he said, "You know, joining the Green Party right now is like naming your band *The Dead Kennedys*." He said, "There are just certain places you're never going to be invited to."

I'm delighted to get this invitation. I really am. I have the added pleasure of knowing two of my teachers at Stanford Law School, Chuck Lawrence and Barbara Babcock, have both preceded me in giving the Raven Lecture, and so I'm delighted to be in such good company.

I do want to just correct one thing Rachel Moran said.¹ I spent ten years as a public defender, and during that time, I didn't push forward for any kind of prosecution as I was working on the other side of the aisle. It wasn't until I ran for district attorney in 1999, which was a rather unusual thing to have happen, to have a public defender who had never run an office or had any kind of administrative experience, to suddenly jump into a race for district attorney. And it was at that time that I was articulating a very progressive platform, which included the focusing of prosecutorial concerns on issues such as the environment and some of the pretextual owner-move-in evictions that were taking place in the city. I called for the prosecution of governmental corruption and I came out strongly against the death penalty and against the three-strike law.

One of the kindest things that was ever said about me in politics, although it wasn't meant that way, was during that race. Some of you may know the conservative journalist, Ken Garcia, who writes for the San Francisco Chronicle. Speaking of me, he wrote, "in another era, [I] would have been in the Socialist circle of Eugene Debs", and naturally I took that as a compliment.

I want to say at the outset that I'm not an academic. I consider myself one of a sort of cadre of progressive lawyers that are fighting for progressive change—and that gets defined a lot of different ways. I think of it in a very broad sense as an effort to create a more democratic, egalitarian, and humanistic world. It's that notion that we are chasing, and sometimes we chase it as lawyers. Sometimes we chase it in politics. And we bring to the political efforts that we've been involved in—and I say we because it's always at least a small tribe of people trying to make this revolution happen—we bring to it a certain degree of daring, I think, in that we want progressive change to happen now. We don't want to wait for it. Some of us are getting older. I'm thirty-eight years old. We're ready to live in the world that we can envision.

OVERVIEW

As I prepared for today's talk, it occurred to me that speaking about the American city and the progressive opportunities we have in a municipality

1. Rachel Moran, professor at Boalt Hall School of Law and director of the Institute for the Study of Social Change, delivered the introductory remarks to this speech.

necessitates setting some kind of context at the outset for what is happening in that city, the nation and even internationally. I want to begin by discussing some things with which we're fairly familiar, but I want to make sure they are fresh in our minds as we discuss both the possibilities and limitations the American city afford us.

The first thing I want to emphasize is that there's an increasing disparity between rich and poor in our society. I think it's quite noticeable and it's widening. It is said that the United States has the highest income inequality among all industrialized nations, and that one out of three Americans are classified as living in poverty at least two months out of the year. And the United States has the highest number of people among full-time workers earning less than 66 percent of median income. The wealth of the top 1 percent has doubled in the last twenty years, at the expense of the bottom 40 percent, who have seen a 25 percent reduction in wealth. And one need only consider the state minimum wage, which is set at \$6.75 an hour, to calculate full-time work for that state minimum wage, which is far above the federal minimum wage of \$5.15 an hour. Full time work at \$6.75 gets you roughly \$14,000 a year.

We're also living in an age of crisis in our democracy because of low voter turnout. We have single-digit turnouts in many important races in this country. Recently, in a mayoral election in Dallas, there was a 5 percent turnout. School board races outside Detroit resulted in a 1 percent turnout. And we're talking about registered voters who turned out to vote, so we're not even talking about those eligible to vote who aren't registered. Even in San Francisco, in the 2001 city attorney's race, there was a turnout of only 13 percent. And seven cities in Los Angeles County recently cancelled city council elections because there were no contested races.

Related to this is the phenomenon of allowing elections to be decided by a plurality rather than a majority of votes cast. This is extremely distressing. Not only do we do it for congressional candidates who are trying to win their primaries, but we also do it in the presidential contest where the declared winner isn't required to actually win a majority of votes cast. This is precisely how the Florida contest was decided in 2000.

In congressional races, it's particularly distressing because once you win the primary, 97 percent of them are essentially pre-decided. There's no real contest that's going to take place there. And we know this because these districts have been gerrymandered in a way to create safe districts.

There are a very high number of incarcerated adults in our society. Many are disenfranchised once they're on parole, so in effect they cannot participate in our electoral system. Last year for the first time, according to Justice Department records, the number of people in United States jails and prisons exceeded two million. For African-American men between the ages of twenty and thirty-four, the percentage of African-Americans in prison was 12 percent. By comparison, 1.6 percent of white men in the same age group were incarcerated.

Now, I put this out there because I'm trying to paint a picture for you, in some ways, of really how bleak our society is and how much work there is to do, but I'm doing this in part because I'm also going to demonstrate that even in the midst of this kind of conservatism, that there is the opportunity to try to start breaking down some of these realities.

We have new federalism. We have unfunded mandates. We have cuts in

social programs. We have first-strike foreign policy approaches that I think destabilize the world peace. And, of course, we have the WTO,² created in 1995 during the Uruguay round of GATT [General Agreement on Tariffs and Trade] talks,³ that essentially allows states and cities to be sued for interfering with trade and makes these entities susceptible to penalties for anticipated profits. Europe is paying \$115 million in annual penalties to maintain a ban on beef containing residues of artificial growth hormones. In the United States, we've had laws challenged and struck down that try to promote the environment, try to ban MTBE⁴ additives and things of the like.

And, finally, I'll just note the anti-immigrant sentiment that has swept the country in the post-9/11 era. We have the passage of the Patriot Act, where even progressive Democratic darlings like Paul Wellstone and Barbara Boxer felt compelled to vote for it. We see broad powers to spy on American citizens and to detain immigrants without due process, of course, none of this being related to the security failures that led to 9/11 in the first place.

I think the walls that are created by these various issues that I'm raising are a challenge for the progressive community. And I think that, in many respects, the potential for what can happen in a progressive American city presents itself as a tool for trying to work to resist, what, I would call, really anti-democratic values.

Now, I don't want to overstate the thing. As a city council, the tools we have at our disposal are not bulldozers, but perhaps they're nails that you hammer into these walls, which start to create cracks that create awareness about some of the things that can be accomplished. And once you make these advances, it's extremely difficult for them to be reversed.

Some of our victories are the result of home rule doctrines that exist in some of our state constitutions. California, for instance, allows for a certain autonomy for charter cities. It's Article 11, Section 5 of the State Constitution that gives plenary power over municipal affairs to charter cities. And that autonomy is particularly strong in the area of how elections are conducted. Some of the advances that we have made are through the initiative process. It's frankly the progressives taking a page out of the conservative playbook, going to the voters directly, demanding things like a raise in the minimum wage, and these things happen because there is no state preemption in the Constitution. The police powers grant the municipality the right, as long as there's no state law preempting this activity, to legislate in this area. And in some cases, it's been through crafting very narrow laws that skirt commerce clause prohibitions by tailoring laws that allow us, for instance, to prohibit the expansion of chain stores, formula retail establishments and the like.

Now, let me emphasize, we have not always been successful. We lose more often than we win. But when you consider that everything we're working on is radical to a certain extent, when we do get a victory, even if it's once a year, we have made certain strides towards the inevitability of a progressive movement that I believe will ultimately take hold.

Here are some of the things that we've managed to do, even in the last three or four years: San Francisco became a city that issued the matriculate consular cards,

2. World Trade Organization.

3. General Agreement on Tariffs and Trade.

4. Methyl Tertiary Butyl Ether.

the ID cards for immigrants residing in the United States. We passed transgender health benefits for city employees, the only city in the United States to do that. We were the first city to pass a municipal solar bond. We've passed localized initiatives related to medical marijuana, trying to stave off federal interest in prosecuting these cases. Certainly in the context of gay marriage, we have engaged in city-wide civil disobedience. We have a district attorney, because of campaign pressures, who has articulated an anti-death penalty position that was recently tested with the killing of a police officer. We have a different approach in implementing three strikes. We have passed inclusionary housing ordinances, which mandate a certain percentage of monies or housing be dedicated to affordability.

I want to focus on the first four that I mentioned, and try to talk about them a little bit, to show you, in practical terms, what can be accomplished.

INSTANT RUNOFF VOTING

One of the realities of holding elective office if you're a member of the Green Party is coming to terms with having elected George W. Bush as president. I think that there are many Greens who rightfully dispute this, who say Al Gore was a lousy candidate who couldn't win his own state. They point out that there were more Democrats that voted for George Bush than there are members of the Green Party in the United States, et cetera, et cetera. But I want to put that aside for a moment, and I just want to accept the premise that a vote for Ralph Nader, certainly in Florida, deprived Al Gore of the presidency, and I want to posit to you this idea of what a municipality can do about this.

In 1974, the City of Ann Arbor, Michigan, decided to do something about a recurring problem that they had. Republicans kept winning the mayorship because the election was being decided by a plurality. What didn't seem right to folks was that the vote totals of the two other political parties in town, the Democrats and the more radical Human Rights Party generally constituted a majority of the vote. Neither party could win an election though, because they kept splitting the progressive vote, ensuring that the Republicans would win with a vote total – short of a majority.

They took a measure to the ballot. Voters approved a measure that would allow them to rank their preferences when they went to the polls. So you could rank your choice of candidates, literally indicating first choice, second choice, et cetera. In the election of 1975, the Republican mayor, James Stevenson, won 49 percent of the vote. The Democratic candidate, an African-American candidate, Albert Wheeler, won 40 percent of the vote, and the Human Rights Party candidate won 11 percent of the vote. Her name was Carol Ernst.

Well, Ernst was eliminated from the runoff procedure, and the second choices of the folks that had voted for the Human Rights Party were calculated, and lo and behold, Ann Arbor, Michigan, elected its first African-American mayor, a Democrat who instituted progressive reform. The Republican Stevenson's vote total didn't change once Ernst was eliminated from the race. All of the Human Rights Party votes went to the Democratic candidate making it a 51% to 49% victory.

The Republicans immediately fought to have this method of voting repealed. The conservative newspapers in town editorialized against it and, in a close

election, won a repeal. We haven't had anything like that instant runoff voting or rank-choice voting implemented since 1975.

When I first got to the Board of Supervisors, this seemed like something we should be working on. Obviously, if instant runoff voting had been used in Florida in the 2000 election, voters could have voted for Nader first, and put Gore down as their second choice. Once it was apparent that no candidate had won a majority of votes cast in the first round of balloting, the bottom vote-getter, Nader in this case, would have been eliminated and we would have then redistributed the votes that had originally gone to Nader. Gore likely would have been elected President of the United States.

While San Francisco elections are not decided by a plurality, we nevertheless were experiencing low turnout in some of our elections. As stated earlier, 13 percent turned out in a city attorney race. So, there was some desire to get a majority winner in a single trip to the ballot box. We went to the voters and said: Let's try to get a majority winner at a time when we have more people turning out to the polls. Let's save money by not having a runoff. But, more importantly for the Greens that were behind this measure, let's try to create a single city in the United States that can experiment with a type of voting that, if successful, will force changes in how elections are conducted around the United States. We wanted what happened in Florida not to stand as a reason for not joining our party or voting for our candidates.

Now, in the last couple of years we've been fighting to implement instant runoff voting. It looks like we have a favorable initial testing of the software upgrade that's going to allow us to implement it this November, and we have a court that's very interested in seeing this happen. But I want to posit to those Democrats here—particularly those who, now in a federal election time, continue to say, “Nader's a spoiler. A vote for Nader is a wasted vote,” et cetera, et cetera—I want to ask the Democrats, “What have you done about this problem in three and a half years?” I mean, if you think about it, I've laid it out to you very clearly. It's simply that we allow plurality victories. Let's just make a law that requires a majority victory. You don't have to change the Electoral College. You don't need a constitutional amendment. Each state can decide how to award the Electoral College votes. In Florida, it would simply mean that the state decided to adopt either a run-off five weeks later, or—through a method of rank-choice voting or instant runoff voting—a situation where you can rank your preferences in a single trip to the ballot box.

Such a measure, Measure 1, was before the voters in Alaska about two years ago. It would have applied to federal elections, including the presidential race that is coming up. The Democratic Party, which is very powerful in Alaska, opposed the measure and the voters eventually rejected the measure. I think that one of the reasons the Democrats have opposed this reform is because they have been the beneficiaries of this spoiler problem, although they don't like to speak about it. Certainly in 1992, when Bill Clinton was elected president, there was a spoiler named H. Ross Perot. Do you remember him? He got 19 percent of the vote. Three-quarters of it was coming from George Bush Sr., and Bill Clinton was elected with 43 percent of the vote. What kind of democracy do we live in?

Those who would be critical of the emergence of the Green Party or of a candidate trying to articulate positions against the Patriot Act, against the WTO, against NAFTA, against the war in Iraq - Well, you can understand the dilemma that

progressives are in when we feel that the Democrats aren't doing enough.

The possibility of a single municipality adopting a voting mechanism that could really address this issue is enormously important. The idea that in a single American city, testing this voting method could challenge what has been a century of conducting elections in a particular way, which has only served the two-party system, has profound possibilities.

THE MINIMUM WAGE

I want to now address wage earning and its relationship to the income disparities that I spoke about earlier. I mentioned that the state minimum wage is \$6.75 an hour, which gets you roughly \$14,000 a year, for full-time work in California. Interestingly, if you took the 1968 state minimum wage and tied it to inflation, the wage would actually be \$8.92 an hour. That's right, not \$6.75 but \$8.92. That's a pretty startling difference. Imagine that a wage earner today is actually making less than they were 35 years ago.

This disparity also exists if we look to the federal minimum wage, which is currently \$5.15. Considering that the cost of living in San Francisco is 84% higher than the rest of the United States, that wage would have to be \$9.48 in order for there to be any kind of parity. This could not fail to get the attention of a Green Party member, a progressive, or the cadre of lawyers trying to make social change in the United States.

I want to tell you how my office started working on a minimum wage law in San Francisco. Now, one of the things that happened, and politics is very anecdotal in certain respects, is we happened to be out eating at a cheap Mexican restaurant in the Mission, and of course I mean "cheap" in the sense of inexpensive food – the food there was quite good. It was late at night, probably after midnight. I was there with a couple of my aides, and we started questioning: "How much do the guys behind the counter make?" We started talking about it. "Isn't there a living wage law already in effect?" Well, a living wage is ten dollars and something. But we realized that the living wage doesn't apply to all workers. It only favors those represented workers – those who are actually union workers, or workers who are working for the city or have contracts with the city. So in effect, the living wage neglects the neediest workers, as it is essentially a victory brought to you only by organized labor.

When we started saying, "Hey, you know what? We want to bring the bottom up for all the other workers," few were interested in this. Labor unions weren't interested because it wasn't going to help their workers. Initially, we couldn't get folks that had worked on the living wage in San Francisco to work on this initiative. Why? Because the law was likely to primarily help immigrant workers and unskilled workers that don't even go to the polls. And so there we were, trying to carve out an initiative effort that would ultimately get decided by those adversely impacted by the need to pay higher wages, and benefit a group of people legally incapable of voting – or well known for not showing up to the polls. Eventually, those entities, that I'm critical of, joined forces with us because they were essentially compelled by their own politics. They supported helping the bottom worker whether they were represented or not. It's just that they wouldn't have selected that battle as the most important one to fight.

As a result of raising the minimum wage in San Francisco to \$8.50 an hour, and tying it to a consumer price index or inflation indicator for the future, we have been able to raise the wages of 50,000 workers in San Francisco. Studies indicate that there is a very strong and consistent relationship between wage earning and health. Dr. Rajiv Bhatia, of the San Francisco Department of Public Health has written, "Income is one of the strongest and most consistent predictors of health and disease in the public health research literature." The size of this effect is illustrated by a recent national study that found:

[that] people with average family incomes of \$15,000 to \$20,000 were three times as likely to die prematurely than those with family incomes greater than \$70,000 a year. The strong relationship between income and health is not limited to a single illness or disease. People with lower incomes have higher risks than people with higher incomes for giving birth to low birth weight babies, for suffering injuries or violence, for getting most cancers and for getting most chronic conditions. Moreover, the relationship between income and health extends beyond health narrowly defined as the absence of disease. Income supports eating nutritious food, being physically active, providing children with safe and nurturing homes, enjoying friendships and participating meaningfully and productively in society.

So, I want to step back and reflect for a moment on what I said at the outset. Here we are, working within adverse conditions as it relates to income disparities. We're up against trends on a federal level with insufficient resistance coming from Congress, and yet, in a single city like San Francisco, we see possibilities. The City becomes a place to experiment and enact laws that directly impact health and wages. Progress is made despite the prevailing conservatism around the country.

FORMULA RETAIL LEGISLATION

About two years ago, I was in my office and got a phone call from some neighbors, residents of District 5, which includes Cole Valley, an area near Golden Gate Park. And they were very concerned. It's a very small neighborhood commercial district, and they were very concerned about a chain store, Walgreens, moving into the area. They hadn't been given any notice of it, and wanted to try to negotiate with Walgreens to see if they could mitigate the likely traffic impacts as well as influence some of the architectural and design decisions in the remodeling of the existing buildings.

So, we tried to facilitate these issues. One of my aides got on the phone, called Walgreens, said, "Hey, can one of your people come to the office? Maybe we can get a dialogue going. The neighbors are having a hard time getting your attention." And they just didn't have time. They said, "Gee, you know, we don't have time to send anybody to talk to you." Later, I called myself and said, "I don't think you understand. I'm a member of the Board of Supervisors. I represent this district. A lot of pissed-off people live in that area, and they really want to talk to you." And they said, "Gee, you know, maybe we can make ourselves available for a conference call." And I said, "Listen, guys, you know what? I got a lot of things I'm working on. This wasn't really on my radar screen. But you're starting to make me really interested in this. And I don't think that this is going to inure to your benefit." And that's how it went.

So, I started looking closely at the issue. What generally happens in a city like Berkeley or San Francisco, where you have discrete charm in neighborhood commercial districts, is that you'll find many small independent operated stores. Some are café's, many are unique retail establishments. Eventually, you get the arrival of the chain store.

It's got certain components to it, like standardized service. It's got architecture features that are uniform. The décor is uniform. You know the routine. Well, as they move into the neighborhood, slowly things start to change. These charming little neighborhood districts start to lose their charm because they start to all look alike.

Nevertheless, many folks say they like these chain stores. They say "What's wrong with it? They have good services. They have good prices. Let the consumer decide. Let the consumer decide with their wallet." Well, keep in mind that consumers will act very selfishly. I mean, if you need an aspirin, you're going to go into the nearest store, perhaps a Walgreens, whether you believe in chains or not. You're not going to act with the greater good in mind, by and large anyway. And the illusion that justice will be obtained if we just let the consumer and their wallets decide doesn't hold up. It sounds good at first, but ultimately we learn that chain stores hurt our neighborhoods in ways beyond just appearances. But we don't figure that out until later.

It's not until after the store is there that they're paying low minimum-wage jobs, that they're essentially driving up rents that the independent neighborhood-serving retail cannot afford. It's not until those impacts have been felt that consumers suddenly say, "Hey, where are the independent stores I used to go to?" And, of course, by then you're there, trying to find ways to do what? To reverse something that's already happened. And frankly, it's too late.

The homogenizing effect these chain stores have isn't limited to zoning matters or only concern retail businesses. Media consolidation is happening around the country. Radio stations, in particular, are owned by the same entities and as a result we've lost the decentralized decision-making made at the local level. Now you got centralized decision making. So, you can't even hear Hank Williams over the radio in Texas. You can't hear the Neville Brothers in New Orleans or the MC5 in Detroit. You can't even get local news coverage over your local radio stations.

We started to ask: Is there a way that we can, through zoning laws which a municipality controls, regulate businesses that have standardized architectural and service components? We amended our planning code to create a three-tiered approach. First off, we created a notification requirement. Before a store with more than 12 franchises can move into a neighborhood, they now had to give their neighbors living within 150 feet advanced warning. This would allow objecting neighbors to gather the necessary signatures to appeal to the planning commission for what is known as discretionary review.

For neighborhood commercial districts that wanted a heightened level of scrutiny, something greater than just notification and a discretionary review process is required. We created a conditional use permitting process before the planning commission, which would automatically require these retailers to appear before the commission. It would allow neighbors to be heard and would allow negotiations over mitigations—and, frankly, a discussion over whether or not this particular store was necessary to the furtherance of the neighborhood commercial district. It would allow

that discussion to take place.

And finally, we allowed certain neighborhood commercial districts to simply decide altogether to ban or prohibit these formula retail establishments by simply declaring, through an ordinance, subject to a mayoral veto, that they did not want these establishments in place.

Now, San Francisco is the largest city to have ever enacted such a statute, and it took effect just a couple of weeks ago. Some small cities in California have adopted similar protections. Arcada has certain prohibitions. The city of Coronado has a similar protection. And in the case of Coronado, the Court of Appeal took up the matter of whether this would be deemed an interference with interstate commerce. They concluded that it was not discriminatory because it did not impose different regulations on interstate as opposed to intrastate businesses, nor did it distinguish between those businesses that are locally owned and those that are owned by out-of-state interests. Its regulations were essentially even-handed.

And so, I present to you one of really the most radical pieces of legislation to emerge in American cities, that essentially staves off encroaching corporate America. It repudiates the proliferation of chain stores that harm neighborhood character and that snatch local dollars from the local economy. A study in Austin, Texas, confirmed these findings. It looked at two different parts of the commercial district, one that had chain stores and one that did not, and found that chain stores took money out of the local economy. "Local merchants spent a much larger portion of total revenue on local labor to run their enterprise and to sell merchandise. Local merchants keep their modest profits in the local economy." These were the conclusions. Local merchants provide strong support for local artists and authors, creating further local economic impact.

Modest changes in consumer spending habits can generate substantial local economic impact, so for every hundred dollars in consumer spending at Borders, the total local economic impact was found to be only thirteen dollars. The same amount spent with a local merchant yielded more than three times that amount in the local economy. The study found that if each household in Travis County simply redirected just a hundred dollars of planned holiday spending from chain stores to locally owned merchants, the local economic impact would reach approximately \$10 million."

NON-CITIZEN VOTING

The final example I want to raise today, which directly addresses the progressive potential that a municipality affords, relates to something I'm working on right now. It is in the context of elections. It implicates the powers that are articulated in Article II, Section 5 of the California Constitution, which reads:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general law. City charters adopted pursuant to this constitution shall supersede any existing charter and with respect to municipal affairs shall supersede all laws inconsistent therewith.

Thus, the home rule provision, as this is known as, permits charter cities to exercise plenary powers over municipal affairs, subject only to constitutional

limitations.

One of the issues that we're working on now is trying to expand the right to vote in San Francisco to non-citizens. Now, the state constitution grants the right to vote to citizens who are over the age of eighteen. It's our contention that this is essentially a right that a municipality cannot take away from you. If you're eighteen or older, if you're a citizen of the United States, you have the right to vote. However, we believe that a municipality has the right to expand that rule. For instance, we could grant the right to vote to non-citizens or we could lower the voting age beneath eighteen, if there was a public will to do so.

Now, some will argue that this doesn't make any sense at all, but I would challenge you to look back on the history of the United States. It's actually quite unusual that voting is tied to citizenship. Voting at one time was tied to the ownership of property. It was tied to gender at one time. William Carey Jones, writing in 1913 about the municipal affairs power, the home rule provision, basically argues that it was designed to serve a broad purpose. Quote,

It was to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.

I would posit to you, using the minimum wage example, that there is no reason why a state minimum wage that applies in Stockton, California, should apply to San Francisco, California, where you have a higher standard of living, where everything costs more. Likewise, if you have a city like San Francisco that has a legitimate interest in fostering a more representative, responsive local school board that will take into account the needs of its large immigrant student population when making important educational policy decisions, then why shouldn't that municipality, under this doctrine, be allowed to expand the right to vote to try to address these concerns?

Interestingly enough, as it relates to the enfranchisement of non-citizens, we would not be the first city to do so. The state of Maryland has six different communities, including Tacoma Park and Chevy Chase, which have granted resident non-citizens the right to vote in all local elections, not just school board elections. The state of Illinois, in response to Chicago's deteriorating public school system, in 1988 granted non-citizens the right to vote in school board elections, where parents could show that they had children in the public schools. The state of New York allowed non-citizen parents the right to vote in school board elections beginning in 1970 and ending just last year. Mayor Blumberg disbanded their very unique school board system. And in the state of Massachusetts, the cities of Amherst and Cambridge have passed local legislation enfranchising non-citizens to vote. In Massachusetts, however, unlike these other states and unlike California, there isn't a home rule doctrine, and so those cities are awaiting the state legislature to pass laws enabling that local legislation.

CONCLUSION

Collectively, these various efforts have been successful in moving the progressive movement forward, despite conservative tendencies in the United States. That these successes, albeit modest ones, are occurring at a time when progressive communities are on the defensive is, I believe, very profound. It illustrates the possibilities that the American city provides to us as a place where progressive ideas can take hold. Time alone will judge whether these changes are lasting and whether they fully take hold. But, I am hopeful that that in fact will be the case.

That many of these changes were initiated by a single council person is also significant. To use my own example, I was elected in a single district of San Francisco. In order to win election, I probably had to get ten or twelve thousand votes, in a district with 80,000 inhabitants. I raised and spent forty thousand dollars to win a city council race in one of the largest cities in the U.S. So, imagine how you can spark progressive change by simply raising that small amount of money and getting elected in a single council victory.

I also want to counsel or sort of put out the warning, that just as progressives can take advantage of this sort of home rule doctrine in municipal affairs, so too can conservatives. They can argue that we shouldn't have majority elections, that we should just have plurality victories in mayors' races. We shouldn't have an elected school board. We should have the school board appointed by the mayor, who runs citywide and has to raise more money than a candidate might have to raise to run in a small district, so it might favor the interests that support that candidate.

I think some of the progressive advancement that was made, not just the ones I've spoken about but some of the ones I also alluded to earlier, are going to withstand the test of time because of two things in San Francisco. One is, frankly, the phenomenon of jury nullification, the centuries-old doctrine that was first articulated in the late seventeenth century in the *Bushells Case*, where you had Quakers being tried for unlawful assembly and for preaching against the Church of England, and jurors deciding that they were empowered to decide what the facts were and to ignore the facts that they so desired because they knew the law was so oppressive.

When you have a municipality engaging in certain activity as it relates to medical marijuana, gay marriage and some of these advancements, it's very unlikely in the contest between municipality and the federal government that the federal government will really want to test its authority, because ultimately they have to do it in the courtrooms of that community. Consider Ed Rosenthal's recent verdict in the medical marijuana case that was tried in San Francisco. He was convicted in a community that favors medical marijuana, but as soon as the jurors learned that the judge had withheld what they felt was important evidence of his involvement in medical marijuana activities, they all appeared at a press conference with the attorneys in the case and with the defendant, who was awaiting sentencing, to denounce the judge's decisions.

The other phenomenon that I think works in favor of keeping much of the progressive possibilities in San Francisco relates to zoning realities. In San Francisco, you can divide the east versus the west. The east is more progressive; the

west is more conservative. The east progressives have adopted the idea of greater density in building. As one of the values of the progressive movement, we see articulation moving away from suburban sprawl. In exchange for the greater density, we of course look for mitigations to improve public transportation, to demand amenities like public parks, et cetera. But at its core, it is essentially creating housing in the most progressive areas of San Francisco, which means the populations in those districts will increase over time, which means that the voting strengths in the east will continue to be stronger and stronger until eventually the west is outnumbered.

I want to just say—as you all know, I lost the mayor’s race recently. Enrique Pierce, who’s in the back there, ran the campaign. He was the campaign manager. And in the long tradition of radical politics, he chose to skip school—he was in his third year at Boalt during the campaign—while he was running the campaign. But I look back at that race and I say that we ran the most progressive campaign for the position of mayor in the history of San Francisco. I don’t believe that you can find any other candidate, one who reached a runoff for that position, that articulated core progressive values the way we did: frankly, principles implicating the redistribution of wealth, progressive taxation, expansion of voting rights, values related to immigrant rights, working-class rights, and diversity.

And once we got into that runoff, we did not moderate our views to try to win over the right or the middle. And I think that this is really what will be the long-standing accomplishment of that campaign. Because as the left holds its ground, if we can articulate and gain support among the electorate, then it essentially signals to the winner in a close contest, it marks the place where the center has to move. And I think that, more than anything, is what we accomplished.

When I ran for city council president about a year and a half ago, I was told that it could not be done, that a Green Party member could not win a leadership vote in a council that had a super-majority of Democrats, that it simply wasn’t going to happen. And yet when I left that chamber, I had won by the narrowest of margins, a 6-5 vote. It had not been since the 1930s, when Frank Havenner was elected board president in San Francisco, that a third party had won that contest. And Havenner was a member of the Progressive Party and a disciple of Hiram Johnson, who was one of the leading reformers of his time.

The advances that I’ve spoken about—sometimes winning, sometimes losing—really, I think, stand as victories toward the path of progressive reform, and certainly, I think, that they stand as meaningful possibilities that are taking place in the context of what you can do in a single city. I tried to liken it to the idea of creating these cracks in these walls that look monolithic and extremely conservative. Frankly, voters often feel, I think mistakenly, powerless to make change, even in a city as progressive as San Francisco.

I leave you with that: that much, in fact, can be accomplished. But do not set your sights simply on the notion of the international conflict or the national conflict. When I get invited to speak at an anti-war rally in the Civic Center plaza, in front of City Hall, I go there and I stand on a podium and I see thousands of people, and they’re progressive and they’re radical, and they oppose the war, and they’re thinking people. But how hard is it to mobilize twenty people on a weekend to walk precincts in a school board race? And that is our challenge, that we have to win those local races. We have to elect Matt Gonzalez and Chris Daley and Tom Ammianos so that they can be at the burrito place late at night and stumble across a

very simple concept and say, "Let's do something about it!" Or they can be on the telephone with that representative from Walgreens and say, "Really? Is that how you want it to be?"

And so, thank you.

INTRODUCTION

Bienvenidos! In last issue's editorial, we named and evoked what we dubbed the current moment of insurgent *Raza* activism at U.C. Berkeley School of Law (Boalt Hall).¹ We wanted to take a few moments to reflect on the activism that produced a rich array of events the *Berkeley La Raza Law Journal* (BLRLJ) hosted in the Fall 2004 and Spring 2005 semesters. Through our symposia and discussions, we hoped to highlight important developments in our community, as well as initiate social movement and progressive change.

In the fall of 2004, our Journal members and undergraduate *Raza* student organizations worked tirelessly on our semester symposium, "Our Pueblo: Defendiendo Nuestros Derechos." The day-long community forum held at the King Student Center on Saturday October 23, 2004 united an assortment of Bay Area residents ranging from students, parents, teachers, health care providers, and community activists to discuss the critical issues that impact the Latina/o community. Our Pueblo featured a series of workshop discussions in the areas of immigration, education, health, and political access, and included keynote speakers, a resource fair of Bay Area organizations, and a roundtable discussion regarding these policy areas.

On Tuesday November 16th, BLRLJ and the *Asian Law Journal* organized an evening colloquium titled "Thirty Years of *Lau v. Nichols*: A Panel Discussion on Bilingual Education and the Law." The event focused on the legacy of the *Lau* decision, which mandated the need for equal resources for English speaking and bilingual students in an educational setting, but also illustrated the gradual dismemberment of *Lau* by the judiciary. The colloquium identified strategies for overcoming adversities to bilingual education in light of Proposition 227. Rachel Moran, who was one of our panelists and also a strong ally of our Journal, later encapsulated her research in an article on *Lau* that is included in this issue.

The following March, we organized a colloquium on the 1930s repatriation of approximately 2 million Mexican Americans by the United States government. During the event titled "Ejected from our Homes: Depression Era Deportation of Citizens," panelists spoke of the deportation campaigns which forced many to leave their homes, families, possessions and property. Providing historical, legal and political perspectives, the discussion focused on the need to amend the wrongs before the victims of repatriation fade away entirely.

Our spring symposium, "Making Movement: Communities of Color and New Models of Organizing Labor," addressed how different communities of color—particularly low income, immigrant, and disadvantaged populations—were adversely affected by changes in domestic and international labor law. The daylong symposium was a collaborative effort by BLRLJ and the *Berkeley Journal of Employment and Labor Law* (BJELL). Our keynote speeches and panel discussions demonstrated how up-and-coming attorneys, legal scholars, and community activists can use their skills to advocate on behalf of underrepresented communities, and help reformulate innovative models of organizing labor.

1. See *Introduction*, 15 BERKELEY LA RAZA L.J. v (2004).

We are also excited to offer the latest manuscripts published by the *Berkeley La Raza Law Journal*—on the cusp of our 25th anniversary.

Our first Article, “Undone by Law: The Uncertain Legacy of *Lau v. Nichols*,” is authored by Rachel F. Moran, the Robert D. and Leslie-Kay Raven Professor of Law.² Profesora Moran has been a long-time supporter of the Journal. She is an Executive Committee Member of Boalt Hall’s Center for Social Justice and has been the Director of the U.C. Berkeley Institute for the Study of Social Change for the past several years. Professor Moran’s Article derives from the presentation she delivered at the “Thirty Years of *Lau v. Nichols*” colloquium, discussed above. She significantly expanded her Article from a previous version published by the U.C. Language Minority Institute, now re-published here with kind permission.³

Professor Moran begins by highlighting the importance of *Lau* in the jurisprudence of equal protection. As she notes, “*Lau* pushes beyond a paradigm of intentional harm to attack exclusionary practices, whether or not motivated by a discriminatory purpose.”⁴ The Article continues by evoking *Lau*’s history and then elucidates its legacy via the metaphor “of ritual dismemberment in the courts.”⁵ This striking and terrible image—so corporeal and redolent of past and present instances of legal violence—reverberates throughout Moran’s Article and underscores what U.S. society may suffer if *Lau*’s legacy is lost.

If the state refuses to educate our children on how to communicate with each other in the diversity of languages spoken in many of our homes and families, how will those children join the national polity? How will they develop *civitas* or a shared sense of *pueblo*-hood, when their primary and secondary education excludes them on the basis of not having learned English from infancy?

While Moran continues her Article by expounding the practical meaning of *Lau*’s undoing in light of other federal protections—such as the Equal Educational Opportunities Act; the English Language Acquisition, Language Enhancement, and Academic Achievement Act; and the First Amendment guarantee of free speech—her conclusion resonates strongly with her guiding imagery. With *Lau* undone on a legal landscape darkened by the shadow of the Rehnquist Court’s (and likely the Roberts Court’s) Eleventh Amendment jurisprudence, children who are denied effective bilingual education will not likely be granted the equal protection of law from the federal courts. Plaintiffs will be forced to prove the impossible standard of intentional discrimination fabricated by the U.S. Supreme Court and they will have to bring claims “on a district-by-district basis.”⁶

2. Rachel F. Moran, *Undone by Law: The Uncertain Legacy of Lau v. Nichols*, 16 BERKELEY LA RAZA L.J. 1 (2005).

3. *Undone by Law: The Uncertain Legacy of Lau v. Nichols*, UC LMRI NEWSLETTER (U. Cal. Linguistic Minority Research Inst., Santa Barbara, Cal.), Summer 2004, at 1.

4. MORAN, *supra* note 2, at 1.

5. *Id.*

6. *Id.* at 8.

The absurdity of precluding effects claims should be apparent to anyone who walks to the public schools of our nation's central cities or even to many suburban schools. Our children and the generations to come will not be served well by the demise of the innovative jurisprudence established over a generation ago by *Lau*.

En los Estados Unidos y en todo el mundo, hay muchos más idiomas que el Inglés.

Our next Article, "Race and the California Recall: A Top Ten List of Ironies," is authored by Steven Bender, James and Ilene Hershner Professor of Law, University of Oregon School of Law; Sylvia R. Lazos Vargas, Professor of Law, University of Nevada-Las Vegas School of Law; and Keith Aoki, Philip H. Knight Professor of Law, University of Oregon School of Law.⁷

In their engaging Article, Professors Bender, Vargas, and Aoki deconstruct the racial politics of the 2003 California gubernatorial recall election that ejected Governor Gray Davis—the first Democratic Governor of California since the end of Governor Edmund G. "Jerry" Brown, Jr.'s term in 1983—and ushered Hollywood action movie star Arnold Schwarzenegger into the state capitol.

The Article illuminates the seemingly contradictory media standards applied to candidates Schwarzenegger and Cruz Bustamante and explains the disparity by referring to Anglo anxieties about race relations and immigration. Professors Bender, Vargas, and Aoki support this explanation by triangulating their interpretation of the California recall election with other elections in California, along with ones in Texas and Oregon. They note:

Political scientists observe that the more white majorities feel that minorities are on the verge of disturbing a status quo where white voters dominate, the more susceptible they are to voting against minority candidates. The irony is that in a predominantly Anglo state, such as Oregon, a minority candidate has a better chance of getting elected to public office than she would in a state like California or Texas, where minorities appear to be heading towards numerical dominance.⁸

As they continue to explain, the California recall election clearly demonstrated some of the social dynamics and racial politics of contemporary U.S. society. For example, in the same election where they elected Arnold Schwarzenegger and rejected Cruz Bustamante, a majority of the electorate soundly defeated Proposition 54, which would have prohibited the state from tracking race in government recordkeeping. Professors Bender, Vargas, and Aoki interpret these facts as evidence of California voters' understandings of racial messages: while Prop. 54's facial colorblindness was apparently understood to be bad policy, a

7. Steven Bender, Sylvia R. Lazos Vargas & Keith Aoki, *Race and the California Recall: A Top Ten List of Ironies*, 16 BERKELEY LA RAZA L.J. 11 (2005).

8. *Id.* at 13.

majority of the voters was apparently influenced by the negative (nativist-racist) stereotypes triggered by Cruz Bustamante's candidacy.⁹

The Article continues to offer insights into the contemporary racial formation in California by highlighting the need for Latina/o and Asian American candidates to forge electoral majorities by gaining crossover votes from African American and Anglo communities.¹⁰ However, this goal is elusive because Latina/o and Asian American social groups do not reliably vote as racial blocs because of their internal diversity, relatively undeveloped partisan affiliations, and the lack of genuine outreach by the Democratic Party.¹¹

Professors Bender, Vargas, and Aoki conclude their Article by reflecting on the "fickle memory" of the electorate.¹² They evoke the recent racial politics of the 1990s and discuss the ironies of white European immigrant candidate Schwarzenegger's anti-immigrant campaign in light of the substantial proportions of the immigrant-identified communities (Latina/o and Asian American) that voted for him and against Cruz Bustamante, the grandchild of Mexican immigrants.¹³

Regardless of one's partisan affiliation, Bender, Vargas, and Aoki's Article provides critical analysis of the contemporary racial formation and thereby usefully informs anyone interested in the multidimensional complexity of U.S. racial politics in the dawning twenty-first century.

Finally, we are very pleased to publish a Comment by Susan Taing, a recent graduate of the Georgetown University Law Center, titled "Lost in the Shuffle: The Failure of the Pan-Asian Coalition to Advance the Interests of Southeast Asian Americans."¹⁴

Taing begins her article by discussing the recent Supreme Court decision *Grutter v. Bollinger*, which upheld the University of Michigan's affirmative actions policies toward Latina/o Americans, African Americans and Native Americans.¹⁵ The Court held that the law school's desire to promote a more diverse student body was indeed a compelling state interest, and the admission policies were narrowly tailored enough to promote this interest.¹⁶ Like most affirmative action programs, the University of Michigan omitted Asian Americans as a group, because Asian Americans were already admitted in significant numbers.¹⁷ In her Comment, Taing explains that the Asian American population, composed of descendants from East Asia, South Asia, Southeast Asia as well as Hawaii and the Pacific Islands, is a vast

9. *See id.* at 14-15.

10. *See id.* at 15-16.

11. *See id.* at 21.

12. *Id.* at 18.

13. *See id.* at 18-21.

14. Susan Taing, *Lost in the Shuffle: The Failure of the Pan Asian Coalition to Advance the Interests of Southeast Asian Americans*, 16 BERKELEY LA RAZA L.J. 23 (2005).

15. *See id.* at 23-29.

16. *Id.* at 26.

17. *Id.* at 28.

INFORMATION FOR AUTHORS

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