

## FACULTY VIEWPOINTS

# A Wish List for the New Administration

Early this spring, the YLR asked a handful of Law School faculty members to weigh in with their thoughts about the direction the next presidential administration could take. The op-eds below are their responses and constitute a “wish list” for the next administration.

## Heather Gerken Create a Democracy Index

Heather Gerken is Professor of Law  
at Yale Law School.



One of the puzzles in my field, election law, is that we spend a great deal of time thinking about what an ideal election system ought to look like, but almost no time figuring out how to get from “here to there”: that is, how reform actually takes root. Given that it is extraordinarily difficult for reform proposals to get traction in this country, my hope is that the next administration will focus more on “here-to-there” strategies.

Happily, two presidential candidates—Senators Hillary Clinton and Barack Obama—have taken an initial step toward

jumpstarting the conversation on reform. They have separately introduced bills whose aim is to establish a “Democracy Index,” a ranking system of state election administration practices, which I proposed in January in an editorial in the *Legal Times*. The Index would concentrate on the issues that matter to all voters: How long did you spend in line? How many ballots got discarded? How often did voting machines break down? It should work for a simple reason: no one wants to be at the bottom of the list.

The Democracy Index is a “here-to-there” solution. First, and most importantly, it changes the terms of the debate. Right now, it is extremely hard for voters to figure out whether the system is working or not. Problems occur routinely, but they become visible to most of us only when an election is so close that those problems threaten to affect the outcome of an election, and we have no comparative data that would tell us which states’ systems work and which don’t.

The Index would make the systemic problems in our election system visible to

everyone. It gives voters a metric to hold elected officials accountable. Election administrators can defend their choices all they want, but they cannot get around the stark reality of the bottom line: How is the system working? And why is the state next door doing so much better?

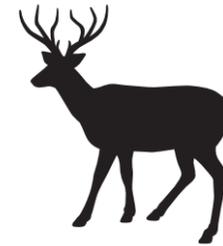
The Democracy Index is a “here-to-there” solution in a second, key respect. One of the central obstacles to reform is political self-interest. The foxes are guarding the henhouse in this country—partisans make decisions about how elections are run—and it is difficult to persuade politicians to give up that power. Most reformers ask politicians to do just that—to act contrary to their self-interest. The Democracy Index realigns the interests of politicians with the interests of voters. After all, every Secretary of State will want to be at the top of the Index. And certainly no one wants to be at the bottom. After all, most of the people who run our election system have higher political aims. Imagine you were running against a former Secretary of State like Ohio’s Kenneth Blackwell or Florida’s

## FACULTY VIEWPOINTS

Katherine Harris. What better campaign weapon could you imagine than a ranking system showing that your state is one of the worst-run systems in the country?

## Daniel Esty Reigniting America’s Environmental Spirit

Daniel C. Esty ’86 is the Hillhouse Professor of Environmental Law and Policy, with appointments in both Yale Law School and the Yale School of Forestry & Environmental Studies. He is the Director of the Yale Center for Environmental Law and Policy.



America has made a great deal of environmental progress over the past four decades. The Clean Air Act of 1970 and the Clean Water Act of 1972 launched an era of federal government-led environmental action. But the pace of progress has slowed, and it is time for a major overhaul of our approach to environmental protection. The next President should move to restructure how society pursues environmental protection, pushing for much greater use of economic incentives and a shift of the center of environmental gravity to the private sector.

One key point of learning from the past several decades is that environmental progress depends on technological advances. A successful response to climate change, in particular, will require an energy future that breaks free of fossil fuels (or a breakthrough in the capture and storage of carbon dioxide). A second key point of learning is that governments are not very good at doing technology development. Yet, for forty years, the government has played a central role in defining through “best available technology” rules what pieces of pollution control equipment are bolted onto smokestacks or effluent pipes.

It’s time to shift primary responsibility for environmental innovation onto the private sector. Government must still play a critical role in setting out policy goals and ensuring that incentives are in place to promote appropriate corporate activity. But business is better situated to do the work of developing photovoltaic cells, high-efficiency wind turbines, or “smart appliances” that reduce energy consumption. Companies, it turns out, are better at risk-taking, attracting an appropriate mix of skills and talents, paying for success, reinforcing promising lines of research, and redeploying capital where particular approaches show little promise.

By making every company and every individual pay for their greenhouse gas emissions and other pollution as well, we can lure venture capitalists, inventive spirits, and entrepreneurs into the environmental arena—re-energizing society’s march toward environmental progress. But leadership from the very top will be required to launch such a “new” environmental revolution.

## Jack Balkin and Reva Siegel Choice-Respecting Family Policy

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment.

Reva Siegel ’86 is Nicholas deB. Katzenbach Professor of Law and Professor of American Studies at Yale University.



For decades one issue—abortion—has dominated and polarized discussions of reproductive rights and family policy. We need a new direction—a national policy that respects women as responsible decisionmakers as much as it does men, facilitates their choices, and views reproductive rights as integral to a larger

family policy. Government can support the formation of strong, stable families by helping women and men avoid unintended pregnancies, and by helping those who want children to have them with less harm to themselves and to their families.

What would family policy that respected women’s choices as much as men’s look like? First, it would provide young people with information about the risks of unprotected sex; and it would improve access to contraception, especially for those most at risk for unintended pregnancies. Second, it would help effectuate women’s choices about unplanned pregnancies—providing information about abortion and adoption, material assistance for those struggling to raise children, legal procedures to help minors make difficult choices in troubled or hostile family environments, and resources to counter domestic violence. It would secure women’s right to an abortion free from government pressure designed to coerce, manipulate, intimidate, or shame women into continuing a pregnancy they wish to end. Third, it would support those choices *after* birth as well as before—through support for health care and nutrition for struggling families, through day care and workplace accommodation that would make it easier for both women and men to combine caregiving and waged work.

Sadly, family and reproductive rights policies are headed in the opposite direction: Most public support for women who give birth ends with birth; health care, day care, and workplace reforms have stagnated. Meanwhile governments have done everything possible to restrict information about and access to contraception and abortion; to deter health care providers from providing abortion and contraception services; and to encourage pharmacists to deny services on religious grounds. The Supreme Court’s most recent abortion decision in *Gonzales v. Carhart* only made matters worse; it suggested that states could enact new restrictions on abortion procedures because some women might not know what they really wanted and would regret

## FACULTY VIEWPOINTS ★ A WISH LIST FOR THE NEW ADMINISTRATION

their choices later on. This new paternalism hardly respects women's informed choices; it forecloses them. It treats women according to sexist stereotypes as emotional and irrational creatures who cannot be trusted with control over their own reproductive futures.

The effects of these various social policies fall most heavily on poor women, young women, and women in rural areas; ironically, they actually increase the number of abortions, delay many abortions to the second trimester, and increase health complications. Women are pushed at from two directions—coerced and frightened into having unwanted pregnancies, and abandoned after they do the state's bidding. This is not an acceptable “compromise” between pro-life and pro-choice positions—it is simply dysfunctional.

Government can do better. It can treat both women and men as human beings who have the intelligence to make responsible choices about their reproductive lives. It can help them choose the conditions under which they become parents and better manage the competing demands of parenting and the workplace. It can support family formation and keep existing families strong and stable. If we claim to respect women, we should respect their choices. If we want to promote family values, we should value families. It is as simple as that.

### Michael Graetz Restructure America's Tax System

Michael Graetz is the Justus S. Hotchkiss  
Professor of Law



The aging of the population, longer life expectancies, and rising health care costs

will put enormous stress on our ability to fund our government in the years ahead. In the short-term, modest changes in spending or taxes can balance the budget. But going forward we must restructure our nation's tax system.

Our archaic tax system was designed when the United States had virtually all the money there was. Even a horrid tax system—with individual income tax rates up to 91 percent—could not stymie our economic progress then. Now the U.S. economy must compete worldwide for the investment capital necessary to produce rising living standards for Americans. How should we reform our nation's tax system so that it is conducive to economic growth, fair, and simple for the American people to comply with?

The income tax law is four times longer than *War and Peace* and considerably harder to parse. Americans waste \$150 billion each year just to calculate and administer the tax. Incentives for unproductive expenditures, along with tax-planning efforts, are estimated to cost our economy an additional \$1 trillion a year. These are costs we cannot afford.

The only way to wean politicians from thinking that tax benefits are the way to solve our nation's problems is to get most Americans out of the income tax system altogether. We can do this and have a tax system that is much simpler and more conducive to economic growth by replacing the income tax for most Americans with a value-added tax (VAT), a broad-based tax on consumption used in every other Organization for Economic Cooperation and Development country and by nearly 150 countries around the world.

Here is the general scheme: Enact a value-added tax at a 10–14 percent rate to finance an exemption of \$100,000 from the income tax, and substantially lower the individual and corporate income tax rates on income above that. This would free 150 million Americans from having to deal with the income tax at all. Use a smart card or employer-based refunds to offset the regressivity of the VAT for low and moderate income people and to

replace the Earned Income Tax Credit.

Unlike many other tax reform plans that have been advanced, this system would not shift the tax burden away from our wealthiest citizens down the income scale. It would be far simpler and less costly to comply with and more favorable to savings, investments, and economic growth than our current tax system. It would fit well with international arrangements and improve the competitiveness of American businesses and workers. And it would stop the madness of relying on income tax breaks as the solution to the nation's social and economic problems. I detail this plan and the reasons for it in a book entitled *100 Million Unnecessary Returns: A Simple, Fair, and Competitive Tax Plan for the United States*, forthcoming in January from Yale University Press. I hope you will take it seriously.

### John Donohue Rethink the “War on Drugs”

John J. Donohue III is the  
Leighton Homer Surbeck Professor of Law



Crime is an issue that often seeps into Presidential elections in one form or another. Indeed, the Bush Administration has rolled back or undermined the two primary crime-fighting initiatives of the Clinton Administration by allowing the 1994 federal ban on assault weapons to lapse, and by eliminating Clinton's COPS program, which put tens of thousands of new police on the streets of American cities. Gun control is largely a dead letter, since the NRA has shown that it has the power to keep any type of gun in the hands of anyone who wants them, as well as the power to punish any Democrat who seeks greater gun control legislation.

One area that could bring large dividends in terms of crime reduction would be to change tactics in the quagmire of

## FACULTY VIEWPOINTS ★ A WISH LIST FOR THE NEW ADMINISTRATION

**“The proper way to deal with all of these addictive substances is to legalize, tax heavily, ban all forms of marketing, and fund efforts to restrain consumption and provide treatment for abusers.”** *John J. Donohue*

the American war on drugs. With blind fidelity to a failed policy, we continue to fritter away scarce law enforcement resources fighting sale and possession of drugs and to put hundreds of thousands in prison at enormous cost to taxpayers and to inmates and their families. Many substances from alcohol and nicotine to marijuana, cocaine, and heroin impose high social costs on American society, but only the illegal drugs lead to mass incarceration, corruption of police, street killings, and other acts of violence in the effort to market them to a desirous American population. Just as the end of Prohibition generated enormous crime reductions, legalization of the above drugs would likely bring about similar crime drops, while risking increases in the high costs attending the likely increase in consumption and abuse.

The proper way to deal with all of these addictive substances is to legalize, tax heavily, ban all forms of marketing, and fund efforts to restrain consumption and provide treatment for abusers. Instead, we have pursued a policy that either puts hundreds of thousands of Americans in prison when a coordinated and aggressive regulatory posture could likely restrain demand in a far less costly manner, or gives far too much freedom to stimulate demand and sales by aggressive marketing and advertising. One potential obstacle to a regime of legalization coupled with discouraging regulation and

taxation is that the suppliers of addictive substances will use constitutional arguments to advance their objectives (one can imagine the briefs by sellers of marijuana insisting on their first amendment rights to peddle the drug should legalization occur) or enlist the support of compliant legislators to help stimulate demand (note the activities of the gambling industry for an unwholesome example). This might suggest that constitutionally enshrined restrictions on the ability to market harmful substances might be an important antecedent to an effort to reduce crime by eliminating the staggering social costs of the war on drugs.

### Jonathan Macey Call for a Corporate Revolution

Jonathan Macey '82 is Sam Harris  
Professor of Corporate Law, Corporate Finance,  
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at Yale Law School



Ten years ago, nobody bothered to ask what the next administration should do about corporate law. Corporate law in general and the internal corporate gover-

nance of public companies in particular were issues dealt with almost exclusively at the state level. Intervention in corporate governance at the federal level was fairly rare, incremental, and reserved for particularly highly salient political issues like takeovers and insider trading that politicians simply could not afford to resist.

Enron, WorldCom, Adelphia, Tyco, Global Crossing and the other high-profile corporate meltdowns at the turn of the century changed all of this. Now everything from corporate loans to executives to the relationship between boards of directors and their outside auditors is covered by federal law on top of state law. The political spoils from regulating U.S. companies and capital markets simply became too irresistible.

Over-regulation has gotten so bad that we need more than mere reform. We need revolution. The average number of IPOs made in the U.S. has dropped by 72 percent over the last five years, and by a whopping 85 percent in the vital technology sector. Twenty-three of the twenty-five largest global IPOs in 2006 were listed on exchanges outside of the U.S.

Nowadays, when venture capitalists have finished making their contributions to start-up companies, they often no longer even attempt the traditional, time-honored strategy of doing an IPO. Instead, following the sclerotic European universal banking model, they simply try to line up a merger deal with an old-line established firm.

The next administration should start by recognizing that U.S. capital markets are in a crisis situation and that this crisis is caused by federal over-regulation of public companies and initial public offerings, and runaway private litigation. Second, it should sponsor sweeping legislative reform that removes the authority of the SEC to regulate not only internal corporate governance of U.S. corporations, but also public securities markets and exchanges and initial public offerings. The legislation should also unleash the market for corporate control by making defensive tactics such as the

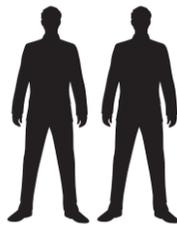
## FACULTY VIEWPOINTS ★ A WISH LIST FOR THE NEW ADMINISTRATION

poison pill illegal unless authorized by shareholder vote.

U.S. capital markets rose to prominence in an era in which healthy competition among rival stock exchanges and regulation at the state level enabled the U.S. not only to attain a dominant position in world capital markets, but also to provide a reliable low-cost source of capital for the emergent entrepreneurial class. If the new administration decides to abjure its recent practice of pandering to special interest groups and serve the needs of investors and workers, it is still not too late to unshackle the robust forces of capitalism that made this country great.

### William Eskridge A Wish List for Gay Rights

William N. Eskridge, Jr. '78 is the John A. Garver Professor of Jurisprudence



Lesbian, gay, bisexual, and transgendered (LGBT) Americans are worthy citizens who contribute productively to the nation. Under this premise, consistent with scientific evidence and people's experience, most LGBT rights advance national interests. Here is a realistic wish list:

1. *Job Discrimination.* The proposed Employment NonDiscrimination Act would bar most workplace discrimination because of sexual orientation or gender identity. Most Americans support this legislation; it will not cost employers much money; and it provides essential employment protections against prejudice-based harassment and discrimination in the workplace.

2. *Anti-Gay Violence.* LGBT Americans are subject to vicious violence by private and public bigots. The federal govern-

**“The 1993 statute excluding openly gay Americans from military service has been a costly failure, and the Administration should create a bipartisan commission to gather information and suggest reforms.”** *William Eskridge*

ment should provide funds for state anti-violence programs, hate crime prosecutions, and shelters for LGBT youth subjected to violence from their families.

3. *Same-Sex Couples.* The Defense of Marriage Act (1996) exclusion of same-sex couples from federal statutory “marriage” rights should be repealed. Meanwhile, the President should issue an executive order (similar to those issued by numerous governors) allowing federal employees to include their same-sex domestic partners in their health care benefits. If it does not repeal DOMA, Congress should enact legislation recognizing domestic partners for purposes of immigration, federal safety net entitlements like social security, and conflict of interest laws.

4. *Title IX (Anti-Discrimination in Educational Programs).* The Administration should strengthen Title IX's protections for LGBT students against discrimination and harassment and should insist on more progress toward complete gender equity in athletic programs.

5. *Sex and AIDS Education.* Federal sex and AIDS education programs should abandon their current sectarian (anti-homosexual and anti-abortion) slant and return to a medical focus. Follow the Scandinavian model for sex and AIDS education, which is fact-based, practical, and non-prejudiced.

6. *Military Service.* The 1993 statute excluding openly gay Americans from military service has been a costly failure,

and the Administration should create a bipartisan commission to gather information and suggest reforms. These might include repeal of the statute, experimental programs where the ban is revoked for specific units, and stronger anti-harassment rules.

### Peter H. Schuck School Choice

Peter H. Schuck is the Simeon E. Baldwin Professor of Law



The key to America's future is quality education for all youngsters. Governments at all levels have spent trillions of dollars on programs aimed at closing the vast educational achievement gap between low-income children and their more fortunate peers, but it remains.

We cannot close this gap until disadvantaged parents have the power, not just the right, to send their children to schools other than the low-performing ones to which they are now consigned. If parents had the choice and the wherewithal to exercise it, many would opt for alternate public schools such as magnets or operationally independent “charter” schools, while others would choose

## FACULTY VIEWPOINTS ★ A WISH LIST FOR THE NEW ADMINISTRATION

secular or religious private schools. The well-documented success of the Catholic schools in educating the same kinds of low-income children—whether Catholic or non-Catholic, minority or white, immigrant or American, urban or suburban—whom public schools have manifestly failed to reach is a strong indictment of the public system.

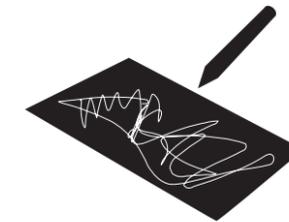
Every careful study of choice shows some benefits and no significant harm, with per pupil expenditures that are nearly half those in the public schools. For people who enjoy choice to argue that low-income children must be denied choice in order to “save” those schools is not simply wrong as an empirical matter (public schools that must compete for scarce dollars with private ones tend to improve), and as a historical matter (choice was common until the mid-19th century). It is also morally perverse, preferring the putative welfare of the school system to that of the children it is meant to serve.

Private schools and religious schools are often more successful than public ones in teaching civic virtues, community service, tolerance, and even feminism. In localities with choice, private schools tend to be more integrated, both racially and by income, than are their public schools, which reflect segregated housing patterns. Choice plans, by reducing the premiums paid for housing in areas with good public schools, make it somewhat easier for poorer families to move to those areas. No wonder vouch-

ers are most strongly supported by poor inner-city residents and most vigorously opposed by well-to-do suburbanites and their teachers unions.

### Ian Ayres Streamline Tax Filing

Ian Ayres '86 is the William K. Townsend Professor of Law at Yale Law School and a Professor at Yale's School of Management



The IRS should fill out your tax return for you. The IRS already has all the information it needs to fill out the complete forms for millions of wage income taxpayers who don't itemize their deductions. Taxpayers wouldn't be forced to use the IRS's pre-completed form. They could revise it or they could just throw it away and start from scratch.

Joe Bankman, the mastermind behind this idea, has shown that there are as many as 50 million Americans who would not need to change a thing and there are 50 million more where the IRS could make a darn good start. The feds even know enough to complete your state form for you while they're at it.

This isn't some pie in the sky idea. California's Ready Return Project already

shows that it can work. In 2005, over 11 thousand Californians used tax returns that the state had filled out for them in advance. The participants in the pilot program loved it. Almost all the users said they'd use it again next year.

But the Tax Preparation industry hates this idea and has been fighting it tooth and nail. Why pay a tax preparer to do your taxes if the government has already done it for you? Intuit, the maker of Turbo Tax, last year poured more than \$1 million into the California comptroller's race in an attempt to seize control of the state's Franchise Tax Board. They succeeded in killing the program for 2006 returns, but it is scheduled to expand in California to up to a million prepared returns in 2007.

John Edwards has got out in front on what should be a bipartisan issue. His “Form 1” program would have the IRS do the deed for millions of taxpayers.

It's kind of crazy that the current system requires people to keep copies of their W2 and 1099 forms. This would be like Visa requiring us to keep copies of all our charges, and then to fill in a blank form reporting how much we spent. Customers expect Visa to start the ball rolling by sending them a bill. We should expect no less from the IRS.

I remember my dad taking over the kitchen table for one weekend every April as he struggled to do our family's taxes. This is one rite of spring that we should try to end. ▼

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The Law Report would like to hear what you think about the issues for the 2008 election. To read an op-ed about human rights by Dean Harold Hongju Koh, and to weigh in on these and other issues, visit the Yale Law Report website at [www.law.yale.edu/ylr](http://www.law.yale.edu/ylr).