

YOU ARE LIVING IN A GOLD RUSH

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I. INTRODUCTION

Our times represent, at least for me and many of my friends, such a bewildering mix of right-wing ascendancy,¹ liberal cooptation,² euphemism,³ doublespeak, intergenerational rivalry,⁴ two-party politics in which the parties trade sides on key issues virtually every month,⁵ and

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1. See, e.g., MANUEL G. GONZALES & RICHARD DELGADO, *THE POLITICS OF FEAR: HOW REPUBLICANS USE MONEY, RACE, AND THE MEDIA TO WIN*, at vii (2006) (describing how the conservative right has used the politics of fear to enlist public support) [hereinafter GONZALES & DELGADO, *POLITICS OF FEAR*].

2. See, e.g., *id.* at ix, 84, 104-06 (describing how many liberals adopted programs dear to the right in hopes of remaining in power); *infra* note 5 and accompanying text.

3. For example, the No Child Left Behind Act substitutes frequent testing for educational reform, smaller class size, or adequately financed schools, as discussed in a special section in the *New York Times* devoted to the President's State of the Union Address. See David E. Sanger & Jim Rutenberg, *Bush, Pressing Modest Agenda, Insists U.S. Must Not Fail in Iraq*, N.Y. TIMES, Jan. 24, 2007, at A14 ("Children should be tested on basic reading and math skills every year between Grades 3 and 8. Measuring is the only way to know whether all our children are learning."); see also Editorial, *Energy Rhetoric, and Reality*, N.Y. TIMES, Jan. 25, 2007, at A24 (deploring empty promises of energy conservation masking as high-minded goals); Cornelia Dean, *Scientists Criticize White House Stance on Climate Change Findings*, N.Y. TIMES, Jan. 31, 2007, at A17 (same); Elisabeth Rosenthal & Andrew C. Revkin, *Science Panel Says Warming Is 'Unequivocal'*, N.Y. TIMES, Feb. 3, 2007, at A1 (same) [hereinafter Rosenthal & Revkin, *Unequivocal*]; Denise Grady, *U.S. Reconfigures the Way Casualty Totals Are Given*, N.Y. TIMES, Feb. 2, 2007, at A17 (noting that U.S. officials are altering definitions of "casualty" to depict the Iraq war as less dangerous to civilians than it is).

4. Consider, for example, recent efforts to enlist the young in support of cutbacks for Social Security by depicting it as a program of prime benefit to the elderly. See, e.g., Sanger & Rutenberg, *supra* note 3 ("If you're a younger worker, I believe you should be able to set aside part of that money in your own retirement account, so you can build a nest egg for your own future.").

5. For example: for at least partial support by some Democrats for the war in Iraq, see Adam Nagourney & Patrick Healy, *Democratic Hopefuls Split over the Best Path to Peace*, N.Y. TIMES, Feb. 2, 2007, at A12; for support for the minimum wage (first opposed by most Republicans, then supported), see Kate Zernike, *Senate Adds Tax Breaks as It Passes a Wage Bill*, N.Y. TIMES, Jan. 31, 2007, at A17; the military draft, usually anathema to peaceloving liberals, is now receiving support from some of them, see, e.g., Eric Lichtblau, *Flurry of Calls About Draft, and a Day of Denials*, N.Y. TIMES, Dec. 23, 2006, at A14; and affirmative action is newly popular among

incomprehensible economics⁶ that it is hard to read the daily papers without the growing suspicion that one has gone mad. Just as you thought you understood what is happening in Iraq, the Sunnis and Shiites start fighting each other with a level of ferocity that makes our presence there practically irrelevant.⁷ As soon as you thought you had Bush's economic program figured out—lavish tax cuts to the rich, deregulation for the chemical industry, symbolic concessions for everyone else⁸—his administration proposes something completely out of character, such as universal health insurance, financed, to be sure, by taxing the relatively few “gold plated” employer-paid group benefits.⁹ Oy, veh. (Translation: Ay, caramba). It goes on and on.

Here is one way I have hit upon to think about our times. I do not guarantee it will work for you. But if it does, hey, I'm just here to help.

You can think of our times, beginning perhaps fifteen years ago, as a latter-day Gold Rush, fueled by easy money from the technology revolution, globalization, outsourcing, the opening of third-world markets, and the emergence of India and China as trade powers—all part of what columnist Tom Friedman calls the flat world.¹⁰

As someone once said, it is hard to see the back of your head. Part of what this phrase means, I think, is that it is difficult to get a fix on how others see you. But in another sense, the phrase refers to the inherent difficulty of understanding one's times, at least when living

business groups, *see generally* David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

6. For example, the Republicans, who ordinarily believe in fiscally prudent policy, under George W. Bush, have created the largest deficit in U.S. history by heavy military spending coupled with tax cuts. *See, e.g.*, David E. Rosenbaum, *Pin the Label on Tax Policy*, N.Y. TIMES, Feb. 15, 2004, § 3, at 11; *see also* Steven A. Atlas, Editorial, *Cut Benefits to Save the Tax Cuts?*, N.Y. TIMES, Feb. 28, 2004, at A14.

7. *See, e.g.*, Mark Mazzetti, *Analysis Is Bleak on Iraq's Future*, N.Y. TIMES, Feb. 3, 2007, at A1 (describing how the Iraq war has developed into a Sunni-versus-Shiite power struggle with the Americans caught in the middle); *The Analysis: On the ‘Polarization’ of Iraqis and Their ‘Ready Recourse to Violence’*, N.Y. TIMES, Feb. 3, 2007, at A6 (same); Marc Santora, *Iraq Leader and Sunni Officials in Sectarian Clash on Security*, N.Y. TIMES, Jan. 26, 2007, at A1 (same).

8. *See, e.g.*, MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 41-45 (2005) (discussing the extent of tax cuts made for the benefit of the wealthy under the Bush Administration); Richard Delgado, *The Myth of Upward Mobility*, 69 U. PITT. L. REV. (forthcoming 2007) [hereinafter Delgado, *Myth*].

9. *See, e.g.*, Robert Pear, *Experts See Peril in Bush Health Proposal*, N.Y. TIMES, Jan. 28, 2007, § 1, at 20; Editorial, *The President's Risky Health Plan*, N.Y. TIMES, Jan. 26, 2007, at A20.

10. *See generally* THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (updated & expanded ed. 2006) (positing that developments in communication and information technology have “flattened” the world—enabled capital, labor, and ideas to find each other regardless of their initial location).

through them.¹¹ Later, of course, it is much easier; one gains perspective and can look back and see the currents that were swirling around, sort them out, and make some sense of them.

Doing that at the very time they unfold is trickier. My solution has been to search for a similar period in the past that exhibited some of the same forces at play as today. For me that period is the Gold Rush of the mid-nineteenth century.¹²

II. RELIVING THE GOLD RUSH

Our times, as mentioned earlier, are characterized by rampant globalization, accompanied by a rapid increase in social inequality, obscenely high corporate profits and executive salaries, official corruption, and a laissez-faire government averse to regulation or any form of social welfare or redistribution.¹³ We have seen a coarsening of public taste and an increase in bellicosity in diplomacy and world affairs.¹⁴ Our judicial system has stood as no bulwark against these tides, handing down decision after decision favorable to a hawkish executive

11. For discussion of one aspect of this predicament, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1260-61, 1275-82 (1992) (pointing out that one rarely is able to detect the racism of one's time, but only that of the past, and coining term "empathic fallacy" to describe the belief that one can).

12. California, Colorado, and Alaska were the sites of major gold rushes during this period; other regions had smaller versions as well. On the California Gold Rush, see, for example, RODNEY PAUL, CALIFORNIA GOLD RUSH (1947); GEORGE R. STEWART, THE CALIFORNIA TRAIL (1962); JOHN WALTON CAUGHEY, THE CALIFORNIA GOLD RUSH (1975); JOHN R. UMBECK, A THEORY OF PROPERTY RIGHTS: WITH APPLICATIONS TO THE CALIFORNIA GOLD RUSH (1981); WALTON BEAN & JAMES J. RAWLS, CALIFORNIA: AN INTERPRETIVE HISTORY 84-97 (4th ed. 1983) [hereinafter RAWLS, INTERPRETIVE HISTORY]. On the fate of minorities during Gold Rush times, see, for example, JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 311, 369 (2000) [hereinafter PEREA ET AL.]. On the fate of Latinos, especially Mexicans, during this period, see, for example, RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 111-12 (6th ed. 2007); MANUEL G. GONZALES, MEXICANOS: A HISTORY OF MEXICANS IN THE UNITED STATES 83-88, 92, 122 (1999); Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1533-40 (2000); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 715-22 (1999).

13. See *supra* notes 1-9 and accompanying text.

14. See, e.g., JACQUES BARZUN, FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE 788-98 (2000) (observing that Western culture is in decline even as its material wealth increases) [hereinafter BARZUN, DECADENCE]; GONZALES & DELGADO, POLITICS OF FEAR, *supra* note 1, at 15-16, 59-60, 82-83, 111-14 (commenting on this new belligerence of neoconservatives who whip up war fervor through appeals to nationalism and fear).

branch, corporate power, and traditional religion and morality.¹⁵ What is going on here? Was it not just a few years ago that courts were the defenders of the weak and powerless, and the champions of the criminally accused, mental patients, and the poor? Were they not the careful monitors of the line between church and state, as well as defenders of women's right to choose?¹⁶

Looking at today from the perspective of the Gold Rush and a few other go-go eras such as the Gilded Age helps current events fall into place. If it does not help you make the right guesses on the stock market, at least it may help you from going stark raving crazy.

So, in what respects are we reliving the Gold Rush? For one thing, we have all heard of the riches to be had, seen the many new Hummers and other expensive cars on the highway, noticed the recent wave of second-home buying.¹⁷ Most of us have not shared in that new wealth, in fact have jobs that are less secure and bring us less real income than ever.¹⁸ But we have all heard of dot-com millionaires, barely out of their teens, who started a company with a few friends one night in a dorm

15. E.g., John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754, 757 (2007) (discussing developments such as The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified in scattered sections of 10 U.S.C.) and recent decisions such as *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *Rasul v. Bush*, 542 U.S. 466 (2004), that arose out of efforts to increase the executive's warmaking powers); Noah Feldman, *Whose War Powers?*, N.Y. TIMES, Feb. 4, 2007, § 6, at 21; Mark Leibovich, *Leftward, Ho?*, N.Y. TIMES, Feb. 18, 2007, § 4, at 1 (describing the Terry Schiavo case and the conservative moral agenda); see also *Andersen v. King County*, 138 P.3d 963, 982, 990 (Wash. 2006) (upholding a Defense of Marriage Act because "marriage is traditionally linked to procreation and the survival of the human race"); *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005) (upholding display of the Ten Commandments on grounds of Texas state capitol).

16. See generally, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment and that the right of an indigent defendant to have the assistance of counsel in a criminal trial is fundamental); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements from the custodial interrogation of the defendant "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a state criminal abortion statute that excepts only a life-saving procedure without regard to the pregnancy stage or recognition of the other interests at stake violated the Due Process Clause of the Fourteenth Amendment); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that requiring an official state prayer to be recited at public schools violated the Establishment Clause).

17. On this new wealth, see, for example, Micheline Maynard & Nick Bunkley, *G.M. Applying Its Sales Skills to Its Comeback Story*, N.Y. TIMES, Oct. 3, 2006, at C1 (commenting on the new popularity of Hummers); Robert Strauss, *If It's Really Expensive, We'll Take it*, N.Y. TIMES, May 28, 2006, at § 14 (N.J. Weekly) (commenting on the wave of second-home buying).

18. See, e.g., Delgado, *Myth*, *supra* note 8 (commenting on the new job insecurity and drop in real income).

room and are now wealthy enough to buy their old universities.¹⁹ For those not good at mathematics or computer science, television shows like *The Apprentice*, *American Idol*, or *Survivor* teach that a technical background or business degree from a fancy school are not necessary for success. All that is required is a confident demeanor, a winning personality, and the willingness to take chances.²⁰

Much the same was true during the Gold Rush. Coarse, uneducated single men with few prospects and little knowledge of mining or the outdoors flocked to California, Colorado, and the Klondike from cities in the East, the Midwest, or South in search of easy fortune.²¹ Few of them found it, but all had heard of someone else who had. So they all kept trying long after prudence would have suggested a different line of work.²²

One thing the miners accomplished was a considerable amount of environmental destruction; few of them took time to clean up their debris before moving on to another site or going back home to St. Louis. Colorado today is paying the price in deforested hillsides (razed to provide timber to shore up the mines), poisoned rivers, and mountains stained white by chemicals leaching out of the abandoned mines.²³ I have lived there; it is not a pretty sight.

Today, we repeat many of those patterns. Silicon Valley is one of the most polluted spots in the nation,²⁴ while our national attachment to big cars and fossil fuels contributes daily to global warming.²⁵ All this accompanies a laissez-faire, me-first attitude that bears an eerie resemblance to the one that fueled the first Gold Rush 150 years ago.

19. See, e.g., Andrew Ross Sorkin, *Dot-Com Boom Echoed in Deal to Buy YouTube*, N.Y. TIMES, Oct. 10, 2006, at A1 (describing how three twenty-somethings started up a profitless website one night after a party and eventually sold it to Google for 1.65 billion dollars).

20. See, e.g., Delgado, *Myth*, *supra* note 8 (commenting on the role of these television programs in reinforcing hopes of easy wealth).

21. For descriptions of the prevailing climate during these times, see sources cited *supra* note 12, and Jacqueline Baker Barnhart, *Prostitutes in San Francisco*, in NEW DIRECTIONS IN CALIFORNIA HISTORY: A BOOK OF READINGS 135, 135-43 (James J. Rawls ed., 1988) [hereinafter Barnhart, *Prostitutes*].

22. See *supra* note 12 and accompanying text.

23. See, e.g., Alan Prendergast, *What Lies Beneath: The Effort to Reclaim a Historic Mining District Has Consumed Years and Millions of Dollars. But Will It Hold Water?*, DENV. WESTWORD, Sept. 1, 2005, <http://www.westword.com/2005-09-01/news/what-lies-beneath/>.

24. See, e.g., DAVID NAGUIB PELLOW & LISA SUN-HEE PARK, *THE SILICON VALLEY OF DREAMS: ENVIRONMENTAL INJUSTICE, IMMIGRANT WORKERS, AND THE HIGH-TECH GLOBAL ECONOMY* (2002) (noting that this region is highly polluted and that the technology workers who process microchips are at risk of ingesting several types of deadly toxins).

25. On global warming and its causes, see, for example, Rosenthal & Revkin, *Unequivocal*, *supra* note 3.

In addition to dreams of easy wealth going hand in hand with environmental pillage, the two eras witnessed a pronounced coarsening of taste and culture. The miners wanted women and bawdy houses, not opera and classical music.²⁶ After a rough day in the fields, they expected easily grasped, visceral entertainment, the kind we would today call “sight gags,” not the kind that would challenge their brains and sensibilities.

Is this true for our period, as well? Consider how support for the arts has fallen, how crime, horror, and other best-selling genres account for the sale of ninety percent of books, and the Internet is crowded with shrill blogs, conspiracy theorists, pornographers, inane friendship circles, and spam.²⁷ Can anyone recall when America last produced a world-class composer, poet, novelist, or painter?²⁸

What about the role of law? Today, our judges wear robes, publish their opinions in nicely bound volumes, and go home by five o'clock. In that sense, we are a little more civilized than the vigilantes that doled out frontier justice in the Wild West. But we have had our lapses—Guantanamo Bay, Abu Ghraib, and foreign rendition, to name a few.²⁹ And the USA PATRIOT Act denies civil liberties for the foreign born and ordinary citizens alike just as surely as did a lynching party looking for a Chinaman.³⁰

Consider how both eras witnessed nativism and a dislike of foreigners.³¹ Today's society is up in arms about illegal immigration, with a militarized border, beefed-up patrols, and even calls for a 700-mile long fence.³² Even small communities far from the border are

26. See, e.g., RAWLS, INTERPRETIVE HISTORY, *supra* note 12, at 95-96; Barnhart, *Prostitutes*, *supra* note 21, at 135-45 (describing prostitution as a business, enabled by San Francisco's “lack of standard social mores” during the Gold Rush).

27. See, e.g., Note, *Splog! Or How to Stop the Rise of a New Menace on the Internet*, 19 HARV. J.L. & TECH. 467, 467-68 (2006).

28. See, e.g., BARZUN, DECADENCE, *supra* note 14, at 790-92 (noting that Western civilization has produced few great artists, composers, and writers in recent times).

29. E.g., *Officer to Face Court-Martial on 8 Charges in Abu Ghraib Abuse*, N.Y. TIMES, Jan. 27, 2007, at A18; Ian Austen, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A5 (describing U.S. role in foreign rendition—transferring subjects held in custody to other nations for torture).

30. See USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, 50 U.S.C.).

31. On the history of nativism, see, for example, IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997); PEREA ET AL., *supra* note 12, at 29, 835-36, 841; ACUÑA, *supra* note 12, at 69-70, 253-54.

32. See, e.g., Editorial, *The Not-So-Great Wall*, N.Y. TIMES, Nov. 6, 2006, at A20 (describing proposal to beef up border enforcement and build a 700-mile long fence).

enacting repressive measures aimed at signaling that undocumented workers are not welcome.³³

What about in 1850? The last half of the nineteenth century saw a veritable flood of legislation, at both the local and state level, aimed at keeping foreign competition under control. When Mexican and Chinese gold miners enjoyed success, states imposed Foreign Miners' taxes on brown and yellow prospectors,³⁴ while San Francisco enacted anti-Chinese ordinances to keep that group from operating profitable laundries.³⁵ Anglos removed Native Americans from rich lands, resettling them in desolate reservations far from where their ancestors were buried.³⁶ In a few cases, these reservations were found to contain mineral wealth. Anglos simply removed the Native Americans a second time.³⁷ When the Japanese successfully farmed rocky or hilly parcels that West Coast Anglo farmers could not make bloom, western states and cities simply passed ordinances that kept them from farming, and Congress enacted statutes that prevented them from immigrating altogether.³⁸

The two periods, then and now, were marked by foreign wars and invasions, then in the form of a pretextual, land-grabbing war with the new, weak nation of Mexico and, a little later, another with Spain.³⁹ Today, the United States brandishes a muscular foreign policy that covets bases in other parts of the world, access to markets and oil, and the right to dictate the kinds of weapons other nations develop, even if they disclaim any intention to use them.⁴⁰

Both periods saw shifts in the ruling ideology. Then, doctrines like Discovery, Manifest Destiny, and, later, the Monroe Doctrine justified official expansionism.⁴¹ Today, we tell ourselves a subtler story, that we

33. See, e.g., Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34 (describing two cities' measures to discourage Latino immigration).

34. See, e.g., ACUÑA, *supra* note 12, at 112; PEREA ET AL., *supra* note 12, at 311, 370.

35. See *Yick Wo v. Hopkins*, 118 U.S. 356, 357-58, 373-74 (1886).

36. See PEREA ET AL., *supra* note 12, at 27, 188-91, 208.

37. *Id.*; see also RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 66-67 (1975) (describing removal of Cherokee from government enclave in Georgia when gold was discovered there); Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 372 (1998).

38. See PEREA ET AL., *supra* note 12, at 398-405, 514-17.

39. *Id.* at 253-75; ACUÑA, *supra* note 12, at 40-51, 70.

40. On that newly muscular policy, see, for example, David Brooks, *The Iraq Syndrome*, R.I.P., N.Y. TIMES, Feb. 1, 2007, at A23.

41. See PEREA ET AL., *supra* note 12, at 178-79, 254-58, 326-31, 868; ACUÑA, *supra* note 12, at 43-45.

are spreading democracy.⁴² During westward expansion, the settlers detested the far distant federal government, which insisted, from time to time, on decency and negotiation in the treatment of Native Americans; they much preferred local authorities, who were much less tolerant of the Native Americans and Mexicans.⁴³ Today, in similar fashion, conservatives extol the benefits of federalism, with a weakened federal bureaucracy sharing power with the states.⁴⁴ The only difference is that the Native Americans are missing and the ideology slightly more dignified.

III. CONCLUSION

If we are all living, in effect, in a Gold Age with innumerable parallels to that rough period 150 years ago, what does it bode for the future? For one thing, the excesses of the Gold Rush era came to an end; they did not go on forever. The money ran out. We stopped killing each other, invading other nations, and stringing up foreigners, blacks, and Latinos. U.S. society eventually began cleaning up the worst of the environmental messes left from that era and shifted to more sustainable sources of income, such as farming and industry. Perhaps time will temper some of the worst excesses of our day as well, and we will relearn the lessons of the past, including how to live with our neighbors, share our vast wealth, and live in harmony (after a fashion) with the natural environment.⁴⁵

Don't count on it. But you heard it here first.

42. See *The State of Our Union Is Strong: Our Cause in the World Is Right*, N.Y. TIMES, Jan. 24, 2007, at A16 (describing "decisive ideological struggle" for "human freedom").

43. See, e.g., RAWLS, INTERPRETIVE HISTORY, *supra* note 12, at 140-41.

44. On federalism, see The Federalist Society, <http://www.Fed-soc.org> (last visited Apr. 9, 2007).

45. E.g., Rosenthal & Revkin, *Unequivocal*, *supra* note 3.