

# CORRESPONDENCE

## "Interstitial" gaps

To the editors:

Louis Menand's review of *The Collected Works of Justice Holmes* ("Bet-Tabilitarianism," November 11) seeks to characterize Oliver Wendell Holmes's writings as a manifesto in support of freewheeling judicial activism. Nothing could be further from Holmes's philosophy than the notion that judges are free to decide cases according to their personal views.

Menand claims that Holmes's concept of the judicial function coincided with the way people think—"by the seat of their pants. First they decide, then they deduce." According to Menand, starting with Holmes's first article in 1870, "he spent the next sixty-two years as a jurist and a judge trying to be faithful to this insight." Menand bases this gross distortion on Holmes's oft-repeated principle that "general principles do not decide concrete cases." But that is not because the decision has already been made, but because of the inherent limitations of general principles.

Holmes properly rejected, of course, what has been called the "judicial slot machine" theory of the judicial process—the naïve notion that judges merely "find" or "discover" the correct decision by pulling the lever on a machine pre-loaded with all the correct answers. Do judges "legislate"? Holmes's response is incomparable: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially" (*Southern Pacific Co. v. Jensen*, dissenting opinion). Filling "interstitial" gaps is one thing; but it is quite another to attribute to Holmes the view that the whole judicial process is nothing more than an elaborate window dressing for decisions previously made by the judges "by the seat of their pants." As Holmes stated, judges need "to learn to transcend our own convictions" and "it is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives...."

Menand fails to distinguish between Holmes's comments about the result-oriented origins of the early common law and Holmes's views about the function of a judge in a modern democratic society. Holmes's recognition that legal decisions are not brought by the stork

cannot be turned into a brief for judicial promiscuity.

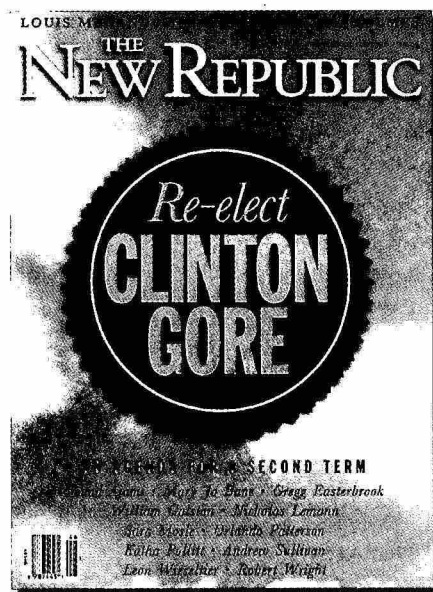
EARL E. POLLOCK  
Longboat Key, Florida

## Euro-trash

To the editors:

Nathan Glazer accurately lays out "the one simple factor" that explains why cities in Western Europe are "better" than even our best: Europeans "love their cities more than we do" ("It's Better in Europe," November 11).

But, somehow, after covering nearly all the bases, Glazer fails to see the most glaring consequence of Europeans' preference for urban life. Their cities are nicer—suffering less from blight and



crime—because more well-off citizens want to live in them and always have. Their choice bids up housing and other living costs that effectively ban most poorer Swedes, Germans and French—and those countries' immigrant populations—from their more desirable city centers or inner-ring neighborhoods. This is true despite often elaborate provisions for low-income housing and other state schemes to counter market pressure on living costs. And this is not a mere academic footnote to an overall urban design success story.

Anyone familiar with the crisis facing today's European urban planners could have informed Glazer that suburban high-rise slums and ethnic ghettos are a serious problem from rough outer Stockholm neighborhoods like Rinkeby or Fittja to the Lyons suburban-ghetto, Venissieux Les Minguettes, where in the last few years riots have become a near monthly occurrence. An observer needn't have read *Le Monde* every day

over the last decade to know that much of the steam driving Jean-Marie Le Pen's ultra-right National Front comes from the overheated spectacle of violence and desperation in France's suburban ethnic ghettos, places far from Eiffel Tower crowds and Champs Élysées sidewalk cafés—places where ordinary cops won't even go anymore. Instead, only the militarized—and hated—riot police, the CRS, are sent there even on routine calls.

SCOTT HOLMQUIST  
Berkeley, California

## GOP togetherness

To the editors:

John B. Judis caught me ("Meltdown," November 11) on the New Hampshire campaign trail in a moment of candor, correctly reporting my serious reservations about the wisdom of some of my party's 1995 environmental initiatives. An opinion attributed to me about the Christian Coalition ("he doesn't like the Republicans' ties to the religious right"), however, was invented out of whole cloth, apparently to support the premise that mainstream Republicans believe that the Republican Party will be doomed unless it jettisons its conservative principles and constituencies.

Nonsense. I joined the Republican Party and won my state Senate seat in 1994 and again in 1996 because my party has become the party of grassroots energy, ideas and fundamental change. While I differ with social conservatives on abortion, they are a vital part of the Republican Party governing coalition. Social conservatives must also be credited with bringing into unmistakable focus the problems associated with America's declining moral and ethical standards.

Republican Party activists include a fractious mix of sound-currency/free-trade establishmentarians, populists, libertarians, low-tax/limited government advocates and social conservatives. Our challenge is not to doom ourselves to minority party status by building a cellar under our big tent to hide some members of our coalition. Instead, Republicans must develop and articulate our many and broad areas of agreement—which now reflect American political consensus.

JIM RUBENS  
New Hampshire State Senator  
Etna, New Hampshire

John B. Judis replies:

Saying I "invented out of whole cloth" his opinions about the Christian Coalition is a serious charge, and entirely unwarranted. After TNR received this letter,

I sent Rubens a copy of my notes from our conversation, including the sentence I quoted from him, "The real Republican Party is not the Christian Coalition." He replied, "Your notes look fine," but then went on to dispute my interpretation ("he doesn't like the Republicans' ties to the religious right") of that sentence. That's certainly his right, but a difference of interpretation is not what his letter suggested. I stand confidently behind everything I wrote and reported about him.

## Band-Aids

To the editors:

You do not have to be a member of "the strange union of business interests, naïve libertarians and misguided left-wing urban advocates" to disagree with Orlando Patterson's advice ("An Agenda for a Second Term," November 11) to the president to tighten the screws on unskilled legal and illegal immigration in the interest of the earnings of our "low-class workers." While the evidence that the unskilled component of our current immigration hurts the wages of our workers is problematic, at best, Patterson's demand for an enhanced enforcement of sanctions on the hire of illegals (who are manifestly among the unskilled) to make their entry unprofitable is nothing less than misguided.

Patterson makes a fatal mistake, shared by the economist George Borjas, by both political parties and by even well-meaning liberals such as Father Hesburgh and the late Barbara Jordan. He assumes that the inflow of illegals can be virtually eliminated by domestic (and, for that matter, border) punishment strategies. The wage and opportunity differentials are so immense, as between us and the poor countries from which the illegals mainly come, that efforts at reducing incentives, whether by taking the illegals off the welfare rolls or ejecting their children from the schools or by imposing ever greater penalties on their employers, will yield little response.

While they do little, therefore, to reduce the illegals in our midst, these efforts only serve to drive more of them, unable to rear their heads in protest and able only to extend their hands in supplication, into the underground economy of sweatshops and exploitative work conditions that a well-meaning but ineffective Labor Secretary Robert Reich seeks to fix with Band-Aid gestures such as marching into New York's garment district with the hapless Kathie Lee Gifford. Few unions here have traditionally come to their aid, as did some empathetic German unions in support of the foreign guestworkers in the 1970s when they

demonstrated with placards saying: *Ihr Kampf ist unser Kampf* (their battle is our battle). Instead, the demonization of the illegals has only prompted a general cry of *Mein Kampf*.

Surely it is time to come to terms with this reality. Domestic enforcement has been tried without success before: that was in fact the principal aim of the 1986 Immigration Act, which introduced employer sanctions against objections that they could not work. The only policy that combines decency with sense is then to remove the illegals from the political radar screen, freezing domestic enforcement instead of expanding it. Once the illegals get past the border, we ought to rein in, rather than enhance, the harassment and penalties that produce misery and no results.

But I believe that this must go hand in hand with stricter enforcement at the border itself. Not that even the border enforcement can be particularly effective. The Rio Grande could be fenced up, a ditch dug, the army deployed, all at great cost along the huge border, and we may optimistically hope to dent the flow from Mexico. But how do we effectively stop the illegals who arrive on legal short-term visas and then get lost in our land? They already number close to 60 percent of the estimated illegal inflow.

The best defense of border enforcement (which Patterson dismisses as ineffective while accepting uncritically the assumption that domestic measures will work instead) is simply that the government must show, despite the stark reality that immigration is increasingly beyond control, that it is doing something to control it. And that something has to be a policy that creates the maximum such illusion at least cost in terms of our traditions of liberty, justice and fairness. Domestic enforcement measures, whether directed at illegals or at employers, do worst in this regard; border enforcement measures do best. The policy choice is both obvious and the opposite of what Patterson wants.

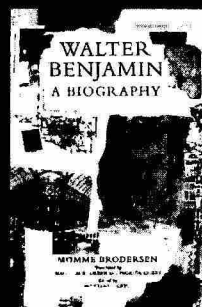
JAGDISH BHAGWATI  
New York, New York

## Nailed

To the editors:

There is only one thing in all your issue of November 11 worth reading and that is Leon Wieseltier's "Do Everything." At last Bill Clinton . . . nailed. As for Jeffrey Rosen, he asks if he is alone in "suspecting that Clinton is not merely the lesser of two evils, but by far the most impressive president that those born after the death of JFK have known?" Yes.

F.E. REGAN  
Crafton, Massachusetts



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