

Renewing the American Constitutional Tradition

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Introduction

The Hoover Institution is proud to publish this volume in honor of Koret Foundation board of directors president Tad Taube. The contributions reflect a variety of disciplinary perspectives including political philosophy, law, comparative politics, and anthropology. They explore a wide range of topics: the spirit and structure of the Constitution, the debt crisis, the growth of the administrative state, competing conceptions of the role of judges in our constitutional system, the interests and ideas that incline the United States to promote liberty and democracy abroad and the limits of America's capacity to do so, and religion and the American regime. And these essays and lectures first appeared in a variety of venues and formats.

What binds the chapters in this volume together is a shared commitment to understanding the moral and political challenges the United States faces today in light of the enduring principles of American constitutional government. Thus all exemplify the spirit that informs Tad Taube's approach to the study of American politics and that guides his sustained support over the course of decades of public policy research aimed at strengthening the ability of the United States to honor its founding promise of individual liberty and equality under law.

The principles of the American constitutional tradition have been exposed to sweeping criticism by reigning orthodoxies in the American academy. Scientism—which is not to be confused with the natural sciences—declares that *all* legitimate knowledge stems from the methods and standards employed by the natural sciences. Illegitimately extending these methods and standards beyond their proper spheres, scientism dismisses the appeal to principle in morals and politics as an expression of superstition or a disguised effort to satisfy an appetite. And it treats prudence, that form of judgment nurtured by experience that translates principles into practice, as hopelessly arbitrary and unreliable.

Meanwhile, progressivism—which is not to be confused with the conviction that the defense of liberty always includes an ability to improve the

polity—proclaims that the Constitution is a living thing whose meaning changes with changing times. Progressives find in this premise authority to read their values into the Constitution and license to extrude from it the principle of limited government, which is a centerpiece of the American constitutional tradition but which progressives believe interferes with their ambitious programs. These programs seek to vest ever-greater political responsibility in the hands of bureaucrats, administrators, and judges, whose supposed technical expertise and presumed refined moral judgment, progressives believe, will yield just public policy.

The American constitutional tradition is grounded in an alternative understanding of good government. The Constitution assumes, with the Declaration of Independence, that all human beings are by nature free and equal; that legitimate government flows from the consent of the governed; and that the primary purpose of government is to secure the rights shared equally by all. It recognizes that securing those rights is a complex undertaking because human beings are largely driven by self-interest, but are also capable of public-interested conduct, particularly when they are educated to exercise the virtues that advance their private interest well understood. It creates a limited government of few and defined powers to secure individual liberty. And it incorporates a variety of institutional structures and devices—including federalism, representation, the enlargement of population and territory to promote pluralism, the separation of powers, a bi-cameral legislature, a unitary executive, and an independent judiciary—to keep government within those limits. But the ultimate check on government in the American constitutional system is a morally responsible and politically engaged citizenry that holds public officials accountable through the electoral process.

In the first chapter, “*The Federalist*: Constitutionalizing Liberty,” I explore the understanding of self-government that undergirds the Constitution and that is elaborated in *The Federalist*, the first and still authoritative commentary on the Constitution. I emphasize the lesson of political moderation inscribed in the Constitution. That lesson should not be confused with popular misunderstandings according to which moderation reflects the sacrifice of principle to expediency. The Constitution is rooted in an awareness of the variety of contending principles that sustain liberty. Through carefully constructed government institutions it encourages the accommodation and

balancing of those principles or, in other words, political moderation well understood.

In “Spending, Public Debt, and Constitutional Design,” Michael McConnell argues that spending and debt are not only political issues but legal and constitutional ones as well. Because of the temptation of democratic majorities to impose debt on future generations through generous expenditures on themselves in the here and now, it is appropriate, he argues, for the Constitution to set limits on spending. At the same time, because democratic majorities also undertake sound expenditures—for example, for defense of the country and the acquisition of physical assets—that benefit future generations too, the Constitution must provide flexibility. McConnell finds a reasonable and constitutionally sound principle for limiting spending, and thereby controlling the accumulation of debt, in Article I, Section 8, Clause 1 of the Constitution, which provides that Congress use tax funds to promote the “general welfare.” Based on examination of constitutional text, history, and structure, McConnell concludes that the best interpretation of this constitutional provision is that federal spending should not be directed toward local projects intended to benefit a single state or a few states but rather should be reserved for purposes covering the entire country.

In “The Perilous Position of the Rule of Law and the Administrative State,” Richard Epstein analyzes the erosion of economic liberty and the aggrandizement of the federal government caused by the rise of administrative agencies (for example, the Federal Communications Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Labor Relations Board). The transformation began with the Interstate Commerce Act of 1887; it was accelerated by the proliferation of agencies during the Woodrow Wilson administration; and in landmark New Deal cases it was entrenched and expanded by the Supreme Court’s broad reading of the Commerce Clause. The result has been the delegation to administrative agencies of far-reaching discretion to make rules, enforce laws, and adjudicate controversies, which imposes “ever-greater strains on the rule of law.” This is because the rule of law presupposes “known, consistent, and certain rules that are applied prospectively by neutral judges to the cases before them.” But the more rule-making authority is exercised by administrative agencies, which are several steps removed from the electorate, the more unknown, inconsistent, and uncertain the rules become.

In “The Rise of the Romantic Judge,” Mary Ann Glendon contrasts two conceptions of the role of the judge in the American constitutional system. According to the classical conception, which is rooted in the political theory that informs the Constitution and is expounded in *The Federalist*, the judge’s task is to apply the law impartially—that is, governed by constitutional text, structure, history, and precedent and without regard to persons or outcomes. By contrast, the romantic judge, associated with progressive politics, downplays constitutional text, structure, history, and precedent, seeking instead to reach results that correspond to what is called for by his or her understanding of justice and sense of compassion or empathy. The costs to constitutional self-government of the romantic conception, according to Glendon, are considerable. Since sometimes the left will be in power and sometimes the right, it means that judging will be turned into an extension of partisan politics. And by transferring political power to the courts, the major branch of government most distant from, and least accountable to, the people, the practice of romantic judging undermines democratic politics by weakening the habits of self-government.

The American constitutional tradition illuminates not only the challenges of domestic policy but also those of foreign policy. Given America’s global economic influence, wide-ranging diplomatic reach, and unprecedented capacity to project force around the world, one particularly salient area in the twenty-first century concerns America’s interest in, and capacity to advance, liberty and democracy abroad. Because of the universal claims out of which American constitutional government arises, liberty and democracy in the rest of the world have always been a matter of sympathetic concern to the United States. Since countries devoted to freedom and equality are likely to cooperate more readily and compete more fruitfully, the growth of liberty and democracy abroad has from the beginning been understood to be a national interest. But since, as *The Federalist* points out, the capacity for self-government is rooted in a variety of factors including geography, resources, and culture, America must be ever attentive to the material and moral preconditions that impose limits on the capacity of U.S. foreign policy to encourage freedom and democracy in distant and diverse settings.

In “Promoting Democracy,” Larry Diamond argues that in America two broad schools of foreign policy have competed for dominance. The first, closely tied to the founding, holds that America makes its proper contribution

to liberty and democracy abroad by exemplifying them at home, but should avoid “foreign entanglements.” The second, associated at its origins with Woodrow Wilson, contends that America not only has an interest in but the responsibility to energetically promote liberty and democracy beyond its shores, and can do so through a variety of means including diplomacy, economic development, political reform, and, where necessary, military action. Recent decades, Diamond observes, have witnessed a melding of these two schools. Moreover, while Ronald Reagan entered office criticizing the naiveté of Jimmy Carter’s foreign policy, which was built around an international human rights campaign, Reagan did more than any president of the twentieth century to entrench the promotion of liberty and democracy in American foreign policy. Nevertheless, as Diamond shows, controversy remains and is sure to continue about the means and instruments most adequate to advancing liberty and democracy abroad.

In “Democratic Imperialism: A Blueprint,” Stanley Kurtz illuminates the challenges America faces in establishing freedom and democracy in illiberal and undemocratic states by placing those challenges in larger historical and political context. Kurtz suggests that Britain’s experience in India may be the most instructive precedent. That experience involved two competing approaches. One, whose greatest exponent was the British statesman Edmund Burke, stressed respect for indigenous beliefs, practices, and institutions and sought to work in and through them to promote gradual transformation. The other, represented most prominently by James Mill and his son John Stuart, was generally skeptical of indigenous beliefs, practices, and institutions and strove to replace them promptly with the principles and practices of freedom. Kurtz concludes that the freedom agenda must be advanced judiciously because it is risky and fraught with the moral ambiguities involved in forcing another people to be free. To succeed it must achieve a complex synthesis, combining a Burkean respect for gradual transformation and traditional ways with a Millian determination to provide education in the principles of liberty and to create political institutions based on freedom and equality.

George Will brings the volume to a close in “Religion and Politics in the First Modern Nation” with an examination of the contribution of religion to forming the beliefs and nourishing the virtues of freedom. Drawing on James Madison and Alexis de Tocqueville, among others, Will vindicates the paradoxical proposition that to continue to sustain belief in natural rights and

to foster virtue, religion must remain on the periphery of partisan politics. The vindication involves a delicate balance. Good citizenship is not inextricably bound up with citizens' religious faith, Will argues, but "religion has been, and can still be, supremely important and helpful to the flourishing of our democracy." Although the natural rights in which our constitutional system is grounded do not themselves require a foundation in religious faith, it is "indubitably the case that natural rights are especially firmly grounded when they are grounded in religious doctrine." And while the virtues on which self-government depends can arise from a variety of sources, religion has throughout American history played a crucial role in nurturing them. If we are to continue to nurture the virtues of freedom, a religious faith that keeps its distance from partisan politics and a partisan politics that keeps its distance from religious faith will be vital to the public interest.

Indeed, maintaining the proper separation from and respect for religion—no less than balancing the principles and goods involved in the pursuit of all the vital matters of public policy examined in this volume—is inseparable from the renewal of the American constitutional tradition.

It is a pleasant task to note that this book was underwritten by the Koret Foundation. I am grateful to Koret Foundation chief executive officer Jeffrey Farber and chief operating officer Tina Frank for the fruitful collaboration out of which this volume arose. Hoover Institution senior associate director Richard Sousa shepherded the project through the entire process from conception to publication. And thanks to Tad who, since that first breakfast at Buck's of Woodside many years ago, has been a provocative interlocutor, a generous benefactor, and a good friend.

Peter Berkowitz
Stanford, California
August 2013

The Federalist: Constitutionalizing Liberty

Peter Berkowitz

Scarcely a detail of constitutional design escaped lively and learned debate at the Constitutional Convention in the spring and sweltering summer of 1787. Yet all the delegates in Philadelphia readily agreed on the Constitution's leading principles: government's power was derived from the consent of the governed; its preeminent aim was to secure individual liberty or the rights shared equally by all; and limits must be built into government to honor consent and secure liberty.

Indeed, the consensus about government's leading principles was so wide and deep in America during the founding era that in the great ratifying debates that took place during the fall of 1787 and well into 1788, the consensus encompassed the Constitution's worthy opponents, who came to be known as the Anti-Federalists. Their major objection was that the proposed limits for the new national government were too few and too ineffective to meet the requirements of republicanism, which was generally understood as government whose authority was rooted in the people and whose purpose was to advance the people's good by safeguarding their liberty. The size, structure, powers, and distance from the people of the national government outlined in the Constitution, the Anti-Federalists contended, posed an intolerable threat to the people's freedom. The Constitution would inevitably overwhelm the states, invade people's rights, and undermine the virtues that republican government demanded.¹

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For their part, the Constitution's proponents agreed in principle with the Anti-Federalists about the threats a strong national government posed to liberty and self-government. Despite the dangers, the founders maintained that the Articles of Confederation, the charter of government under which Americans had been living, had to be replaced because they suffered from irreparable weaknesses. Agreed to by the Continental Congress in 1777 in the midst of the Revolutionary War and ratified in 1781, two years before the Treaty of Paris brought the war to an end, the Articles of Confederation left the Continental Congress unable to effectively provide for the common defense, conduct diplomacy, collect taxes, regulate commerce, and adjudicate disputes that crossed state boundaries. A substantially strengthened national government, the champions of the Constitution argued, was necessary to perform the tasks crucial to preserving the union. And, they believed, preservation of the union was vital because it provided the best means of preserving the people's liberty.

Sharing the Anti-Federalists' fears about government power, the framers devised diverse restraints to control the larger and stronger national government they presented to the American people for ratification in the form of the Constitution. A principal instrument of restraint was federalism, or the establishment, in the interest of individual liberty, of a judicious balance in the division of labor between the national government and state governments.

In a letter to George Washington a month before delegates gathered in Philadelphia, James Madison placed the challenge of federalism front and center. On April 16, 1787, Madison—who because of his central role at Philadelphia earned the title “father of the Constitution”—wrote:

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.²

Madison offered several proposals for attaining some middle ground between individual independence of the states and one simple republic composed of

the people of all the states. The proposals aimed at strengthening the national government by giving it a variety of new powers: to operate without the regular intervention of state governments; to exercise ultimate authority in matters requiring uniformity, including regulation of trade and naturalization; to veto state legislation; and to wield supremacy in judicial matters. Not all of Madison's proposals were adopted: the Constitution does not grant the national government a veto over state legislation, though state legislation must be consistent with the Constitution and federal law. But Madison's determination to balance the claims of "local authorities" with "a due supremacy of the national authority" was embraced as a guiding principle at Philadelphia and woven into the fabric of the Constitution.

A well-balanced federalism, however, would not be sufficient to attain a middle ground between the extremes of unqualified state sovereignty and a single pure republic. "A Government composed of such extensive powers" as Madison envisaged would also itself need to be "well organized and balanced."³ The essential balance would have to be achieved not only between the national government and state governments but within the national government itself (and within state governments).

The balance Madison sought amounted to more than providing competing interests the room to maneuver. It went beyond allowing policy preferences from different political perspectives to be considered and contested. It strove to give rival and worthy political principles—such as individual rights and majority will, energy and stability, limited and enumerated powers and flexibility in governance—their due weight. The framers' aim was to constitutionalize liberty by institutionalizing political moderation.

CONTEMPORARY PERSPECTIVES, CLASSICAL ROOTS, FOUNDING COMPROMISES

The balancing of diverse principles, or political moderation, that the Constitution incorporates into the fundamental structure of government is often misunderstood, if not overlooked, because of immoderate views that are brought to bear on it. Many of today's progressives subscribe to dubious opinions inherited from the original progressivism that arose at the end of the nineteenth century and flourished in the first two decades of the twentieth century. They tend to understand the Constitution primarily in terms

of checks and balances, which they conceive of in a crude Newtonian or mechanical sense. Moreover, they are likely to suppose that advances in morality and science have greatly reduced the need to limit government power, which the framers considered of paramount importance. And progressives are inclined to blame the Constitution's cumbersome lawmaking apparatus for blocking what they regard as urgent projects of social and political transformation.⁴

These progressive criticisms frequently rest on mistaken notions of the purpose, structure, and operation of the Constitution, and typically misidentify the true sources of progressive frustration. First, the Constitution's scheme of checks and balances also facilitates cooperation by blending powers so that in limited but consequential ways, each branch of government is involved in the operation of the other two. Second, the evidence is overwhelmingly against those who believe that human nature has undergone any fundamental alteration since the eighteenth century or, more to the point, that self-interest, pride, ambition, greed, envy, fear, and the whole panoply of destabilizing passions the framers fortified the Constitution to withstand have ceased to interfere with the exercise of reason by citizens and their representatives. And third, progressives seldom contemplate that their inability to assemble enduring electoral majorities in behalf of progressive political goals reflects both lack of solid majority support and constitutional constraints designed to encourage deliberation in the legislative process.

In contrast to progressives who typically seek to overcome the Constitution, conservatives characteristically strive to recover and renew it. Conservative scholars of political theory have been at the forefront of the quest over the last half-century to acquire an accurate understanding of the letter and spirit of the Constitution, including an appreciation of the Anti-Federalist thinkers who opposed it in the name of liberty. Conservative legal scholars have championed the doctrine of originalism, which grounds the authority of federal judges to strike down legislation as unconstitutional in a historically informed understanding of the Constitution's original meaning. And members of the Tea Party movement, who rallied around conservative candidates in the November 2010 midterm elections, have popularized the return to the Constitution, enthusiastically calling for a renewal of a constitutional conservatism that has at its core a dedication to the central constitutional principle of limited government.

Conservatives, however, are not immune to immoderate views about the Constitution. Whereas progressives are inclined to disparage it, conservatives tend to idealize it. The conservative temptation has been to ascribe to the Constitution a purity it never possessed and never could have attained. In succumbing, conservatives neglect the spirit of political moderation that gives strength and resilience to the political institutions the Constitution establishes.

The spirit of political moderation that animates the Constitution must not be confused with the progressive celebration of the “living Constitution.” Progressives usually invoke the idea of the living Constitution as an invitation to judges to find in the Constitution’s vaguer formulations—“due process of law,” “equal protection,” the prohibition on “cruel and unusual punishment,” and the power to “regulate commerce . . . among the several states”—malleable moral and political values. These values, they contend, authorize courts to strike down laws they think unwise, unjust, or at odds with the fundamental requirements of democracy, though not apparently in conflict with the Constitution’s text, structure, and the history of its framing and ratification; or authorize courts to uphold laws that, while in conflict with the Constitution’s text, structure, and the history of its framing and ratification, are in progressives’ opinion wise, just, or required by democratic theory.⁵ In contrast, the political moderation that animates the Constitution is found in its text and structure and the history of its framing and ratification. Supreme Court Justice Antonin Scalia has remarked that he prefers a dead Constitution⁶—a salutary preference in the face of progressives’ inclination, in the guise of respecting the Constitution, to infuse it with partisan moral values and policy preferences. But in reality the American Constitution promotes the spirit of balance. The balance it strikes among competing political principles and the imperative to balance that its design proclaims are of course highly relevant to the judicial task. The relevance, however, extends well beyond the judiciary; it applies also to the activities of the legislative and executive branches, to citizens’ exercise of their rights and discharge of their responsibilities, and indeed to every aspect of self-government in a free society.

The framers of the Constitution incorporated political moderation into the institutions of government in novel and potent ways. But they were by no means the first to recognize the importance of political moderation to

good government. Indeed, the Constitution also partakes of the old practice of weaving together diverse human elements and political principles, which Plato and Aristotle taught was the quintessential political art.⁷

In accordance with the classical understanding, the framers recognized that to perform their tasks well, legislatures, the executive, and judges would require different skills and qualities, because the political institutions created by the Constitution incorporate a variety of political principles. The House of Representatives is closest to the people and is the most democratic and boisterous; representatives are apportioned on the basis of population and every two years they stand for election in relatively small districts. The Senate, in which states are represented equally and whose members serve six-year terms, is more aristocratic and staid; it is designed for thorough deliberation and involves weightier responsibilities, providing advice and consent on treaties and executive branch appointments and trying all officials whom the House votes to impeach. The president's energy and unity reflect king-like qualities that come into play in the enforcement of the law, the conduct of foreign affairs, and the exercise of commander-in-chief powers. Independent judges, who are appointed for life, represent the operation within the federal government of judgment about law that is relatively insulated from politics.

The imperative to balance extends to the compromises that the founders adopted because they needed to obtain the requisite signatures at the Constitutional Convention and ultimately win ratification of the new charter of government. The most important structurally, and the most in keeping with the underlying spirit of the Constitution, was the so-called Great Compromise. Borrowing elements from the Virginia Plan and the New Jersey Plan, it was responsible for establishing the legislative branch as bi-cameral, with states receiving proportional representation in the House and equal representation in the Senate.⁸ The most notorious of these compromises, and the most antithetical to the Constitution's underlying spirit, was the fateful compromise on slavery.⁹

Although it never uses the terms "slave" or "slavery," the Constitution gave the pernicious practice legal sanction. Article I, Section 2, counts those who were neither "free Persons" nor "Indians not taxed" as three-fifths of a person in determining representation and direct taxes.¹⁰ Article I, Section 9, prohibits Congress from interfering with the "importation" of "persons" before 1808. And Article IV, Section 2, provides for the return of "a Person

held to Service or Labour in one State” who had escaped into another state. Yet, as Abraham Lincoln argued, by refusing to use the terms “slave” and “slavery,” the Constitution implicitly declares that their legal recognition was an ugly necessity.¹¹ Moreover, by institutionalizing as a governing moral and political principle the self-evident truth of the Declaration of Independence that all human beings are by nature free and equal, the Constitution condemns slavery as a violation of fundamental rights and laid the groundwork for its eventual elimination after the Civil War by means of the Thirteenth, Fourteenth, and Fifteenth Amendments.¹²

The Constitution’s compromise with slavery does not belong to the highest form of political moderation because it did not involve the balance of worthy principles. Nor does it reflect the balancing of reputable public policies or the clash of legitimate interests. Rather, it involves the balancing of a worthy goal, the preservation of a union devoted to liberty, with an ugly necessity, acquiescence to southern states’ nonnegotiable demand for the preservation of a hateful institution. In the end, only a bloody civil war could pry the South loose from it. Still, by compromising with an ugly necessity on terms that favored freedom, the Constitution, even at its low point, vindicated the claims of political moderation.¹³

THE FEDERALIST AND THE AMBIGUITIES OF SELF-GOVERNMENT

The case for balance on behalf of liberty and for ratifying the Constitution as an exemplary embodiment of that balance was developed most forcefully and authoritatively in *The Federalist*, a collection of eighty-five essays that originally appeared in New York newspapers between October 1787 and August 1788. The essays were the brainchild of Alexander Hamilton, who had been one of New York’s delegates to the Constitutional Convention and would become the first United States secretary of the treasury; he contributed nearly two-thirds of the total. He enlisted two other statesmen in the ambitious undertaking. John Jay, then secretary of foreign affairs under the Continental Congress and later the first chief justice of the Supreme Court, contributed a handful of papers. And James Madison, who represented Virginia at the Constitutional Convention and would go on to serve as the fourth president of the United States, contributed almost one-third,

including several of the most significant. All the essays were published under the pseudonym Publius, to indicate their unity of purpose and the civic inspiration the American founders drew from a founder of the Roman Republic.

While *The Federalist* has deservedly become a classic work of political philosophy, it is by no means a comprehensive treatise on politics. It does not, for example, systematically discuss religion, tradition, virtue, the family, community, education, economics, or the cultural presuppositions of self-government. Nor is that a surprise. The authors' practical task was paramount: they undertook to explain the operations of the Constitution and how it translated political principles into sturdy and flexible political institutions, and thereby to persuade citizens of the state of New York that supporting the Constitution was vital to their interests and indispensable to their rights. Of course, as a political tract for the time, *The Federalist* did not refrain here and there from polemical overstatement and understatement. But it would be a great error to think of *The Federalist* as merely a polemical political tract. The authors chose to make their case for ratification by showing how the Constitution, in many cases in and through its compromises, weighed universal features of human nature and fashioned political institutions that conformed to the enduring requirements of self-government.

The Constitution's institutionalization of political moderation depended on innovations. These, Hamilton boldly proclaimed in *Federalist* No. 9, are rooted in principles that should be of interest to all "enlightened friends of liberty."¹⁴ Thanks to "great improvement" in the modern era of "the science of politics," more effective responses had been developed to the age-old challenge of republican government.¹⁵ The perennial problem was how to preserve the virtues of republics—liberty and self-government—while controlling the vice of instability that plagued regimes devoted to freedom and equality and eventually destroyed them. Improvements were at hand, according to Hamilton, because of progress in understanding "the efficacy of various principles" that "were either not known at all, or imperfectly known to the ancients."¹⁶

Thanks to this progress, the Constitution would achieve a balance unprecedented in the annals of self-government, keeping government that was grounded in the consent of the governed within its proper limits, while furnishing it with the energy—or capacity to act swiftly and decisively—and the authority to effectively perform the functions indispensable to securing

liberty. Prominent among the innovations were the separation of powers, checks and balances, an independent judiciary, elected legislative representatives, and an enlargement in the polity's geographical extent and population. These were all "wholly new discoveries, or have made their principal progress towards perfection in modern times."¹⁷ They would provide "means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided."¹⁸

The result, Hamilton argued in an echo of Madison's April 1787 letter to Washington, was "a confederate republic" that combined the benefits of local and national sovereignty.¹⁹ More precisely, as Madison observed in *Federalist* No. 39, the Constitution creates a government that is both federal, in that it unites sovereign states, and national, in that certain of its limited and enumerated powers reach the people in their individual capacities directly and not based on their state citizenship.²⁰ In another echo of Madison's letter—and in anticipation of points Madison would make in subsequent installments of *The Federalist* about the "mixed constitution"²¹ and "compound republic"²² created by the Constitution—Hamilton observed that within that mix, the Constitution erects a national government that itself contains a balance of competing principles. By joining energy and efficiency to accountability to the people and respect for their rights, the Constitution combines "the advantages of monarchy with those of republicanism"²³ without departing from republican political principles.²⁴

The need for the political moderation that suffuses the Constitution's institutional design arises from the ambiguities of self-government. According to *The Federalist*, these reflect the ambiguities of human nature. Human beings are by nature free and equal, but equality in natural rights is accompanied by inequality in natural gifts and abilities. Human beings are also endowed with passion and reason, but since the passion for reason tends to be weak, passion often gets the better of reason. Men and women are capable of disciplining passions by means of education—in the narrow sense of literacy and general knowledge and in the broader sense of formation of character. They can also enlarge their understanding of private interest by appreciating its convergence over the long run with the public good. Through the exercise of the virtues—starting with self-control, rationality, and industry—they are able to bring their conduct in line with an enlightened understanding of their true interests. The Constitution seeks to economize on virtue because while

necessary to self-government, virtue is a scarce resource that government has little competence to cultivate or authority to regulate.

Since choice is essential to admirable deeds, dignity, and happiness, virtue presupposes liberty. Conversely, liberty presupposes virtue, because maintaining the institutions of a free society—political, economic, and cultural—is hard work that requires citizens to exercise excellences of mind and character. Since religion was considered an indispensable teacher of virtue, liberty for the founders also presupposed faith,²⁵ which in eighteenth-century America mainly meant Protestant Christianity. However, neither virtue nor salvation was properly the aim of politics because permitting government to take responsibility for them would invite infringement of rights and government intrusion into the private sphere where it lacked knowledge, means, and legitimacy.

Contrary to the canard popularized by its academic critics and by some of its scholarly supporters, the Constitution and the larger liberal tradition do not limit government's responsibility for virtue because of theoretical opinions about the opposition between freedom and virtue, skeptical doubts concerning virtue's reality, or relativist certainties about its nonexistence. Rather, the Constitution restricts government's role in shaping opinion, instilling habits of heart and mind, and forming character in order to safeguard individual freedom. This freedom, it was widely understood at the time of the founding, enabled individuals to discharge their responsibility to maintain themselves and to care for their families and their religious communities, where virtue was principally cultivated.²⁶

The framers knew that even in the best of circumstances virtue would be in short supply, and that a constitution devoted to protecting liberty and derived from the will of the people would give vice abundant opportunity to flourish. To endure, such a constitution would have to provide through its "extent and structure," in Madison's illuminating formulation in *Federalist* No. 10, "a republican remedy for the diseases most incident to republican government."²⁷

The Constitution has done more than endure. Well into its third century, the Constitution's experiment in democratic self-government may reasonably be pronounced a remarkable success. Notwithstanding its many imperfections and the daunting challenges it continues to face, the world's oldest liberal democracy remains the freest, most diverse, most prosperous,

and mightiest nation the world has ever known. While the balance of interests, policies, and principles it must strike is constantly changing, the need to exercise political moderation in striking the balance remains a paramount political task.

THE FEDERALIST'S LESSON OF MODERATION

The Federalist provides unrivaled insight into the Constitution's institutionalization of political moderation. The most famous of its eighty-five papers are probably Nos. 1, 10, 47, 51, 70, and 78. They should serve as a staple of any respectable introduction to American politics and provide a point of departure for any serious renewal of constitutional understanding. Unfortunately, even these deservedly preeminent papers are vanishing from the college curriculum. Rarely is *The Federalist* mandatory reading for the general liberal education of all students, and even political science departments seldom require their students to acquire more than the most cursory knowledge of it.²⁸ When *The Federalist* is studied, its views on the connection between liberty, self-government, and political moderation are generally neglected.

Hamilton introduced the theme of political moderation in *Federalist* No. 1, in the context of an analysis of the difficulties of obtaining an impartial debate about the Constitution's merits. The debate, he stressed, revolved around the momentous question of how the American people should govern themselves. Ratification of the Constitution was necessary to preserve the "existence of the Union, the safety and welfare of the parts of which it is composed, the fate of an empire, in many respects, the most interesting in the world."²⁹ More was at stake, however, than the future of America:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.³⁰

This early assertion of American exceptionalism may appear to brim with immoderation. Yet Hamilton was right: never before had a free and democratic government been established on a continental scale through reflection and choice. His assessment, moreover, was neither parochial nor aristocratic; America's crisis of government presented the opportunity to vindicate universal principles of freedom and consent.

Both "patriotism," or love of country, and "philanthropy," or love of humanity, *Federalist* No. 1 states, will impel "all considerate and good men" to consider the significance of the moment and carefully examine the Constitution's merits.³¹ In the best case, such men would aspire to "a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good."³²

Yet in most cases—even those involving considerate and good men—factors not connected to the public good could be counted on to perplex and bias men's estimates of their true interests. Consequently, genuine deliberation on issues of great political importance was "a thing more ardently to be wished, than seriously to be expected."³³ The extensive political changes embodied in the Constitution compounded the problem: "The plan offered to our deliberations, affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favourable to the discovery of truth."³⁴

Weak or bad men were particularly vulnerable to losing sight of the public interest, but intelligent and public-spirited men were far from immune. Some would resist evaluating the Constitution on the merits because of their vested interest in the old order. Others would seek to foment enmity and division, exploiting disarray by finding profitable opportunities in the breakup of the union. Still others, acting on the basis of "upright intentions," would oppose change because of "the honest errors of minds led astray by preconceived jealousies and fears." Even the best minds would prove unreliable: "So numerous indeed and so powerful are the causes, which serve to give a false bias to the judgment, that we upon many occasions, see wise and good men on the wrong as well as on the right side of questions, of the first magnitude to society."³⁵

The chastening spectacle of bad men rejecting the Constitution for power and profit, and wise and good men failing to grasp its advantages is richly

instructive. “If duly attended to,” Hamilton observed, the spectacle “would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy.”³⁶

The lesson of moderation that Hamilton gleaned from examination of the abundance of causes that distort judgment and encourage indifference or disdain for the public interest goes well beyond the debate about the Constitution. Rooted in reflections on human nature and freedom, Hamilton’s lesson of moderation applies to democratic debate in general, and more broadly to the challenge of designing a government fit for a free people. In politics, our adversaries as well as our allies—and of course we ourselves—are always vulnerable and frequently succumb to impure influences: “Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question.”³⁷ The knowledge that even those who defend the better alternative—not only in debates about constitutional fundamentals, but also in controversies over law and public policy—may do so for confused or self-serving reasons counsels patience with the one-sidedness endemic to politics, very much including democratic politics: “Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties.”³⁸

Despite the lesson of, and inducements to, moderation furnished by consideration of the realities of democratic debate, immoderation tends to carry the day. Hamilton suspected that “as in all cases of great national discussion,” so too in the debate over the ratification of the Constitution, “a torrent of angry and malignant passions will be let loose” and partisans will seek to win supporters “by the loudness of their declamations, and by the bitterness of their invectives.”³⁹

In particular, he anticipated that the Constitution’s opponents would introduce an invidious distinction between energy in government and protection of the people’s liberty.⁴⁰ Vigor in rule would be portrayed as a stalking horse for monarchy, and solicitude for the people’s rights would be depicted as a calculated bid for “popularity at the expense of the public good.”⁴¹ But both energy and liberty are essential features of good government. Indeed, each is essential to the other. To protect against threats to freedom from abroad, a strong and agile government is needed to organize resources, craft

strategies, and command forces. To secure rights at home, government also needs strength and agility to enact, implement, and enforce laws. While energy in government can swamp liberty and liberty can sap energy, the proper balance requires ample room for both.

The reconciliation of enduring political principles is also at issue in Madison's famous analysis of factions in *Federalist* No. 10.⁴² A faction is a group of united citizens acting contrary "to the rights of other citizens, or to the permanent and aggregate interests of the community."⁴³ Factions arise from liberty, are excited and amplified by liberty, and the threat they pose must be dealt with in a manner that respects liberty.

In a society based on natural freedom and equality, the equal protection of individuals' unequal faculties is "the first object of government."⁴⁴ Divisions within society spring from the free exercise of unequal faculties, which produces contending interests, most notably the interests connected to the acquisition of different kinds and quantities of property. Unequal acquisition and ownership of property multiplies social divisions by shaping "sentiments and views of the respective proprietors"; these in turn generate "different interests and parties."⁴⁵ Madison concluded that "the latent causes of faction are thus sown in the nature of man."⁴⁶

Political freedom amplifies them. What begins with social divisions based on property quickly spreads to religion and politics and eventually extends throughout civil society. Ambitious leaders have perennially "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."⁴⁷ So central to political life in a free society are parties and factions, and so great a threat do they pose to liberty and stability, that regulating them "forms the principal task of modern legislation."⁴⁸

The unavoidable presence of "the spirit of party and faction" in "the necessary and ordinary operations of the government," however, considerably complicates the task.⁴⁹ The presence is unavoidable because citizen legislators are always also interested parties. As creditors or debtors, members of some economic class or another, and taxpayers one and all, lawmakers will always also have private interests in the legislation they debate and on which they vote. Thus the body whose responsibility it is to regulate faction is itself necessarily riven by faction.

Madison did not rule out the possibility of office holders rising above private interest and acting out of devotion to the public good. But because “enlightened statesmen will not always be at the helm,” government must be fortified against legislators who fail to harmonize the people’s “clashing interests” in light of the public good.⁵⁰ Even if enlightened statesmen were at the helm, good government would often remain elusive because it depends on “taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.”⁵¹

So faction in a free society is unavoidable. Removing its causes is out of the question since that would require regulating opinion or imposing the same interests on each citizen, both of which would destroy the liberty whose preservation is the very purpose of political society. The solution, Madison maintained, consists in controlling factions’ effects.

Democracies, or democracies traditionally understood, were not well suited to controlling factions’ effects. Of course, if the faction was a minority, the majority would defeat the threat to individual rights and the public interest. But in the then-prevailing understanding of democracy, in which citizens met directly to decide matters of law and policy, there was no cure for majority faction—or what John Stuart Mill would later call “the tyranny of the majority”⁵²—consistent with the preservation of freedom. This was a fatal flaw since all experience showed that when given the opportunity, majorities had been quick to implement “schemes of oppression” and “neither religious nor moral motives can be relied on as an adequate control.”⁵³ Hence, democracies “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.”⁵⁴ Because of their internal structure—or lack of it—direct or pure democracies fail to combine liberty with stability, and so destroy both.

One of the improvements that would enable the Constitution, consistent with the principles of republican self-government, to control the destabilizing effects of faction was the institution of representation, or delegation of the tasks of government to a small number of citizens elected by the rest. Representation creates the opportunity “to refine and enlarge the public

views” by placing responsibility for lawmaking in the hands of those “whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”⁵⁵

Since even the least likely to neglect the public interest are fallible, the scheme of representation must be carefully calibrated. Citizens will not always choose representatives wisely and representatives will not always perform their tasks responsibly. Accordingly, there must be enough representatives “to guard against the cabals of the few” but not so many as to unleash “the confusion of a multitude.”⁵⁶ At the same time, care must be given so that electoral districts do not become so large that representatives grow remote from “local circumstances and lesser interests.”⁵⁷ Nor should representatives be elected by so few that preoccupation with the local and lesser renders them unfit to “comprehend and pursue great and national objects.”⁵⁸

The second improvement for dealing with the effects of faction involved increasing the number of citizens and enlarging the country’s territory. Traditionally, republics were small by definition, the size of a city. Madison argued that small size was a principal cause of their instability because it allowed for a majority faction to dominate, or a few minority factions to undermine the state. In contrast, a larger territory and population multiplies “the variety of parties and interests,” dispersing citizens’ energies and increasing the number of associations that have some claim on them, thereby reducing the likelihood that a majority faction will arise to trample on the rights of minorities or that a few factions will disrupt or paralyze the people.⁵⁹ The constant clash and competition of many and varied interests characteristic of liberal democracy in America today, a reflection of constitutional design, may not always be edifying or inspiring. But by thwarting the rise of a single overweening majority or the emergence of a few powerful minorities hostile to the public interest, the multiplication of parties and interests provides a vital safeguard of freedom.⁶⁰

The Constitution’s separation of powers scheme also exemplifies the institutionalization of political moderation. Distinguishing the legislative, executive, and judicial functions of government by giving to each its own department was “an essential precaution in favor of liberty,” as Madison argued in *Federalist* No. 47.⁶¹ So the distinct powers of government can work

together effectively, the Constitution also blends them, giving each branch a small but significant share in the work of the others.⁶² The legislative branch, for example, must confirm federal judges and has the power to impeach the president and remove him from office; the president signs and vetoes legislation and appoints judges; and the judiciary can strike down congressional statutes and declare presidential actions unconstitutional.

During the ratifying debates, this blending looked to many critics like a gross violation of the separation of powers. To the contrary, argued Madison, it was fully consistent with that “sacred maxim of free government,” provided that the maxim was well understood.⁶³ The limited blending of separate and distinct powers comported with the common practice of state governments in America. And it reflected the political teaching of the “celebrated Montesquieu,”⁶⁴ which all sides agreed was authoritative. Montesquieu, Madison emphasized, did not require that each branch be pure, but rather that no two principal functions of government be combined entirely in a single branch.

To keep the separate powers separate, however, the Constitution does not rely only or ultimately on “parchment barriers.”⁶⁵ Rather, it is structured to prudently channel passions and interests. As Madison explained in *Federalist* No. 51, the Constitution organizes the legislative, executive, and judicial branches so that in advancing their interests and performing their constitutional tasks, office holders also will serve as “the means of keeping each other in their proper places.”⁶⁶ Assuming that the passions and interests that impel men to compete for high office are usually impure and will continue to exert their influence once men attain high office, the Constitution adopts a “policy of supplying by opposite and rival interests, the defect of better motives.”⁶⁷ The policy is implemented through “inventions of prudence”—constitutional structures in which “ambition must be made to counteract ambition” and that equip members of each of the three branches with powers to resist encroachment by the others.⁶⁸ By aligning office holders’ personal pride in publicly recognized achievement with the rights and prerogatives of their office, the Constitution seeks to harness powerful passions and interests and place them in the service of the public good. Without relying overly much on virtue—and without denying its necessity either—the Constitution aims at improving the chances for legislation consistent with

the requirements of the public good by giving office holders in each branch a private interest in checking the propensity to overreach common to all.

So critical is the structure of government to the protection of freedom that Hamilton argued in *Federalist* No. 84 that a bill of rights would not only be superfluous but counterproductive.⁶⁹ As Madison stressed in *Federalist* No. 45, the Constitution forms a government of limited and enumerated powers: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”⁷⁰ There was no need to prohibit the federal government from, for example, infringing on the rights of religion and speech, because it had no powers with which to do so. Furthermore, argued Hamilton, expressly prohibiting the federal government from exercising powers it did not possess was dangerous because it might give rise to the destabilizing inference that the federal government possessed unenumerated powers.

Still, the Constitution’s complex institutional arrangements as well as its first ten amendments—the Bill of Rights, which despite Hamilton’s objections came into effect in 1791—were at best “auxiliary precautions.”⁷¹ The ultimate precaution was a “dependence on the people.”⁷² All parts of government ultimately must answer through elections to the people, who are the original source of legitimate political power—even judges are appointed and confirmed by elected representatives.⁷³ The ultimate dependence on the people did not change the vital importance of well-designed institutions. Accordingly, Madison observed in *Federalist* No. 51 that since men are not angels and angels do not govern men, the structure of political institutions must operate first to enable the government to control the governed and then to oblige government to control itself.⁷⁴ At the same time, as Madison noted in *Federalist* No. 55, because constitutional democracy depends on the consent of the people—which calls on their judgment, vigilance, and love of liberty—it relies on virtue to a greater degree than any other form of government.⁷⁵

Despite the Constitution’s auxiliary and ultimate precautions, Anti-Federalists condemned the executive, which they saw as a poorly disguised monarch, and attacked the federal judiciary capped by the Supreme Court, which they believed was vested with the anti-democratic power to strike down acts of Congress the justices found to conflict with the Constitution.

Hamilton defended both, showing that the institutions were designed to achieve the proper balance, securing liberty while operating within the constraints imposed by republican principles.

In *Federalist* No. 70, Hamilton argued that energy in the executive is crucial to defending the nation against foreign threats, administering the laws, and protecting individual rights.⁷⁶ Placing the executive power in one person—however large the branch he directs may grow—was the most effective means of ensuring that the president would be able to act vigorously, promptly, and, where necessary, with secrecy. These features of executive power suggest conduct characteristic of a monarch. But the executive was not placed above the law. Hamilton insisted, moreover, that the countervailing forces built into the Constitution would keep the president in check, while enabling him to use his monarch-like powers to defend the nation, enforce the law, and protect rights. In addition, the people would be better able to hold a unitary executive responsible and to remove him within four years through an election, or sooner if the House impeached him and the Senate found him guilty of “high crimes and misdemeanors.” So successful has the Constitution been in anchoring the executive in the will of the people that presidential elections, the only elections in the country in which all eligible voters have the opportunity to participate, have come to be seen as the apex of American democracy.

Similarly, in *Federalist* No. 78, Hamilton maintained that despite the appearance of a threat to democratic legitimacy, the federal judiciary advances the cause of freedom by combining independence and accountability.⁷⁷ To obtain the requisite integrity and impartiality, the Constitution reduces the role of electoral politics in forming the federal judiciary by relying on presidential nomination and Senate confirmation. In addition, the Constitution confers life tenure on judges on condition of good behavior. This frees judges from dependence on regular reconsideration by the political branches and the people. The independence of the courts is necessary because their job is to master the complex body of law that naturally develops in a free society and, in the form of reasoned and impartial decisions, apply it to the cases and controversies that come before them. At the same time, the judiciary’s dependence on the political branches, though attenuated, is necessary and desirable because all exercises of power in a republic must be derived from the consent of the governed.

The Constitution does not explicitly provide for what has come to be called judicial review—the power to strike down legislation and invalidate acts of the executive as inconsistent with the Constitution. Nor does Hamilton use the term. But he does insist that the Constitution’s structure reasonably gives rise to the presumption that an essential part of the federal judiciary’s job is to keep the people’s representatives within limits assigned by the Constitution. After all, “the interpretation of the laws is the proper and peculiar province of the courts”⁷⁸ and, as Article VI, Clause 2, proclaims, the Constitution is the supreme law of the land, along with the treaties and U.S. laws made pursuant to it. Moreover, judicial review is rooted in the idea of consent. When the judiciary strikes down as inconsistent with the Constitution a law passed by Congress and signed by the president, it invalidates the will of a temporary and passing majority in the name of the people’s most deeply considered and most fundamental legal judgments, which are inscribed in the Constitution.⁷⁹ To the objection that judicial review elevates the judiciary above the other branches, Hamilton famously replied that the judiciary is the “least dangerous” of the branches because it lacks the power of the purse, which is assigned to Congress, and the power of the sword, which is assigned to the executive.⁸⁰

Looking back over the last seventy years, these reassurances may seem quaint given the range of divisive questions the Supreme Court has decided. Yet the people continue to retain ultimate responsibility for securing liberty. They may elect a president and a Congress that, consistent with a reasonable reading of the Constitution, will repeal laws the Court declined to overturn or elect representatives who will enact requirements that the Court refused to mandate. Or the people can elect a president who will appoint and senators who will confirm justices with judicial philosophies more in keeping with their opinions about the role of judges in a liberal democracy. And the people are always at liberty to amend the Constitution in accordance with procedures spelled out in Article V. These undertakings are certainly not made easy by the Constitution. But the difficulty of altering the legal judgments of the most politically insulated of the three branches reflects the Constitution’s institutionalization of political moderation.

In *Federalist* No. 85, Hamilton closed the series of articles in behalf of ratification by returning to the theme of moderation with which he began.

With eleven of thirteen states having ratified the Constitution since the publication of *Federalist* No. 1 and having thereby established it among themselves (in accordance with Article VII), he argued against those who wanted to make changes to it before it was “irrevocably established.”⁸¹ That would require beginning the arduous ratification process all over again. As Benjamin Franklin had declared on the final day of the Convention⁸² and as Madison had argued in *Federalist* No. 37,⁸³ though imperfect, the Constitution “is the best that the present views and circumstances of the country will permit; and is such a one as promises every species of security which a reasonable people can desire.”⁸⁴

In quoting the “judicious reflections” of Scottish philosopher David Hume, Hamilton offered an apt statement of the limits of constitution-making for an extended polity:

To balance a large state or society [says he], whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they INEVITABLY fall into in their first trials and experiments.⁸⁵

Hamilton went on to assert that Hume’s words about the difficulty of achieving a correct initial balance in forming a constitution and the necessity of constantly rebalancing as prudence dictates

contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME AND EXPERIENCE.⁸⁶

Hamilton’s lesson of moderation does not counsel resigned acceptance of the Constitution’s imperfections but rather determination to improve the union within the sturdy framework of liberty that the Constitution establishes.

The Anti-Federalists were not convinced. They argued that the Constitution failed disastrously to achieve a balance that supported liberty. In their view, the constitutional scheme of representation would inevitably prove unrepresentative, producing distant and out-of-touch legislators. They charged that Article I's "necessary and proper clause"⁸⁷ would allow the federal government to impose unfair and destructive taxes and regulation and swallow up state governments. And they contended that with its sweeping powers of review the federal judiciary would crush state judiciaries. The Constitution, the Anti-Federalists warned, would strangle liberty in its cradle.

The extraordinary reply to the Anti-Federalists' critique of the Constitution contained in the eighty-five essays comprising *The Federalist* attests to the salience of Anti-Federalist concerns at the time of ratification. And the persistence for two centuries of robust debate about the quality of representation, the allocation of power between the federal and state governments, and the extent of legitimate judicial power under the Constitution attests to the salience of their concerns today.

This would not have shocked the authors of *The Federalist*. The framers' understanding of the unceasing need in the politics of a free society to adjust and readjust, balance and rebalance, calibrate and recalibrate impelled them to craft a durable and flexible arrangement of political institutions for conducting the work of government and for debating the work of government. *The Federalist* reinforces the lesson of moderation inscribed in the Constitution it expounds and defends.

THE CONSTITUTION AND THE PARADOX OF FREEDOM

On October 6, 1787, at the Pennsylvania State House—known today as Independence Hall—James Wilson, who signed the Declaration of Independence and played a major role at the Constitutional Convention, delivered an early and influential speech in support of the ratification. Launching the campaign for ratification three weeks before Hamilton published the first installment of *The Federalist*, Wilson stressed that vested interests would generate powerful opposition to the new scheme of government. Like Franklin, Madison, and Hamilton, Wilson acknowledged that because of necessary compromises, the Constitution did not attain perfection. And,

like the *The Federalist*, he drew from the struggle to frame the Constitution a lesson of, and inducements to, moderation:

[W]hen I reflect how widely men differ in their opinions, and that every man (and the observation applies likewise to every State) has an equal pretension to assert his own, I am satisfied that anything nearer to perfection could not have been accomplished. If there are errors, it should be remembered that the seeds of reformation are sown in the work itself and the concurrence of two-thirds of the Congress may at any time introduce alterations and amendments. Regarding it, then, in every point of view, with a candid and disinterested mind, I am bold to assert that it is the best form of government which has ever been offered to the world.⁸⁸

Wilson's measured boldness, in keeping with the spirit that pervades *The Federalist*, suggests that it takes political moderation to appreciate the Constitution's institutionalization of political moderation.

It also takes political moderation to appreciate the Constitution's incompleteness and unfinished work. One of the diseases incident to republican government for which the Constitution does not provide a cure is the enervation of political moderation by the achievement of freedom.

As I observe in chapter 2, it is a paradox of freedom that the more one has, the more one wants. Freedom disposes individuals to bristle at authority, to incline toward novelty, and to make their own rules. By expanding choice and producing abundance and affluence, free political institutions and free markets amplify these dispositions. Consequently, the enjoyment of freedom's blessings tends to foster impatience with the political order that enables free citizens to cooperate and compete, and to weaken interest in cultivating, exercising, and transmitting the virtues required for prospering in private and public life. Progress in freedom compounds the challenge of achieving that reasonable balance between liberty and restraint that the framers of the Constitution, very much in agreement with Burke, taught was vital.

Thus, progress in freedom, of the sort the American political tradition has amply exhibited, makes the conservative task more urgent and more complex. While conservatives' electoral fortunes in the United States may wax and wane, progress in freedom steadily increases the need for a constitutional conservatism that preserves liberty by keeping government limited

and by giving tradition, order, and virtue their due. Because liberty depends on a variety of principles, balancing those principles must remain critical to the conservation and correction of liberty. Indeed, recognition that the balance of liberty with tradition, order, and virtue within the American system of limited government has been upset is a defining feature of the distinctive form of American conservatism that arose in the 1940s and 1950s, culminated in the presidency of Ronald Reagan, and lost its way during the George W. Bush years.

NOTES

1. See *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York: Signet Classics, 2003).
2. Letter from James Madison to George Washington, <http://press-pubs.uchicago.edu/founders/documents/v1ch8s6.html>.
3. Ibid.
4. For outspoken statements of the Constitution's supposed grave defects, see Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong and How We the People Can Correct It* (New York: Oxford University Press, 2008), and Levinson, "Our Imbecilic Constitution," *New York Times*, May 28, 2012, <http://campaignstops.blogs.nytimes.com/2012/05/28/our-imbecilic-constitution>.
5. For an impressive progressive effort to square the circle by showing that the Constitution embodies progressive values and, where it does not require, is quite compatible with the contemporary progressive agenda, see Jack M. Balkin, *Living Originalism* (Cambridge, Mass.: Harvard University Press, 2011). For a critique, see Peter Berkowitz, "Reading into the Constitution," *Policy Review*, June/July 2012, <http://www.hoover.org/publications/policy-review/article/118436>.
6. Interview with Justice Scalia, "Scalia Vigorously Defends a 'Dead' Constitution," *All Things Considered*, April 28, 2008, <http://www.npr.org/templates/story/story.php?storyId=90011526>.
7. For the need to mix and combine in proper proportions, see Plato, *Republic*, Book VI 500b–501c; and Aristotle, *Politics*, Book V 1309a30–1310a35, and Book VI 1319b35–1321a1.

8. For an incisive account, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage, 1997), pp. 57–93.
9. For a penetrating analysis, see Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates*, 50th Anniversary Edition (Chicago: University of Chicago Press, 2007).
10. This provision is often misunderstood. The southern states wanted slaves to count as full persons, thus increasing the southern states' representation in the House of Representatives and the Electoral College. The northern states did not want the slaves to be counted at all, not because they denied the slaves' humanity, but because they believed that slaveholding states should not be rewarded with increased power in the federal government.
11. "I particularly object to the NEW position which the avowed principle of this Nebraska law gives to slavery in the body politic. I object to it because it assumes that there CAN be MORAL RIGHT in the enslaving of one man by another. I object to it as a dangerous dalliance for a free people—a sad evidence that, feeling prosperity we forget right—that liberty, as a principle, we have ceased to revere. I object to it because the fathers of the republic eschewed, and rejected it. The argument of 'Necessity' was the only argument they ever admitted in favor of slavery; and so far, and so far only as it carried them, did they ever go. They found the institution among us, which they could not help; and they cast blame upon the British King for having permitted its introduction. BEFORE the constitution, they prohibited its introduction into the north-western Territory—the only country we owned, then free from it. AT the framing and adoption of the constitution, they forebore to so much as mention the word 'slave' or 'slavery' in the whole instrument." Abraham Lincoln, "Speech on the Kansas-Nebraska Act," October 16, 1854, in *Abraham Lincoln, Speeches and Writings 1832–1858* (New York: The Library of America, 1989), p. 337.
12. "Chief Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they

did not at once, *or ever afterwards*, actually place all white people on an equality with one or another. And this is the staple argument of both the Chief Justice and the Senator, for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all* respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in ‘certain inalienable rights, among which are life, liberty, and the pursuit of happiness.’ This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that ‘all men are created equal’ was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.” Abraham Lincoln, “Speech on Dred Scott Decision,” June 26, 1857, *ibid.*, pp. 398–99.

13. So James Madison argues in *Federalist* No. 42: “It were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account, either for this restriction on the general government, or for the manner in which the

whole clause is expressed. It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period, it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the Union. Happy would it be for the unfortunate Africans, if an equal prospect lay before them of being redeemed from the oppressions of their European brethren! Attempts have been made to pervert this clause into an objection against the Constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer, for they deserve none, but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.” See *The Federalist*, No. 42, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter, Introduction and Notes by Charles R. Kesler (New York: Signet Classics, 2003), pp. 262–63. All subsequent citations to individual papers will be to this print edition. *The Federalist Papers* are also available online individually at http://avalon.law.yale.edu/subject_menus/fed.asp.

14. *The Federalist*, No. 9, p. 67.
15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
19. Ibid., p. 69.
20. *The Federalist*, No. 39, pp. 236–43.
21. *The Federalist*, No. 40, p. 243.
22. *The Federalist*, No. 51, p. 320.
23. *The Federalist*, No. 9, p. 69.
24. On the differences between the president and a king, see *The Federalist*, No. 69, pp. 414–21. For a shrewd study of how the Constitution

- obtained on republican terms the energy associated with monarchy, see Harvey C. Mansfield Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: Free Press, 1989), pp. 121–298.
25. For a classic statement, see George Washington’s “Farewell Address” (1796), http://avalon.law.yale.edu/18th_century/washing.asp.
 26. For an extended exploration of the importance that the larger liberal tradition attaches to virtue, see Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (Princeton: Princeton University Press, 1999).
 27. *The Federalist*, No. 10, p. 79.
 28. See Peter Berkowitz, “Why Colleges Don’t Teach *The Federalist Papers*,” *Wall Street Journal*, May 7, 2012, <http://www.hoover.org/news/daily-report/116621>.
 29. *The Federalist*, No. 1, p. 27.
 30. *Ibid.*
 31. *Ibid.*
 32. *Ibid.*
 33. *Ibid.*
 34. *Ibid.*, pp. 27–28.
 35. *Ibid.*, p. 28.
 36. *Ibid.* Madison derived a similar lesson in moderation from closely related considerations in *Federalist* No. 37, pp. 220–27.
 37. *The Federalist*, No. 1, p. 28.
 38. *Ibid.*, pp. 28–29.
 39. *Ibid.*, p. 29.
 40. Madison also addressed this theme in *Federalist* No. 37, pp. 220–27.
 41. *The Federalist*, No. 1, p. 29.
 42. *The Federalist*, No. 10, pp. 71–79. See also Hamilton’s complementary treatment in *Federalist* No. 9, pp. 66–71.
 43. *The Federalist*, No. 10, p. 72.
 44. *Ibid.*, p. 73.
 45. *Ibid.*
 46. *Ibid.*
 47. *Ibid.*
 48. *Ibid.*, p. 74.
 49. *Ibid.*
 50. *Ibid.*, p. 75.

51. Ibid.
52. John Stuart Mill, *On Liberty*, in *J.S. Mill and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), p. 8.
53. *The Federalist*, No. 10, p. 75.
54. Ibid., p. 76.
55. Ibid. So too had Burke argued in 1774, in his “Speech to the Electors of Bristol,” in *The Works of the Right Honourable Edmund Burke*, Vol. II (London: John C. Nimmo, 1887), http://www.gutenberg.org/files/15198/15198-h/15198-h.htm#ELECTORS_OF_BRISTOL.
56. *The Federalist*, No. 10, p. 77.
57. Ibid.
58. Ibid. For more on the considerations that must be balanced in determining the size of the most representative part of the federal government, the House of Representatives, see *Federalist* No. 55, pp. 338–43, and *Federalist* No. 56, pp. 343–47.
59. *The Federalist*, No. 10, p. 78.
60. To the argument that the extensive republic created by the Constitution would be too large and powerful to preserve republican principles, *The Federalist* replies that the smaller confederacies of a limited number of states that had been considered as an alternative to a union of all the states would still require a government as comprehensive as the one proposed by the Constitution. Indeed, even the states themselves were vastly larger than classical republican theory contemplated and were of a size that would call for “the same energy of government, and the same forms of administration” incorporated in the Constitution. See *The Federalist*, No. 13, pp. 92–94, and No. 14, pp. 94–100.
61. *The Federalist*, No. 47, p. 297.
62. *The Federalist*, No. 48, pp. 305–10.
63. *The Federalist*, No. 47, p. 304.
64. Ibid., p. 298.
65. *The Federalist*, No. 48, p. 305.
66. *The Federalist*, No. 51, p. 318.
67. Ibid., p. 319.
68. Ibid.
69. *The Federalist*, No. 84, pp. 509–15.
70. *The Federalist*, No. 45, p. 289.

71. *The Federalist*, No. 51, p. 319.
72. *Ibid.*
73. For reiterations of the conviction that the ultimate precaution against governmental abuse of power is dependence on the people, see, for example, *The Federalist*, No. 21, pp. 134–39; No. 22, pp. 139–48; No. 33, pp. 197–201; No. 44, pp. 277–84; No. 46, pp. 290–97; No. 49, pp. 310–14; and No. 57, pp. 348–53.
74. *The Federalist*, No. 51, p. 319.
75. *The Federalist*, No. 55, p. 343.
76. *The Federalist*, No. 70, pp. 421–29.
77. *The Federalist*, No. 78, pp. 463–71.
78. *Ibid.*, p. 466.
79. *Ibid.*
80. *Ibid.*, p. 464.
81. *The Federalist*, No. 85, p. 523.
82. Benjamin Franklin, speech of September 17, 1787, http://avalon.law.yale.edu/18th_century/debates_917.asp.
83. *The Federalist*, No. 37, pp. 220–27.
84. *The Federalist*, No. 85, p. 523.
85. *Ibid.*, p. 526.
86. *Ibid.*
87. “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” United States Constitution, Article I, Section 8.
88. James Wilson speech, <http://www.lexrex.com/enlightened/writings/jwilson.htm>.

Spending, Public Debt, and Constitutional Design

Michael W. McConnell

You may have noticed we are in a presidential election year.

You can tell by the serious and sober analyses the candidates are offering for how to solve the nation's most pressing problems. Both sides have put forward detailed plans for bringing our fiscal house into order, and the essence of the campaign is a competition to persuade the people of why one plan will have better consequences than the other. The framers would be proud of the way our democratic political system is working.

Just joking.

This year, the United States government will spend approximately \$3.5 trillion. Over the last three years, federal spending has soared to peacetime record levels of over 24 percent of gross domestic product (GDP). We are borrowing forty cents out of every dollar of that \$3.5 trillion. For four years in a row, the federal deficit has exceeded \$1.1 trillion. These annual deficits are adding up. As our two great political parties conducted their national conventions, the accumulated federal debt reached a total of \$16 trillion.

Everyone agrees this cannot and must not continue. The word *du jour* is “unsustainable,” which my handy political glossary defines as meaning the problem is too hard to solve.

What concerns many Americans most is not just the spending, and the taxing, and the borrowing, and the debt, but the political paralysis and ineptitude with which it is greeted.

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At one great political convention, the debt clock was prominently featured, which was a sign of a certain level of seriousness about the problem. And the party clearly has some ideas about what is necessary to bring it under control. But did they explain those ideas to the American public? Did they begin to build the political argument for taking serious action? Did they make clear what they would actually do about it?

Not so much.

But that was the responsible party. For the other party, the spending appears to be a virtue, the burgeoning debt somebody else's fault, and the deficit scarcely acknowledged as a problem. The nation is headed for fiscal catastrophe, but this scarcely warrants mention at the national convention of our largest political party.

Worse yet, the Senate has deliberately refused to pass a budget for the last three years—despite its legal obligation to do so—and Congress has not passed a single appropriations bill for the fiscal year that starts in just over two weeks. Apparently, they are afraid that if they revealed their plans for federal spending, the voters would not like what they see. So let's not budget at all.

This systematic inattention to fiscal problems makes many of us wonder whether ordinary democratic politics is capable of dealing with issues of spending and debt. Maybe we have a structural failure of institutions.

And indeed, looking around the globe at our fellow Western democracies, we are not alone. With a few honorable exceptions—Canada, for example, and maybe Sweden, and a few others—Western democratic governments are drowning in sovereign debt, with little or no sign of political resolve to do much about it than to ask for bailouts from central banks and stronger economies.

Spending and debt are quintessential political issues, one might think. Political, not legal. Political, not constitutional. But is this necessarily so?

Just yesterday, the German constitutional court handed down one of the most significant decisions in its history, upholding the European Stability Mechanism over the constitutional claim that it yields German sovereignty to institutions that lack the essential attributes of democratic legitimacy. In Germany, there is no doubt that issues of public debt raise high questions of constitutional design.

And just last June, our Supreme Court handed down possibly the first decision in its history holding that the spending power under the US Constitution is limited by principles of federalism.

So I want to talk about spending, public debt, and constitutional design in the US Constitution.

Article I, Section 8, Clause 2 allows Congress to borrow money on the credit of the United States. It imposes no limit, but note that granting this power to the legislative branch denies it to the executive. Under the unwritten British Constitution prior to the Glorious Revolution, the king could borrow money as a matter of his own prerogative authority, which kings frequently did, with disastrous results.

The British experience in the century prior to the Constitution suggested that parliamentary control over borrowing was a real, substantial, and effective check on excessive public debt. And so the framers imitated that. Some people thought, last summer, that President Obama should raise the debt ceiling on his own authority, which would have violated this fundamental constitutional principle. But Obama is only president of the United States. He is not King Charles II.

Some among the founding generation would have imposed more strenuous limitations. Thomas Jefferson argued that the federal government should have no power to borrow, which would have been an effective balanced budget amendment. More precisely, in a 1790 letter to James Madison, Jefferson argued that no generation had the right to impose debt on a subsequent generation.

“No man,” Jefferson wrote, “can, by natural right, oblige . . . the persons who succeed him . . . to the payment of debts contracted by him.”

Suppose Louis XV and his co[n]temporary generation had said to the money-lenders of Genoa, give us money that we may eat, drink, and be merry in our day; and on condition you will demand no interest till the end of 19 years you shall then for ever after receive an annual interest of 125/8 per cent. The money is lent on these conditions, is divided among the living, eaten, drank, and squandered. Would the present generation be obliged to apply the produce of the earth and of their labour to replace their dissipations? Not at all.¹

Jefferson was on to something. Democracies are subject to the temptation of looting the income of future citizens. Voters today may have some solicitude for the welfare of their grandchildren, but not as much as they have

for themselves. Borrowing money for current expenditures, and adding it to the public debt, is—as Jefferson recognized—nothing other than robbing the future of their equal rights.

Future generations will have all the needs we have for defense, social spending, education, health care, and the like. It will be no easier for them to finance their expenditures out of taxation than it is for us. But on top of those burdens, our children and grandchildren will have to pay the interest and maybe even the principal on the \$16 trillion of public debt that we have run up through our failure to get the budget in order.

But future generations cannot vote. Current voters—current taxpayers—benefit by spending now and passing the bill to the future.

The underfunding of public pensions is a particularly egregious example. Future pensions are part of the pay of current public employees, and the cost of future pensions should be treated as part of the cost of current operations, paid for out of current taxes. The practice of underfunding pensions is nothing other than asking future generations to pay for our police, teachers, firemen, and road crews. Jefferson would ask: “Why should they?”

If we believe that constitutions should be drafted to protect against systemic democratic maladies, Jefferson would seem to be right in suggesting that we need to use constitutional devices to protect future generations who cannot vote from being sacrificed to the interests of current voters. Balanced budget provisions are not merely an attempt to enshrine a particular economic philosophy into constitutional law—something I disapprove of—but a way to counteract an inherent bias of democracy in favor of the present at the expense of the future.

But Madison had an interesting and compelling response to Jefferson. Some expenditures, he pointed out, are incurred for the benefit of future generations. He pointed to the cost of “repelling a conquest.”² He might have pointed to such things as purchasing Louisiana, which was done by borrowing—except he was writing in 1790, not 1803. When the government purchases a physical asset that will yield benefits for many years to come, there is nothing wrong with spreading the cost over those years of benefit, and the way to do that is through incurring debt. If governments cannot borrow for the purchase of infrastructure and other assets, then the same democratic preference for the present over the future would lead to significant underinvestment.

When I was a junior lawyer in the US Office of Management and Budget (OMB) in the early 1980s, I was tasked with drafting a sensible balanced budget amendment, or, rather, several possible versions. The most difficult aspect was trying to incorporate Madison's insight that the purchase of valuable physical assets should be an exception. The trouble is that almost any expenditure can be called an investment and be characterized as producing future benefits. In principle, abusive borrowing is a proper subject for constitutional design, but it is very difficult to get it right.

Then there was Alexander Hamilton. Hamilton, the most sophisticated economist among the major founders, recognized—as Jefferson and Madison did not—that public debt at a manageable level can serve the macroeconomic interests of the nation by supplying a store of value and easily transferrable medium of exchange—in short, a money supply.

It is probably not in the national interest for the public debt to be zero. US treasuries, effectively risk-free assets (at least for a while longer), are vital for just the reason Hamilton foresaw. Moreover, a growing economy requires an ever-larger pool of treasuries as a medium of exchange. So, a balanced budget is probably not quite right. As long as the deficit stays, on average, below the rate of growth of the economy, the public debt will be a “public blessing,” to use Hamilton's language, and not a curse.³

Alas, the deficit today is careening toward 7 percent of GDP, which is a different matter altogether. Economists tell us that when sovereign debt exceeds 90 percent of GDP—ours is currently in the low seventies, but rising fast—economic growth slows, interest rates rise, and it is very difficult to recover from the spiral. Ask the Greeks, if you do not believe the economists.

Keynesians will say that it is important to allow the federal government to engage in countercyclical fiscal policy, incurring debt in bad times and running surpluses in good. I am not sure whether I believe that, but even if I did, I would note that Keynesianism in practice seems to justify deficits in bad times, but to tolerate deficits in good times as well. The United States has run a surplus only five times in the last half century—an era of unprecedented economic growth. Times never seem to be good enough to take away the punch bowl from the party, to use Alan Greenspan's amusing metaphor.

What about spending? Most people regard the spending power as a “plenary” power limited only by the political process. The founders would have been surprised at this.

Spending from the national treasury presents a classic collective action problem—the veritable tragedy of the commons. Everyone who benefits from the spending gains a great deal, while suffering only a tiny fraction of the burden of taxation to support it. No one will apply cost-benefit analysis to his or her political demands because the benefit will greatly outweigh the cost—even if the benefit is negligible in comparison to the total cost. This is an obvious problem that the founders as practical politicians surely understood.

No one at the founding—indeed, no one for the first century of the republic, as far as I can tell—thought that Congress had unlimited discretion to spend on whatever it wished. Article I, Section 8, Clause 1 limits Congress’s use of tax funds to promoting the “general welfare.” Today, this phrase has little or no meaning. But the term had actual limiting content at the time.

There were two competing interpretations. Madison argued that the general welfare was a quick way of saying that Congress could spend money only in service of the other enumerated federal powers. He had some support for this in the language and accepted interpretation of the Articles of Confederation.⁴ I have to say, though, that as a matter of ordinary English usage, this interpretation strikes me as far-fetched.

Hamilton, in his Report on Manufactures, argued that the term “general” distinguished between genuinely national and merely local purposes. Thus, to be legitimate, “the object to which an appropriation of money is to be made [must] be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.”⁵

In the founding period, the word “general” was used more precisely than we use it today. It was the term used for matters pertaining to the Union as a whole. Thus, they spoke of the “general” government (not the “national” government), and of “general” as opposed to “local” concerns. Hamilton’s position was thus based on the ordinary meaning of the text.

Under Hamilton’s interpretation, the clause addressed the collective action problem on a geographical basis. If merely local purposes are excluded, there will be no scrambling by particular representatives of particular places for maximum exploitation of the common fund. This may be an incomplete solution to the problem—there may be other forms of the tragedy of

the commons than geographical—but it does address an important slice of the problem in a republic where representatives are elected on a local basis.

Hamilton's interpretation of the clause finds support in a debate at the Constitutional Convention in Philadelphia. Benjamin Franklin made a motion to give Congress the power to construct canals, a motion Madison supported on the ground that canals would foster "easy communication between the States" and thus promote economic integration in tandem with the political integration the new Constitution would bring.⁶

The immensely shrewd and practical Roger Sherman objected, saying that the benefit would "accrue to the places where the canals may be cut" while the expense would fall to the United States as a whole—an objection that many delegates apparently found persuasive. Franklin's motion lost eight states to three. It seems likely that the general welfare condition on the spending clause reflected the same distaste for allowing the general treasury to be tapped for localized benefit.⁷

In a moment, I will argue that this principle provides a partial solution to some of our contentious modern debates over spending. But first: how did it work?

The first appropriations statute, in 1789, contained no specific items. In its entirety, it appropriated \$137,000 for the War Department, \$190,000 for repayment of certain Treasury warrants, \$96,000 for veterans' pensions, and \$216,000 for the "civil list," meaning everything else.⁸

But the second appropriations statute, in 1790, contained an appropriation for the construction of a lighthouse on Cape Henry in Virginia. This seems to present the same problem as Franklin's canals, and the proposal set off the nation's first constitutional debate over the scope and meaning of the spending power. Following Madison's approach, the lighthouse might be defended as "incidental to commerce" or possibly in service of a navy (when we would get a navy).

But what seemed to be decisive is the fact that the lighthouse had been authorized the previous year in a statute that would federalize all "lighthouses, beacons, buoys, and public piers" up and down the eastern seaboard.⁹ In light of that statute, the Cape Henry lighthouse was part of a project that served the "general welfare" and not just local interests.

In the same year, Congress refused to fund the removal of obstructions to navigation in the Savannah River. That project was alone, divorced from any general legislation.

Perhaps the clearest example of this interpretation of the clause was President Andrew Jackson's veto of an appropriation to build a road from Maysville, Kentucky, to the Ohio River, a stretch of highway entirely within the state of Kentucky, coupled with his approval of an appropriations bill for the Cumberland Road, also known as the National Road, which linked the eastern seaboard with Ohio, Indiana, and Illinois. The National Road fell even within Jackson's grudging interpretation of the general welfare.

This does not mean that Congress must always allocate funds evenly among the states, but that its spending decisions must be based on criteria that "exten[d], in fact, or by possibility, throughout the Union."

Distinctions of this sort may not be judicially administrable. Distinctions between general and local are matters of degree. But for almost the first century of the republic, these distinctions were vigorously debated and recognized by conscientious Congresses and still more conscientious presidents, who took seriously their duties to enforce the Constitution.

What might be the significance today of a limitation of congressional spending authority to projects whose benefits are "*General* and not local"?

Well, for a start, what about earmarks, which are appropriations for specific projects not part of, or evaluated pursuant to, any broader or more general program? Are they constitutional?

I am not asking whether the courts would strike earmarks down. Presumably, no one has standing to challenge these appropriations in court. I am asking whether a conscientious legislator or president would regard these projects as serving a purpose that extends in fact, or by possibility, throughout the Union.

Earmarks are not a large part of the budget—they were not a large part even before the current supposed moratorium. But they are a gateway drug to irresponsible spending, and an invitation to corruption.

When the costs of a local project—let's say, refurbishing a local park—and the benefits of the project are borne by the same set of taxpayers, we can assume that at some rough-and-ready level, the project will not be approved unless the benefits exceed the costs. But if someone else is paying the bill, the costs do not much matter. The benefits will get all the attention. Do you

think Californians would pay their own good money to build a high-speed rail link between Bakersfield and Fresno?

Even if a project is not wasteful, it violates the terms of our national compact for the entire nation to pay for projects that benefit only one local area. That was Roger Sherman's point, which carried the day at the Constitutional Convention. Why should taxpayers all over the country fund a sewer improvement project for Modesto, California, when other cities have to fund such projects for themselves?

The general welfare limitation addresses the collective action problem that advocates of concentrated benefits will invest more in political effort than broadly dispersed bearers of the attendant costs.

Hamilton espoused the broadest understanding of the spending power among the major framers. But even he would have said that modern earmarking is an abuse of our constitutional design.

The general welfare limitation may also provide a more satisfactory—if more radical—way of thinking about the Medicaid expansion in the 2012 health care decision *National Federation of Independent Business v. Sebelius* (*NFIB*).

You will recall that Congress required the states to expand Medicaid eligibility to all persons, including childless adults, below 133 percent of the poverty line; if they did not, they would lose all of their Medicaid funds. The US Supreme Court, in an impressive seven-to-two majority in which Justices Stephen Breyer and Elena Kagan joined the more conservative justices, held that this threat of a cutoff was so coercive as to be unconstitutional.

But the *NFIB* court's treatment of the issue is anything but crisp and clear. Indeed, the court expressly declined to "fix a line" between permissible encouragement and impermissible coercion—it simply held that the Medicaid expansion was beyond the line.

The court framed the issue as whether a state has "a legitimate choice whether to accept the federal conditions in exchange for federal funds." That question led the court to make a series of shades-of-grey distinctions:

1. The size of the grant that would be withdrawn;
2. Whether the newly imposed conditions make the law "in reality a new program" rather than a "modification" of the old;
3. Whether the states are threatened with loss of "existing" funding or merely new sources of funding; and

4. Whether the attached conditions are ones that “govern the use of the funds” or instead “take the form of threats to terminate other significant independent grants . . . as a means of pressuring the States to accept policy changes.”¹⁰

These considerations have a certain common sense to them, but the line-drawing problems are likely to prove intractable. It is particularly perplexing that the court distinguished, instead of overruling, an earlier case where Congress cut off 5 percent of the federal highway funds for any state that did not pass a twenty-one-year-old drinking age. The court called that a “relatively mild encouragement,” in contrast to the Medicaid provision, which it called a “gun to the head.” But the two provisions are structurally and pragmatically indistinguishable.¹¹

Let me float an idea—more radical than the court’s holding, but possibly more administrable, and rooted in the constitutional text as originally understood. The idea may not be appropriate for judicial review, and it may not hold up to scrutiny. I am hoping to generate some thought.

My tentative suggestion is this: if Congress may spend only for the “general” welfare, it would be unconstitutional for Congress to set up a Medicaid system where funds are spent in all states except for one (or some). It has to be a general program, extending throughout the Union.

And as with other equal-access regimes, it is presumptively unconstitutional for the government to exclude citizens on account of their exercise of a constitutional right—in this case, the state’s constitutional right not to administer a federal program.

Justice Ruth Bader Ginsburg’s dissent on the spending clause issue maintains that “A State . . . has no claim on the money its residents pay in federal taxes.”¹² That is technically true. But if Hamilton was correct, the people of every state do have a constitutional right (whether or not judicially enforceable) to insist that federal spending be for general purposes, meaning extending to the entire Union. It arguably violates that principle to cut off a state’s residents as a means of pressuring their state government to adopt policies Congress otherwise has no authority to compel the states to adopt.

We must not fall into the trap of thinking that federal grants are a “gift,” as Justice Ginsburg misleadingly stated in her dissenting opinion. The monies are forcibly extracted from the people of every state, and the people of

every state are entitled to benefit from them. That is what the court's conception of "coercion" seems to overlook.

This does not render Congress powerless to impose conditions that ensure that funds are properly spent. Congress need not grant funds to state governments that refuse to comply with clearly stated funding conditions. But, according to this theory, Congress's remedy if a state refuses to comply is not to cut the state's citizens off from the benefits of their tax dollars, but to bypass the state government and administer the program directly—through federal agencies or nonstate grantees. The people of the state would not be cut out; only the government of the state would be cut out. The right of equal treatment belongs to the people of the states, not to the state governments.

This, interestingly, is the way Obamacare's "health benefit exchanges" work. If a state declines to operate such an exchange in accordance with the statute's dictates, the federal government will step in and do so in that state. This satisfies the constitutional requirement that spending be for the general welfare because taxpayers in every state will receive the benefit.

For Congress to cut off particular states and deny their citizens any benefit renders the program less than general, and hence unconstitutional.

Regardless of how any particular controversy might be resolved, I hope I have persuaded you that both the spending clause and the borrowing clause raise important issues of constitutional design, based on the collective action problems these powers present.

But recent events may give us reason to doubt that constitutional design can place a real restraint on political leaders determined to rack up more spending and more public debt. Europe's constitutional design appears to prohibit bailouts of its member states, and to prevent the central bank from purchasing sovereign debt. But once the political elite claimed that bailouts and central bank interventions were all that stood between Europe and the abyss, those restrictions were quickly disregarded.

Similarly, here the many state constitutional provisions requiring balanced budgets have easily been evaded, partly by clever devices and partly by, well, ignoring them. Who would know that California's constitution requires a balanced budget?

The 2011 Budget Control Act places a legal requirement on Congress to pass an annual budget well in advance of the new fiscal year, and to conform

actual appropriations to the budget. In my day at OMB, this obligation was held sacrosanct and faithfully obeyed. Not so, anymore.

Madison warned that constitutional limits on governmental abuse would be mere parchment barriers if not reflected in the deep structure of accountable representation and separation of powers. The Anti-Federalists were even more pessimistic, saying that the only real restraint comes from an active and engaged citizenry—the very thing that Madison’s Constitution sought to neutralize, on the assumption that the populace would generally favor short-sighted policies, like “spend now, pay later.”

For a few important months in 2010, an active and engaged citizenry were in the streets and at town halls demanding an end to the abuse. “Spend less, tax less, borrow less,” they said. Since that time, our government in Washington has spent more and borrowed more, and conventional wisdom says it should tax more, as well.

We have pretty much given up on constitutional design as a restraint. The general welfare limits on federal spending are completely ignored, and the Supreme Court did not even mention them in its Obamacare decision.

Will an active and engaged citizenry reemerge, and will they be heard? In the end, American citizens are the only protection that really counts.

NOTES

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The Perilous Position of the Rule of Law and the Administrative State

Richard A. Epstein

I. THE RULE OF LAW IN DISTRESS

Recent scholarship in the academy has turned again to an intensive study of the rule of law in the modern administrative state, a topic that I have addressed in detail in my book *Design for Liberty: Private Property, Public Administration, and the Rule of Law*.¹ One way to view this question is to treat it as a definitional matter. That approach, however, is not a fruitful one, for the concept of a rule of law is not essentially contested today. Professor Shane gave a perfectly accurate definition,² one to which I subscribe but for which I claim no originality. Many of the essential elements of the modern account are found in the *Second Treatise of Government* by John Locke.³ That vision is then further elaborated in the same form, more or less, by Lon Fuller in his book *The Morality of Law*.⁴ The elements of this definition of the rule of law speak of known, consistent, and certain rules that are applied prospectively by neutral judges to the cases before them. The key virtue of this definition is its generality; its application does not commit any defender of the rule of law to any particular substantive view of which laws are desirable, nor does it presuppose some distinctive relationship of individuals to the state or of individuals to one another. It therefore offers a minimum

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condition that is consistent with, and constituent of, any just and efficient legal regime.

When the discussion turns to the modern social democratic state, however, there are deep tensions between the rule of law and the rise of the modern administrative state. In making this claim, I stress the term “modern” to direct attention to the new generation of administrative agencies that began in the United States with the adoption of the Interstate Commerce Act of 1887,⁵ which was the major legislative achievement of its time. Woodrow Wilson’s progressive administration continued the proliferation of administrative agencies, including the creation of the Federal Trade Commission in 1914.⁶ Over the next twenty-five years, the establishment of such agencies as the Federal Radio Commission of 1926⁷ (which morphed into the Federal Communications Commission in 1934),⁸ the Securities and Exchange Commission in 1934,⁹ the National Labor Relations Board in 1935,¹⁰ and acts such as the Fair Labor Standards Act of 1938 continued the modern trend.¹¹

These modern agencies must be contrasted with the types of administrative agencies in England¹² and in the early United States¹³ that were responsible for administering prisons, schools, voting and tax rolls, motor vehicle licenses, and the large set of other ministerial duties that government agencies must discharge in any developed society. Against this backdrop, it is an imprudent exaggeration to say that all public administration must necessarily conflict with the rule of law. There has been in recent years much corruption in the distribution of vehicle licenses in Illinois;¹⁴ however, it is not just conceivable, but also eminently possible, for that state to run an efficient vehicle-licensing system. The same is true of the first aggressive application of the modern administrative state, which involved the evolution and maturation of the system of ratemaking in the period from around 1887 through the end of the Second World War.¹⁵

Most forms of rate regulation did not generate any significant tension with the rule of law because the defined purpose of the system gave tolerably clear direction to its operation. To put the point in its simplest version, if a competitive market exists, regulators need not intervene to ensure its sound operation. In contrast, if a monopoly existed, as was common with such industries as telecommunications, electric power, and railroads,¹⁶ regulators were forced to determine which techniques would best be able to limit the firm to a reasonable risk-adjusted rate of return without wrecking the

industry in question.¹⁷ Accordingly, regulators struggled to avoid two perils at once: They could not confiscate the invested capital in the industry by cutting rates too severely, and they could not sanction the collection of monopoly profits by cutting rates too little.¹⁸ In practice, it turns out, that standard is relatively operational. What was and still is striking about this endeavor is that judges in the 1910s and 1920s by and large made accurate decisions of fair rates of return, even though their grasp of modern economic theory was not as solid as that of today's judges.¹⁹

At the other extreme lie cases in which the necessary operation of executive power precludes any major role for the rule of law. Nobody thinks that application of the rule of law allows Congress and the president to decide when to declare war on a foreign nation. Even the more humdrum problem of prosecutorial discretion, in which decisions on what charge to bring depends on the facts of a particular case, is very difficult to constrain through external sanctions. In addition, it is commonly understood that there is an important class of decisions that necessarily become deeply political, at which point consultation and similar virtues—all of which Professor Shane is correct to stress—play an irreducible role. Between these poles, though, lies a key middle class of situations involving the large administrative agencies of the Progressive Era that gave rise to the modern arena of administrative law. It is in this middle class of large administrative agencies where the level of discretion, while not that of an executive officer or a prosecutor, is great enough to generate some real uneasiness about compliance with the rule of law.

II. THE GROWTH OF THE FEDERAL GOVERNMENT

Professor Shane is right when he says that Congress is every bit as prone to rent-seeking political corruption as any administrative agency, which is to some degree insulated from political pressures.²⁰ All sides of the political spectrum understand that taming Congress is an ongoing endemic problem that resists easy solution.²¹ A large portion of the problem, however, stems from constitutional choices made regarding the scope of Congress's power in the first place. Once the scope of congressional power was expanded by the Supreme Court's broad readings of the Commerce Clause, few, if any, constraints remained on the issues that Congress could confront.²² Congress is no longer confined to worrying about such distinct problems as regulating

interstate commerce; it now has a blanket license to do almost anything it wants by way of regulation.²³ As the space Congress occupies grows, the door opens to the risk of faction and intrigue.

As the power of Congress continued to grow, most discernible protections of private property and economic liberty found in the Constitution were also overrun by the same progressive impulse. It is important to understand how this change came about. One explanation of this phenomenon, to which Professor Barron referred,²⁴ is contained in Professor Richard Stewart's important paper about the reformation of administrative law.²⁵ Professor Stewart pointed out correctly that the older system of administrative law worked against a regime of strong property rights, where discretion was relatively limited.²⁶ In contrast, as he added in a later paper, the great New Deal compromise or settlement was: property rights are out and participation rights are in.²⁷ The role of the administrative state now is to determine exactly how those participation rights can be used and effectuated through deliberation.²⁸ Unfortunately, once property rights are removed, or even diluted, the rights and duties of the government and private parties become an open question.

Start with local governments. Suppose that a small group of nine people arrayed like a tic-tac-toe board will deliberate about whether the plot of land located in the center should be kept open so that the others can have better scenic views from their own plots. The vote could easily be eight to one against preserving the party's right to develop the plot in the same fashion as his eight neighbors. They would never reach that result if the regulation required them to compensate that party for his losses, but if the new restriction is treated as a "mere regulation" of property, compensation is not required. More deliberation thus leads to the successful formation of coalitions that will strip the owner of that central plot of land of his development rights, even if the gains to the other eight are less than his losses. Deliberation only exacerbates the dangers of the weak rights structure of the administrative state; deliberation cannot cure any fundamental mistakes in the articulation and the speculation of rights.

Moreover, allowing administrative agencies to defer enforcement when its rules pinch too much will not cure the erosion of private property and economic liberty. In this regard, Professor Barron shows too much optimism about government by waiver.²⁹ Waiver introduces yet another component of discretion that poses difficulty for the rule of law. To give one example,

consider the “mini-med” plans that McDonald’s and other companies have put in place for workers, but which cannot meet various rules concerning their permissible level of administrative costs.³⁰ The government, fearing that the system will implode, grants waivers of these regulations. These waivers go to some companies, but not to others.³¹ Furthermore, the waivers are of uncertain duration, and they are given without any statement of reasons. There is every reason to believe that these waivers will be doled out in ways that advance the political position of those in a position to grant them, with a Democratic administration favoring union plans over employer plans and “blue” states over “red” states—and a Republican administration the reverse. The waiver is not created by what Professor Barron refers to as some complex path-dependent explanation.³² It is created when public legislation endows individuals with a set of positive rights that are financially unsupportable. The government must then waive onerous conditions to keep the legislation alive. What government officials do not want to do is to get out of the rights business altogether.

It should be clear, therefore, that the major constitutional transformations of federalism and property rights necessarily cede to Congress a larger realm of government that is subject to few legal constraints. One early sign of this shift in judicial attitudes was the pivotal case of *Nebbia v. New York*,³³ which sustained the actions of New York’s Milk Control Board in using the criminal law to enforce a system of *minimum* prices for the dairy industry.³⁴ *Nebbia* meant that the Supreme Court was quite happy to allow Congress and the states to become cartel factories,³⁵ effectively allowing interest groups to use political influence to secure gains that, in a saner world, would be per se violations of the antitrust laws. The earlier synthesis started to unravel. This paradox becomes perfectly evident in the operation of the agricultural agencies and their allocations,³⁶ and with the National Labor Relations Board and mandatory collective bargaining,³⁷ which make the perpetuation of monopoly profits their end.

III. DISCRETION IN THE FEDERAL COMMUNICATIONS COMMISSION

The operation of government with enhanced powers invites the use of government discretion. A well-known Supreme Court decision about the delegated authority of the Federal Communications Commission (FCC), Professor

Shane's chosen agency, illustrates this principle.³⁸ *National Broadcasting Co. v. United States* was a case that technically involved the breakup of the National Broadcasting Corporation (NBC) and its blue and red network into two networks, one of which became the American Broadcasting Corporation (ABC) and the other of which remained NBC.³⁹ The statutory question before the Supreme Court in *National Broadcasting Co.* involved the definition of the phrase "public interest, convenience, or necessity"⁴⁰—the standard that Congress gave to the FCC for determining how to allocate frequencies.⁴¹

Justice Frankfurter, the author of the majority opinion in *National Broadcasting Co.*, was not inclined to limit the FCC to the modest task of defining frequencies that private parties could utilize without interference from each other.⁴² He, like James Landis, another famous Harvard figure, extolled the expertise and impartiality of administrative agencies.⁴³ The central issue in *National Broadcasting Co.* was as follows: Is the job of the FCC to make sure that property rights are consistent so that there is no interference between one station and another?⁴⁴ Justice Frankfurter, in the most confident terms, stated that it was quite clear that in regard to this particular statute, the Court was obligated not only to let the FCC set the rules of the road, but also to determine the composition of the traffic:

Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them.⁴⁵

But how does anyone in government decide to set the composition of the traffic? To Justice Frankfurter, it was not possible to create a series of frequencies and then to sell them to the highest bidder, be it a private citizen or firm. Creating these frequencies and policing the interferences would require some modest administrative system, but the overall cost of its operation, both public and private, would likely not reach 1 percent of the complex system now in place with his blessing.

As is often the case in administrative proceedings, Justice Frankfurter decided that it was impossible for the Court to determine the appropri-

ate standards, so he remanded the case back to the FCC to determine the assignment of these frequencies.⁴⁶ Unfortunately, during the sixty-nine years between 1943 and 2012, none of the countless efforts to figure out the appropriate system of allocation has succeeded. The various approaches that have been adopted have thus introduced into the system a level of discretion that places real pressure on rule-of-law values.⁴⁷ For example, would local broadcasting be more important than diverse forecasting,⁴⁸ broadcasting, and everything else?⁴⁹ This uncertainty resulted in comparative hearings that allowed multiple supplicants to plead their respective cases.⁵⁰ The final decisions were largely non-reviewable except on technical procedural grounds, as establishing a normative framework to solve the problem that Justice Frankfurter delegated to the FCC—but could never accomplish himself⁵¹—proved to be impossible.

What should have happened? The moment the frequency is allocated to a party, the question becomes whether it is assignable. The answer is, of course it is freely assignable once it has been given to an individual institution. As a result, all the rents from the bidding would go to the person who won the lottery the first time around and who sold the frequency to somebody else. But the second assignee does not get a permanent interest in the frequency because the process requires the party who received the initial assignment to go through a license renewal on a periodic basis,⁵² which only injects more cost and some long-term uncertainty into the system. To be sure, one risk of the property-rights solution to frequency allocation is that it could result in oligopoly ownership by a few major companies that broadcast to mainstream audiences, eliminating some fringe groups.⁵³ Instead of creating a sensible system of antitrust regulation for frequencies, though, Justice Frankfurter conferred huge amounts of discretion on an administrative agency whose *raison d'être* is the disregard of stable systems of property rights.

Left to their own devices, private broadcasters could have solved the concerns about minority voices being denied access to the frequency spectrum. An interesting example is that of *Cosmopolitan Broadcasting Corporation v. FCC*,⁵⁴ in which Cosmopolitan found its own way to let minority voices onto the spectrum, within the FCC licensing system; it turned itself into a leasing agency for timeslots on its station.⁵⁵ What that innovation meant, in effect, was that anybody could buy the frequency between one and two o'clock in the afternoon on a Tuesday. We now can have a Greek show,

after which we can have a Turkish show, and then we can have any other show, in any other time slot, by someone willing to lease the appropriate time slot. Subleasing solved the problem of enabling minority voices to be heard. But despite this seemingly desirable result, the FCC lifted *Cosmopolitan's* license.⁵⁶ Why? Because when the station adopted the subleasing strategy, the Court found that it did not discharge the specific statutory task that the Federal Communications Act conferred upon it, namely, to make conscientious personal decisions as to how the frequency ought to be used.⁵⁷

Such decisionmaking as to how scarce resources should be used is extremely costly because of the necessary level of discretion it entrusts to agencies, without any clear sense of how such discretion is to be used. The implicit premise of Mr. Landis's defense of the modern administrative state is that the abundance of agency expertise could meet whatever challenge was put before it.⁵⁸ In truth, any experts in this area would abandon the entire licensing venture as unworkable in light of its intrinsic difficulties. Nonetheless, the FCC was forced to lurch forward despite the absence of an orderly body of knowledge or the possibility of acquiring one. Agency expertise instead became a cover for agency delay or agency bias.

IV. ADMINISTRATIVE AGENCIES: IMPLEMENTATION VERSUS ADJUDICATION

The issue of agency expertise fares no better with the National Labor Relations Board (NLRB). The president appoints the chairman of the NLRB.⁵⁹ The four remaining seats are divided by custom between the two major political parties.⁶⁰ The NLRB is devoted to "safeguard[ing] employees' rights to organize" and use unions as bargaining representatives.⁶¹ Expertise is hard to come by for a mission that should never be undertaken in the first place—to cartelize labor markets. Once experts with strong views on both sides of the question are chosen, though, it becomes nearly impossible, especially in politically charged times, to have the kind of neutral opinions that Locke's and Fuller's conception of justice would otherwise require.⁶²

In general, I am not unduly troubled by the creation of independent agencies that do the same kind of implementation work as executive agencies. But the common practice of adjudication within these agencies raises a different problem altogether, for it is very dangerous under rule-of-law principles to let

an agency litigate matters that involve the implementation of its own agenda. On matters of constitutional design, the correct solution is to declare that only independent courts, preferably courts of general jurisdiction, should decide those issues, precisely because these judges will not suffer from powerful pre-commitments on the only set of issues that they are called upon to litigate.⁶³ Nor do I think that this matter can be effectively controlled by various forms of judicial oversight. Professor Barron takes some hope from the use of citizen suits to control administrative action.⁶⁴ But all too often this approach makes things worse, not better. I am a strong defender of the principle that standing rules ought not to block anybody from challenging a statute that is *ultra vires*.⁶⁵ But the moment we allow parties to resort to litigation to challenge particular administrative outcomes that are clearly lawful, all too often the privilege is used by outliers who seek to upset what might well be a consensus opinion. So, instead of moving back toward the median voter on key issues dealing with the management of public resources, decisionmaking becomes—through citizen suits—all too polarized.

In a similar vein, I am uneasy with Judge Kavanaugh's suggestion that better action by administrative law judges can control the problem of administrative discretion.⁶⁶ Although the work of the District of Columbia Court of Appeals has advanced mightily from the freewheeling days of the 1970s, when administrative law became an art form unto itself,⁶⁷ there is only so much that sensible judges can do to control the problem of excessive administrative discretion.

Here are some examples. First, it is doubtful that judicial oversight of administrative action can do much in dealing with the Food and Drug Administration (FDA) for slowing down new drug applications.⁶⁸ Further, that action would be futile, for it would only slow matters down further, and force the parties to engage in indirect maneuvers in an effort to speed the process along. Second, the prospect of judicial review is of little comfort to companies like Boeing, which settled its dispute with its unions before the matter reached the NLRB.⁶⁹ Third, in similar fashion, universities turn somersaults to avoid censure from the Office of Civil Rights in the Department of Education, which can be enforced by administrative action for which there is no effective judicial review.⁷⁰ The agency's power is expanded first by a modest statute⁷¹ that is relatively innocuous, then by an administrative rule,⁷² and lastly by an "Intercollegiate Athletic Policy Interpretation."⁷³ These major

transformative actions take place “under the radar,” where the fear of sanctions effectively keeps challenges from reaching the appellate courts, lest the sanctions be all the heavier.

V. GOING FORWARD—OR BACKWARD

It is perhaps only wishful thinking to believe that we can return to a pristine era in which these basic principles—known, consistent, and certain rules applied prospectively by neutral judges—apply. But at least we should be conscious and aware of the odd anomalies that arise when administrative remedies undermine the very objectives that they are supposed to achieve. A recent case, charmingly called *Association of Irrigated Residents v. EPA*, illustrates how an unthinking administrative state poses unnecessary risk to common-law rights.⁷⁴ Why are these citizens irritated? In fact, located near their residences are a group of animal farms that emit healthy doses of stench into the air, all of which were tortious at common law going back to the thirteenth century with remedies of both damages and injunctions.⁷⁵ Now the rise of the administrative state reduces that level of protection in the area where it is needed most by prohibiting citizen suits. Why are such suits prohibited? Because we have administrative expertise in this area. That administrative expert is the Environmental Protection Agency (EPA); it knows exactly how to handle these cases, or so we are told, so it can determine whether the various emitters engaged in wrongs that violated the statutory minimums.⁷⁶ The EPA admitted that it was not sure how to measure the actual amount of pollution, so instead it entered into a deal with the farmers: If the farmers paid a small fine to the EPA, it would in turn suspend immediate actions against and block common-law suits until the EPA finally determined whether the farmers were liable and the amount of damages, if any, to be paid.⁷⁷ That arrangement gives the farmers every incentive to draw out the EPA’s investigation as long as they possibly can so that they do not have to internalize the costs borne by other people choking while they raise their animals.⁷⁸ Preemption by the administrative state thus destroys common-law rights.

Even this brief sketch illustrates this uneasy proposition about administrative agencies. In all too many settings they intervene when they should stay their hand, which is true about much of what transpires in the FCC and

NLRB. In other cases, the EPA blocks common-law and equitable remedies that should be routinely allowed. These ad hoc motions put ever-greater strains on the rule of law, which leads me to this somber assessment—that much of the work of the administrative state is at cross-purposes with both sound public policy and the rule of law.

NOTES

1. Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (2011). For a very different take, see Jeremy Waldron, *The Rule of Law and the Measure of Property* (2012).
2. See Peter M. Shane, “The Rule of Law and the Inevitability of Discretion,” 36 *Harv. J.L. & Pub. Pol’y* 21, 23 (2013) (“The Rule of Law be understood as the ‘ascendancy’ in our constitutional system of a certain culture of argumentation or interpretation.”) (internal quotation marks omitted) (citations omitted).
3. John Locke, “Second Treatise of Government,” in *Two Treatises of Government and A Letter Concerning Toleration* 100 (Ian Shapiro ed., 2003).
4. Lon L. Fuller, *The Morality of Law* (2d ed. 1969).
5. Interstate Commerce Act of 1887, Pub. L. No. 49-41, ch. 104, 24 Stat. 379 (repealed 1995).
6. See Federal Trade Commission Act of 1914, Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2006)).
7. Radio Act of 1927, Pub. L. No. 69-632, ch. 168, 44 Stat. 1162.
8. Communications Act of 1934, Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. (2006)).
9. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2006)).
10. National Labor Relations Act of 1935, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2006)).
11. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).
12. See, e.g., Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: From Coke to Lochner*, 24 *Const. Comment.* 601

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 15. See Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* 298–304 (1998).
 16. See *id.* at 301.
 17. See *id.* at 307–09.
 18. For a comprehensive discussion of these techniques, see *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307–16 (1989).
 19. For a discussion of the ups and downs, see Epstein, *supra* note 15, at 279–318.
 20. Shane, *supra* note 2, at 22–23.
 21. See, e.g., Thomas B. Edsall, “Putting Political Reform Right Into the Pockets of the Nation’s Voters,” *N.Y. Times*, Dec. 14, 2011, <http://www.nytimes.com/2011/12/15/books/republic-lost-campaign-finance-reform-book-review.html> (reviewing Lawrence Lessig, *Republic Lost: How Money Corrupts Congress—and a Plan to Stop It* (2011)); Mickey Edwards, “The Unraveling of Government,” *Campaign Spots*, *N.Y. Times*, (Sept. 27, 2012, 11:49 PM), <http://campaignstops.blogs.nytimes.com/2012/09/27/the-unraveling-of-government>.
 22. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253–55 (1964); *Edwards v. California*, 314 U.S. 160, 173–74 (1941); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824).
 23. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578–79 (2012).
 24. David Barron, Professor, Harvard Law Sch., Remarks at the Thirty-First Annual Federalist Society National Student Symposium (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).

25. Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harv. L. Rev.* 1667 (1975).
26. *Id.* at 1669–70.
27. See Richard B. Stewart, "U.S. Administrative Law: A Model for Global Administrative Law?" 68 *Law & Contemp. Probs.*, Summer 2005, at 63, 74–75.
28. See *id.* at 74–75 (describing current agency deliberation and rulemaking procedures).
29. See Richard A. Epstein, "Government by Waiver," *Nat'l Aff.*, Spring 2011, at 39, http://www.nationalaffairs.com/doclib/201103117_epstein.pdf.
30. See Janet Adamy, "McDonald's May Drop Health Plan," *Wall. St. J.*, Sept. 30, 2010, <http://online.wsj.com/article/SB10001424052748703431604575522413101063070.html>.
31. See Epstein, *supra* note 29, at 46–47.
32. See Barron, *supra* note 24, at 51.
33. 291 U.S. 502 (1934).
34. See *id.* at 506, 539.
35. For an estimate of the thousands of business practices that were required or prohibited by National Recovery Administration directives that organized various industry-wide cartels, see Gary Dean Best, *Pride, Prejudice, And Politics: Roosevelt Versus Recovery, 1933–1938*, at 79 (1991).
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37. See, e.g., "Employer/Union Rights and Obligations," *National Labor Relations Board*, <http://nlrb.gov/rights-we-protect/employerunion-rights-obligations>.
38. See Peter M. Shane, Professor, Ohio State Univ. Moritz College of Law, Remarks at the Thirty-First Annual Federalist Society National Student Symposium 12 (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).
39. 319 U.S. 190 (1943).
40. *Id.* at 194.
41. *Id.* at 216.

42. See, e.g., Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617, 619 (1927).
43. See James M. Landis, *The Administrative Process* (1938).
44. 319 U.S. at 209–10.
45. *Id.* at 215–16.
46. *Id.* at 216–19, 224–25.
47. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973); *Commc’ns Inv. Corp., v. FCC*, 641 F.2d 954 (D.C. Cir. 1981).
48. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).
49. See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 781–82, 806 (1978); see also *Nat’l Broad. Co.*, 319 U.S. at 203, 217–18.
50. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965); In the Matter of Request for Declaratory Ruling by Fletcher, Heald and Hildreth, 75 F.C.C.2d 721 (1980).
51. See *Nat’l Broad. Co.*, 319 U.S. at 216–19, 224.
52. See 47 U.S.C. § 309(h) (2006) (detailing forms and conditions of station licenses).
53. See “FCC Frequency Assignment Databases,” *FCC*, <http://transition.fcc.gov/oet/info/database/fadb.html>; “United States Frequency Allocations,” *NTIC*, <http://www.ntia.doc.gov/files/ntia/publications/2003-allochrt.pdf> (showing breakdown of U.S. frequency allocations).
54. 581 F.2d 917 (D.C. Cir. 1978).
55. *Id.* at 919.
56. *Id.* at 928.
57. *Id.* at 919–22, 931.
58. See Charles H. Koch Jr., “James Landis: The Administrative Process,” 48 *Admin. L. Rev.* 419, 427 (1996).
59. 29 U.S.C. § 153(a) (2006).
60. See Joan Flynn, “A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000,” 61 *Ohio St. L.J.* 1361, 1372 n.42 (2000).
61. See “What We Do,” *National Labor Relations Board*, <http://nlrb.gov/what-we-do>.

62. See Neal Devins & David E. Lewis, "Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design," 88 *B.U. L. Rev.* 459, 469–70 (2008).
63. See, e.g., Melanie Trottman, "Pick for Labor Board Opposed by Business," *Wall St. J.*, Jan. 28, 2011, <http://online.wsj.com/article/SB10001424052748703399204576108432052942332.html>.
64. See Barron, *supra* note 24, at 45.
65. See generally Richard A. Epstein, "Standing and Spending—The Role of Legal and Equitable Principles," 4 *Chap. L. Rev.* 1 (2001).
66. See Brett M. Kavanaugh, United States Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit, Remarks at the Thirty-First Annual Federalist Society National Student Symposium 66–68 (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).
67. See Gary Lawson, *Federal Administrative Law* 253–55 (5th ed. 2009) (outlining the judicial approach of Judges David Bazelon, Harold Leventhal, Carl McGowan, and Skelly Wright).
68. See, e.g., Richard A. Merrill, "Regulation of Drugs and Devices: An Evolution," 13 *Health Aff.*, Summer 1994, at 47, 65 ("[T]he law under which the FDA functions is structured to reward caution and facilitate delay.").
69. See Steven Greenhouse, "Labor Board Drops Case Against Boeing After Union Reaches Accord," *N.Y. Times*, Dec. 9, 2011, <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html>.
70. See, e.g., Marjorie A. Silver, "The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement," 55 *Geo. Wash. L. Rev.* 482, 573 (1987) ("If OCR terminated federal financial assistance, and the recipient had not availed itself of all avenues of review but nonetheless sued to enjoin the termination, it is unlikely that the court would consider the merits *de novo*; the doctrines of exhaustion of administrative remedies and collateral estoppel would likely bar further consideration of the merits.").
71. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2006)).

72. 34 C.F.R. § 106.37(c) (2012).
73. Policy Interpretation of Title IX Education Amendments of 1972, 41 Fed. Reg. 71, 413 (Dec. 11, 1979).
74. 494 F.3d 1027 (D.C. Cir. 2007).
75. *Id.* at 1028; *see also, e.g.*, Janet Loengard, “The Assize of Nuisance: Origins of an Action at Common Law,” 37 *Cambridge L.J.* 144, 144–46 (tracing the common law origins of nuisance to the reign of Henry II).
76. *See Ass’n. of Irrigated Residents*, 494 F.3d at 1031.
77. *Id.* at 1029.
78. *Id.* at 1038 (Rogers, J., dissenting) (noting that the EPA’s proposed measurement methodologies could take “five, twenty, or even thirty, years” to develop).

The Rise of the Romantic Judge

Mary Ann Glendon

When Tocqueville described the American people as having “the ways and tastes of a magistrate,” he was paying our forebears a high compliment. The prestige of American judges, as he saw it, arose from qualities that require careful cultivation: a particular sort of trained intelligence, a superior ability to set aside personal biases and to consider all sides of a question, a knack for explaining positions in terms that make sense even to those who disagree.

The traditional ideal of a good judge is summed up in the oath that every American judge has taken from the early years of the Republic to the present day:

I do solemnly swear that I will administer justice without respect to persons, do equal right to the poor and to the rich, and that I will impartially discharge and perform all the duties incumbent upon me, according to the best of my abilities and understanding agreeably to the Constitution and laws of the United States, so help me God.

That classical understanding of the role of the judge was so strong that, as late as the 1960s, Justice William O. Douglas was widely regarded as a disgrace to the bench even by many lawyers who shared his social and economic views. Douglas’s contempt for legal craftsmanship was seen as sloppiness and his solicitude for those he considered underdogs was perceived as favoritism.

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By the end of the 1960s, however, traditional ideas about what it meant to be a good judge were being challenged by a new, romantic, ideal. In eulogies, tributes, law-review articles, and legal journalism, judges began to be praised for qualities that would once have been considered problematic: compassion rather than impartiality, boldness rather than steadiness of temperament, creativity rather than craftsmanship, and specific results regardless of the effect on the legal order as a whole.

This fateful change was set in motion by the appointment of Earl Warren as chief justice in 1953. President Eisenhower's choice of Warren was an unusual move, for the new chief justice had spent almost all his professional life in electoral politics. After serving as California's attorney general, he became a power in the state Republican party and then a popular governor. He was Thomas E. Dewey's running mate in 1948, and a serious contender for the Republican presidential nomination himself in 1952.

Nothing in Warren's background had prepared him for the fine-gauge work of opinion writing. He was impatient with the need to ground a desired outcome in constitutional text or tradition. As described by an admirer, Warren was a man who brushed off legal and historical impediments to the results he felt were right; he was not a "look-it-up-in-the-library" type.

What he was, at his best, was a statesman. Although scholars have questioned its foundations in text and tradition, the Warren Court's unanimous decision in *Brown v. Board of Education* was an act of statesmanship. Some academics have downplayed the importance of *Brown* in the struggle for racial justice, pointing out that southern states did not desegregate the public schools until forced to do so years later by legislation. But that is to underrate the effects of *Brown* on attitudes about race relations—effects that in turn helped to bring about the Civil Rights Act of 1964 and voting-rights legislation. The Warren Court laid its prestige on the line in a bid not only to dismantle official segregation, but to help delegitimize racially discriminatory attitudes. There can be little doubt that *Brown* played more than a trivial role in advancing the ideal of a color-blind society.

The effects of *Brown* on the legal profession and on the legal order as a whole, however, were less salutary. It is one thing for the Court to address the nation's most serious social problem by an extraordinary act of judicial statesmanship. It is another to embark on a new era of ambitious exercise of judicial power. As that era unfolded, it was not Earl Warren but William Brennan,

appointed to the Supreme Court by Eisenhower in 1956, who came to incarnate most fully the romantic ideal of a judge.

Brennan was of humble origins. The son of Irish immigrants, he made his way to Harvard Law School—encouraged by his trade-unionist father who told him that a lawyer could do a lot of good for working people. Brennan did go into labor law, but enlisted on the other side of the cause that had meant so much to his father. After some years as a successful corporate practitioner in New Jersey, he became a trial judge and rose in time to the New Jersey Supreme Court. On the U.S. Supreme Court, he became a towering hero to those who shared his view that the Court had not only the power but the duty to promote social and political change.

Described by his biographer, Kim Eisler, as neither the most brilliant nor the best writer on the Court, Brennan during his long tenure may nevertheless have had the most influence on the general direction of its decisions. Few lawyers would disagree with the *New Yorker's* evaluation, on Brennan's retirement in 1990, that he had come "to personify the expansion of the role of the judiciary in American life."

Even toward the end of his career, as the composition and mood of the Court changed, Brennan was often able to beat the odds and further his vision. As portrayed by Bob Woodward and Scott Armstrong in *The Brethren*, Brennan "cajoled in conference, walked the halls constantly and worked the phones, polling and plotting strategy with his allies." In later years, when his colleagues declined to follow him on such excursions as judicially banning capital punishment or abolishing the custom of prayer at the opening of legislative sessions, Brennan went out on the hustings, calling on state courts to take up the cudgels.

In speeches and writings, Brennan encouraged state judges to exercise their powers of constitutional review in new and creative ways. State courts, he pointed out, could interpret their own constitutions so as to provide even more rights than are afforded under the federal Constitution. Like the fox in Aesop's fable, the wily Brennan cajoled whole flocks of jurists into dropping their reserve. "State courts cannot rest," he wrote, "when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those afforded by the Supreme Court's interpretation of federal law."

Unlike many of the adventurous judges who followed in his footsteps, Brennan did not mind revealing his views on the role of a judge. Here he is in a 1988 essay:

The Constitution is fundamentally a public text—the monumental charter of a government and a people—and a Justice of the Supreme Court must apply it to resolve public controversies. For, from our beginnings, a most important consequence of the constitutionally created separation of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical, and political questions in the form of lawsuits, in an attempt to secure ultimate resolution by the Supreme Court. . . . Not infrequently, these are the issues on which contemporary society is most deeply divided. They arouse our deepest emotions. The main burden of my 29 years on the Supreme Court has thus been to wrestle with the Constitution in this heightened public context, to draw meaning from the text in order to resolve public controversies.

That passage can instructively be compared with views often expressed in the past by Justices Oliver Wendell Holmes and Louis D. Brandeis. Holmes insisted that popularly elected legislatures were the ultimate guardians of the liberties and welfare of the people. “About 75 years ago,” he said as a very old man, “I learned that I was not God. And so, when the people want to do something I can’t find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, ‘Goddammit, let ‘em do it.’”

Brandeis for his part emphasized that, where vexing social problems were concerned, it would usually be more advantageous to leave state and local governments free to experiment than to impose uniform and untested federal mandates upon the entire country. The states, he said, were like “laboratories” where innovative approaches to difficult problems could be tested and refined or rejected.

Although one of the opinions of which Brennan was proudest was on legislative reapportionment, he maintained an uncharacteristic silence on the role of the legislature in resolving the issues on which “society is most deeply divided.” The reason must be that the way he saw his own life’s work, as indi-

cated in the above passage, put him in direct competition with decision-making through ordinary democratic political processes. Quoting Justice Robert Jackson, he made no bones about his position that, right or wrong, the Court was to have the last word: "The Justices are certainly aware that we are not final because we are infallible; we know that we are infallible because we are final."

Brennan's approach to judging could not be more remote in spirit from Holmes's structural restraint. Nor did Brennan have much use for the prudent avoidance of the appearance of judicial imperialism that was characteristic of the first great shaper of the Court, John Marshall. Brennan did not hesitate to claim, regarding the Court's powers: "The course of vital social, economic, and political currents may be directed."

Energized and prodded to no small degree by Brennan, majorities on the Warren and Burger Courts actively pursued a high-minded vision of empowering those individuals and groups they perceived as disadvantaged. When deference to the elected branches served those ends, as in many affirmative-action cases, Brennan deferred as humbly as any classical judge. When the decisions of councils or legislatures got in his way, he invoked expansive interpretations of constitutional language to brush them aside.

While Brennan was not one to let text or tradition stand in the way of a desired result, he did know how to turn his corners squarely. But he did not share the devotion to judicial craftsmanship that characterized the work of colleagues like John Marshall Harlan or Byron White. Nor did he show much concern about the probable side-effects of a desired result in a particular case on the separation of powers, federal-state relations, or the long-term health of political processes and institutions. With respect to such matters, he was impatient with what he considered to be abstractions and technicalities.

When it came to compassion, Brennan had plenty for those he made (or wished to make) winners, but he showed little sensitivity toward those he ruled against. His heart went out to Native Americans when a Court majority permitted the federal government to build a road through sacred Indian places on public land. But in striking down a longstanding and successful New York City program providing remedial math and reading teachers to poor, special-needs children in religious schools, Brennan was pitiless. It took a dissent by Justice Sandra Day O'Connor to point out that the

majority ruling, written by Brennan, had sacrificed the needs and prospects of 20,000 children from the poorest families in New York, and thousands more disadvantaged children across the country, for the sake of a maximalist version of the principle of separation of church and state.

The new model of bold, assertive judging inevitably spread to the lower courts. One federal appellate judge who embraced it early was J. Skelley Wright. Looking back on his role in expanding landlords' liability for the condition of leased premises, he wrote in 1982, "I didn't like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital. I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust."

The romantic ideal also fired the imaginations of judges in the capillaries of the legal system, the sites of the everyday administration of justice described in *The Federalist* as "the great cement of society." A District of Columbia Superior Court judge, Sylvia Bacon, told the American Society for Public Administration in 1976 that "There is a sense among judges that there are wrongs to be righted and that it is their responsibility to do it." As for the role of the Constitution and the law in guiding the judge's sense of right and wrong, Judge Bacon brusquely remarked: "Legal reasons are often just a cover for a ruling in equity, basic fairness."

By "fairness," Judge Bacon apparently did not mean anything so prosaic as keeping an open mind to the arguments, and applying the relevant law without regard to the identity of the litigants and without regard to a particular outcome. Her notion was more visceral: "Plain and simple sense of outrage by the judge." Such views were no impediment to Judge Bacon's election to a seat on the American Bar Association's board of governors in the 1980s.

Yet they would have been anathema to the Founders, for whom impartiality was the *sine qua non* of judicial justice. Massachusetts, adopting John Adams's words, built the concept into its Bill of Rights:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.

Though today's romantic judges still take office solemnly promising to perform their duties "without respect to persons," they seem to be following *sub silentio* a different oath that would read something like this:

I affirm that I will administer justice with careful attention to the individual characteristics of the parties, that I will show compassion to those I deem disadvantaged, and that I will discharge my duties according to my personal understanding of the Constitution, the laws of the United States, and such higher laws as may be revealed to me.

But is compassion a viable substitute for the admittedly elusive ideal of impartiality? Few would dispute that judges should be able to empathize with the people who come before them. But during the *Lochner* era, the Supreme Court's first sustained period of adventurous judging, Court majorities were extremely compassionate toward big business, while showing little concern for women and children working long hours in factories.

The real question is which judicial attributes offer the most protection against arbitrariness and bias. It is hard to imagine that the routine administration of justice can benefit from an increase of compassion at the expense of impartiality. A close-knit, relatively homogeneous community can perhaps get along with a system where village elders reach decisions on the basis of their personal sense of fairness and their informed concern for the parties and the community. But that pastoral model cannot serve for an ethnically and ideologically diverse nation where litigants are strangers to the judge and often to each other. Under such conditions, the liberties and fortunes of citizens cannot be left to the mercy of each judge's personal sense of what procedures are fair, what outcome is just, who needs protection, and who deserves compassion.

To those who maintain that judicial independence and impartiality are simply a sham, it must seem logical to select judges according to their ideological leanings. But that is a dicey business—and not only because "sensitivity" and "compassion" are easier to fake than intelligence and integrity. The problem with subjective judging is that, sooner or later, the tables are apt to be turned when ambitious judges with the "wrong" ideas ascend to the bench.

True, complete impartiality is an elusive ideal. But to borrow an analogy from Clifford Geertz, the impossibility of achieving a completely sterile

operating field does not mean that you have to conduct surgery in a sewer. True, as Alexander Hamilton remarked in *Federalist* 78, it will always be difficult to find candidates for the judiciary “who unite the requisite integrity and the requisite knowledge.” But why should the country’s response to the scarcity of such individuals be to accept a thoroughly politicized judiciary? One alternative that has worked well for some liberal democracies is a meritocratic civil-service judiciary, staffed with graduates of judicial-training academies. But we need not depart so radically from our own traditions. Surely the wise course for Americans is to insist on judges who have demonstrated a capacity for self-restraint (structural, interpretive, and personal) as well as a commitment to the time-honored judicial practices that help to promote those qualities.

The relevant skill is to maintain principled continuity in the system, while deciding particular cases in a way that even the losing party can accept as fair. The best appellate judges take special pains to explain their decisions to the party they will disappoint and to the lower court judge whose decision is being reversed. Judge Guido Calabresi, a former dean of Yale Law School, has explained why it is especially important to do so when the issues are highly controversial:

A decision which recognizes the values on the losing side as real and significant tends to keep us from becoming callous with respect to the beliefs that lose out. . . . This gives the losers hope that the values they cherish will not ultimately be abandoned by the society, and that the society, despite what it chooses to do now, will not become immoral in the long run. It tells the losers that, though they lost, they and their values do carry weight and are recognized in our society, even when they don’t win out. In other words it treats them as citizens of the polity and not as emarginated bigots or unassimilated immigrants.

No one is born with that sort of virtuosity. But Anglo-American judges over centuries have developed numerous safeguards against lapses and partiality. Chief among them is the requirement that a judge expose his reasoning in a written opinion. Since a perfectly reasoned opinion may rest on arbitrary premises, a judge is also expected to explain the facts and principles

on which each decision is based and to follow those principles consistently in future cases.

Such technical skills in the judiciary are more necessary than ever in a complex modern society. And yet the supply of competent judges at all levels is threatened by habits associated with adventurous judging. As every lawyer knows, part of an appellate court's work involves maintaining a reasonable degree of coherence and predictability in the law. If that unglamorous but crucial task is not performed well, the courts falter in their fundamental obligation to decide like cases alike. Practitioners then stumble, too, for they cannot give reliable advice to clients who are trying to plan for the future, or to decide whether to prosecute, defend, or settle claims.

It has become steadily more difficult, however, for appellate judges to ensure reasonable reckonability and coherence in the legal system. Legislatures and administrative agencies rarely take the trouble to fit new statutes and regulations into the framework of existing law. Rather, they leave it up to judges to make some sense of a welter of federal, state, and local enactments that are often conflicting or overlapping—some overly detailed, others airily vague, some (like the Affordable Care Act) both overly detailed and alarmingly vague. The intellectual difficulty of many of these cases surpasses anything that ever came before Marshall's Court in the early days of the Republic. In consequence, the quality most required of an appellate judge is often a craftsman's art and painstaking care. It is cause for concern that specialists in areas like tax, antitrust, labor, pensions, maritime law, insurance, social security, patents, trademarks, and copyrights increasingly complain of a decline in judicial workmanship.

After all, what will be left of the principle that like cases should be decided alike if every judge feels free to brush aside precedents, statutes, and bargained-for contractual provisions as mere technicalities? Do Americans really want the rank-and-file judiciary to cast off restraints that rested lightly on the shoulders of men like Holmes and Learned Hand? For judges who slip the mailed fist of power into the velvet glove of compassion?

In constitutional cases, romantic judging exacts a heavy toll on the democratic elements in our form of government. When Warren and Burger Court majorities converted the Constitution's safety valves (the Bill of Rights, due process, equal protection) into engines with judges at the controls,

they wreaked havoc with grass-roots politics. The dismal failures of many local authorities in dealing with racial issues became pretexts for depriving citizens everywhere of the power to experiment with new approaches to a wide range of issues that often take different forms in different parts of the country. Constitutional provisions designed to protect individuals and minorities against majoritarian excesses were increasingly used to block the normal processes through which citizens build coalitions, develop consensus, hammer out compromises, try out new ideas, learn from mistakes, and try again.

For reasons that are all too understandable, elected officials have offered little resistance to judicial inroads on their powers. On hot-button issues, politicians are often happy to be taken off the hook by the courts. But each time a court sets aside an action of the elected branches through free-wheeling interpretation, self-government suffers a setback. Political skills atrophy. People cease to take citizenship seriously. Citizens with diverse points of view lose the habit of cooperating to set conditions under which social and economic life can flourish. Adversarial legalism supplants the sober legalistic spirit that Tocqueville admired in the American people and regarded as an important element in the maintenance of our democratic experiment. As Abraham Lincoln warned, "If the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."

In retrospect, one can see that the rise of bold judging began in response to changing times and proceeded at first with good intentions. Earlier in the century, state-court judges often had to take the initiative to keep judge-made law abreast of rapid social and economic changes. In the wake of the New Deal, federal judges had to improvise techniques for dealing with new types of statutes—constitution-like regulatory laws that created administrative agencies with rule-making and adjudicating powers. In *Brown*, the Supreme Court exercised statesmanship in order to address the legal aspects of the country's most pressing social problem.

The acclaim that greeted the Supreme Court's dramatic decisions in its early civil rights cases made it difficult for some of the Justices and their successors to resist the impulse to keep on doing justice by their own lights. That

those lights were not always powered by authoritative sources was easy to disguise, even from themselves. It was a case of successes leading to temptations, of a good thing taken to extremes.

In finding a path back from these extremes, the beginning of wisdom would be to recognize that, whatever the pros and cons of adventurous judging by the Supreme Court on rare and momentous occasions, romantic ideals are a poor guide to how judges throughout the system should comport themselves as a general matter. The unique political role of the nation's highest court may require its members at times to show the sorts of qualities that are traditionally associated with executives or legislators—energy, leadership, boldness. But, day in and day out, those qualities are no substitute for the ordinary heroism of sticking to one's last, of demonstrating impartiality, interpretive skill, and responsibility toward authoritative sources in the regular administration of justice.

True, a judge will win no plaudits from most professional court-watchers for ordinary heroism. He or she may even draw their contempt for not being interesting enough. When Byron White stepped down from the Supreme Court in 1993, the *New Republic's* cover story called him "a perfect cipher." Admitting that White was "a first-rate legal technician," a writer for that magazine sneered at him for being "uninterested in articulating a constitutional vision." To this writer, it was evidence of White's "mediocrity" that he was hard to classify as a liberal or a conservative!

What made White hard to classify, of course, were the very qualities that made him an able and conscientious judge—his independence and his faithfulness to a modest conception of the judicial role. His "vision," implicit in nearly every one of his opinions, was not that difficult to discern. As summed up by a former clerk, it was one in which "the democratic process predominates over the judicial; [and] the role of the Court or any individual Justice is not to promote particular ideologies, but to decide cases in a pragmatic way that permits the political branches to shoulder primary responsibility for governing our society. . . . The purpose of an opinion . . . is quite simply to decide the case in an intellectually and analytically sound manner."

Though White's competence, independence, and integrity did not make for lively copy, he was a model of modern neoclassical judging. So much so, that his replacement, Ruth Bader Ginsburg, took the occasion of a speech shortly after her appointment to embrace the model of the "good judge" as

represented by Learned Hand. Quoting Hand's biographer, Justice Ginsburg said that the good judge is "open-minded and detached . . . heedful of limitations stemming from the judge's own competence and, above all, from the presuppositions of our constitutional scheme; [the good] judge . . . recognizes that a felt need to act only interstitially does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions."

Today, the Supreme Court is often said to be split between "liberals" and "conservatives." But at a deeper level, the Rogers Court appears to be a court in which classical and romantic ideals of judges are vying for dominance, even within the hearts of some of the justices. For decades now, many of the most momentous controversies to come before the Supreme Court have ended in 5–4 decisions. These deep and chronic divisions on the Court have inflicted more than a little harm on the body politic. The public increasingly perceives that cases with far-reaching consequences are being decided by simple majority vote rather than reasoned elaboration of principles found in the nation's Constitution and laws. Many Americans are coming to accept such behavior as normal or even desirable. As a result, the judicial selection process has become so politicized as to deter many well-qualified men and women from running a gauntlet similar to that which many appointees have been subjected.

At the heart of most divisions on the nation's highest Court, and throughout the nation's judicial system, are radically divergent understandings of the proper role of a judge. Thankfully, there are still many judges at all levels who fully embrace the duty of impartiality as well as the limited role envisioned for them by the Founders. But a dangerously free-wheeling attitude toward the exercise of judicial power is gaining ground, fostered by legions of law teachers who preach that law is little more than disguised power, that legal norms are infinitely manipulable, and that judges should ignore text, precedent, and constitutional structure when it seems fair to them to do so.

The current prevalence of what I have called the romantic view of judging should be alarming. In our increasingly heterogeneous nation, it is more important than ever for citizens to be able to rely on the administration of justice by impartial judges without regard to a person's wealth, power, ethnicity, or other characteristics. It is more important than ever that the lives, liberties, and fortunes of our citizens not be left to the mercy of a judge's

personal opinion of what procedures are fair, what outcome is just, who does or does not need protection, and what Congress or the Constitution ought to have said rather than what is present in the text. It is more important than ever to have judges with a demonstrated capacity to take the judicial oath and mean it, to swear to: “administer justice without respect to persons, and do equal right to the poor and to the rich, and impartially discharge and perform all the duties incumbent on me according to the best of my abilities and understanding agreeably to the Constitution and laws of the United States.”



Promoting Democracy

Larry Diamond

Since the founding of the American Republic, the United States has been torn between two quite different visions of how it should relate to other countries. One approach sees the world as it is, not as we would like to be—an intrinsically anarchic and amoral collection of states seeking to expand their power and influence in the world. In this unsentimental conception of a dangerous, conflictual world—where (to paraphrase the nineteenth-century English statesman, Lord Palmerston) “nations have no permanent friends or allies, only . . . permanent interests”—the guiding foreign policy priorities for the United States are the safety of its citizens, the security of its borders, the extension of its power, and the advancement of its economic interests in trade, investment, and natural resources. Not surprisingly, this approach to foreign policy has come broadly to be known as the “realist” school, though realism has contained within it sharply different tendencies, from isolationism to a strong propensity for interest-driven intervention. In the early decades of American independence, when the United States was still a relatively new and fragile nation, its basic tenet was caution about alliances and “foreign entanglements.” Thus, in 1821, President John Quincy Adams proclaimed that America’s principal “gift to mankind” was its repeated affirmation of democratic principles. The United States, he said, had been wise to abstain from “interference in the concerns of others, even when conflict has been for principles to which she clings.” He added, in terms that would have a deep impact on twentieth-century

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advocates of realist restraint in global affairs, like Hans Morgenthau and George Kennan:

Wherever the standard of freedom and Independence has been or shall be unfurled, there will [America's] heart, her benedictions and her prayers be. But she goes not abroad, in search of monsters to destroy. She is the well-wisher to the freedom and independence of all. She is the champion and vindicator only of her own.¹

An alternative strain of thinking in American foreign policy has insisted that the ideals of the American Revolution and its founding Declaration must somehow shape and inform the way the United States relates to other countries in the world. Its first full expression came in the presidency of Woodrow Wilson, who believed that it was America's moral obligation and vital interest to shape the rest of the world in the image of its own values of freedom and democracy—that (as the historian of American foreign policy, Walter Russell Mead, has characterized it) “the U.S. has the right and the duty to change the rest of the world's behavior.”² Out of this Wilsonian conception sprang not only America's military engagement in World War I, and Wilson's pursuit of a League of Nations, but a recurrent American concern with the nature of government in other countries around the world that would find prominent expression in the presidencies of FDR, Truman, Kennedy, Carter, and Reagan. This approach became labeled the “idealist” school in American foreign policy, though idealism always coexisted with (and not infrequently was trumped by) frequent concessions to geostrategic realities.

If the early American realists were isolationists in their caution about foreign entanglements, their more modern-day successors understood that America's territorial expansion and economic rise inevitably gave it global interests that required robust alliances, partnerships of convenience, coercive actions, and even long-term military deployments around the world. This more muscular and ambitious worldview first emerged full-blown in the foreign policy of Theodore Roosevelt and then reached its apogee during the Cold War struggle to check Soviet expansionism and communist revolutions. Its most consummate practitioners were Henry Kissinger and Richard Nixon. Other American presidents during this era, including Dwight Eisenhower and Lyndon Johnson, also privileged the defense of American power over the

advancement of American ideals, and were even willing to use American power to oust elected leaders or block popular aspirations when they seemed to conflict with American interests. After each of these periods of foreign policy realism, however, there came a correction. Kennedy's Alliance for Progress, and his rhetorical embrace of freedom and socioeconomic reform, reinjected idealism after President Eisenhower and his secretary of state, John Foster Dulles, had emphasized containing communism and advancing American economic interests. After the supremely "realist" years of the Nixon-Ford era, Jimmy Carter launched a new and lasting emphasis on human rights in American foreign policy. It succeeded in pressuring a number of Latin American dictatorships to return power to elected civilians, but critics charged that it also paved the way for anti-American revolutions in Iran and Nicaragua.

President Ronald Reagan came into power criticizing Jimmy Carter's naivete in undermining American allies and interests, yet he wound up going much further, making the promotion of democracy an elevating purpose of American foreign policy. Reagan not only challenged communism as a system, but he ultimately pressed for democratic transitions among American allies—the Philippines, Korea, and Chile. Both Carter and Reagan permanently changed American foreign policy by establishing new and lasting institutions to press for democracy and human rights. Although he was considered a realist, George Herbert Walker Bush then further institutionalized democracy promotion by making it a major purpose in American foreign aid, and by crafting an ambitious strategy of diplomacy and aid to solidify the emerging democracies of Central and Eastern Europe. During the subsequent presidencies of Bill Clinton, George W. Bush, and Barack Obama, the weight given to democracy promotion in American foreign policy has shifted back and forth, in rhetoric and in practice. But these shifts have always occurred within the boundaries of broad agreement among foreign policy elites that the United States should spend at least some resources and diplomatic capital working to advance and defend democracy around the world. And strikingly, each of the last five American presidents, from Reagan to Obama, has over the course of his presidency given more emphasis to democracy promotion than he did in the early stages of his presidency.

If the polls are to be believed, however, the American people are much more skeptical about the value of promoting democracy abroad than are the country's elected leaders and foreign policy practitioners. Since 2001,

Pew public opinion polls have found democracy promotion finishing last in the public's list of priorities for American foreign policy, well behind such "realist" concerns as protecting American jobs, protecting the United States from terrorism, and reducing dependence on imported energy (though in reality, the first and last are much more the province of domestic than foreign policy). Between September 2001 and May 2011, the percentage of Americans listing democracy promotion as a foreign policy priority fell steadily from 29 percent to 13 percent, and the proportion listing promotion of human rights also slipped from 29 percent to 24 percent.³

IS DEMOCRACY PROMOTION IN THE AMERICAN NATIONAL INTEREST?

So is it in the national interest of the United States to promote freedom and democracy in other countries? Any answer to this question must first raise several others: What do we mean by "promoting" democracy—what methods count, and are all methods equally acceptable? Should we distinguish among countries, or different types of countries? Is it possible that promoting democracy may be more in the American interest in some places—and at some times—than in others? And if it is *an* interest of the United States to promote democracy, does this mean it must be *the* central interest, trumping other items on the agenda or diffusely shape every aspect of policy? Moreover, how does one factor in the temporal dimension to thinking about the national interest? If Americans have a long-term interest in fostering democracy, but doing so carries risks in the short run, which point on the time horizon should prevail?

There are many reasons to think that the United States should "keep its nose out of other people's business," at least in terms of how states are governed internally. To begin with, a strict reading of the norms of sovereignty, as codified by the Peace of Westphalia in 1648, grants each state not only territorial integrity but also the exclusive right to determine its own policies and governmental structures within its territory. From this has come the principle of "nonintervention" in the internal affairs of other states, which was elevated to a nearly sacred status during the immediate post-World War II era of decolonization and has been written into the charter of the World Bank's International Bank for Reconstruction and Development (IBRD) and

other international structures. When states invite international assistance for their efforts to administer free and fair elections, build independent judiciaries, and construct and deepen other structures of democracy, that is one thing. But when other democracies provide assistance to independent organizations, human right activists, critical media and opposition movements that are trying to change a state's form of government from authoritarianism to democracy, this is a form of intervention, however peaceful the means and idealistic the motivation.

There are, of course, possible real costs to the United States of promoting democracy, including financial costs. But the entire budget for “core,” non-security US international affairs—in essence, diplomacy and aid, outside of elevated contingency operations in places like Iraq and Afghanistan, as well as all US support for international organizations like the UN—is only slightly over \$50 billion.⁴ That is just 1.7 percent of the entire federal budget (far exceeded by the \$671 billion requested for the Pentagon in fiscal year 2012), and total funding for all democracy and governance assistance programs (not including economic assistance) probably does not exceed \$2 billion—considerably less than a tenth of a percent of the overall budget. In short, if a case is to be made for *not* promoting democracy, it is difficult to make it on fiscal grounds.

Neither is it convincing to argue any longer that democracy is mainly a “Western” concept, unsuitable for and largely unwanted by non-Western peoples and cultures. Since the “third wave” of global democratization began in 1974, the percentage of states that meet the minimal test of electoral democracy (that all the people of a society can participate in choosing and replacing their leaders in regular, free and fair, multiparty elections) has gone from barely a quarter to roughly 60 percent. Today, there is at least a critical mass of democracies in every region of the world except the Middle East. Democracy has become the predominant form of government in all of Europe, as well as in Latin America, and has a substantial presence in Africa and Asia. Many of the third-wave democracies—including all the new EU members, many in Latin America (such as Chile, Argentina, and Brazil), as well as Korea and Taiwan—can be considered “consolidated” in that political elites and the mass public do not want and cannot really imagine any other form of government. A number of Muslim-majority countries—including Turkey, Indonesia, Bangladesh, and Mali—are democracies.

Moreover, public opinion surveys show clear majorities of the public in each cultural zone and in most countries preferring democracy as the best form of government and wanting their leaders to be accountable to them. In short, democracy has become a universal value, in the sense that it has broad appeal within every region of the world and essentially no global rival as an ideal form of government.⁵

The more sophisticated objections come in two forms. One is that the world is still a dangerous and essentially anarchic place, where “real” security and economic interests must trump the moral concern to see the triumph of democracy and human rights. It would be nice if Saudi Arabia and China were democracies, but securing trade and financial relationships with these countries is more important. Similarly, the United States needs Russian cooperation on strategic arms reduction, and in containing nuclear arms proliferation, Islamic terrorism, and the spread of Iranian influence, more than it needs Russia to be a democracy. By the same token, moderate and friendly Arab autocracies, the argument goes, have kept at least a cold peace with Israel and a broader stability in the Middle East region, which supplies about half of the world’s oil exports. Moreover, they have been reliable sources of cooperation in the war on terror, even if the United States has had to look the other way while they torture suspects handed over to them.

A second objection asserts a bias for modesty and restraint in the conduct of foreign affairs, doubting that the United States knows enough—about other countries or the underlying dynamics of development—to intervene intelligently and responsibly to advance democracy, and suggesting that such intervention often is clumsy, ill-considered, and resented for its pretentious and overbearing moralism. Too often, these realists insist, an initial intention to do political “good” in places like Vietnam and Iraq ends up in horrific miscalculation and costly and debilitating (if not downright immoral) entanglements. When arms are taken up in the cause of advancing freedom, the line between democracy promotion and imperialism can become blurry—or crossed. Thus, in making the case for “ethical realism,” Anatol Lieven and John Hulsman lean heavily on the writings of Morgenthau and Kennan, to urge a foreign policy based on prudence, caution, and humility—“including humility concerning our ability to understand the outside world, foresee the future, and plan accordingly.”⁶ By this realist reckoning, democracy is a difficult thing to achieve; each country must find its own path and pace; and

America should instead pursue more limited “ethical” goals of peace and development while also privileging its security and economic interests. Some realist critics often add that inordinate amounts of money and manpower get devoted to building democracy and peace in the world’s hardest cases, like Afghanistan, Iraq, Haiti, and Somalia, which are likely to remain mired in conflict and autocracy no matter what the United States does.

The case for promoting democracy is in part moral—that democracies do a much better job of protecting human rights, and that peoples have a right to determine their own future democratically—but it proceeds as well on fiercely practical grounds. Democracies do not fight wars with one another; in fact, no two genuine, liberal democracies have ever done so, and all of America’s enemies in war have been highly authoritarian regimes. Today, the principal threats to American security—whether from terrorism or from potential military adventurism or cyberwarfare—all come from the world’s remaining authoritarian regimes, such as Iran, North Korea, Russia, and China, or from states like Somalia and Yemen that have collapsed or decayed because of authoritarian rule. Democracies make better trading partners because they are more likely to prosper and to play by fair rules, as they are more “likely to develop fair and effective legal systems.”⁷ This same regard for law makes democracies better bets to honor their international treaty obligations. And they make more reliable allies because their commitments are grounded in and ultimately sustained by public opinion; “democracies are like pyramids standing on their bases.”⁸ By contrast, the international posture of autocracies rests on the personal interests of the autocrat, and when he dies, changes course, or is overthrown, American interests can get burned.⁹ Much of the Cold War history of America’s engagement with the Third World is a story of heavy investments in authoritarian client regimes—in places like China, Vietnam, Iran, Nicaragua, Haiti, and Zaire—eventually going down the drain into revolution or state collapse.¹⁰ Moreover, once democracy takes root in a country, the United States is relieved from having to worry about responding to famine, genocide, and humanitarian emergency (though certainly not poverty). Both famine and genocide are uniquely phenomena of authoritarian regimes, and state failure is also the product of authoritarian abuse. As the spread of democracy in Europe and Latin America has demonstrated over the last two decades, a zone of democracy is also a zone of peace and security.

Short-term vs. Long-term Interests

To argue that every country can and should immediately become a democracy flies in the face of history and evidence. Numerous transitions have floundered because of a rush to hold national elections too quickly. And in other instances, the sudden downfall of a tyrant can unleash civil war or a new form of tyranny, if there is not time for an array of new political forces to organize, establish support bases, and generate a pluralistic and tolerant political landscape. Depending on the social order and recent historical circumstances, it can take time to build a viable democracy. But that time is probably measured in years, not decades. The opposite argument—that it took the United States 200 years to become a democracy and so Uganda or Azerbaijan needs the same amount of time—is equally silly, and a transparent excuse for indefinite, predatory autocracy. Even many poor countries with few of the presumed developmental requisites for democracy, such as a strong middle class and high levels of education and income, have managed to implement at least the rudiments of democracy rather quickly and sustainably.

MEANS AND INSTRUMENTS OF DEMOCRACY PROMOTION

Much of the debate about “democracy promotion” in American foreign policy involves those with opposing views making assumptions and talking past one another. When many Americans—including even some who work on or in international affairs—see the words “promoting democracy” they think: “imposing democracy.” Yet many of the actual actors who work to promote the spread and stability of democracy around the world think of “democracy promotion” mainly as “democracy assistance,” and understand that to be effective it must be done in partnership with local actors and in response to their stated needs. In truth, there is a very wide range of instruments available to the United States to extend democracy as a form of government in the world and help it become more effective and viable. Whether one thinks “democracy promotion” is a worthwhile purpose for American foreign policy may depend not only on the priority one thinks it should be given in competition with other foreign policy goals but also on the means that are used.

Forced Imposition

At the extreme end of the range of instruments for promoting democracy is imposing it by force. Particularly in the wake of the 2003 US military invasion of Iraq, followed by a quasi-colonial, US-led, foreign occupation of the country, many Americans imagine coercion and imposition when they think of democracy promotion. President George W. Bush made the decision to invade Iraq on the basis of national security concerns (believing that Saddam Hussein was hiding weapons of mass destruction and constituted a major, long-term security threat to the region and the United States). However, in the run-up to the war, and even more so in its aftermath (when weapons of mass destruction were not found), many hawks inside and outside the Bush administration also justified the intervention by insisting that it could enable Iraq to emerge as a free (and pro-American) democracy, and a source of democratic diffusion throughout the Arab world.

For more than a year, from May 2003 to June 2004 (the period of formal occupation under the Coalition Provisional authority, the transitional government in Iraq), the United States led a complex and extremely ambitious “nation building” effort that had as one of its principal aims developing the political institutions, civic structures, and values of democracy. Promoting a democratic transformation of Iraq was not only embraced as a means of legitimating the American occupation. It also reflected deeply held convictions on the part of President Bush and many in his administration, as expressed most memorably in Bush’s second inaugural address:

America’s vital interests and our deepest beliefs are now one. . . . So it is the policy of the U.S. to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.

To be sure, President Bush went on to add immediately:

This is not primarily the task of arms. . . . America will not impose our own style of government on the unwilling. Our goal instead is to help others find their own voice, attain their own freedom, and make their own way.

But the far-reaching mission that was the Coalition Provisional Authority in Iraq, and the enormous, high-profile investment of American lives, talent, and treasure, along with the rapid emergence of a virulent anti-American and antidemocratic insurgency, gave credence to the view that the American project of transforming Iraq into a democracy had a good bit of the character of imposition.¹¹

In recent decades, no major current of American foreign policy thinking has advocated using force in order to promote democracy as the main or highest objective. From Iraq and Afghanistan in the last decade back to the most ambitious American ventures in democratic transformation—in Germany and Japan—at the end of World War II, national security has always been the principal driver of American decisions to wage all-out war. To be sure, some other American military interventions—Somalia, Haiti, and Bosnia in the 1990s, and Libya (with European states in the lead) in early 2011—were motivated by humanitarian imperatives (or the intersection of humanitarian and geopolitical concerns) rather than by “hard” security calculations of imminent danger or harm to the United States. But in virtually all of these interventions, the effort to stand up and strengthen democratic institutions became an important part of the post-war nation-building effort. Moreover, this has not just been an American impulse to make democracy the form of government left behind. Increasingly, democratization has been a major theme of United Nations nation-building missions in war-torn countries like El Salvador, Mozambique, Sierra Leone, and East Timor. And despite the legendary tensions between the American administrator of the Coalition Provisional Authority in Iraq, Ambassador L. Paul Bremer II, and the UN mission there, the goal of reconstructing the Iraqi state on democratic foundations was one that the United Nations and the United States shared.¹²

Post-Conflict Democracy

Post-conflict states present some of the most challenging circumstances for promoting democracy, because they lack many of the conditions that make democracy sustainable. For one thing, they all have experienced violent conflict and the shattering of the central state. No country can have a democratic state without first having a state—a legitimate administrative apparatus that commands a relative monopoly over the means of violence in a country and

is capable of mobilizing collective resources to generate public goods. Also, these states have typically also suffered a meltdown of the economy, and without means of livelihood for the people and revenue for the state, no form of political order can be stable. Moreover, viable democracy requires a range of other political institutions—political parties, legislatures, courts, local governments, and a competent, neutral electoral administration—as well as some degree of understanding of democracy, tolerance for opposition, and independent organizations and media in civil society. All of these institutions and norms must gradually be built or reconstructed, often from scratch, while also stabilizing and reviving the economy and rebuilding the military and police forces. Typically in “post”-conflict states, ethnic or religious divisions, violent resistance, aspirations for vengeance against past abuses, and endemic corruption pose continuing formidable challenges.

Thus, nation building is an immensely challenging, expensive, and protracted exercise. If they are to have any reasonable hope of success at reconstructing an effective state—not to mention a democratic one—international intervening actors (not least the United States) must carefully assess the circumstances, prepare the mission, and ensure that the goals they establish are matched by the time and resources they are willing to commit. The structure, strategy, and sequence for reviving effective governance can also make a big difference. Often it makes sense to defer multiparty national elections for a few years until a country has had time to assemble a viable transitional administration, revive public services, create representative local governments, and generate the administrative and political elements for meaningful, free, and fair elections. Yet the experience of countries like El Salvador, Mozambique, Liberia, Sierra Leone, and East Timor shows that international assistance (with the United States as a major actor and donor) can be effective in helping countries move from civil war and state failure to democracy. And once political order is restored and foreign military forces draw down, the specific means for assisting them overlap quite a lot with those deployed in countries not traumatized by recent violent conflict.

Diplomacy

American power and influence is in decline, but the United States is still by far the most powerful country in the world. Beyond its military, it has numerous

other instruments—diplomacy, aid conditionality, and sanctions—to pressure states to democratize, to respect human rights, or to govern more democratically. These instruments are also available to other democracies, and some of them can be most effectively applied by regional or international democratic coalitions or international organizations.

Diplomacy is the most common and conventional means by which states try to influence other states. But even when a powerful state like the United States appeals privately to a foreign government or leader to enact democratic reforms, or issues a diplomatic *démarche* formally protesting the undemocratic actions or stances of the foreign government and requesting specific democratic reforms or guarantees, autocratic leaders do not yield simply because they are persuaded by the moral or practical logic. Rather, underlying the diplomatic message is at least the implication that relations with the United States could be damaged if the regime clings to its repressive ways. When threats of consequences become explicit, then the diplomatic effort to nudge a regime toward democratic reform has escalated from pure diplomacy to the use of aid conditionality and the possible implementation of sanctions.

Diplomatic pressure works to open up autocratic regimes or to edge them forward to democracy when the United States and other democracies have leverage over those regimes because of the density of economic, social, and cultural ties. Linkages that render authoritarian states vulnerable to external pressure include economic ties (trade, investment, and credit), security ties (treaties and guarantees), and social ties (tourism, immigration, overseas education, elite exchanges, international NGO and church networks, and Western media penetration). Strong linkages forge cultural bonds that help rally democratic societies and parliaments to lobby for the defense of human rights and democracy, as seen with pressure on the Clinton administration to move against the Haitian military dictatorship in 1994 and the “extensive Hungarian lobbying” of the European Union to press Romania and Slovakia to improve the treatment of their Hungarian minorities.¹³

At the same time, international linkages can make critical social and political constituencies within authoritarian countries either more committed to democracy or more sensitive to Western pressures, generating a more subtle form of democracy promotion. Ties to the West induced elites both “to reform authoritarian parties from within (as in Croatia, Mexico, and

Taiwan)” and “to defect to the opposition (as in Slovakia and, to a lesser extent, in Romania during the mid-1990s).”¹⁴ After Western countries “forced severance of [Taiwan’s] formal ties” and revoked Taiwan’s UN membership in order to warm relations with mainland China, Taiwan’s elites saw that democratic reform might provide a means to renew the sympathy and support of the American public and other Western democracies.¹⁵ The desire to be accepted as a partner among industrial nations also contributed to the democratic transitions in South Korea as it prepared to host and risked losing the 1988 Olympics and in Chile as it prepared for the 1988 plebiscite on whether to extend Pinochet’s dictatorship. In these contexts, US and international criticism of authoritarian rule bred a sense of isolation and a desire to be regarded with respect by the industrialized democracies.¹⁶ But where ties are less intimate, for example in the former Soviet Union and much of Africa, Western pressure to democratize has been less consequential.

Leverage, too, depends on the power of the authoritarian state, and thus, mighty states like China and the Soviet Union (and subsequently, Russia) have found it easy to slough off American criticisms of their repressive practices. Moreover, successive US administrations have backed away from an initial impulse to confront China on its human rights record, realizing how little leverage the United States has and worrying about the consequences for American efforts to obtain China’s cooperation on other foreign policy goals. Many authoritarian regimes in the world—Saudi Arabia, Iran, Azerbaijan, Kazakhstan, Venezuela, and Nigeria under military rule—are relatively immune from international democratic pressure because oil gives them an independent source of steady, or even staggering, revenue. And geopolitics may also powerfully affect foreign policy calculations. The United States has historically been nearly silent about the highly undemocratic nature of Saudi Arabia because of the latter’s pivotal importance as a counter to Iran in the Gulf region and as the largest reserve supplier of oil on world markets. Thus, when Saudi Arabia made it clear earlier this year that the preservation of Bahrain’s embattled al-Khalifa monarchy was one of its vital interests, and then deployed its own troops to help crush prodemocracy demonstrators in that small neighboring island state, the Obama administration meekly muted its criticisms and focused its energies on supporting democratic change elsewhere in the region. Similarly, Kazakhstan’s oil and gas wealth, its long border with Russia, and its value as part of the Northern

Distribution Network providing an alternate route of supply of American military forces in Afghanistan have all given that former Soviet Republic significant leverage with the United States, again leading to a muting of American criticisms of political repression.

As noted earlier, strategic interests often led the United States to compromise its democratic principles in order to forge mutually supportive relations with dictatorships during the Cold War. This realist practice subsided after the fall of the Soviet Union but resumed after the September 11 terrorist attacks, when a new group of authoritarian “frontline” states in the war on terror—Pakistan, Egypt, Saudi Arabia, Kazakhstan, Kyrgyzstan, and Uzbekistan—became more critical to US strategic interests. Even before September 11, “Pakistan’s status as a nuclear power hostile to India, with ties to the Taliban regime in Afghanistan and fundamentalist factions gaining ground at home,” led the Clinton administration to temper its response to the October 1999 military coup.¹⁷ In recognition of Peruvian president Alberto Fujimori’s support for the war on drugs, the Clinton administration maintained military cooperation and attended his third-term inauguration despite describing Fujimori’s fraud-ridden 2000 election as “invalid.” In the fall of 2005, the United States backed away from its appeals for free and fair parliamentary elections in Azerbaijan and accepted a blatantly fraudulent outcome.¹⁸ Six months later, in April 2010, Bush granted President Ilham Aliyev an official White House visit. So much for the promise in his second Inaugural Address “to all who live in tyranny”: “When you stand up for your liberty, we will stand with you.”

Yet when the United States is motivated to exert diplomatic pressure on authoritarian allies, it can make a difference, either in helping to generate space for political opposition and dissent, or in tipping the balance at a critical transitional moment. By publicly documenting and denouncing human rights abuses in Latin America, and then coupling these denunciations with reductions in military and economic aid, the Carter administration contained repression, narrowed the options for military autocrats, and accelerated momentum for democratic change in the region. When the Dominican military stopped the presidential election vote count in 1978 in the face of an apparent opposition victory, swift and vigorous warnings from President Carter, Secretary of State Cyrus Vance, American embassy officials, and the commander in chief of the U.S. Southern Command

succeeded in pressuring the Dominican military to allow the opposition candidate to take office, thus effecting a transition to democracy. Vigorous, explicit diplomatic messages from the Reagan administration, artfully coordinating public actions and private appeals, dissuaded Ferdinand Marcos in the Philippines in 1986 and Chun Doo Hwan in South Korea in 1987 from forcibly suppressing prodemocracy protests and helped induce them to allow a democratic transition to unfold. And a more extended strategy succeeded in encouraging a process of democratic change in Chile and discouraging military dictator August Pinochet from thwarting the electoral process. Although President George W. Bush in his final two years backed away from pressuring Arab authoritarian regimes, after Islamist parties and movements made alarming gains in Egypt, Lebanon, and Palestine, his public appeals for democracy in the Middle East encouraged opposition movements and helped persuade President Mubarak to open up political space and allow a contested presidential election in 2005. The resulting political liberalization was partial and short-lived, but it stimulated political aspirations and the growth of opposition networks and skills in ways that would ultimately contribute to the downfall of Mubarak in the February 2011 revolution.

Diplomats on the ground, from the United States (and other democracies), also have many tools at their disposal to support and advance struggles for democracy (as described, for example, in *A Diplomat's Handbook for Democratic Development*).¹⁹ Their reporting back to Washington (or their other capitals) may help to catalyze the use of stronger tools to pressure for democracy. US embassy officials may extend their cloak of diplomatic immunity to prevent punitive state violence against dissidents by merely showing up at the scene of protests, demonstrations, and imminent arrests. Or they may give hope, inspiration, and legitimacy to democratic opposition forces by publicly meeting with them and hearing their concerns, monitoring their trials and imprisonments, observing elections, speaking out for democratic principles and visiting communities victimized by state violence (as US Ambassador Robert Ford did in Syria until he had to be evacuated). They may save dissidents from arrest by granting them asylum. The expanding practice of public diplomacy represents American society to the host society through a variety of public appeals, exchanges, and programs that project democratic models, values, and experiences and give ideas and moral support

to democratic forces. And increasingly, US diplomats may help to provide or facilitate more concrete forms of democracy assistance and technical advice.

Sanctions and Aid Conditionality

When efforts at moral or rational persuasion fail, democracies can increase the pressure by manipulating harder interests. This involves threatening or actually moving to impose costs on a country—or its key ruling elites—for violations of international norms of democracy and human rights. The range of tools here includes economic sanctions—reduction or suspension of aid and trade ties; diplomatic sanctions, such as the downgrading of diplomatic, cultural, and symbolic ties; military sanctions, such as the suspension of military aid, cooperation, and weapons sales, pursuit of a wider ban on arms sales to the country, and cutoffs of access to military-related technology; and aid conditionality. Whereas sanctions are punitive—imposing penalties for bad conduct—aid conditionality offers positive inducements of new flows of economic assistance if a country meets objective standards of democracy and good governance.

The academic literature is generally skeptical on the efficacy of international sanctions as a tool for inducing changes in the behavior of states. Sanctions work only when they can generate significant pain on the target country. The realization that trade sanctions just were not going to move a country as big and powerful as China to liberalize politically persuaded the Clinton administration to lift its conditioning of “Most Favored Nation” trading status on human rights in 1994. Typically, sanctioned and isolated states find ways to adapt by developing home-grown alternatives to products they can no longer buy, by simply passing off the costs of sanctions on to their long-suffering populations while blaming the international community for national hardships, and by cultivating or deepening alternative ties and suppliers of resources, technology, and geopolitical support. This explains why pariah regimes like North Korea, Burma, Zimbabwe, and Iran have been able to survive tough international sanctions imposed by the United States and other democracies. In these cases, the relative dearth of linkages to the United States has greatly limited American leverage in inflicting pain on the regimes and reshaping behavior. And the regimes have been sustained by the tolerance or support of friendly neighbors, like China and Russia, and

in some cases by their own sources of mineral wealth. Yet, historical experience shows the corrosive impact of poor economic performance on authoritarian regimes may be cumulative, generating a growing vulnerability that may not be visibly apparent.

On the other hand, where ties to the United States have been strong, sanctions have had an effect in moving regimes toward democratic concessions. Carter's human rights policy toward Latin America had an effect precisely because it coupled moral denunciations with reductions in economic and military aid. Years of stiffening economic sanctions from the United States and Europe, as well as disinvestment by private corporations and institutions, gradually ratcheted up the pressure on the apartheid regime and the white population in South Africa during the 1980s. For some time, South Africa adapted by becoming more self-sufficient, but when gold prices declined and domestic debt and inflation escalated, the result was a "protracted recession, capital flight and a profound sense of isolation. . . . Whites began to realize that unless they came to terms with the political demands of the black population, the economic noose would not loosen."²⁰ In the early 1990s, the freezing or suspension of Western aid forced countries like Benin, Kenya, and Malawi to open up and hold competitive, multiparty elections. In short, country-specific sanctions can work, when major powers cooperate, when there is extensive linkage, and when domestic pressures converge.

Increasingly, as the sanctions weapon gets refined from a blunt instrument to a range of more targeted and precise tools of punishment, stigmatization, and deterrence, sanctions are becoming more credible and effective in shaping the behavior of authoritarian elites. Targeted sanctions on regime elites, including travel bans and asset freezes, can get the attention of venal rulers who may be more prepared to see their countries suffer than themselves. "The warning by senior U.S. diplomats that the U.S. Government would freeze personal off-shore assets of Ukrainian officials in the event of government repression had considerable restraining impact on potentially violent behavior."²¹

The logic of conditioning economic assistance on democracy (or progress toward it) is relatively recent. While there had been individual country episodes of conditionality, prior to 2000 these generally were much more often linked (by World Bank and International Monetary Fund negotiating teams) to a country's economic reform policies, and typically were linked to

promises of future reforms rather than offered as rewards for prior behavior. With the initiation in 2002 of a new development assistance vehicle, the Millennium Challenge Account (MCA), the Bush administration brought the principle of conditionality to a new level. The semiautonomous implementing agency, the Millennium Challenge Corporation (MCC), rewards developing countries for demonstrated performance in democracy, just governance, and economic freedom and entrepreneurship, ranking countries on a set of 22 indicators. Countries that rank highly qualify for substantial new grants of aid, which must be negotiated with the MCC in contracts for specific developmental programs.

While the MCA has been funded at only a fraction of its promise (falling well short of the anticipated goal of \$5 billion annually), it has negotiated quite significant compacts for developmental assistance with a number of developing democracies, such as El Salvador, Mongolia, the Philippines, Ghana, and Malawi. The amounts of the compacts typically run into the hundreds of millions of dollars, providing a tangible incentive to achieve and maintain standards of democracy and good governance. And the willingness to suspend countries, such as Nicaragua, when they veer away from democracy also reinforces the conditionality mechanism. Unfortunately, some of the recipients, like Armenia and Jordan, are clearly not democracies, while others, like Tanzania and Senegal, are at best ambiguous in their adherence to democratic norms. However, in 2011 the MCC, which administers the grants and judges eligibility, modified the requirements to require that eligible countries score above an absolute threshold on either political rights or civil liberties (as measured annually by Freedom House).²² Whether this most ambitious experiment to date in aid conditionality succeeds over time in promoting democracy will depend first on whether democracies like Ghana achieve more vigorous economic development with this and other aid flows; second, to what extent the political conditions are sufficiently well-monitored and enforced so that elected leaders perceive real costs in trying to diminish or undermine democracy; and third, whether the selection criteria are in fact tightened so that obviously authoritarian regimes do not continue to be selected. One encouraging trend is that several of the countries that have recently been granted more limited aid under the “threshold program” to try to raise them up to qualifying standards are emerging democracies, like Liberia and East Timor, where a sizeable flow of politically conditional aid

might help to lock in democratic commitments while advancing the economic conditions for sustainable democracy.

Democracy Assistance

One reason why so many Americans question whether they should be promoting democracy abroad is that they do not realize that high-profile military interventions in Iraq and Afghanistan or humanitarian interventions in places like Haiti and Somalia are the exception rather than the rule. In most countries where democracy is absent or insecure, American efforts to encourage it proceed quietly and incrementally, far out of the glare of major media attention, through quotidian efforts of assistance to strengthen democratic institutions, reform governance, develop independent organizations and media, build democratic culture, monitor democratic elections, and, in authoritarian circumstances, train and support democratic forces in civil society.

Since 1983, the lead American organization for providing this assistance has been the National Endowment for Democracy (NED) and its four core grantees: the international institutes of the two US political parties (the National Democratic Institute, NDI, and the International Republic Institute, IRI), the Center for International Private Enterprise (CIPE), and the Free Trade Union Institute (FTUI, now the Solidarity Center). These five organizations are publicly funded in their grants and programs by annual congressional appropriations, supplemented in the latter four cases with significant grants and contracts from the US Agency for International Development (USAID). Although it began with very small annual budgets (under \$20 million), NED gave critical aid to democratic movements in Poland, Nicaragua, and Chile. Probably its greatest success story was in Poland, where FTUI transferred substantial assistance to the Solidarity trade union to support its education, publishing, and human rights projects. NED and its affiliates also contributed to peaceful democracy transitions in the Philippines, Namibia, Haiti, Zambia, and South Africa, in part by funding election-monitoring efforts and helping to organize international election-observing teams. In retrospect, each of these efforts has an air of inevitability to it, but at the time the odds against successful transitions were long, and the combined assistance efforts of NED,

other American donors, and in some cases the NGOs or aid organizations of other democracies crucially helped to make political breakthroughs possible.

Repeatedly over the last two decades, US and international assistance for independent media, free elections, and civic organizations have made significant, if not always immediate, contributions to democratic change. For example:

- International election observer missions—with American NGOs like NDI, IRI, and the Carter Center playing leading roles—have helped to enhance the credibility and legitimacy of elections in many new and tense circumstances, such as South Korea in 1987, Bulgaria in 1990, and Ghana and the Dominican Republic in 1996; to mediate bitter disputes over the electoral process in countries like Nicaragua, El Salvador, Albania, and Cambodia.
- Political parties reflecting diverse societal interests have received training and advice on how to develop membership bases, volunteer networks, campaign organizations, local branches, fundraising, public opinion polling, issue research, policy platforms, media messages, constituency relations, and democratic methods of choosing their leaders and candidates and involving members. Some of this has come during election campaigns, but much of it is ongoing organization building, helping parties to govern and legislate, to recruit and campaign, and to involve women and youth.²³

Not all of this aid is effective. Some recipients are weakly committed or openly corrupt opportunists who set up BRINGOS (“briefcase NGOs”) and GONGOs (“government-organized NGOs”), that is, fronts and apologists for authoritarian regimes. Others are simply wasteful or ineffectual. Critics of this aid worry that civil society becomes too dependent on foreign donors—without explaining how independent prodemocracy groups and media could raise the funds to function viably in relatively poor countries, or those where an autocratic state dominates and coopts the private business sector. Strategic calculations may lead international election observers to pull their punches before declaring that a fraudulent election has been stolen and illegitimate.

They may also soften the US government's resolve to support democratic opposition forces challenging pro-American autocrats, but NED makes its grants entirely independent of the State Department or White House. And large amounts of aid to modernize parliaments, courts, and other government agencies may amount to little if political leaders lack the will to allow these institutions to function democratically and check the abuse of power. Even where these forms of political assistance crucially contribute to democratic breakthroughs or tangibly help fledgling democratic institutions to gain strength and credibility, they always do so in a supporting role.

There is general consensus among scholars and practitioners that democracy assistance cannot substitute for the "courage, energy, skills, and legitimacy" of a country's own prodemocracy groups and leaders.²⁴ The most careful and dispassionate scholar of US democracy assistance efforts, Thomas Carothers, concludes (not surprisingly) that these forms of aid have the most visibly positive effects where there are already present at least moderately favorable conditions for democratic change, such as sincere and effective democrats, divided autocrats, and higher levels of economic and educational development. Nevertheless, where democracy assistance is "properly designed and implemented," where it proceeds from sensitive knowledge of the local political terrain and then endeavors to monitor grants carefully over time, it can "help broaden and deepen democratic reforms" in new democracies and sustain civic awareness, democratic hope, and independent information and organization in authoritarian regimes.²⁵

Thus, if democracy assistance does not in itself work miracles, it does occasionally help miraculous democratic breakthroughs to occur, and over time it helps to build the civic and political foundations of enduringly free societies. Given the relatively modest total amounts the US government spends on these forms of assistance annually (something over \$1.5 billion, mainly through USAID, for aid to civil society, political parties, representative institutions, corruption control, representative and judicial institutions, and other elements of democratic governance), this is no small achievement. In fact, when these political aid flows were assessed (for the years 1990 to 2003) by an independent team of social scientists a few years ago, they found the effects were clearly and consistently positive, but only modest because individual country levels of assistance were modest (about \$2 million to

\$4 million on average). Larger levels of democracy assistance appear to yield larger impacts. They found that each additional million dollars of democracy assistance increases the “normal” rate of expected improvement in democracy scores by 50 percent.²⁶ The findings—unprecedented for their empirical depth and statistical precision and sophistication—fully justify the authors’ conclusions that overall levels of democracy assistance should be increased, and that democracy assistance should be sustained in countries even after they have reached what has heretofore been considered a “satisfactory” stage of democratic development.

PROMOTING DEMOCRACY MORE EFFECTIVELY

A compelling case can be made that a more democratic world is not just an intrinsically better and more humane world, but also a safer, less stressful, and more predictable and secure world for the United States. But even if that is so, how does one get from here to there? The United States might well be more secure if democracy really took hold in Egypt and Pakistan, but what about the risks and costs along the way? How much short-term stability is the United States willing to sacrifice for long-term gain, and how grave are the transitional risks—not just of a hostile government coming to power, but of political order imploding altogether? And even if these risks are tolerable in many places, what about others—like Saudi Arabia—where the stakes are enormous and so are the dangers of a rapid rush to popular sovereignty? Then there are the questions of means. If America has the interest, does it have the capacity and means? Or should it draw the line at certain types of means?

Promoting democracy can never be the sole purpose of American foreign policy, and at times it will clearly recede in priority as the United States pursues urgent and palpable competing national security concerns. But too often the United States has traded short-term gains in stability or economic advantage at the price of long-term costs to its national interest, once autocrats like the Shah of Iran, Somoza in Nicaragua, Duvalier in Haiti, Mobutu in Zaire, and Siad Barre in Somalia fell from power, leaving chaos or anti-American revolutions in their wake. Pressing for open, accountable, responsive, and legitimate government—in other words, democracy—is in the

American national interest, even if the means, volume, and pace must vary across countries and over time.

One of the attractions of democracy assistance is that it offers some scope for the United States to square the difficult circle and have its relations with autocracies proceed on dual tracks when necessary. On one track (the most visible), formal diplomatic ties and aid flows—at the extreme, the nearly \$2 billion a year (more recently down to about \$1.7 billion) that went to the authoritarian regime of Egyptian president Hosni Mubarak—can sustain cooperative relations with autocrats the United States may not like but judges it needs strategically. On the other track, democracy assistance can provide hope, training, and resources to prodemocracy forces in civil society and the political opposition, while American diplomats can monitor and protest the worst abuses and reaffirm American values. The problem with this approach, however, is that when the United States perceives a strategic need to embrace a dictator, it gives the latter leverage. And since autocrats under challenge are locked in an existential struggle for survival—where failure could mean not simply retreat into a plush retirement, but sudden death, humiliating exile, or imprisonment and prosecution for past crimes—they will fight furiously to remain in power. Historically, the United States has retreated too quickly from this authoritarian counterpressure, underestimating its own leverage and overestimating the leverage and options of autocratic actors like Mubarak or the Pakistani military. Getting the balance right is a delicate and high-stakes challenge, in which American foreign policymakers must wrestle not only with the conflict between ideals and interests, but with a conflict between competing interests and rival scenarios of disaster for the American interest. Moreover, one of the things that recipients of democracy assistance most often and loudly complain about is precisely the lack of coordination and consistency between the civic aid they receive from the United States—which they appreciate and even depend upon—and the “high politics” of diplomacy and government-to-government aid, which too often rewards and reinforces the very authoritarian regime they are trying to displace.

Much more can and should also be done to reorganize foreign aid around the incentive-based approach of the MCA. Indeed the entire US foreign assistance program has become a hopeless jumble of congressional earmarks and

partial objectives that rob aid administrators of the flexibility they need to look at countries holistically and with fresh eyes. The most important question that should be asked in allocating aid and designing country strategies is, "How can the United States encourage coherent and sustained progress toward just development?" That means not just economic growth or better health for the next year or two, but more open, accountable, and effective institutions in the state and civil society, for the long run.

Finally, the United States can gain a lot in terms of legitimacy and effectiveness by working to defend and advance democracy as often as possible through regional organizations, like NATO and the Organization of American States (OAS), through international organizations like the UN, and through broad multilateral networks like the Community of Democracies. Over the last two decades, the UN has emerged as a significant player in democracy promotion, assuming critical roles in assisting the organization of democratic elections and in helping to resolve violent conflict through democratic mechanisms. Today, the United Nations Development Program (UNDP) is one of the largest international providers of democratic governance assistance, with a budget of about \$1.4 billion for that purpose in 2005, including support for about a third of the parliaments in the developing world.²⁷ While the Community of Democracies has been mainly a symbolic gathering of states since its founding in 2000, it is now beginning to develop a more effective governing structure, and means (such as through cooperative democracy partnerships) to provide tangible forms of governance assistance to new and troubled democracies. Having not just other established democracies, like Canada, Japan, and from Europe, but emerging democracies like India, Korea, Mongolia, Mexico, Chile, Mali, and South Africa, sharing membership on the Governing Council of the Community, in itself sends a significant message about the growing global legitimacy of democracy.

In a world of ongoing security threats—terrorism, narcotrafficking, and proliferation of weapons of mass destruction, to name a few—and of new threats such as cyberwarfare and China's expanding military power and strategic ambitions, promoting freedom and democracy will sometimes fade from view as an objective. But it should never be lost from view. The

states that present these threats to the United States are all autocracies, or at least illiberal and weak democracies urgently in need of strengthening. Ultimately, nothing will advance the security and prosperity of the United States more than the gradual movement of the world toward more and better democracy.

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Democratic Imperialism: A Blueprint

Stanley Kurtz

Although the United States is the preeminent power in the world, we are not yet an empire. Notwithstanding periodic foreign interventions and our considerable international influence, we have not used our military to secure direct and continuous control over the domestic affairs of foreign lands. If anything, the United States has avoided empire. We have abolished the draft, reduced taxes, cut defense spending, and eschewed nation-building. Only recently, we were accused of “abandoning” Afghanistan in the wake of the Soviet departure from that country. Today, Afghanistan may be the germ of a new American imperium.

Iraq forces the imperial question. In the aftermath of an Iraqi war, it may suffice to install a friendly autocracy, withdraw the bulk of our forces, and exert our influence from afar. Yet some have called for more. From voices within the administration like Deputy Secretary of Defense Paul Wolfowitz, to policy intellectuals like Richard Perle, to esteemed scholars like Bernard Lewis, many have argued that only a democratic transformation of Iraq, and eventually of the larger Arab world, can provide long-term security against terrorism and nuclear attack.

In an important address in February, George W. Bush lent his voice to this chorus. In no uncertain terms, the president affirmed that “the world has a clear interest in the spread of democratic values,” not least because “free nations do not breed the ideologies of murder.” The president invoked the examples of American-led democratization in post-World War II Germany

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and Japan, and he pointedly rejected the claim that Arab nations are incapable of sustaining democracy. What the president did not say, yet gently and ambiguously implied, was that so deep a cultural change would require America to occupy Iraq in force and manage its affairs for years to come.

Could such a venture in democratic imperialism be harmonized with our liberal principles? Even if so, would it work? Is it possible to bring liberalism to a society so long at odds with the values of the West?

All of these questions were posed and answered, both in theory and in practice, during Britain's imperial rule of India. Three great British thinkers, Edmund Burke, James Mill, and John Stuart Mill, not only philosophized about liberal imperialism; they lived it. Burke helped force a major reform of Britain's early imperial system, while John Stuart Mill succeeded his father James as the "chief examiner" in the London headquarters of the British East India Company.

Burke on one hand and the Mills on the other founded the two competing moral and administrative schools of thought on the British Empire. Burke's colonialism was conservative, respectful of indigenous practices and elites, and insistent on the highest standards of stewardship. The Mills were skeptical, even contemptuous, of traditional practices and elites; they were determined to force a democratic social transformation. Neither approach, it turns out, was able to operate independently of the other. If we find ourselves shouldering an imperial burden in Iraq or beyond, we shall want to study the wisdom—and the folly—of Burke, the Mills, and their respective disciples. Far more than America's post-World War II occupation of Japan, the British experience in India may be the key precedent for bringing democracy to an undemocratic and non-Western land like Iraq.

FROM INDIA TO IRAQ

British imperial India might seem an unlikely model for an American occupation of Iraq. American rule in Iraq would ideally be a successful and time-limited experiment in democratization. Yet the British governed sections of the Indian subcontinent for nearly 200 years. The earliest period of British colonial rule was marked by extreme exploitation and neglect. Once colonial government was placed on a sounder footing, even the best-intentioned policies of dedicated and sympathetic administrators frequently went awry,

leading to serious social disruption. Midway through the Raj, the British harshly suppressed a violent rebellion, leaving a legacy of suspicion between ruler and ruled. The aftermath of rebellion ushered in the later phase of empire, which was marked by an ideology of racial superiority, continued exclusion of Indians from the higher levels of the civil service, and a growing independence movement that was opposed consistently, sometimes violently, by the British. If anything, therefore, the British experience in India might best be viewed as a model of what not to do in Iraq.

The British Raj does indeed represent a useful countermodel for any American venture in Iraq. Yet the experience of India under the British was by no means entirely negative. In fact, the very movement of Indians to free themselves from British rule was a product of British influence. Above all, the British cultural legacy explains why post-independence India took a democratic turn. Nor was the emergence of Indian democracy an entirely unintended consequence of British imperial domination. Despite the many problems and conflicts of empire, several critical threads of British imperial policy were intended to bring about eventual democratic self-rule in India. When India finally did attain independence and democracy, it was in no small part due to those policies.

But why look to India at all when we have the American occupation of Japan as a model? That occupation was a successful and short-lived American-run venture in the democratization of a non-Western autocracy. Why not simply repeat the formula? The problem with the Japanese precedent is that the post-World War II transformation of Japan was far less radical than meets the eye. Japan, after all, was already substantially modernized, else it would not have been able to challenge us militarily. Industrial might and an efficient, modern bureaucratic apparatus were keys to Japanese success, both during and after the war. And although World War II Japan was far from democratic, military rule was actually a diversion from a long Japanese history of experimentation with government along Western and democratic lines. In comparison to Iraq's ethno-religious factionalism, moreover, Japan is culturally homogeneous. So American efforts to impose a democratic constitution on Japan succeeded because they rested on a set of economic, social, and historical prerequisites, all of which are virtually absent in Iraq.¹ The British, on the other hand, transformed a country with no democratic tradition into one of the more successful democracies in the non-Western world.

This Indian experience more closely resembles the challenge we shall face in Iraq than does the example of post-World War II Japan.

DEMOCRATIC GRADUALISM

How, then, did the British bring democracy to India? “Very slowly” is a large and important part of the answer to that question, although this is not an answer Americans want to hear. Yet it is something we need to remember. Authentic democratic development is slow—a lesson easily forgotten by a nation that was, in important respects, democratic from the start. Again, the example of post-World War II Japan, which rests on a long and too-little-known history of indigenous experimentation with democracy, misleads us into thinking that supervised elections and imposed constitutional changes can, by themselves, suffice to introduce democracy to a non-Western country.

Until the 1830s, British imperial policy in India was one of minimal interference with the indigenous social system. With a shockingly small number of British soldiers and administrators governing a land of many millions, the British had no desire to undertake potentially disruptive reforms of Indian society. Most British administrators were “Orientalist” in inclination. That is, they were devoted to the respectful study of Indian culture. Orientalist scholarship served as the foundation for a policy of government by means of indigenous elites. In formulating that policy, the Orientalists drew on Edmund Burke’s social conservatism—his respect for the wisdom of tradition and for the local aristocracies that serve as its custodians.

As a prominent disciple of the liberal utilitarian philosopher Jeremy Bentham, James Mill became the leader of a reformist liberal opposition to the Burkean Orientalists. As chief examiner of the British East India Company, he drafted the memoranda of instruction that were sent to India during the 1820s and 30s. (Although Mill drafted the memos, and was highly influential, he did not have final authority over their contents.)

It was the liberals’ education policy that successfully laid the groundwork for India’s modern and democratic future. The Orientalists wanted to subsidize the advanced study of indigenous languages. The liberals, on the other hand, were determined to create a class of English-speaking Indians. Precisely because there were too few British administrators to govern India’s vastness, the assistance of a corps of English-speaking Indian clerks was

required. Yet liberal administrators were looking for something more than bureaucratic assistants. Their hope was to mold a class of Indians that was modern and liberal in outlook, a class that could eventually govern India on its own.

That is exactly what happened. Liberal administrative victories over the Orientalists in the 1830s set up a system of English education that eventually produced a small but influential bureaucratic class of Anglicized Indians. Although a more conservative administrative policy of indirect rule through indigenous elites eventually returned (under the dual blows of failed land reform and the Indian Mutiny of 1857), a small but productive system of English-language education remained sacrosanct throughout British rule. By the 1880s the growing class of English-educated Indians, frozen out of higher administrative positions, was agitating for a larger role in government. At that point, administrative liberals returned to power long enough to devolve a limited share of control to local representative assemblies on which Indians could sit. These English-educated Indians, who populated the bureaucracy, the courts, and the local democratic assemblies, formed the core of India's movement for independence.

The British, of course, went back on their promise of eventual democratic self-rule, forcing Indians to seize their independence through a decades-long campaign of agitation and resistance. Yet the educational policies set up by liberal British administrators 100 years before independence had laid the foundation for democratic self-rule in India.

Another key contribution of liberal and reformist British administrators to independence was the construction of an all-India communications and transportation network in the 1850s. An efficient national postal service, telegraph system, and railroad network were all laid down in that decade. Of course, this network increased the efficiency of British military and administrative control over the subcontinent. Yet the new infrastructure also generated a national consciousness among Indians, who had not previously seen themselves as members of a single society. In particular, the English-educated Indian bureaucratic class was brought to awareness of its shared identity, values, and grievances by the new networks of communication. Thus was born the idea of a modern, independent, and democratic Indian state.

The lesson in all this is that a slow process of English-medium education in modern and liberal ideas has the potential to transform a traditional

non-Western society into a modern democracy. (Because of English's status as the world's lingua franca, by the way, even Sweden now makes English a compulsory second language.) To work, such an education needs to be followed by actual experience in legal, administrative, and legislative institutions constructed along liberal lines. India's English-speaking bureaucratic class made up only 1 or 2 percent of the population. Yet that class was sufficient to manage a modern democracy and slowly transmit modern and liberal ideas to the larger populace. So the route to modernization is not a direct transformation of the traditional social system, but an attempt to build up a new and reformist sector.

Several problems with this scenario as a model for a postwar Iraq are immediately apparent. For one thing, it took just over 100 years to move from the establishment of English-language education in India to independence and democracy. We don't have that kind of time in Iraq, where our purpose is to liberalize the culture quickly enough to undercut the growth of terrorism and anti-Western ideologies. Of course, after an initial outburst of liberal enthusiasm, the British did everything in their power to prevent their Indian subjects from attaining democratic self-rule. In contrast, since our national safety depends on establishing a successful liberal society in the Arab world, we have no reason to delay. Ideally, we could see good results in the time it takes to educate a single generation.

That is still a long time. And we live in an era of nationalism. British rule actually created Indian nationalism, and in many ways the Raj depended for its survival on the initial absence of nationalist sentiment. Yet Arab nationalism has been a force to reckon with since just after World War I. In fact, the British themselves took over Iraq in 1917–1918 and initially tried to govern it directly. But by 1920–1921, an Arab nationalist rebellion forced the British to abandon direct rule and install a friendly and pliable monarch instead. By the same token, any American attempt to govern Iraq, or to supervise the education and training of a liberalized bureaucratic Iraqi class, is sure to generate Arab nationalist resistance. So even if the democratizing lessons of British imperial India might work in principle, will we be able to implement them in practice?

There are at least two possible solutions to the problem of Arab nationalist reaction—the Iraqi immigrant returnees and what we might call “blended rule” (a combination of direct and indirect rule). The Iraqi returnees, who

have lived in the West and imbibed its culture for years, may already be a class of modern and liberal citizens who can help to govern and reform their society. Unfortunately, the evident divisions in the ranks of the returnees suggest the ongoing power of traditional regional, ethnic, and religious loyalties among them. Nonetheless, the returnees may provide a sufficient number of relatively liberalized Iraqis to jump-start the long-term process of cultural change.

The other question is whether, after an initial period of military rule, America can devise a way of exercising influence in postwar Iraq that is something less than classic direct imperial rule, yet something more than the “Orientalist” policy of indirect rule through traditional elites. (The latter policy might create a stable Iraq but will not produce a democratic Iraq.) This is a delicate and complicated question. To create a modernizing and liberal bureaucratic elite in a country where no such class exists, Westerners will be needed to run the schools and to serve as model administrators and judges. While the returnees may be able to help here, substantial American or Western involvement in the administration and staffing of a reconstructed Iraq will almost certainly be essential to any hoped-for democratic transformation. The question is, can that kind of intimate American involvement take place under the umbrella of an Iraqi government?

Even if we can reduce the process of generating a liberal, Western-educated, and modernizing bureaucratic class to a generation, and even if we can do so without provoking excessive cultural backlash, we still face the reality that authentic democracy takes time to develop. Holding democratic elections in a fundamentally illiberal environment invites ethnic conflict, Islamist or secular dictatorship, and the same round of military coups that eventually brought Saddam Hussein himself to power. This suggests that a period of quasi-imperial, and therefore undemocratic, control might be a necessary prerequisite to democracy itself. That brings us to another critical lesson of the British experience in India—the paradoxical compatibility between imperialism and democracy.

A FAILED REFORM

James Mill’s theory of social change was straightforward: Replacing priestcraft and local despotism with wholesome government would quickly sweep

away irrational prejudice. Educate the populace, make them secure in their property, govern them well, tax them lightly, and their economic habits will be transformed to resemble those of enterprising British citizens.

Mill's attitude toward indigenous Indian elites was diametrically opposed to that of the Burkean Orientalists. Where the Orientalists looked at Hinduism's sacred texts and saw legal subtlety and literary brilliance, Mill saw barbaric punishments and wild-eyed myths. For the Orientalists, Brahman priests were the leading caste of the land whose understanding should be taken by administrators as the key to prudent rule. To Mill, on the other hand, Brahmans were the ultimate embodiment of sinister priestcraft—wielding abstruse rituals and extravagant tales to keep the masses ignorant and docile.

The Orientalist administrators feared that by displacing indigenous elites, James Mill's policy of radical reform would provoke a revolt. Yet Mill was confident that any prejudice in favor of tradition, self-rule, or indigenous elites would fall away once the populace perceived the social and economic benefits of Britain's modernizing policies. In Mill's utilitarian theory, the mind was a *tabula rasa* that could quickly be shaped, and reshaped, by changing external influences. Tradition, in this view, counted for little.

In practical terms, James Mill's strategy, which was eventually taken up by a generation of liberal administrators in India, centered on land reform. For Mill and his followers, the key to social progress in India was to undercut the power of reactionary local elites by deeding land to individual peasants. Once these peasant cultivators had secure ownership of their land, market forces would take over, and spontaneous economic development would rapidly follow. This formula for modernization is not unlike that favored today by Peruvian economist Hernando de Soto.

Yet in early nineteenth-century India, liberal land reform was a dismal failure.² Reform did indeed undercut the traditional system of village self-rule and did also initiate a limited market in land. Yet the spirit of British economic enterprise did not follow. Instead, the local economy remained stagnant while the collapse of the traditional village political system put new demands on already strained British administrators.

The failure of liberal land reform was a vindication of sorts for the Orientalists. Yet they, too, had misjudged the situation. Even the Orientalist administrators had favored a policy of limited reform in the districts under their control. While they had no intention of undercutting indigenous elites,

the Orientalists did sponsor surveys that recorded who worked the land. In doing so, the Orientalists meant only to verify that traditional village leaders were not unfairly exploiting peasants—or deceiving the British—as they collected taxes on the government’s behalf. Yet the unintended effects of the Orientalists’ land surveys were almost as disruptive of the traditional system of ownership and political control as the more intentionally radical reforms of the Millian liberals.

Although the upshot of reform was to parcel out control of land to individuals, and although the traditional politico-economic leadership of the village was greatly unsettled thereby, fundamental Indian patterns of caste and “joint family” association remained strong. The notion of collective property ownership among kin, while disrupted in its details, remained pervasive, whatever the technical system of title-holding. With the bonds of traditional kinship and caste relatively unbroken, a shift toward capitalist enterprise was anything but automatic. Nor did either the Orientalists or the liberals have a very clear understanding of the real social underpinnings of the system they were (unsuccessfully) toying with.

The lessons of empire, then, include a caution to democratizing optimists. Western economic and political habits are not simply waiting to be unleashed by a few simple legal reforms. The real barrier to modernity in the non-Western world lies in the pervasive and recalcitrant structures of everyday life—structures few Westerners understand. In India, the key barriers to modernization are the joint family system and caste. The counterparts in Iraq are the patriarchal family system, the bonds of lineage and tribe, and related conceptions of collective honor.³ Traditional social practices like these can sometimes adapt themselves to modernity. Yet a direct attempt to overthrow these structures is difficult to manage and unlikely to succeed.

COMPETING ADMINISTRATIVE SCHOOLS

It is superficially true that Burke and the Orientalist administrators inspired by him advocated rule consistent with indigenous principles, whereas the liberals inspired by James Mill favored democracy for all. On closer inspection, however, one can see how both schools of thought favored a program of Westernizing reform and each had a healthy respect for the cultural barriers to modernization.

For England and India alike, Burke was an advocate of gradual reform within the context of time-tested institutions. In Britain, that meant going slow on the expansion of suffrage while encouraging a concept of stewardship in the public interest among Britain's aristocratic office-holders. It's easy for a modern American to dismiss these conceptions as outdated, but history largely vindicated Burke. Britain developed slowly and peacefully into a modern democracy, while the democratic radicalism and upheavals of the French Revolution (which Burke famously condemned) led to decades of turmoil and dictatorship. Both schools understood what modern Americans forget: that too-rapid democratization in the absence of cultural prerequisites can be dangerous.

In the 1780s Burke sought to reform Britain's growing empire in India.⁴ The early years of British rule featured much economic exploitation as well as general neglect of the population's elementary needs and interests. The East India Company's conduct outraged Burke, who saw in rule by transient and commercially minded outsiders the ultimate contradiction of true stewardship—rule by those who live among and understand the habits and interests of the people.

Burke's opponents claimed that, since Indians were in any case accustomed to being ruled despotically, a measure of British despotism was both necessary and justified. To reply to that argument, Burke made himself into one of the first European experts on a non-Western culture. Burke successfully established that Hindu and Muslim law rivaled Western law in sophistication, and argued that such a people was just as entitled to the rule of law and just stewardship as the people of England. Interestingly, the founder of modern conservatism was Britain's sharpest internal critic of imperial abuse.

Burke sometimes hinted that, through a process of gradual and unforced reform, Indians might someday supplement their own customs with the full advantages of British liberty. Yet, as would later be true of the Mills, Burke had a limited understanding of the actual structures of Indian life. The caste system, for example, was for the most part opaque to him. Nowadays, students of Burke tend to push his criticisms of empire even further. If Indians had sophisticated law and were entitled to genuine stewardship by an indigenous elite, why have empire at all? But Burke can be pushed in the other direction as well. If non-Western societies are much further from the blessings

of liberty than Burke dared imagine, then why not undertake a more radical program of reform?

This was the question posed by James Mill in his rejection of the Burkean Orientalists' preference for rule through an indigenous elite. Yet John Stuart Mill made a lifelong effort to transcend the dichotomy between Burke and his father—between the indirect rule favored by the Orientalists and the radical reformism of the liberals.

John Stuart Mill famously suffered a mental breakdown as a result of his father's authoritarian and unbalanced rearing. James Mill raised his son John in isolation from all but a few family members, personally taught him Greek by age three, Latin by eight, and a demanding course of university-level material (including the history of India) throughout childhood. Religion, music, and art were intentionally excluded from young John's curriculum. In effect, John Stuart Mill was a guinea pig in a great utilitarian experiment in child rearing. By excluding all "irrational" and traditional influences, James Mill hoped to create a perfectly rational and "reformed" human being, just as he hoped to create a reformed and rational India.

Just as John Stuart Mill was advancing, under his father's influence, at the East India Company office, his mental breakdown hit.⁵ To save himself from the feeling that he was incapable of normal human emotions, John Stuart Mill secretly began to read the romantic poets. That led him to Samuel Taylor Coleridge's conservatism. Less well-known is John Stuart Mill's growing interest, at just this time, in the administrative theories of the Burkean Orientalists, which were built around the same sort of respect for tradition found in Coleridge. Just before and after his father's death, Mill began to throw his weight behind the Orientalists' policies of rule through indigenous elites.

Eventually, in his administrative policies as in all aspects of his thought, John Stuart Mill sought a synthesis. Having abandoned his father's doctrinaire reformism, Mill was able to shift as circumstances demanded. With the advent of the great transportation and communications projects of the 1850s, Mill moved back into the reformist camp. Yet while many reformist administrators—his father above all—thought the actual participation of Indians in government was unnecessary to modernization, Mill always advocated participation in imperial administration by indigenous elites. In effect, this view was a synthesis of the Orientalist position (with its respect for the

role of indigenous elites) with his father's authoritarian reformism. By the time he wrote *Considerations on Representative Government* (1861), Mill had worked out his system of liberal gradualism—an attempt to split the difference between his father and Burke.

John Stuart Mill's administrative shifts reflected a larger rhythm of change in the history of British India. The balance between reformism and relatively indirect rule constantly changed. Burke's early reforms brought a necessary respect for indigenous interests after a period of British exploitation and neglect. Decades of stable rule eventually made reformist administrative experimentation possible. Out of that period of reform came English-language education. Yet the reformers went too far. After the failure of their land reforms (which played a role in provoking the revolt of 1857), a policy of indirect rule through indigenous elites returned, punctuated by the liberal reforms of the 1880s that devolved a measure of power to local assemblies.

The lesson in all this is that there is no single correct way of democratizing Iraq. Some elements of the Bush administration prefer to work through traditional Arab elites, while others remain intent on relatively rapid democratization. (No doubt, both positions are considerably more nuanced than this.) So the nucleus of two competing administrative schools for a post-war occupation is already in place. Only time will tell how to plot a course between the two approaches.

Consider the problem of Iraq's traditional tribal areas as a specimen of the coming administrative challenge. A truly modern and democratic Iraq will require a state with a monopoly on the legitimate use of force. That means in the areas where rifle-bearing tribesmen still rule, the populace will eventually have to be disarmed. Yet, in the early phases of the occupation, it will be necessary to work with the tribes, not against them, to consolidate the new government's control. It will take time to educate and train a modernizing and liberal elite. Eventually, patronage through tribe and kin will have to be stamped out in favor of an educational and bureaucratic meritocracy. In the meantime, some cultivation of traditional leaders and some accommodation of traditional kinship-based patronage will have to be tolerated. Inevitably, there will be contradictions in policy. The overall pace and direction of that policy needs to be guided by circumstances, not by simple doctrine. John Stuart Mill's administrative flexibility and synthesis is the model.

LIBERAL IMPERIALISM?

Debate over the governance of postwar Iraq pits democratizers against realists. Realists are skeptical about the prospects for cultural change in the Arab world, warning that democracy will create ethnic strife and elected despotisms. Partisans of democratization, on the other hand, are willing to take risks to achieve the sort of deep-seated cultural change that might finally put an end to regimes that harbor, sponsor, or generate terrorists. In this view, it takes democracy to make democracy. Only by actually choosing their own governments—then living with the imperfect consequences of those choices—can a people learn the meaning and necessity of responsible elective behavior.

These opposed views often exist simultaneously within the same administration. For example, Thomas Carothers has highlighted contradictions within the democracy promotion policies of Presidents Ronald Reagan and George W. Bush.⁶ After lavishing effort on the construction of a credible electoral process in El Salvador, the Reagan administration covertly funneled money to ensure the victory of its favored candidate, Jose Napoleon Duarte. The current administration is encouraging democracy among the Palestinians while also making clear that it considers the reelection of Yasser Arafat an unacceptable outcome. And at the moment, the administration is trapped between its democratizing rhetoric and the growing crisis in Venezuela, where the popularly elected but anti-American government of Hugo Chavez holds sway. This sort of problem could confront us in an Iraq that is only formally democratized.

Part of the difficulty here is that our democratization debate is premised on a false dichotomy. Skeptical realists highlight the danger of holding elections in an illiberal environment. Democratic imperialists insist that faith in our values demands that we risk a shift to an electoral system in the Arab world. But what if a policy that eschews immediate elections is not simply a bow to illiberal realities, but itself reflects an understanding and affirmation of authentic liberal democracy? After all, no less a liberal than John Stuart Mill articulated just such a policy of democratic delay.

After more than two decades' experience as a leading liberal voice within the British East India Company, Mill warned in *Representative Government* against premature elections in societies lacking the cultural prerequisites of

democracy. Unless electors actually understand and embrace liberal constitutional principles, said Mill, representative institutions quickly degenerate into tyranny and faction. According to Mill, a government capable of bringing democracy to an illiberal society will have to be in some degree “despotic.” In other words, after warning against the dangers of too-rapid democratization, Mill defends the necessity of an enlightened colonial despotism as a route to the long-term liberalization of relatively “uncivilized” societies.

Mill’s thoughts on colonialism are not a favorite subject of his contemporary readers and admirers. When Mill’s views on colonial democratization are examined at all, Mill is usually excoriated for his imperialism, his alleged betrayal of liberal principles, and his cultural bigotry. Mill does deserve criticism for his condescension toward, and limited understanding of, non-Western societies. Yet, in general, the complaints are unfair.

In *Representative Government*, Mill was grappling with a fundamental problem of British democracy, a problem little appreciated by modern Americans. America enjoyed near-universal white male suffrage from the start, but throughout the nineteenth century, Britain and other European nations struggled mightily with the question of how far to extend the franchise. This was not a straightforward matter of equality and justice but entailed the potential destruction of democracy itself by means of a popularly supported despotism. France had several times fallen victim to just such a despotism, and this was much on the minds of liberal democrats like Mill.

From the start, American democracy was premised upon its relative social equality and its widely educated public. Europe’s class divisions, its unlettered peasants, and its ill-educated workers meant that universal suffrage could quickly and easily lead to despotism. So Mill’s cautions about too-rapid democratization applied not only to India, but to England as well.

Yet Mill was indeed a liberal. If he saw legitimate limits to proposals for universal suffrage, he was also a leader of the movement to extend the franchise as quickly and as far as prudently possible. And despite his approval of an enlightened colonial despotism in India, Mill was a supporter of the liberal administrative policies that did in fact eventually lead to Indian democracy. For example, Mill was well aware of the tendency of the new Indian communications and transportation infrastructure to generate a national consciousness and to lift the concerns of individuals beyond their localities

and toward the broader public good. For this reason, Mill strongly supported these reforms when they were playing out and clearly alludes to them with approval in *Representative Government*.

More important, in *Representative Government*, Mill lays out, more than 20 years before the fact, the governmental reforms of the 1880s that eventually did lead to independence and democracy in India. Speaking broadly, without mentioning any particular country, Mill argues that the way to democracy in relatively “uncivilized” colonies is the construction of local democratic assemblies that do not compete with the central power but are “auxiliary” to it. *Representative Government* was well-known to colonial administrators and surely helped set the pattern for the liberal reforms of the 1880s. Those who reproach Mill for his involvement in colonialism seldom acknowledge that Mill actually supported and helped to author many of the liberal colonial policies that did in fact bring democracy to India.

Of course, Mill is chastised for his embrace of the civilizational ranking characteristic of nineteenth-century British thought. It is true that Mill, like his father, was mistaken to dismiss Indian culture as “barbarian.” But it is important to understand why Mill was mistaken. Neither of the Mills had a clear or satisfactory conception of what made Indian society tick. They judged India by British yardsticks and found it wanting. In doing so, the Mills did indeed misjudge a complex, graceful, and sophisticated social system—one with great strengths as well as great weaknesses.

Yet once *our* problem becomes the democratization of a non-Western culture, John Stuart Mill’s seemingly dated framework is surprisingly modern and relevant. It can certainly be argued that traditional Arab society is far more appealing, and far less oppressive, than its detractors realize. But to the extent that the export of democracy becomes our goal and standard, Mill’s warnings about precipitous reform in the absence of cultural prerequisites, his plans for eventual success, and even his ranking of societies by their relative readiness for democracy make a great deal of sense.

The lesson here is that due caution about the rapid importation of full-blown democracy to illiberal societies is entirely compatible with faith in, and even promotion of, liberal principles. Because of our unique social history, Americans think of democracy in universalist and rights-based terms. John Stuart Mill, however—like Edmund Burke and Alexis de Tocqueville before him—was keenly aware of democracy’s social and cultural prerequisites. We

cannot and should not return to the nineteenth century's ignorant and simplistic ranking of societies on a single evolutionary scale. Nor can we govern Iraq with the arrogance and prejudice of the nineteenth-century British. Yet the problem of a postwar occupation of Iraq is rather more similar to the challenges faced by Mill than to any experience with which Americans are familiar. For that reason, we would do well to learn from Mill's cautious, thoughtful, and in many ways successful program of democratization. Mill's belief in democratic gradualism was not only realist; it was also liberal.

A JUST EMPIRE?

Talk of empire is discomfoting. Even if it might be possible to isolate and extract the most liberal and beneficial lessons of the British experience in India, can any empire, however benign, be counted morally just? To venture an answer to that question, we would do well to consider the moral arguments surrounding European colonialism.

Much of the debate over the moral status of European colonialism turns on economic questions. Colonialism's defenders stress the lasting investment in productive forces made by the colonizer on behalf of the colonized. Critics of colonialism highlight transfers of wealth from the colonized country to the seat of empire. In a sense, as David B. Abernathy notes in his recent and very useful moral assessment of European colonialism, each side in this debate accepts the ethical premises of the other.⁷ That is why colonialism's critics play down investment, while colonialism's defenders play down wealth transfer. In these terms, the British experience in India was clearly one in which the investment of productive forces was high—with the improvements in transportation and communication sponsored by liberal colonial administrators like John Stuart Mill looming particularly large.

Yet the debate over the moral status of colonialism is bedeviled by deeper dilemmas. Take the problem of the "counterfactual." Defenders of empire assume that the economic and political development stimulated by European rule would not have occurred in the absence of colonialism. Yet, by pointing to the example of Japan, critics of colonialism claim that, if left to their own devices, most conquered countries would have modernized even without European rule. I have argued that the Japanese example is the exception, not the rule. But since the counterfactual (i.e., what would have happened

without colonialism) is formally unknowable, it is difficult to reach agreement on this issue.

And unlike calculations of investment or profit, certain critical moral criteria may be impossible to compromise or modulate. Implicitly, both sides in the colonialism debate agree that contempt for the race, cultural practices, or historical accomplishments of a colonized people is deplorable. But while some instances of European rule may have been more or less bigoted than others, even the fairest and most respectful instance of colonial rule may be inherently humiliating to the colonized. That may explain why defenders of colonialism have almost nothing to say about complaints of humiliation. That silence may indicate implicit moral agreement with the critics of empire, an affirmation of the one unanswerable argument of colonialism's critics.

On the question of democracy, the tables are turned. Here the contemporary critics of colonialism affirm by their virtual silence the power of a seemingly unanswerable moral argument. Contemporary scholarly accounts of colonialism, for example, have plenty to say about the way in which the British rationalized their possession of empire as a way of bringing liberalism and democracy to India. However, few scholars dare acknowledge that, for all the problems, British rule did in fact make India's modern democracy possible. What are we to make of the fact that one of the key British "rationalizations" for empire turned out, in large measure, to be true?

Our commitment to political autonomy sets up a moral paradox. Even the mildest imperialism will be experienced by many as a humiliation. Yet imperialism as the midwife of democratic self-rule is an undeniable good. Liberal imperialism is thus a moral and logical scandal, a simultaneous denial and affirmation of self-rule that is impossible either to fully accept or repudiate. The counterfactual offers a way out. If democracy did not depend on colonialism, we could confidently forswear empire. But in contrast to early modern colonial history, we do know the answer to the counterfactual in the case of Iraq. After many decades of independence, there is still no democracy in Iraq. Those who attribute this fact to American policy are not persuasive, since autocracy is pervasive in the Arab world, and since America has encouraged and accepted democracies in many other regions. So the reality of Iraqi dictatorship tilts an admittedly precarious moral balance in favor of liberal imperialism.

The British Empire was far more successful than other European empires in bringing democracy to the colonized—India being the most impressive

example. Combine successful democratization with the massive investment the British made in the infrastructure of their prized colonial possession, and the British imperial experience in India clearly ranks as one of the most legitimate and successful colonial enterprises. Yet the British showed racial and cultural contempt for Indians and systematically excluded Indians from the higher ranks of the civil service. So the intrinsic humiliations of empire were compounded by the realities of British rule in India. That deplorable fact must rank high in any contemporary moral accounting.

Presumably, American rule in Iraq would be relatively free of the racial and cultural bigotry that so marred British rule in India. It would also feature substantial American investment in moral and material infrastructure. And the very purpose of American rule in Iraq would be to create the authentic democracy that we know has been impossible to establish in our absence. So by commonly agreed-upon criteria, an American imperial interlude in the Arab world would be as just as it is possible for such an inherently ambiguous undertaking to be.

Yet the deeper legitimacy of an American imperial adventure in Iraq would rest on a consideration entirely absent from debates over the morality of European colonialism. Both sides in the colonialism debate agree that empires ought to be judged according to whether they help or harm their subject populations. That is because European empires were established aggressively and opportunistically. These empires were defensive only insofar as they were fending off encroachments by the other European powers. (No small concern, by the way.) Yet, in the broadest sense, an American occupation of Iraq would be motivated and justified as self-defense. The dual advent of nuclear proliferation and terrorism has made the creation of an authentic democratic culture in the Arab world essential to the survival of the West.

In this sense, the real *moral* analogue of an American occupation of Iraq is our postwar occupation of Japan, whose defensive purpose was the democratization and demilitarization of a defeated foe. The Japan analogy may be flawed as a *pragmatic* model for democratization in Iraq, but its moral status is a significant precedent. The key difference is that bringing democracy to Iraq will take longer than it did for Japan. But while that is not a morally insignificant fact, it is ultimately more a difference of practice than of principle.

LESSONS

As a way to encourage democratization, an extended American occupation of Iraq would be just policy. Would a long-term occupation also be wise policy? That is the more difficult question. Since democratization will be more lengthy and difficult in Iraq than in postwar Japan, America will have to marshal its will and resources for a stressful and challenging enterprise. If the Iraqi returnees turn out to be poor democratizers, or if America finds it difficult to exercise great and lasting influence without quite seeming to do so, the chances of an Arab nationalist reaction or internal American divisions are high. Certainly, one reasonable response to this scenario is refusal to engage in a long-term occupation at all.

Yet the argument for a venture in democratic imperialism is also strong. In the long term, it may be our best insurance against the deadly and ever-spreading combination of terrorism and weapons of mass destruction. Particularly in the early stages, such a venture should concentrate on building up a modernizing and liberal class through education. An end-run around traditional structures will be more successful than direct assault. Someday, however, the time for a limited assault will come. Shifting administrative strategies are a feature of successful democratic imperialism. Only circumstances can dictate the balance between relatively indirect rule and reformist transformation.

Above all, should America undertake an extended occupation of Iraq, the dichotomy between realist caution and reformist liberalism will have to be transcended. Authentic democracy develops slowly. The trick is to encourage electoral experiments on the local level while still keeping hold of national power. Gradualism is not a betrayal of democratic principle. On the contrary, it is an insight bequeathed to us by the founders of liberalism itself.

NOTES

1. See Stanley Kurtz, "After the War," *City Journal* (Winter 2003).
2. For an account of the failure of British land reform policy, see Ann B. Callendar, *How Shall We Govern India?* (New York: Garland Publishing, 1987).

3. See Stanley Kurtz, "Root Causes," *Policy Review* 112 (April–May 2002).
4. The best account of Burke's dealings with India is Frederick G. Whelan, *Edmund Burke and India* (Pittsburgh: University of Pittsburgh Press, 1996).
5. For an excellent account of Mill's work at the British East India Company and its role in his personal and intellectual development, see Lynn Zastoupil, *John Stuart Mill and India* (Stanford, CA: Stanford University Press, 1994).
6. Thomas Carothers, "Promoting Democracy and Fighting Terror," *Foreign Affairs* (January–February 2003).
7. David B. Abernathy, *The Dynamics of Global Dominance* (New Haven, CT: Yale University Press, 2000), 387–407.

Religion and Politics in the First Modern Nation

George F. Will

In 1953, the year in which the words “under God” were added to the Pledge of Allegiance, and the first year of the presidency of Dwight Eisenhower, he proclaimed July Fourth a national day of prayer. On that day he fished in the morning, golfed in the afternoon and played bridge in the evening. There were, perhaps, prayers in the interstices of these recreations, perhaps when the president faced a particularly daunting putt.

This was not Ike’s first peculiar foray onto the dark and bloody ground of the relationship between religion and American public life. Three days before Christmas in 1952, president-elect Ike made a speech in which he said: “Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don’t care what it is.”

He received much ridicule from his cultured despisers for the last part of his statement—his professed indifference to the nature of the religious faith without which our government supposedly makes no sense. But it is the first part of his statement that deserves continuing attention.

Certainly many Americans—perhaps a majority of them—agree that democracy, or at least our democracy, which is based on a belief in natural rights, presupposes a religious faith. People who believe this cite, as Eisenhower did, the Declaration of Independence and the proposition that all people are endowed by their creator with certain unalienable rights.

But there are two separate and related propositions that are pertinent to any consideration of the role of religion in American politics. One is an

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empirical question: Is it a fact that the success of democracy, meaning self-government, requires a religious demos—religious people governing themselves by religious norms?

The second question is a question of logic: Does belief in America's distinctive democracy—a limited government whose limits are defined by the natural rights of the governed—entail religious belief?

Regarding the empirical question: I believe that religion has been, and can still be, supremely important and helpful to the flourishing of our democracy. I do not, however, believe it is necessary for good citizenship.

Regarding the question of our government's logic, I do not think the idea of natural rights requires a religious foundation, or even that the Founders uniformly thought so. It is, however, indubitably the case that natural rights are especially firmly grounded when they are grounded in religious doctrine.

I will come at this large subject a bit obliquely, as follows. We in journalism are admonished not to bury the lede. That is, we are supposed to put the most important point in the first paragraph. So I will begin briskly by postulating this:

In the twentieth century, the most important decision taken anywhere, about anything, was the decision, made in the first decade of the century, about where to locate Princeton University's Graduate College. Princeton's president, a starchy Presbyterian named Woodrow Wilson, wanted the Graduate College located on the main campus, so undergraduates and graduate students would mingle. Wilson's adversary, Dean Andrew Fleming West, wanted the Graduate College located where it now is, on a hill a few blocks from the main campus. Woodrow Wilson was a man of unbending temperament when he was certain he was right, which was almost always. He took his defeat about the graduate college badly, resigned Princeton's presidency, entered politics, and ruined the twentieth century.

I simplify somewhat and exaggerate a bit. I do so to make a point.

Today and for the past century, since Woodrow Wilson was elected the nation's president 100 years and one month ago, American politics has been a struggle to determine which of two Princetonians best understood what American politics should be. Should we practice the politics of Woodrow Wilson of Princeton's class of 1879? Or the politics of James Madison of the class of 1771?

What, you may well be wondering, has this to do with our topic today, the role of something ancient—religion—in something modern, the American polity. The crux of the difference between the Madisonian and the Wilsonian approaches to politics is the concept of natural rights.

As I draw for you my picture of the rivalry between these Princetonians, I recall the story of the teacher who asked her class of eight-year-olds to draw a picture of whatever each of them chose, and as they drew she circulated among their desks. Pausing at the desk of little Sally she asked, “Of what are you drawing a picture?” Sally said: “I am drawing a picture of God.” The teacher said, “But Sally, no one knows what God looks like.” To which Sally replied, “They will in a minute.”

In forty minutes or so, you will have my theory of the role of religion in American politics. I will begin by noting three perhaps pertinent peculiarities about my presence for this purpose at this distinguished university and this center, both of which owe so much to the generosity of the Danforth family.

The first peculiarity is this: I write about politics primarily to support my baseball habit; and I am a Chicago Cubs fan now standing in the belly of the beast that is Cardinals Nation. I grew up northeast of here, in Champaign, Illinois, midway between Chicago and St. Louis. At an age too tender to make life-shaping decisions, I had to choose between being a Cub fan and a Cardinal fan. All my friends became Cardinal fans and grew up cheerful and liberal. I became a gloomy conservative—but not gloomy about the long-term prospects for the American polity or the role of religion in it.

The second peculiarity is this: America has just had a presidential election, its fifty-seventh, in which the ticket of one of the major parties did not contain a Protestant. This was an event without precedent, and is especially interesting because the ticket—a Mormon and a Catholic—was put forward by the party that is the current choice of a majority of America’s evangelical Protestants. Clearly, regarding religion, the times they are changing. But, then, when are they not in this relentlessly forward-looking, forward-leaning nation?

A third peculiarity is that I am a part of this interesting change. I am a member of a cohort that the Pew survey calls the “nones.” Today, when Americans are asked their religious affiliation, 20 percent—a large and growing portion—say “none.” My subject today is the braided role of religion and

politics in America, yet I am not a person of faith. Concerning this, permit me a brief autobiographical digression.

I am the son of a professor of philosophy. He was the son of a Lutheran minister. Indeed, my father, Frederick Will, may have become a philosopher because his father was a minister. As a boy, the future professor Will occasionally sat outside pastor Will's study, listening to the pastor and members of his congregation wrestle with the problem of reconciling the doctrine of grace with the concept of free will. By the time my father became an adult, after a childhood of two or more church services every Sunday, he had seen quite enough of the inside of churches. But he also had acquired a philosopher's disposition.

Hence, I was raised in a secular home, but one in which the table talk often took a reflective turn. Because my father had recently sojourned at Oxford, I was able to spend two years there in the early 1960s, when it was the vibrant center of the study of philosophy in the Anglophone world. Because of that, I next went to Princeton to study political philosophy, intending to follow my father's footsteps into academia. Which I briefly did, before I turned to—or, as my father thought, before I sank to—journalism.

I began in journalism as the Washington editor of William F. Buckley's *National Review* magazine. Bill was a devout Catholic who believed that a real conservative need not be religious but could not be hostile to religion. I agree.

As did our nation's Founders. Which brings me to our subject, and to my thesis, which is this: Religion is central to the American polity because religion is not central to American politics. That is, religion plays a large role in nurturing the virtue that republican government presupposes because of the modernity of America. Our nation assigns to politics—to public policy—the secondary, the subsidiary role of encouraging, or at least not stunting, the flourishing of the infrastructure of institutions that have the primary responsibility for nurturing the sociology of virtue.

Some of the Founders, such as Benjamin Franklin, subscribed to eighteenth-century Deism, a watery, undemanding doctrine that postulated a Creator who wound up the Universe like a clock and thereafter did not intervene in the human story. It has been said that the Deist God is like a rich aunt in Australia—benevolent, distant, and infrequently heard from. Deism explains the existence and nature of the universe. But so does the Big Bang theory, which is not a religion. If a religion is supposed to console and enjoin as well as explain, Deism hardly counts as a religion.

George Washington famously would not kneel to pray. When his pastor rebuked him for setting a bad example by leaving services before communion, Washington mended his ways in his characteristically austere manner: He stayed away from church on communion Sundays. He acknowledged Christianity's "benign influence" on society, but no ministers were present and no prayers were said when he died a stoic's death. This, even though in his famous Farewell Address, which to this day is read aloud in Congress every year on his birthday, Washington had proclaimed that "religion and morality are indispensable supports" for "political prosperity." He said, "Let us with caution indulge the supposition that morality can be maintained without religion." He warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

The longer John Adams lived, the shorter grew his creed, which in the end was Unitarianism. Jefferson wrote those ringing words about the Creator who endowed us with rights. But Jefferson was a placid utilitarian when he urged a nephew to inquire into the veracity of Christianity, saying laconically: "If it ends in a belief that there is no God, you will find incitements to virtue in the comforts and pleasantness you feel in its exercise, and the love of others which it will procure you."

James Madison, always common-sensical, explained—actually, explained away—religion as an innate appetite: "The mind prefers at once the idea of a self-existing cause to that of an infinite series of cause and effect." When the first Congress hired a chaplain, Madison said, "It was not with my approbation."

Yet even the Founders who were unbelievers considered it a civic duty—a public service—to be observant unbelievers. For example, two days after Jefferson wrote his famous letter endorsing a "wall of separation" between church and state, he attended, as he and other government officials frequently did, church services in the House of Representatives. Services were also held in the Treasury Department.

Jefferson and other Founders made statesmanlike accommodation of the public's strong preference, which then as now was for religion to enjoy ample space in the public square. They understood that Christianity, particularly in its post-Reformation ferments, fostered attitudes and aptitudes associated with, and useful to, popular government.

Protestantism's emphasis on the individual's direct, unmediated relationship with God, and the primacy of individual conscience and choice, subverted conventions of hierarchical societies in which deference was expected from the many toward the few.

Beyond that, however, the American Founding owed much more to John Locke than to Jesus. The Founders created a distinctly modern regime, one respectful of preexisting rights; rights that exist before government; rights that are natural in that they are not creations of the regime that exists to secure them.

In 1786, the year before the Constitutional Convention, in the preamble to the Virginia Statute for Religious Freedom, Jefferson proclaimed: "Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry."

Since the Founding, America's religious enthusiasms have waxed and waned. The durability of America's denominations has confounded Jefferson's prediction, made in 1822, four years before his death. He then said that "there is not a young man now living in the United States who will not die a Unitarian." In 1908, William Jennings Bryan, the Democrats' presidential nominee, said that his opponent, William Howard Taft, was unfit to be president because, being a Unitarian, he did not believe in the Virgin Birth. The public yawned and elected Taft.

There is a fascinating paradox at work in our nation's history. America, the first and most relentlessly modern nation, is—to the consternation of social scientists—also the most religious modern nation. One important reason for this is that we have disentangled religion from public institutions.

There has long been a commonplace assumption that my dear friend Pat Moynihan, himself a liberal in good standing, called "the liberal expectancy." It was—it still is—the assumption of most intellectuals that as science, rationalism, and the rationality of market societies advance—as the disenchantment of the world proceeds apace—pre-modern forces will lose their history-shaping saliency. The two most important of these forces are religion and ethnicity.

Of course, every day in every region, events refute the liberal expectancy. Religion, and especially religion entangled with and reinforcing ethnicity, still drives history.

Religion is also central to the emergence of America's public philosophy. So, at the risk of offending the specialists by distortion through compression,

let me offer a brief—a very brief—placement of America’s Founders in the stream of world political philosophy.

Machiavelli’s thought is a convenient demarcation between the ancients and the moderns. The ancients took their political bearings from their understanding of the best of which people were capable. They sought to enlarge the likelihood of the emergence of fine and noble leaders, and fine and noble attributes among the led.

Machiavelli, however, took his bearings from people as they are. He defined the political project as making the best of this flawed material. He knew (in words Kant would write almost three centuries later) that nothing straight would be made from the crooked timber of humanity.

Machiavelli was no democrat, but he is among democracy’s precursors. This is so because he reoriented politics toward accommodation of strong and predictable forces arising from a great constant—the human nature common to all people in all social stations.

For forty-four years, Machiavelli and Martin Luther were contemporaries. Machiavelli’s *The Prince* was distributed in 1513; Luther’s 95 Theses were nailed to the church door in Wittenberg in 1517. Luther was no democrat, in theory or temperament. But Luther, too, was one of democracy’s most potent precursors. When, summoned before the Diet of Worms, he proclaimed, “Here I stand—I cannot do otherwise,” he asserted the primacy of the individual’s conscience.

This expressed the logic of his theological radicalism, his determination to found Christian faith on the unmediated relation of the faithful person to God. Without fully intending to do so, he celebrated individualism at the expense of tradition and hierarchy. Because Luther was in humanity’s past, democracy was in humanity’s future.

The advent of modernity in political philosophy coincided with parallel developments in a closely related field of philosophy—epistemology, the philosophy of knowledge, of how we know things. Here Descartes played a role comparable to Machiavelli’s role in reorienting political thought.

Descartes sought a ground of certainty, a ground beyond revelation and pure, abstract reason. He famously found such ground in cognition itself: *Cogito ergo sum*—I think, therefore I am. The senses—and what twentieth-century empiricists called “sense data”—would supply the foundations for whatever certainties humanity can achieve.

It was in Hobbes's political philosophy that epistemology became decisive. Hobbes's bedrock of certainty came from his experience of religious strife in England. This strife taught Hobbes that all human beings fear violent death. On this powerful and simple desire for security he erected a philosophy of despotism: In exchange for security, people would willingly surrender the precarious sovereignty they possessed in the state of nature, where life was "solitary, poor, nasty, brutish and short."

But Hobbes' philosophy contained the seeds of democracy, in four ways. First, Hobbes said that all human beings are equally under the sway of this strong imperative. Second, all human beings can, without the assistance of a priestly clerisy, comprehend the basic passions that move the world. Third, to the extent that the world of politics is driven by strong and steady passions and interests, to that extent there can be a science of politics. A science of politics based on what all human beings have in common—knowledge supplied by the senses—is a political science deriving its data from the demos, the people. Fourth, because people do not agree about religious truth, and because they fight over their disagreements, social tranquility is served by regarding religion as voluntary matter for private judgment, not state-supported and state-enforced orthodoxy.

In the interest of social peace, the higher aspirations of the ancients were pushed to the margins of modern politics. Those aspirations were considered at best unrealistic and at worst downright dangerous. Henceforth, politics would not be a sphere in which human nature is perfected; the political project would not include pointing people to their highest potentials. Instead, modern politics would be based on the assumption that people will express—will act upon—the strong impulses of their flawed natures. People will be self-interested.

To recapitulate: The ancients had asked what is the highest of which mankind is capable and how can we pursue this. Hobbes and subsequent modernists asked: What is the worst that can happen and how can we avoid it?

America's Founders—and particularly the wisest and most subtle of them, James Madison—had a kind of political catechism, which went like this:

What is the worst political outcome?

The answer is: tyranny. What form of tyranny can happen in a republic governed by majority rule? The answer is: Tyranny of the majority. How

can this be prevented, or at least made unlikely? The answer is: By not having majorities that can become tyrannical by being durable. By, that is, reducing the likelihood that a stable tyrannical majority can emerge and long endure.

How is this to be achieved? By implementing Madison's revolution in democratic theory.

Of the diminutive Madison—he probably was five feet four inches tall—it was said: Never had there been such a high ratio of mind to mass. He was Princeton's first graduate student. And he turned democratic theory upside down.

Hitherto, the few political theorists who thought democracy was feasible believed it could be so only in small, face-to-face societies, such as Pericles's Athens or Rousseau's Geneva. This was supposedly so because factions were considered the enemy of popular government, and small, homogeneous societies were thought to be least susceptible to the proliferation of factions.

Madison's revolutionary theory, the core of which is distilled in *Federalist Paper* Number 10, was that a republic should be not small but extensive. Expand the scope of the polity in order to expand the number of factions. The more the merrier: A saving multiplicity of factions will make it more probable that majorities will be unstable, shifting, short-lived combinations of minority factions.

Madison related his clear-eyed and unsentimental view of human interestedness to the Constitution's structure of the separation of powers. In *Federalist* 51 he said: "Ambition must be made to counteract ambition." That is, the self-interests of rival institutions will check one another. Madison continued:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

So, said Madison, we must have a policy of "supplying by opposite and rival interests the defect of better motives."

But neither Madison nor the other Founders were saying that we should presuppose that America could prosper without there being good motives. Such motives are manifestations of good character. Our sober Founders were not so foolish as to suppose that freedom can thrive, or even survive, without appropriate education and other nourishments of character.

They understood that this must mean education broadly understood to include not just schools but all the institutions of civil society that explain freedom, and equip citizens with the virtues freedom requires. These virtues include industriousness, self-control, moderation, and responsibility. These are virtues that reinforce the rationality essential to human happiness.

Notice that when Madison, like the Founders generally, spoke of human nature, he was not speaking, as modern progressives do, as something malleable, something inconstant and evolving, something constantly formed and reformed by changing social and other historical forces.

When people today speak of nature they generally speak of flora and fauna—of trees and animals and other things not human. But the Founders spoke of nature as a guide to, and measure of, human action. They thought of nature not as something merely to be manipulated for human convenience but rather as a source of norms to be discovered.

They understood that natural rights could not be asserted, celebrated, and defended unless nature, including human nature, was regarded as a normative rather than a merely contingent fact. This was a view buttressed by the teaching of Biblical religion that nature is not chaos but rather is the replacement of chaos by an order reflecting the mind and will of the Creator.

This is the Creator who endows us with natural rights that are inevitable, inalienable, and universal—and hence the foundation of democratic equality. And these rights are the foundation of limited government—government defined by the limited goal of securing those rights so that individuals may flourish in their free and responsible exercise of those rights.

A government thus limited is not in the business of imposing its opinions about what happiness or excellence the citizens should choose to pursue. Having such opinions is the business of other institutions—private and voluntary ones, especially religious ones—that supply the conditions for liberty.

Thus the Founders did not consider natural rights reasonable because religion affirmed them; rather, the Founders considered religion reasonable because it secured those rights. There may, however, be a cultural con-

tradiction of modernity. The contradiction is that while religion can sustain liberty, liberty does not necessarily sustain religion. This is of paramount importance because of the seminal importance of the Declaration of Independence.

America's public philosophy is distilled in the Declaration's second paragraph: "We hold these truths to be self-evident." Notice, our nation was born with an epistemological assertion: The important political truths are not merely knowable, they are self-evident—meaning, they can be known by any mind not clouded by ignorance or superstition.

It is, the Declaration says, self-evidently true that "all men are created equal." Equal not only in their access to the important political truths, but also in being endowed by their Creator with certain unalienable rights, including life, liberty, and the pursuit of happiness.

Next comes perhaps the most important word in the Declaration, the word "secure": "To secure these rights, governments are instituted among men." Government's primary purpose is to secure preexisting rights. Government does not create rights, it does not dispense them.

Here, concerning the opening paragraphs of the Declaration, is where Woodrow Wilson and progressivism enter the American story.

Wilson urged people not to read what he called the preface to the Declaration, and what everyone else calls its essence. He did so for the same reason that he became the first president to criticize the American Founding. And he did not criticize it about minor matters; he criticized it root and branch, beginning with the doctrine of natural rights.

His criticism began there precisely because that doctrine dictates limited government, which he considered a cramped, unscientific understanding of the new possibilities of politics. Wilson disparaged the doctrine of natural rights as "Fourth of July sentiments." He did so because this doctrine limited progressives' plans to make government more scientific in the service of a politics that is more ambitious.

Wilson's intellectually formative years in the late nineteenth century were years in which Darwin's theory of evolution seeped from biology into the social sciences, including political science. Wilson, the first president of the American Political Science Association, wanted the political project to encompass making government evolve as human nature evolves. Only by doing so could government help human nature progress. This is why, for

progressives, progress meant progressing up from the Founders and their false—because static—understanding of human nature.

Only government unleashed from the confining doctrine of natural rights could be muscular enough for this grand project. Such a government needed not the Founders' static Constitution but a "living" Constitution, a much more permissive Constitution. That is, the new progressive government needed the old Constitution to be construed as granting to the government powers sufficient to whatever projects were required for progress.

But what, then, about the Framers' purpose of writing a Constitution to protect people from popular passions? Wilson argued that the evolution of society had advanced far enough that such worries were anachronistic. The passions had been domesticated; they no longer threatened to be tyrannical, or to otherwise threaten the social order.

Hence Wilson thought the state, emancipated from the constraints of the Founders' static Constitution, should be "an instrumentality for quickening in every suitable way . . . both collective and individual development." Who is to determine what ways might not be "suitable"? The answer must be the state itself.

Wilson was, as progressives tended to be, a historicist—that is, someone with a strong sense of teleology. History, he thought, had its own unfolding logic, its autonomous trajectory, its proper destination. It was the duty of leaders to discern the destination toward which history was progressing, and to make government the unfettered abettor of that progress.

Progressives tend to exalt the role of far-sighted leaders, and hence to exalt the role of the president. This, too, puts them at odds with the Founders.

The words "leader" or "leaders" appears just thirteen times in the *Federalist Papers*. Once is a reference to those who led the Revolution. The other dozen times are all in contexts of disparagement. The Founders were wary of the people's potential for irrational and unruly passions, and therefore were wary of leaders who would seek to ascend to power by arousing waves of such passions.

Wilson, however, was unworried. He said: "Great passions, when they run through a whole population, inevitably find a great spokesman." In 1912, they found Wilson. And he began building what we have today, the modern administrative, regulatory state, from the supervision of which no corner of life is immune.

Now, I will leave it to other, more theologically grounded persons to decide whether, or how, the progressive doctrine of a changing human nature can be squared with the teachings of various religions. I will, however, postulate this:

A nation such as ours, steeped in and shaped by Biblical religion, cannot comfortably accommodate a politics that takes its bearings from the proposition that human nature is a malleable product of social forces, and that improving human nature, perhaps unto perfection, is a proper purpose of politics.

I will go further. Biblical religion is concerned with asserting and defending the dignity of the individual. Biblical religion teaches that individual dignity is linked to individual responsibility and moral agency. Therefore, Biblical religion should be wary of the consequences of government untethered from the limiting purpose of securing natural rights.

Do not take my word for it. Take the word of Alexis de Tocqueville.

De Tocqueville wrote *Democracy in America* two generations after the American Founding—two generations after Madison identified tyranny of the majority as the distinctively worst political outcome that democracy could produce. De Tocqueville had a different answer to the question of “what kind of despotism democratic nation’s have to fear.”

His warning is justly famous and more pertinent now than ever. This despotism, he said, would be “milder” than traditional despotisms, but

it would degrade men without tormenting them . . . It is absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that, it had for its object to prepare men for manhood; but on the contrary, it seeks only to keep them fixed irrevocably in childhood. . . . It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that; it provides for their security, foresees and secures their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living? . . . So it is that every day it renders the employment of free will less useful and more rare; it confines the action of the will in a smaller space and little by little steals the very use of free will from each citizen . . . [It] reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd.

Each of us can—must, really—decide to what extent de Tocqueville’s foreboding has been fulfilled. People of faith might well ask this: Does the tendency of modern politics to take on more and more tasks in order to ameliorate the human condition—does this tend to mute religion’s message about reconciling us to that condition? And people of faith might well worry whether religious institutions can flourish in the dark shade beneath a government that presumes to supply every human need and satisfy every appetite.

To the extent that the politics of modernity attenuates the role of religion in society, to that extent it threatens society’s vitality, prosperity, and happiness. The late Irving Kristol understood this. Although not an observant Jew, my friend Irving described himself as “theotropic,” by which he meant oriented to the divine. He explained why in these words:

[A] society needs more than sensible men and women if it is to prosper: It needs the energies of the creative imagination as expressed in religion and the arts. It is crucial to the lives of all of our citizens, as it is to all human beings at all times, that they encounter a world that possesses a transcendent meaning, a world in which the human experience makes sense. Nothing is more dehumanizing, more certain to generate a crisis, than to experience one’s life as a meaningless event in a meaningless world.

We may be approaching what is, for our nation, unexplored and perilous social territory. Europe is now experiencing the widespread waning of the religious impulse, and the results are not attractive. It seems that when a majority of people internalize the Big Bang theory and ask, with Peggy Lee, “Is that all there is?”; when many people decide that the universe is merely the result of a cosmic sneeze, with no transcendent meaning; when they conclude that therefore life should be filled to overflowing with distractions—comforts and entertainments—to assuage the boredom; then they may become susceptible to the excitements of politics promising ersatz meaning and spurious salvations from a human condition bereft of transcendence.

We know, from the bitter experience of the blood-soaked twentieth century, the political consequences of this felt meaninglessness. Political nature abhors a vacuum, and a vacuum of meaning is filled by secular fighting faiths, such as fascism and communism. Fascism gave its adherents a meaningful life of racial destiny. Communism taught its adherents to derive meaning

from their participation in the eschatological drama of History's unfolding destiny.

The excruciating political paradox of modernity is this: Secularism advanced in part as moral revulsion against the bloody history of religious strife. But there is no precedent for bloodshed on the scale produced in the twentieth century by secular—by political—faiths.

Therefore, even those of us who are members of the growing cohort that the Pew survey calls “nones,” even we—perhaps especially we—wish continued vigor for the rich array of religious institutions that have leavened American life. We do so for reasons articulated by the most articulate American statesman.

In 1859, beneath lowering clouds of war and disunion, a successful railroad lawyer from across the river, from less than 100 miles north of here—a lawyer turned presidential aspirant—addressed a Wisconsin agricultural society. He concluded his speech with the story of an oriental despot who assigned to his wise men the task of devising a proposition to be carved in stone and be forever in view and forever true. After some while they returned to the despot and the proposition they offered to him was: “This too shall pass away.”

Said Abraham Lincoln: How consoling that proposition is in times of grief, how chastening in times of pride. And yet, said Lincoln, it is not necessarily true. If, he said, we Americans cultivate the moral and intellectual world within us as assiduously and prodigiously as we cultivate the physical world around us, perhaps we shall long endure.

We have long endured. We shall continue to. This is so in large part because of America's wholesome division of labor between political institutions and the intermediary institutions of civil society, including and especially religious institutions, that mediate between the citizen and the state.

The mediating institutions crucial to the flourishing of St. Louis include this university, this center and are crucial to both—the Danforth family.

I thank you for your hospitality and your attention, and now I welcome your questions.



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