The Paradox of Popular Sovereignty: An Introductory Essay

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Forward to the paperback edition of The Road to Mass Democracy

One of the perks of working in an international university is talking with students from around the world. Only days before the military coup in Cairo last summer, I asked one of our Egyptian students his opinion of the tumultuous events in his country. He had already earned his master’s degree several months before and was auditing a second area of studies for as long as his father could afford to keep him safe in Sweden, or until civil conditions had stabilized at home. The young man was unabashed in expressing his hopes for the army to step in and take control from the elected government: “Democracy doesn’t work in our country.”

In the building where I live work two cleaning women from the Balkans. My wife occasionally talks with them about our respective homelands. One is a Macedonian whose family fled the ethnic violence that followed the breakup of Yugoslavia. The other is a Serb who grew up in Bosnia. Her father disappeared and is presumed dead and buried somewhere in a mass grave. Although they acknowledge that things have improved in recent years, they maintain that tensions still seethe, the infrastructure is a wreck, and there are no jobs. Neither woman is old enough to have lived under the iron rule of Marshal Tito, but both nostalgically remember a more authoritarian, yet more peaceful time, a time when “we were all Yugos.”

These conversations do not conclusively prove anything, other than that democracy is not the universal aspiration that US Secretaries of State might assume it to be. Nevertheless, a categorical proposition is false, so the logicians tell us, if a single example to the contrary is true, and the modern world can furnish millions of such contrary examples, of men and woman for whom having an equal say in their country’s political direction is not as high a priority as having public order, a means of livelihood, and a degree of certainty that the rules around which they plan their commerce and social transactions will be the same tomorrow as they are today, and enforced equally for one as for all.

Indeed, judging from American political events in the two decades since The Road to Mass Democracy was originally published, these prerequisites of liberty do not seem to adhere merely from the universal right of suffrage. Despite the fact that practically any warm body not convicted of a felony may cast a vote for the highest office in the land, the government of the United States is more intrusive and more arbitrary than at any time in its history. The solicitation of votes by our increasingly poll-driven, image-conscious politicians, obliged at all times to appear in public as regular folk, coincides miraculously with government’s runaway legislation, regulation, confiscations, violations, currency inflation, and war.
However widely accepted, or at least tolerated, by the mass electorate, the regular activities of the regime in Washington are not merely unconstitutional. They are *anti-constitutional*, opposed to the purposes for which the Constitution was created. Take, for example, the founders’ concern about “mutability of legislation.” An often expressed fear at the constitutional convention and in the ratification debates was that the proliferation of new laws, which were frequently repealed, superseded, or in conflict with other laws, made it impossible for the average citizen to know the rules, or the consequences of not observing them. Two and a quarter centuries after checks and balances were instituted to inhibit this “excess of lawmaking,” it is the members of Congress, themselves, who can not keep pace, as they routinely ratify volumes of legislation they have not even read.

According to those checks and balances, “All legislative powers herein granted shall be vested in a Congress of the United States.” It is simply no longer true. Our representatives in Washington could not churn out such a massive heap of enactments without the army of unelected staffers and lobbyists who in reality control the legislative process. Of course, without vetting and discussion by constituted authority, it is a lawless legislative process, adding new meaning to the Government Publication Office’s *Statutes at Large*. And this colossal compendium of US legislation does not include the thousands of executive orders, judicial rulings and regulatory agency decrees that have the force of law, blindsiding unwary citizens with forfeiture of property and freedom on a daily basis.

“The right of the people to be secure in their persons, their houses, their papers, and effects, against unreasonable searches and seizures,” is as much imperiled by recent regimes as it was under King George III. Without so much as a knock on the door, the FBI, DEA, ATF, ICE (formerly INS) or any of the numerous federal agencies with a special weapons and tactics unit, can come crashing into family dwellings, guns drawn, demanding submission and ready to open fire at the least show of resistance. The Fish & Wildlife Service has a paramilitary arm, and apparently so does the Department of Education. With the advent of “civil forfeiture,” compliments of the War on Drugs, property involved in an alleged crime is liable to be confiscated even if the owner of the property was not involved in, or had no knowledge of, the criminal activity in question. Captured cash and auction proceeds from property thusly acquired has become a growing source of revenue for governments at all levels.

Since the initiation of the War on Terror, government trespasses have taken an even darker turn. Not only are Americans liable to be *detained without charges, trials or lawyers*, but the executive branch claims the right to abduct anyone anywhere to be rendered abroad for “*enhanced interrogation*,” outsourcing in what less euphemistic times would have been called cruel and unusual punishment. And in what has to be the greatest abuse of authority to date, the President’s men maintain a “*kill list*” from whom the Commander-in-Chief can select human beings, US citizens included, to be terminated on sight. Within hours, or minutes, of this death sentence imposed by the chief executive on the basis of secret evidence, unmanned flying machines drop fire from the sky, and any women, children, or wedding guests unfortunate enough to be in the vicinity of these sneak attack are written off as “collateral damage.” Two
centuries ago, representatives of the British colonies in America declared their independence from an arbitrary monarch:

For depriving us in many cases, of the benefits of Trial by Jury:
For transporting us beyond Seas to be tried for pretended offences.

Today, public officials call for inquiries and the arrest of citizens who expose the same offenses and worse.

At least we are not forced to quarter troops, and as long as home construction continues to be fueled by Fed-sponsored bubbles, we might never have to. The low interest lending and high volume currency creation that encourages these housing booms are among the chief props supporting the debtor economy in general, and the prodigal spending of the world’s number one debtor in particular. As with other activities of government, this inflationary policy is at odds with the purposes of the Constitution’s authors. It is not by mere happenstance that the Constitution grants Congress the power to coin money, while no mention is made of the power to print it.

Respectable opinion might differ on the constitutionality of paper money. The consensus at the constitutional convention seemed to be that the expressed power to borrow implied the power to issue IOUs which creditors could use as negotiable instruments in trade. But the delegates were only too familiar with the saying “not worth a Continental” —a disparaging reference to the paper currency that had collapsed into worthlessness by the end of the Revolutionary War it was intended to finance. They wished to avoid drawing attention to a power which, combined with the power to regulate the value of money, could be construed as a license for the government to print away its debts with inflated paper. Hence, the Constitution’s authors left the power to print money at best vaguely implied, striking out a clause expressly granting the power to “emit bills” of credit.

In 1913, when Congress delegated its currency regulating responsibility to the Federal Reserve, (critics would say abdicated its responsibility to a private banking cartel), the justification was that technical experts would expand and contract the money supply according to rational economic assessments rather than by the political pressures faced by elected officeholders. But the history of the Fed provides few examples of monetary contraction, and a long, steady history of monetary expansion. However justified in the disquisitions of learned economists, the elastic money supply accommodates what appears to be an eternal extension of credit to the US government. It remains to be seen whether the debts will be paid, and, if so, whether the dollars returned will approximate their worth at the time of the loan, or the worth of a Continental.

Throughout history, the most popular pretext for public debt and paper money has been for the support of war. Although the modern welfare state advances numerous social problems to be redressed with similar fervor and commitment of public resources, expenditures for defending the nation against enemies real and imagined traditionally elicit support from both sides of the trough. Since Congress no longer declares war, its main role now is to make appropriations, even for weapons and equipment that
the generals and admirals insist they do not need, but that provide lucrative contracts to campaign donors and jobs to constituents. This explains why the human horror that was visited upon the United States with mere box cutters on 9-11 was met with requisitions for submarines, fighter jets, bombers and missile defense systems. The spending of the United States on the upkeep of its hundreds of bases in scores of countries, on maintaining state of the art weaponry, and supporting its extensive combat operations, exceeds the military expenditures of the next several highest military budgets in the world combined. It comprises half of the “discretionary spending” requested of the US government for Fiscal Year 2014. And the Pentagon’s budget does not include the scores of billions annually associated with nuclear weapons research, veteran’s benefits, pensions to retirees and widows, military aid to foreign countries, or the counter-terrorism and snooping activities of the Homeland-affiliated agencies. Truly, as General Smedley Butler stated, “War is a Racket.” Fortunately for the cause, we have the elastic money supply to support these critical needs.

The last Congressional declaration of war three quarters of a century ago. Since then Congress has issued authorizations for the Commander-in-Chief to do as he intended, with or without its authorization, or to provide a fig leaf of constitutional cover for a war in which he had already involved the nation’s forces. The executive prerogative to initiate war has waxed, the expectation of prior deliberation by the legislature has waned, and military adventures have become unsurprisingly routine. A Congress disposed to deliberate might have granted Letters of Marque and Reprisal to apprehend and punish the conspirators who attacked the World Trade Center and Pentagon. Instead, our Congress acquiesced in the president’s open-ended crusade to rid the world of evil-doers, a cause being fought on even more fronts with the change of administrations.

A country founded in suspicion of standing armies and entangling alliances, in the belief that war was the greatest destroyer of liberty that could befall a people, has sacrificed the blessings of two oceans and militarily weaker neighbors in exchange for the self-appointed responsibility of garrisoning the world. It is a posture that prompts foreign lobbies to intrigue over American military deployment, and makes every outpost a tripwire, every provincial quarrel a matter of national honor, a sacrifice of blood and wealth which is sold to the voters as an existential struggle. It has failed to achieve the peace and security for which it has ostensibly been waged, and there seems to be no end of it in sight before we are too bankrupt to continue.

War, debt, and arbitrary power: such is the state of the Union twenty years after the first publication of The Road to Mass Democracy: Original Intent and The Seventeenth Amendment. The amendment, which transferred the election of United States Senators from state legislatures to the people directly, is not exclusively, or even primarily responsible for the ravages of American officialdom in the twenty-first century. But as much as the book is a history of the Seventeenth Amendment, it is also a philosophical criticism of mass democracy, which I continue to believe is at the root of the current troubles. Unlike other studies which interpret the amendment in the context of machine politics in the Gilded Age or the
regulatory reforms of the Progressive Era, mine has taken, as has been pointed out, an “external” view in which the direct election of senators is seen within a broader — and in my thesis, an ongoing — movement to democratize the American political system.

The fact that the amendment has not been followed by constitutional amendments enabling the recall of elected federal officials, or establishing popular initiatives and referenda at the national level, has been offered as a refutation of this thesis. In answer, I have refined some of my conclusions in the Epilogue, and pruned the phrasing elsewhere, but the core argument stands. The point of the book was to illustrate, through the events that brought about the direct election of senators, a historical disregard for constitutional restraints. The fact that the federal Constitution did not become pockmarked with amendments, as the state constitutions became in the decades before the popular election of Senators, is less significant than the surrender of the Senate’s role in restraining the excesses of popular government. With senators elected directly, it turned out to be easier to ignore, bypass, or misinterpret the Constitution than to amend it. (But it should also be noted that whenever a portion of the population is sufficiently disaffected, there is rarely a shortage of proposals for constitutional change).

The “internal” explanations for the Seventeenth Amendment have not been slighted or overlooked, and are in fact integral to the story. Chapter Five summarizes the pre-amendment performance of the senators in the bicameral legislative process and in executive matters requiring their Advice and Consent. Their role in refining federal legislation, deliberating foreign policy, and protecting the interests of the states which sent them, particularly in matters of appointments and appropriations, tended to be one of delay, which, even if by constitutional design, made the Senate unpopular with the muckraking press as well as with special interests impatient for quicker results from government. Chapter 6 narrates the role of the “Progressive bosses” in effecting a directly elected Senate, cutting out state legislators as middlemen, and inaugurating a Senate lobbying process that now starts directly in the halls of Congress without first having to persuade or purchase a majority of legislators in a majority of state capitol.

But the two preceding chapters take a broader view in which is narrated the deterioration of representative processes in the states under the pressures of populism, followed by repercussions to the intended federal procedures. These repercussions manifest themselves in the popularly sanctioned collapse of the Electoral College completed in the Jacksonian Era, and the all-but-popular election of senators brought about by party primary nominations in the decades immediately preceding the Seventeenth Amendment.

*The Road to Mass Democracy* has been criticized for discounting states’ rights as the primary reason for electing senators by state legislatures. One reviewer took me to task for thinking it “absurd” that the founders had arranged this manner of representation in the upper house of Congress. James Madison came close to saying that very thing in the *Convention*, but fell in line with the unanimous consensus when the issue was put to vote, and he defended the arrangement in *The Federalist*. Among the reasons he gave, the first was that it was an easy sell to the people, who were accustomed to having representatives to
the Continental Congress appointed by state legislatures. Continuing this method of Senate appointments gave the states a vital role in the federal system, a role I have neither denied nor minimized.

It overstates the case, however, to claim that senators were intended merely to serve as ambassadors from the states. Were that the case, they would have served at the pleasure of whoever appointed them rather than for six years without a provision for recall, removable only by a two-thirds majority of their Senate colleagues. They would have been expected to act exclusively on the instructions of the governments which sent them. Certainly, some in the Senate might have viewed themselves as ambassadors, but there were ample instances of senators acting with the deliberative independence for which the chamber had been uniquely constituted. We will not belabor the argument already made in Chapter 2, but in representing the states and not the people directly, the Senate was intended to approximate Montesquieu’s idealized version of the British House of Lords — without hereditary distinction, of course, but distinction of some kind — something refined and aloof, giving the Senate the inclination as well as the authority to resist political interests intent on swinging the stick of government without full consideration for the consequences. It would be representative of the people at heart, but not elected in the same way, or by the same criteria, as the popularly elected House. The appointment would be more select, the tenure more secure, the rotation of its membership more gradual.

As the popularly elected House had the power to hold the Senate in check until the next election, and the state legislatures that elected senators were themselves chosen by popular vote, the theory was that no legislation desired by the people would fail to be enacted as long as the desire was widespread and sustained. The founders, however, were more concerned with thwarting proposals for which there was only regional or temporary enthusiasm. Their diaries, correspondence, speeches and published tracks demonstrate a profound distrust of simple democracy, where demagogues pulled strings behind a facade of popular support, and profiteering middle men reaped unearned harvests from the chaos of fluctuating laws and policy. The framers’ discussions were suffused with references to the balancing of monarchy, aristocracy and democracy in a “mixed constitution,” a concept originating with Greek and Roman political thinkers and evolving over the centuries. The idea was to enable the best of all three forms of government while avoiding the perversion of each: tyranny, oligarchy and mob rule. Under a constitutional monarchy, the King, Lords and Commons represented different social elements, but of course there was no question of instituting hereditary offices and titles in the American republic.

The challenge in the convention was to appoint the monarchical president and aristocratic Senate in a manner different from that of the democratic House, so that each answered to a different type of constituency, supplying natural rivalry to check the interests in the other branches. In looking for the proper “complication of principles,” the framers turned to the states as a constituency distinct from “the people.” The states, after all, preexisted the union, and their jealousy and suspicion had already proven to be effective checks on the Continental Congress under the Articles of Confederation. The founders hoped that state legislatures would promote a higher caliber of statesman to the Senate, statesmen who would not
have to curry favor with the masses in popular elections, but in more factious times they expected that the representatives of the states would act as a counterforce to the representatives of the people as well as to the executive branch. To complete the mix, the president was to be chosen by a College of Electors, who were originally appointed at the discretion of the legislatures. All three elements had to act in concert for any proposal to become law at the national level, and none answered, in the immediate sense, to the same constituency.

The critic who discounts the founders’ adherence to the classical notion of balancing “the one, the few and the many,” who sees the rationale for the original method of Senate elections solely in terms of states’ rights, would assume that all was well until 1913, when the amendment took away the representation of state legislatures in favor of mass elections. Mass elections proved to be expensive, which necessitated today’s alignment with moneyed interests, which, ironically, was among the chief complaints of reformers before the amendment. The interpretation is valid as far as it goes, but does not explain why two-thirds of the Senate and three-fourths of the state legislatures (which are needed to pass a constitutional amendment) approved a resolution requiring the legislatures to abdicate their role in electing senators. Surely, significant populist groundwork had been laid in the states before they surrendered their corporate representation in the national government. As for the progressive’s insistence that corrupt Senate elections demanded constitutional change, an amendment predicated on the malfeasance of the very agents who affected it invites skeptical inquiry.

As investigation revealed, the egalitarian folly of the states immediately after independence was the primary inducement for calling the convention to begin with. In that light, the framers’ reliance on state legislatures to check the national democracy would seem to have been ill-founded. I therefore presented it as almost inevitable that the states would collapse as distinctly represented agencies in the federal system, but in pointing out the chink in the constitutional armor, I never used the word “absurd.” I have no idea what could have been done differently to establish the representational balance and governmental restraint that the founders were trying to achieve. The method they adopted lasted a hundred and twenty-five years. The ill effects of its erosion are felt a century later. Had I summed up the original manner of Senate elections in a single word, it would have been “tragic.”

The Seventeenth Amendment can not be described as a national encroachment on the representation of states, when to all appearances the people of the states no longer believed in the importance of such representation. Indeed, among the highly mobile and rootless individuals of our modern world, Americans participate much less in local elections than in national elections, and are likely to have stronger opinions about who should be president than who should be city councilman, if indeed they even know the names of anyone running for local office. With a hindsight not available to the founders, who could not have foreseen the loss of the local attachments upon which their system depended, we can see the limits of relying on state legislatures as a check on the national government.

Unlike some admirers of my work, as well as some of the critics, I am not an advocate of repealing
the amendment, notwithstanding the urgent need to bind government to constitutional limits. This is not because I prefer the popular election of senators, but because state legislatures proved themselves inadequate to the task when they ratified the Seventeenth Amendment in the first place. But neither do I oppose repeal, inasmuch as it would signify that a healthy majority of the American people, enough to pass a constitutional amendment, had accepted the need of an institutional check upon its political will.

The history of the Seventeenth Amendment underscores an essential paradox of popular sovereignty, which is that a people who respect their constitution have little need of one. It is a redundancy, a written testament to what is already etched in their character. Whereas a people most in need of constitutional restraints is also the most intolerant of them and will not be bound by them for long.

Appreciating this paradox presupposes an understanding of constitutionalism different from that which prevails today. Modern constitutionalism focuses on individual rights that supposedly have been secured and protected through the power of government. The focus of the Convention, however, was on the powers to be delegated to the government, and on the procedural rules that safeguarded the legitimate exercise of those powers. The original, unamended Constitution was not concerned with defining what private citizens had the right to do, but with what the federal government had the right to do, and under what circumstances. Indeed, the unamended Constitution, properly applied, made a Bill of Rights unnecessary, which is why its authors submitted it to the states for ratification without one.

In exchange for ratification, however, the states insisted on a list of popular rights that Congress could not abridge. For example, a state could establish a religion at taxpayer expense, as Connecticut and Massachusetts did for several decades after the First Amendment was ratified, and Congress could make no law concerning that establishment. Each state had its own bill of rights, but in so far as its relationship to the federal government was concerned, a state without a bill of rights could presumably administer cruel and unusual punishment, insist on self-incrimination, and commandeer whatever muskets could be pried from the hands of its citizens. Or it could form its armed populace into a militia and secede from the union. Just to be safe, the Ninth Amendment stipulated that the proposed list of rights “shall not be construed to deny or disparage others retained by the people,” while the Tenth Amendment provided that any powers not granted to the federal government, nor prohibited to the states, belonged to the states, or to the people, in that order.

Without the eight amendments that preceded them, the ninth and tenth were superfluous, for it is in enumerating the inalienable rights that the rights not mentioned become imperiled. The Ninth and Tenth Amendment catch-all clauses technically addressed Noah Webster’s mock concern for the right to go fishing in good weather, but the very concept of a Bill of Rights contained the seeds for a radical shift in constitutionalism. The original emphasis on how government was constituted, how powers were defined and apportioned and under what conditions they could be employed, would in time give way to the preoccupation with discovering and protecting rights. In the aftermath of the Civil War, the Fourteenth Amendment’s so-called “incorporation clause” was said to have applied the federal Constitution’s Bill of
Rights to the states, as in *neither Congress nor any state shall abridge* …, but after nearly a century and a half of usage, the rights incorporated are no longer limited to those plainly listed in the first ten amendments, and the strictures against violating them seem to apply to municipalities, county school boards, private businesses, volunteer organizations and even families. In direct contrast to the intentions of those who insisted on a constitutional list of rights that the federal government could not abridge, the federal government became the actual arbiter of the list, which is another way of saying the arbiter of its own powers.

Both the Bill of Rights and the checks and balances of the unamended Constitution were intended to prevent arbitrary rule, but omitting a list of rights in the original version did not necessarily minimize the constitutional protection of freedom. Certainly, free speech, free press, free assemblage, and the evolutionary liberties that accord citizens due process before the law, are rights worth defending, even with life. But carving them on sacred tablets does nothing to secure them for posterity. The globe is littered with dictatorships that have written bills of rights. The French guillotine and the Bolshevik firing squad both found service in regimes with popular privileges proclaimed in print. And no one in a position of power in the United States is going to jail for violating them now.

The genius of checks and balances is that they do not assume the benevolence of those who rule. The power to make, enforce and apply the law are in separate hands, which is the first defense against capricious government. In the case of the federal government the separation of powers was reinforced by a labyrinthine system of elections in which each branch was appointed in a different manner, and for different tenures in office. A law could hardly be criticized as arbitrary, for example, if passage required a majority in two houses, one of which was chosen directly by the people, the other by state legislatures, and was also subject to the veto of a president who was chosen by an Electoral College — a veto that could only be overridden by a two-third majority in both houses. Even then, having run the constitutional gauntlet to become law, if it should turn out that it in some way imposed *ex post facto* punishment, impaired the obligation of an existing contract, or enacted what was prohibited or unauthorized for the federal government to enact, citizens, states and corporations had a remedy in court. Federal judges, nominated by the president and confirmed by the Senate, could be removed after impeachment by the House and a two-thirds vote in the Senate, but otherwise, their life tenures were intended to protect their scholarly, independent judgment without consideration for political interests, even of those who put them in office.

In the view of those Federalists who voted down a bill of rights in the original Constitution, it was the restraints imposed by checks and balances — the due process of lawmaking and law enforcement — that were the bulwark of liberty, not a catalog of rights declared on paper. But as a fortification against arbitrary rule, the system of checks and balances turned out to be hardly stronger than a bill of rights. To recall the paradox of popular sovereignty, without respect for the representative process, the fixed rules of constitutionalism are ignored and eventually discarded. We will not here retrace the history of the populist...
triumph over what in the book is termed the “representative hierarchy,” but after several waves of reform intended to make government more responsive to the popular will, after the Electoral College had been stripped of its pretensions as a conclave of independent deliberation, and representative government in the states had been sufficiently weakened by the direct legislation movement, state legislators surrendered their responsibility for electing US Senators in 1913.

A generation after the Seventeenth Amendment, and not before, Bill of Rights cases came to the forefront of constitutional issues. The timing suggests a possible corollary between the overthrow of the representative hierarchy and the rise of the rights industry determined to legislate through the courts. In any case, without the original hierarchy empowered to ensure governmental observance of constitutional processes, the system of checks and balances that depended on it collapsed. This resulted in the current free for all in which the executive and judiciary make law, Congress makes laws in areas beyond its authority, and rogue bureaucrats make confiscations and serve as judge, jury and executioner in their own pet causes. The United States government had originally been fenced in by representative procedures for determining the reasoned expression of popular will at the national level, but under the banner of democracy and rights, it was set free to gallop anywhere inspired by the “living, breathing” Constitution.

Once government has escaped the fold, it is difficult to return it to its confines. Yet in an age when we have the power to obliterate ourselves and most other life in our dominion, whether by government or by the lack of it, the restoration of deliberation and restraint is worth consideration. To achieve that restoration, we should recognize the value of separating powers and ensuring their separation via checks and balances. I am open to suggestions about the best way of doing that, but I can only think of two: hereditary hierarchy, or elective hierarchy. My preference for the latter is probably an inherited prejudice, for as is true of most Americans, my ancestors were not aristocrats. But I would also like to see elective hierarchy succeed because I like a challenge, and historically, the odds are against natural aristocracy and the republic of reason.

I can hear minds closing at the suggestion of rebuilding a political elite on the prejudices of the slave-owning patriarchs who wrote the Constitution. Before defending those patriarchs and their political assumptions, let us stipulate that America is better for having ended slavery and given women and minorities the right to vote. This does not mean that everything about the present is better than the past, or that the present is more-clear eyed and less prejudice in every respect with regard to politics. If the founding generation, for example, based the right to vote on qualifications we find objectionable today, it does not follow that the vote should be accorded to everyone without any consideration of merit whatsoever. If poll taxes and literacy tests were unfairly administered in the past to exclude voters on account of race in some states, it is not necessarily the case that they are incapable of being administered fairly to exclude the poorly informed, or the transient passerby with no real stake in the community, or the incorrigible drain on the public purse.
And just because property qualifications existed when only white men could vote, it does not mean women and minorities would have to be excluded from the suffrage if property qualifications were in effect today. The ideal of the freehold property requirement premised that votes were less corruptible if every voter had a clear title to enough land to provide for his (or her) family. To modern ears, if such a notion does not sound racist or sexist, it sounds *classist,* or at best quaint and impracticable. After all, there is little chance of restricting the vote to freeholders when it already extends to the vast majority of landless tenants and heavily mortgaged “owners.” Nevertheless, it is interesting to speculate on the contractual terms for agribusinesses, waste disposers, drillers, miners and frackers if today’s mega-corporations had to negotiate their land use rights with a regime of independent family farmers and homesteading commuters.

Dismissing the founders out of hand because some of them had slaves and because women did not vote is a form of ideological prudery that overlooks a great deal of history and judges from a very selective slice of it. Taking a sufficiently broader view, we can appreciate that conquered whites were slaves in Greece when Aristotle wrote his *Politics.* European mariners and coastal villagers were being sold in the Barbary markets when the constitutional convention met in 1787. The majority of delegates in Philadelphia did not own slaves. Those who did were aware of the moral dilemma and hopeful that the institution would die out under economic forces (instead, it gained new life with the advent of the cotton gin, geographic expansion and the insistence of the upwardly mobile to have the same property rights as the old families had).

Had the states that were already emancipated from this inherited dilemma formed a free state confederation in 1787, rather than agreeing to the Three-fifths Compromise to keep the slave states in the Union, the Union might have been more morally consistent. To have allowed the original seven states to secede from the Union in 1861, not readmitting them until they had abolished slavery, might have been more *constitutionally* consistent. Aside from possibly keeping the four border states from joining the secession and sparing the nation the greatest loss of life in its history, it would have spared both sides the fate of mass conscription, paper money, and the precedent-setting damage to the separation of powers brought about by the Civil War.

As for patriarchy, it is easy to dismiss the less enlightened past before the right of female suffrage. In the long view, however, the women’s vote followed rather swiftly after that of the men, for in the greater part of recorded history, most men have been subjects without political rights, sometimes even subjects of women with hereditary titles. In the early days of the republic, after the American revolutionaries rejected hereditary distinctions, suffrage did not extend to all men, but it did extend briefly to propertied single women in New Jersey. As the suffrage movement gained momentum, women in many states had the right to vote in national elections before the Finns, Norwegians, and Swedes. Throughout the nineteenth and early twentieth centuries, women wielded increasing political clout, until two-thirds of each house in...
Congress concurred in a resolution to amend the Constitution, a resolution ratified by three-fourths of the state legislatures, thereby binding the remaining minority of the country to grant voting privileges to women throughout the land. Whether or not the Nineteenth Amendment was a victory over the supposed misogyny of the founders, it was definitely a victory for the several generations of women and men who followed the Constitution and prevailed in the deliberative process which the founders had established.

Detractors who measure women’s equality against a standard of perfection that has historically never existed are free to repudiate what the founders thought about government. The same for those who do not wish to look past the centuries of struggle between Europeans, Africans and indigenous North Americans — as if slavery and race conflict were not prehistoric problems that affected other parts of the world, and continue to do so even today. But for those with an interest in prudent statecraft and self-government, The Federalist, like Aristotle’s Politics, will continue to be read in other times and other lands, even if it ceases to be regarded in the land of its origin.

Certainly, a constitutional restoration need not be based on the suffrage opinions of the caucasian gentlemen of the eighteenth century. The standards for voting should be subject to review by every generation, but the point is that there be standards. Currently, the main defense against freeloaders and illiterates would seem to be voter apathy, which celebrity do-gooders are trying to overcome using get-out-the-vote campaigns that insist it doesn’t matter whom you vote for, ”as long as you vote.” They have obviously not pondered the consequences. As technology improves the means of registering mass opinion, and politics continues its downward slide into entertainment for the lowest common denominator, we shall likely have the chance to verify if lack of universal participation was the fundamental problem after all, or if, having finally perfected the ”voter app,” we have resurrected and improved upon the age of free bread and circuses. The Roman world was laughing when it died, according to the 5th Century monk, Salvian of Marseille. The modern refusal to take seriously the basic prerequisites for participating in politics will not likely end well for the polity.

Defining qualifications is but the beginning. We must also share an understanding of government’s inherent limits. The objective of politics is to affect policy, to get government moving in a desired direction. But government, or at least government as administered by the state, is in its essence an instrument of coercion. Democratic governments are no different. In almost every vote there is a winner and loser. Every appropriation approved by the majority is a confiscation in the view of those in the minority. The losers do not get to take their belongings and go home. They must comply, or apply counterforce to overthrow or secede. If victorious, they will sooner or later face a minority or an individual within their association who feels an injustice in the common course. There is no inherent unanimity to be expressed simply because everyone has an equal vote on every issue at every level.

_Homo Sapiens_ are free-willed individuals in an uncharted universe of possibilities. There is no end to their ingenuity in improving their condition. Their ability to work together in common enterprises, to trade talents and resources for mutual benefit, seems to advance the entire species, if not equally at once,
at least for all incrementally. But freedom also sows division. Each member of any association must continually accommodate or overcome the will of others. The more extensive the realm of cooperation and commerce, the greater the opportunity for increasing the general welfare, but also the greater chance of conflict among the increased aggregation of interests.

To acknowledge this potential of free-willed beings in free association is to appreciate the limits of politics. The sense of personal regard radiates outwardly to family, neighbors, colleagues, members of social groups, and so forth. Nobody has yet expressed it better than Burke reflecting on the Revolution in France:

To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.

These smaller associations require “government” in the sense that their members must observe expected rules of behavior, but the rules are socially rather than legally prescribed. The more extensive the association and remote from personal familiarity, the less likely that its government will rest on social consent than on formal legislation and mandatory enforcement. This corollary explains why classical writers on the subject of small “r” republicanism could not envision a popular government over an area larger than the city-state.

Whatever the size of the realm, having equal participation in its political process is not synonymous with the government of one’s self. Self-government is a separate realm, encompassing the responsibility we bear for our own well-being as well as the goodwill we share with those in our association. The decisions we make for ourselves, the uses we make of our possessions, and the persons with whom we choose to keep company are by definition preferable to those that are forced on us. As soon as we appeal to the state, we invoke a restriction on someone’s ability to act, an appropriation of someone’s property, or an intrusion into someone’s choice of affiliation. Whether or not the decree is arrived at democratically, we are ultimately resorting to force, and we should remember that the same force is available to any faction having interests in conflict with ours.

If we preferred governing ourselves to being governed, we would invoke the state sparingly. If Father Zossima is correct that the urge to make great gestures for humanity tends to go hand in hand with a tendency to treat individual human beings with contempt,

we need to bear in mind that the wider the realm being governed, the larger the force to be potentially wielded — whether on our behalf or against us. We should therefore wish to deploy state power at the level of government that is as close to our personal association as circumstances permit. The smaller the association, the greater our ability to deliberate within it, to hear out the opposition and personally to present our case in detail. It would make more sense to reason with our neighbors in the town hall before lobbying for national legislation.
Also, the smaller the association, the greater the weight of our individual vote. In national decisions, our direct vote would be diluted among hundreds of millions. Deliberation among so large a mass is categorically impossible, which is one of the chief reasons for preferring representatives. But when those elected rely on focus groups, opinion polls and media consultants, rather than on their own sense of the common good, the election of representatives merely preserves the outward form of republicanism. The animating spirit is closer to that of mass democracy.

The passion for equality is destructive to the representative process, for representation itself is a form of inequality, wherein the elected have the prerogative to propose, discuss and cast votes on matters that the rest of us do not. We can only appeal to counter forces in the representative system or wait it out and elect new representatives. But modern democracy rests on an assumption that it is technologically possible to rule by the plebiscite, or by what amounts to nearly the same thing, the browbeating of representatives with polling data and electronic media blitzes, as if, even at the level of the continental nation state, the decision-making process requires no hierarchy. The *Road to Mass Democracy* argues otherwise: In any large political sphere there is always a hierarchy, a smaller elite to raise the issues and promote the cause, and in the case of democracy, to return favors to the supporting interests that fund the campaign machinery.

If representatives were promoted to *represent* constituencies in the national deliberations rather than to divine and register popular decrees, the hierarchy would at least be openly visible. The democratic facade we have applied to the original structure, by contrast, is buttressed by two party hierarchies operating largely outside the constitutional procedures, an overwhelmingly successful duopoly that has managed in almost every election throughout the 50 states to limit the choice to either Republican or Democrat. Considering how ardently the founding generation hoped to prevent the formation of permanent political parties, the Constitution of the United States stands out in this regard as an epic failure. In fairness to the founders, the social bonds so critical to self-government have likely deteriorated to the point that most voters only care whether the candidate for local sheriff or county clerk belongs to the party that supports or opposes the President of the United States. Casting a ballot demands no more deliberation than exercising an ideological reflex.

This convenience comes at a cost. We have noted that, as merely one among millions, the direct vote of an individual would carry no weight whatsoever in national decisions. Participation at all is limited to ratifying or rejecting what the party leaders have proposed, while the information about those proposals is watered down for mass consumption, the details and motives being known only to a few. Ironically, plebiscitary government proves not to be particularly accountable to the people. Every so often the injustices of insider politics and corporate graft provoke a grassroots movement of protest — a Tea Party on the right, a Wall Street occupation on the left, a Populist Party, a Reform Party, and so forth, but the oligarchs adapt and survive, for they are operationally necessary to maintain the myth of democratic government on the scale of the nation state.
The cost of mass democracy is greater still in that providing the individual an equal share in the highest decisions of state, however illusory it proves to be in practice, coincides with the highest levels of the state deciding on the smallest decisions of communities and individuals. As De Tocqueville explained, “the principle of equality suggests to men the notion of a sole, uniform, and strong government,” and “imparts to them a taste for it.” In equality’s ruthless logic, what is right for one must be right for all. Affairs that could be settled between ladies and gentlemen become concerns for the civil authority, and any solution is an injustice that it is not nationally uniform. As democracy subordinates the government of self to the desire to govern everyone else, and governing everyone else requires consolidating power, we end up with a federal government popularly expected to settle matters pertaining to marriage, child rearing, education, housing, insurance, retirement and inheritance — the whole progress of private life.

Such matters are not only beyond its authority, but often beyond its competence. Within the sovereign realm of over 300 million people disbursed across a continent, the federal government, when compared to levels of government closer to home, is the least visible to constituent oversight and the least amenable to personal persuasion. Of course, self-governing individuals would prefer to resolve their issues socially. When that can not be achieved, however, the preferred level of government intervention would, as we have stated, be the lowest possible. A national referendum would not settle the moral and philosophical disagreements Americans have over the subjects of unwanted pregnancies, same sex unions, reciting the Pledge of Allegiance in school, or smoking pot, even if every eligible voter of the nation had an equal ballot in the decision. On the contrary, without changing a single opinion, it would simply become a target for the opposition to overturn in the next plebiscitary skirmish, providing fodder for the media warfare that keeps the political parties and talking heads in business.

Local variation on such issues might offend righteous sensibilities, but it allows for resolution on a level closer to that of self-governance. To recall, self-government is a realm wherein politically irreconcilable differences might be reconciled without politics, where the “little platoons” of friendship and kinship hold more sway than the written law. In this realm, promoting “family values” on a national political platform seems grossly superfluous, and proposing constitutional amendments either to prevent or protect abortions and homosexual marriages reflects a poor understanding of what a federal constitution is meant to accomplish, as well as a naive, or perhaps cynical, expectation of what it can accomplish.

The urge to make law is not a characteristic of law abiding people, no more than an increased presence of police indicates more peaceful streets or a battery of medical regulations reflects a healthy population. On the contrary, the lawmaking regime seems to thrive best where the responsibility for self is least in evidence. To appreciate fully the link between undisciplined individuals and the unrestrained exercise of state power in democratic governments, I commend the writings of Claes Ryn, and before him, Irving Babbitt, but for our purposes, it is sufficient to recall our opening observations on the current
The paradox of popular sovereignty holds that constitutional restraints on government have no force beyond the respect they are given by the sovereign people. A constitution imposes procedural impediments to the deployment of state power in order to protect self-government, by which we mean the voluntary undertakings and free associations sustained by individual conscience and social norms rather than by statute and government enforcement. When self-government is widely understood as fulfilling one’s personal and social obligations, the impediments are hardly necessary. When it is confused with equality of political participation, the impediments are removed or circumvented to make government more responsive.

There is no telling what happens once the constitutional discipline has departed. Plebiscitary rule tends to vote for more of everything at state expense. Generally there is less accountability and greater fluctuation in the law. That could bring us to the point where the stability of authoritarianism is popularly preferred to the alternative of anarchy, or what the founders called “licentiousness.” Or it could bring secession and dissolution, perhaps over the very social issues that can not be resolved nationally. Whatever the direction of America’s future, it is hubris to forget that all empires have perished, some of the greatest of which began as republics.

On the other hand, some nations have managed, even if briefly, to rekindle an awareness of their original principles. The constitutional structure of the founders is basically intact, minus the manner of Senate elections, but the states would likely require constitutional repairs of their own before being re-entrusted with the role they abandoned a century ago. Perhaps, instead of states, the Senate could represent guilds or professions — distinct communities of some kind. Or perhaps, with a simplified, no-loopholes tax code, it could represent those contributing the most to the public treasury (which would at least make representation of the wealthy more transparent than it is now). At all events, merely to recognize that an upper house should represent something other than the undifferentiated mass brings us a step closer toward deliberative governance.

Restoration or not, we can always govern ourselves, whatever the form of government embodied by the state, so long as we are willing to face the consequences when Caesar is offended. My student friend from Egypt understandably prefers his exile, and managed to obtain another educational deferment. Sadly, he was summoned home anyway. We have a mutual friend from Eritrea, which, to my knowledge, has not had a national election in its history, allows freedom of worship to only a handful of Christian denominations and Sunni Islam, and has no freedom of speech or press. Nevertheless, he was eager to return home after his studies and warmly extended an invitation for me to visit. He is living proof that government is not the wellspring of human happiness.

When last we spoke, he confessed how much he admires America, particularly its economic freedom with its fabled rags-to-riches possibilities. His Eritrean countrymen, so he said, believe, like Americans,
that “Self-reliance is the key to success.” He clapped his hand to his heart, bowed his head slightly in my direction, and exclaimed, “I am pro-USA, very pro-USA.”

Far be it from me to disagree.

Malmö, Sweden

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