

stereotyping, and prejudice not specifically directed at Jews.

Oddly enough, the complaint that Facing History's treatment of the Holocaust pays insufficient attention to Jews and Jewish concerns has sometimes come from people who oppose multicultural education on the ground that it emphasizes the distinctness of groups at the expense of unity and common values. Moreover, the idea that the Holocaust is exclusively "about" anti-Semitism, that our central focus must always be on the Holocaust as a Jewish tragedy, is curiously reminiscent of one of the criticisms made by Christina Jeffrey in her 1986 evaluation of Facing History. The program, she wrote, "may be appropriate for a limited religious audience, but not for widespread distribution to the schools of the nation." Defenders of the former position will rightly distinguish their view from Professor Jeffrey's, since they want this Jewish tragedy to be of universal concern, not of concern to Jews only. Nevertheless, a willingness to appreciate the sufferings of others, a lack of possessiveness about a tragedy that affected millions of non-Jews as well, is much more likely to foster this general concern.

This past spring, the Los Angeles Jewish Federation arranged an evening on which five Japanese-American judges reflected on the relocation and internment of Japanese-Americans during World War II, and on the current wave of anti-immigrant hysteria and resurgent anti-Japanese prejudice. The Federation speaker

observed that "while no wartime experience could compare with the Holocaust, no group had a monopoly on suffering." There are no such monopolies now. This is a central lesson of moral education programs, and one to which Facing History and the Holocaust Memorial Museum have helped point the way.

— Lawrence A. Blum

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Escaping from Politics

Americans have long been committed to a particular conception of republican government. Within this conception, as articulated in our founding documents and the patterns of our political speech, we may distinguish two animating principles. (1) The people are to rule. In particular, those doing the governing are to be accountable to the citizenry through elections and other devices. (2) The people and those who speak for them cannot rule any way they please. We are to be a democracy but of a certain kind, one in which the people's rule is to be limited.

The desire to limit the reach of democratic politics is prompted by a fear that popular rule can be the means by which a majority subordinates a minority or violates individual liberty. As Jefferson observed, "One hundred seventy-three despots would surely be as oppressive as one. . . . An elective despotism is not the government we fought for." Popular rule may also be the vehicle through which those with particular interests can gain the power to advance them, often at public expense. Thus, the central problem of republican government is to define (and enforce)

limits on democratic politics, to ascertain what should be beyond the people's reach.

It is to law and moral theory that we most commonly look for the definition of such limits. In doing so, we assume that democratic politics itself cannot provide them. Democratic politics too often involves a squalid search for narrow advantage and displays of crass self-interest; it is rife with strategic calculation in the service of material gain and high position. We must surely look outside politics, the argument goes, if we wish the limits to be other than arbitrary — the outcome of activities that have other purposes, notably self-interest, and which therefore have no systematic justification. In this light, law and morality look attractive as a source of limits on popular rule.

But upon more careful examination, I think, neither of these ways of limiting the reach of democratic politics looks so appealing. In the end, we must say that the only way to limit democratic politics is by *more* such politics — to be sure, of a different kind from the version I have just been describing, but politics nevertheless. Or so I will argue. Once this is understood, moreover, some recent proposals for reforming our politics look distinctly less attractive than their supporters imagine. They would in fact make it more difficult for us to realize the well-ordered republican regime to which we are committed.

Morality and Limits

Many moral theorists (and political theorists who look to them) argue that our politics must be bound by such values as an individual right to equal respect and economic justice. Their argument is straightforward. Such transconventional values ought to bind us in our political practices. We are not free to adopt just any form of political life, nor to pursue just any objectives that a majority of us happen to prefer.

The principal difficulty with such arguments is that, for the most part, they are presented as if we need not concern ourselves, as we commend specific values, with the question of whether they can actually be given life in political practice. When doubts are raised as to whether a value is attainable, these are often dismissed as "practical objections" that are not decisive from the perspective of moral theory.

But why a "practical objection" should *not* be decisive, as we try to determine what the content of the limits on politics should be, is, to put it mildly, unclear. If there is no plausible version of political activity, of the workings of political institutions, that will give life to the values being advanced, this must be a decisive objection to devoting effort to achieving them. "Cannot" implies "ought not." Moreover, we can only become disheartened and cynical if we assert

a commitment to values that we see no possibility of realizing.

In other words, having a table of values, a set of abstract standards to tell us when we are overstepping the proper bounds of political choice, is less useful than is often supposed, and possibly pernicious if it is all we have to guide us. If we as a republican people are indeed concerned with trying to define that which is to bind political choice, it is misleading simply to say that X is a value, and we ought not in our politics to undercut it — and leave for another time the task of working out which institutions are to put the value into effect, and how they can be made to function in the necessary ways.

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Depending on our intellectual tastes, we can say that moral theory cannot stand on its own as a guide to limiting democratic politics. Or, we might say — and this is the version I favor — that moral theory as it is usually presented in the context of political life has a mistaken view of the problem of limited republican government. In proposing a definition of the limits on democratic politics — of the purposes it should and should not pursue — moral theory typically assumes that an account of democratic institutions can be added later, that it is in some ways ancillary to the main task. In fact, it is at the very heart of the problem of limitation. To lack an account of institutions is not just to have an incomplete theory, but to have a deeply flawed one.

Courts, Law, and Limits

While moral theorists too often speed by the problem of institutions, averting their faces from the world of institutional practice, those we might call legalists are deeply concerned with institutions. However, they have such refined tastes in this matter that only courts will do. No other institutions have the necessary finesse and intellectual breeding to merit consideration.

Broadly speaking, legalists look to the "law" as the principal source of limits on democratic political choice. In this respect, they are akin to those moral philosophers who believe that natural law should guide political choice. But here "law" is understood differently. It is the law of judges and courts, not the law of nature and nature's God. Legalists have

advanced arguments aimed at delineating a body of specifically legal reasoning and, in so doing, they have assigned a privileged role to courts and judges in democratic lawmaking.

Are these legal theorists correct? Is there a special form of legal reasoning that, when employed by judges, should bind political choice? It is relatively easy to agree with the proposition that courts and, therefore, legal reasoning have a special and unique competence with regard to settling disputes *between individuals*. It is difficult, however, to sustain such claims for a special competence in other, larger matters that concern how the larger society and polity should work. I am thinking here of such constitutive questions as the meaning of the idea that all citizens should enjoy the equal protection of the laws, or the proper definition of the rights and responsibilities of citizenship.

Consider, for example, what we might call the primary political rights, such as freedom of speech and assembly. These are best understood not as products of legal reasoning, but as the conclusions of practical political reasoning and empirical assessment of the requirements of popular government. Freedom of religion almost certainly grew out of practical political reasoning on the need to keep religion off the political agenda of popular regimes. This is not surprising, since one of the central concerns of practical political reasoning is precisely how to secure and maintain a well-functioning popular regime with limited powers.

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Admittedly, we are used to thinking of judicial review — and specifically of the Supreme Court interpreting the Constitution — as *the* way in which popular rule is limited. Our guiding image is one of a simple division of labor: the people through their representatives legislate, and the Court decides whether they have gone beyond the appropriate bounds. Advocates of a special sort of legal reasoning reinforce this image by suggesting that courts are uniquely competent to define and set out doctrine, above all constitutional doctrine. The success of any effort at limitation, they argue, depends on the courts as they explicitly connect their decisions to constitutional provisions and to previous rulings.

In contrast, the point I want to urge is that courts — especially high courts that are expected to concern themselves with constitutive matters — are best

understood as political bodies with a particular sort of view of such questions. Like other lawmakers, judges employ whatever skills of practical political reasoning they can command. They sift through a large range of normative and empirical considerations; they test various arguments for relevance to the question at hand, soundness, and correspondence to analyses of similar situations. Judges may be better reasoners, in some respects, than other sorts of lawmakers, and they may generally have a variety of advantages. But that is what they are — differential *advantages*, not a case for a unique competence.

Escape and Return

Moral theorists and legalists wish to substitute for practical political reasoning some special kind of reasoning. But the kind of questions we face when we are considering what limits should be placed on political choice are, at the end of the day, ones that can only be settled by practical political reasoning that takes account of how the world works and can be made to work. There is no special or privileged form of reasoning here, no moral philosophy or theory of law that can guide us. We may need moral philosophy (or revelation) to get started, to acquaint us with plausible versions of what the limits on democratic politics should be. Similarly, we may find the history of court decisions and legal commentary on them helpful in our efforts to come to some conclusion about how to limit political choice. But that is all moral and legal reasoning can do. After that we must rely on what we always rely on in deciding what to do when practical questions confront us. We look to analogies and contrasts, we gather what information there is about the particular part of the world that concerns us, and we think through the connections between our values.

One image bedevils the work of moral theorists and legalists: that the only way to bind political choice is to escape from it, somehow get outside it. "Politics" can't be trusted and so we must somehow step beyond it. Some moral theorists and legalists will go to the extreme and wish, in effect, simply to replace politics and politicians by philosophy and law — or, more precisely, by philosophers and lawyers. As Grant Gilmore put it, however, in hell there will be only law (and lawyers). While it is doubtful that a place where there is only philosophy will be equally dreadful, it is likely that ordinary people will have, as it were, a devil of a time.

In a quite simple sense, there is no substitute for politics — if by politics one means the various ways in which we arrive at collective, authoritative decisions in a world in which people, legitimately, hold different views about the purposes for and the manner in which they are governed. To exclude politics is to require that

we all agree on purposes and manner, or that we not make any collective decisions, or that such decisions be imposed. There aren't any other choices. And since in fact we *don't* all agree, we are left with force or no government. Politics is better, more noble, than these twins of anarchy and despair.

The kind of theory I have been criticizing is surely correct, however, in one thing: a political system wholly characterized by the play of power, bargaining, and the pursuit of narrow advantage would be deeply unattractive and would endanger the kind of primary political liberties that the citizens of western countries (and, increasingly, citizens elsewhere) believe is their right. Moreover, the ordinary politics of narrow advantage and strategic maneuver is too little characterized by reasoned argument. It is too unprincipled. Practical political reasoning plays too little part in it.

But there are different kinds of politics, and we need not accept the form it currently takes. Instead of seeking to escape from politics, we must instead consider how to create a politics that provides substantial scope for our powers of practical reasoning. Where, then, shall we look for guidance on how to build into our political institutions a greater component of practical reasoning?

The Public Interest

James Madison provides one very helpful account of the kind of politics we should aim for. The essential task of lawmaking, he wrote, was to "refine and enlarge the public views." Lawmakers should be in a position to "discern the true interest of their country" and thus be unlikely "to sacrifice it to temporary and partial considerations." In Madison's vision, lawmaking would be the last stop on the road to a progressive refinement in understanding and giving substantive content to the public interest. In this way, the boundaries of the people's rule would be given concrete meaning.

For Madison, then, the challenge is to organize ordinary politics so that the meaning of the public interest gets regular and reflective attention. What purposes should we pursue, and what are the appropriate means for doing so? (Ends and means are joined in the public interest of a republic.) Which purposes and means are excluded? When these questions are the focus of legislative debate, democratic politics binds democratic politics; that is to say, in day-to-day political life there are forces that press for giving concrete meaning to the public interest, and that help contain other forces that press in other directions.

If we accept that a deliberative politics aimed at giving concrete and compelling content to the limits

on popular rule is necessary — that the burden of self-limitation cannot be borne solely by judges (or moral philosophers or other actors ostensibly outside the political realm) — we are in a position to evaluate proposals for reform of our institutions. In general, we should look favorably on proposals which would enhance the deliberative capacities of the Congress, and especially those directed at improving the citizenry's capacity to judge whether legislators are inclined to engage in deliberative ways of lawmaking. Conversely, we should be critical of proposals that would weaken the legislature's deliberative capacities.

The example of term limits is instructive in this last regard. Practical political reasoning about the public interest, and thus about limits on democratic rule, requires judgment tutored by long acquaintance with questions of governance. Yet term limits would mean that elected representatives would never have the opportunity to think systematically about such questions. Nor would lawmakers have the opportunity to devote continuing attention to the "train of measures" that these questions require, needing as they do a regular correcting and extending of initial efforts. Finally, to have a constant turnover of representatives would significantly weaken the legislature's ability to play a constructive role in public discussion of the concrete meaning of the public interest, and thus in the limiting of popular rule.

The argument for term limits is a counsel of despair. To adopt term limits would be tantamount to giving up on the legislature as a crucial component of republican government; it would say that there is no prospect of having a legislature that can play the essential role of reasoning about the limits of popular rule. By contrast, reforms recognizing that we as citizens must judge whether lawmakers are deliberatively minded, that we must have experience of deliberation if we are to so judge, and that we require opportunities at the local level to engage in a deliberative politics, are more attractive. Such reforms would have a far greater chance of serving our aspiration to be a fully realized republican regime.

— Stephen L. Elkin

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