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LIBERAL NATIONALISM

As we entered the final quarter of the twentieth century, there was a widespread assumption that the age of nationalism was over, that we were on the threshold of a postnational era. It is now clear that this assumption was wrong. National movements are regaining popularity, and nations that had once assimilated and "vanished" have now reappeared. Estonians, Latvians, Corsicans, and Lombards awake from the long slumber that communist regimes or Western European nation-states had forced upon them, flex their muscles, and set out to march under the banner of national independence.

Unfortunately, such attempts to turn back the historical clock are often marked by bloodshed and violation of the rights of neighboring nations. In their enthusiasm to regain their national identity and acquire recognition and self-respect, national activists often overlook the changes that have taken place in the surrounding political, economic, and strategic circumstances, and fail to realize that ethnocentric national slogans have become obsolete. The era of homogeneous and viable nation-states is over (or rather, the era of the illusion that homogeneous and viable nation-states are possible is over, since such states never existed), and the national vision must be redefined.

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At first glance, the task of redefining nationalism might seem unpromising from a liberal perspective. The national tradition, with its emphasis on belonging, loyalty, and solidarity, would seem to be fundamentally opposed to the liberal tradition, with its respect for personal autonomy, reflection, and choice. Indeed, some would argue that liberals should engage in a struggle against the national phenomenon, offer a universalist alternative, and rely on persuasion and education to eradicate national feelings.

At first glance, the task of redefining nationalism might seem unpromising from a liberal perspective. Indeed, some would argue that liberals should engage in a struggle against the national phenomenon.

Such an enterprise might be justified were we to agree that national aspirations are inherently evil and there is nothing in them that merits our respect. Karl Popper, in what is probably the best-known attack on nationalism, endorsed such a view when he claimed that nationalism is akin to a revolt against reason and the open society — that it appeals "to our tribal instincts, to passion and to prejudice, and to our nostalgic desire to be relieved from the strain of individual responsibility which it attempts to replace by a collective or group responsibility."

But there are problems with the liberal tendency to describe nationalism as resting merely on irrational (some say primitive) fears of the stranger, as motivated by a morally irrelevant attraction to what is familiar and similar, or as simply giving expression to an unscrupulous desire for power. National existence may instead be founded on a range of perceptive understandings of the human situation, of what makes human life meaningful and creative, as well as a set of praiseworthy values. No doubt there are inherent tensions between certain national values and those of the liberal tradition. But the two modes of thought are not irreconcilable at all points, and the existence of tensions does not imply that we must engage in the ultimate pursuit of one set of values at the expense of the other. A theory of liberal nationalism renounces such absolute solutions, above all by seeking to mediate between the nationalist belief that individuals are the inevitable product of their culture, and the liberal conviction that individuals can be the authors of their own lives.

Constructing National and Personal Identity

Liberal nationalism, like all political ideologies, begins with a conception of human nature. The belief that such a conception is possible — that there are universal features that characterize human beings — might initially seem more plausible to liberals than to nationalists. Yet the nationalist emphasis on the importance of particular circumstances for the construction of personal identity does not contradict the universalist view of human nature. On the contrary, nationalists can endorse this notion and claim that, by nature, individuals are members of particular human communities. Outside such communities, individuals cannot develop a language and a culture, or set themselves aims. There is no substance to their reflection, no set of norms and values in the light of which they can make choices and become the free, autonomous persons that liberals assume them to be.

The definition of individuals as social beings does not seem to evoke strong controversy. But there are different ways of understanding the links between communal membership and personal identity. Being situated, adhering to a particular tradition, and being intimate with a particular language, may be seen as restricting the possibility of choosing elements that are constitutive of personal identity, such as communal and cultural affiliations and a basic set of values. On the other hand, communal membership may also be seen as affording the *preconditions* for personal autonomy. Would national, religious, and cultural movements be so fearful of conversion and assimilation were it not clear that individuals do indeed have a choice in these realms?

Liberal nationalism holds that neither our moral nor our communal identities are wholly prescribed for us by our history and our social affiliations. As moral agents, individuals who are exposed to alternative ways of life, belief systems, and sets of norms are capable of responding by reconsidering their own. Or, following a less radical process, they may challenge the conventional understanding of the basic social norms and values prevalent in their society in terms advocated by these same values. In such instances, the motivation for reflection and change is rooted in tensions and inconsistencies internal to the system. Here reflection might lead to a reinterpretation of socially held norms and values, or to a broadening of their scope.

As for communal identity, individuals can assimilate into national communities other than the ones into which they were born (though full-scale assimilation is rarely possible); they can embrace the national identity of their forefathers, even though they might have been completely estranged from it; or they can choose to preserve their communal mem-

bership, not merely out of convention and routine, but as a result of reflection.

Imaginary Communities

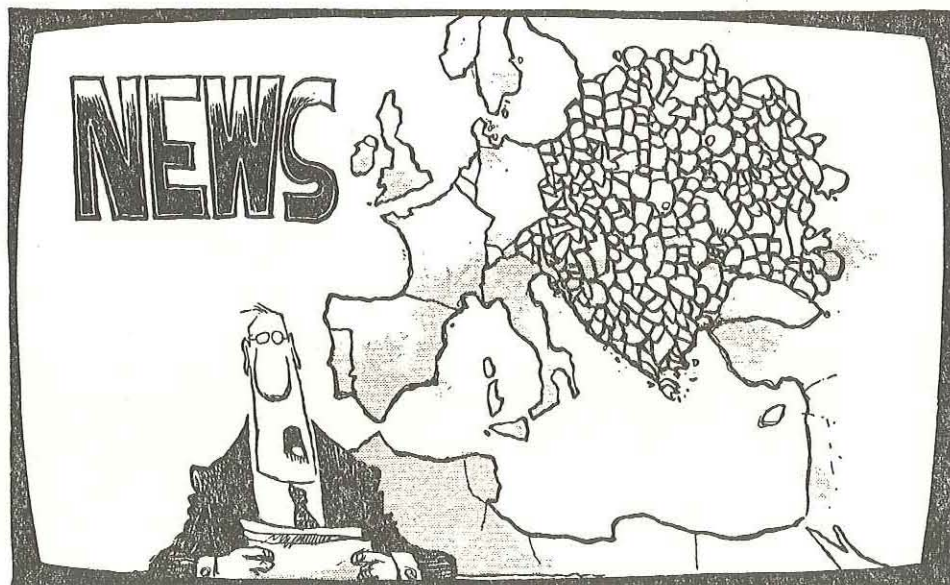
In emphasizing the elective aspect of personal identity, liberal nationalism affirms the right of individuals to exercise cultural choice — to lead lives which, on reflection, they have come to value, rather than lives imposed on them by history and fate. And yet, notwithstanding the individualistic dimension of this argument, liberal nationalism recognizes that culture and membership are communal features, whose worth can be fully enjoyed only together with others making similar choices. A right to culture thus entails the right to a public sphere in which individuals can share a language, memorialize their past, cherish their heroes, live a fulfilling national life.

This approach presupposes a cultural definition of the term "nation," in which the nation is seen as an "imaginary community." Imaginary communities, in Benedict Anderson's formulation, are those that are too large to allow for direct personal relations among all their members. The boundaries of such a community, and the notion of recognition that follows from it, are products of its members' ability to "think the nation" by the power of their imagination. Hence, instead of implying false beliefs or misrepresentations of reality, "imaginary" implies that, unlike the family, the tribe, or the people, the nation exists only

when its members consciously conceive themselves as distinct from members of other groups.

These feelings can of course change and bring about the destruction of nations or result in the emergence of new ones. Nations exist only as long as their members share a feeling of communal membership, and in this sense, Renan's metaphor, "an everyday plebiscite," accurately captures the important role of "the will to belong" in the definition of a nation.

In the modern era, nation-builders have not always acknowledged the role of choice in sustaining national identity. Insisting that their nation is a natural community shaped entirely by history and fate, they compulsively search for ancestral origins to which the new nation might "return," cling to even the faintest testimony of historical continuity, and advance patently false claims locating the nation's roots in a distant past. By emphasizing the link to the past, nation-builders try to play down the fact that their nation is the outcome of a bureaucratic decision or an international agreement and that its national consciousness is only beginning to take shape. Nevertheless, in their attempts to project their idea of a real nation — a group sharing a common denominator based on history, culture, language, and rituals — they express values that are central to national life generally: the urge for continuity, the desire to see at least some parts of social life as unchanging and invariant, and the need for a locus of identification.



"EASTERN EUROPE SUBDIVIDED AGAIN TODAY...."

*Jim Borgman/Cincinnati Enquirer
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Liberal nationalism does not oppose such sentiments. To the contrary, it recognizes that many elements of the nationalist ethos, although unacknowledged, have long been fused into liberal thought. For example, the liberal conception of distributive justice is particularistic and applies only within well-defined, relatively closed social frameworks, which favor members over nonmembers. The same applies to the liberal conceptions of membership and political obligations. These conceptions simultaneously embody two contradictory images of the politi-

Although cultural choices are neither easy nor limitless, cultural memberships and moral identity are not beyond choice.

cal community: that of a voluntary association and that of a community of fate. Liberal nationalism, in its understanding of national and personal identity, embodies a similar contradiction, arguing that although cultural choices are neither easy nor limitless, cultural memberships and moral identity are not beyond choice.

The Nature of Cultural Membership

In the past, the version of nationalism that places cultural commitments at its center has usually been perceived as the most conservative and anti-liberal form of nationalism. Cultural nationalism, it has been argued, preaches the establishment of closed societies, favors the authoritarian uniformity of state and faith, and fosters xenophobia.

But although liberal nationalism emphasizes the role of culture in constituting nations, it does not claim that individuals can find true freedom and expression only through complete identification with the community. From a national perspective, a painter working in the solitude of his atelier, the poet writing to his loved one, and the athlete competing in a sports event, strive for the pinnacle of their own individual achievements, even as they contribute to the advancement of their own particular nations. Moreover, if we accept Raymond Williams' claim that "culture is the ordinary" — the language we teach our children, the bedtime stories we tell them, the lullabies we sing to them — then the meaning of most of our daily actions transcends their particular and direct function. The ability to turn an everyday act into a source of national pride is one of the most appealing aspects of nationalism. It contextualizes human actions, no matter how mundane, making them part of a continuous creative effort whereby culture is made and remade.

The Morality of Community

In placing reflection, choice, and internal criticism at its center, liberal nationalism rejects the notion that nationalism must necessarily, in Gordon Graham's words, "exalt the idea of the nation above all other ideas." It is true that nationalism implies a morality of community — a belief that we are justified to some degree in favoring the interests of fellow members over those of nonmembers. However, liberal nationalism recognizes that modern individuals belong to a complex network of memberships, and therefore argues that a morality of community need not be as xenophobic as it might appear at first glance.

For example: I see myself as an Israeli, but I am also a member of an academic community and therefore committed to the notion of academic freedom. I therefore have a duty to support Palestinian colleagues in their struggle to reopen the universities closed by the Israeli Army in the West Bank. Obviously, the duty to defend academic freedom is a general duty, but the fact that I am a member of the academic community and share this membership with members of other nations intensifies my duty to defend their interests. Hence, I am less troubled by the fact that brokers at the Israeli stock exchange failed to organize a sit-down strike in solidarity with Palestinian academics, than by the fact that no Israeli university has officially done so.

It is true that nationalism implies a morality of community — a belief that we are justified to some degree in favoring the interests of fellow members over those of nonmembers. However, a morality of community need not be as xenophobic as it might appear at first glance.

Liberal nationalism insists upon fostering national ideals without losing sight of other human values against which those ideals ought to be weighed. It celebrates the particularity of culture together with the universality of human rights. In this sense it differs radically from organic interpretations of nationalism, which assume that the identity of individuals is totally constituted by their national membership, and that the personal will is "truly free" only when submerged in the general one. It is a direct descendant of the cultural pluralism of Herder and the liberal nationalism of Mazzini.

National Self-Determination and Individual Liberty

The demand for a public sphere in which the cultural aspects of national life come to the fore constitutes the essence of the right to national self-determination. In the past, the full exercise of this right has often been identified with the creation of a homogeneous nation-state. Many nineteenth-century liberals favored the establishment of such states because, in Hugh Seton-Watson's words, they believed that "individual liberty and national independence or unity would go together," and that liberal principles generally could best be implemented in a unitary state. "Free institutions are next to impossible in a country made up of different nationalities," argued John Stuart Mill. "Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist."

However, as Mill had already noted in 1861, there are major difficulties in implementing the national ideal of a state for each nation. The most prominent obstacle is the geographic one: there are areas of the world where members of different nations are so closely intermingled that it is impossible to grant each an independent nation-state.

This would have been particularly true in light of the interpretation of national self-determination pre-

vailing in Mill's time and extending into the Wilsonian era. National self-determination was perceived, Eric Hobsbawm writes, as a stage in the social evolution of human units as they developed from "family and tribe to county and canton, from the local to the regional, the national and eventually the global." As long as national self-determination was expected to be part of a linear process of historical evolution leading to increasingly larger social units,

The nineteenth-century hope that individual liberty and national independence would go together has failed to materialize.

the idea that it should be granted not just to *unifying* national movements, but also to groups wishing to *secede* and create their own small, homogeneous national units, was ruled out a priori (though Mill himself made some exceptions). Thus, even in Western Europe, the cradle of nationalism, many citizens continue to see themselves as members of national minorities living in a state that does not fly their flag.

The nineteenth-century hope that individual liberty and national independence would go together has also failed to materialize. In fact, the yearning for national self-determination is different from, and may even contradict, the liberal democratic struggle for civil rights and political participation. History shows that individuals often desire to secure status and recognition for their nation even at the cost of relinquishing their civil rights and liberties.

The U.N. Human Rights Committee has viewed the realization of the right to national self-determination as an essential condition for the effective guarantee and observance of individual rights. But members of nations granted national self-determination can, and indeed have, set up regimes that restrict the human rights of their fellow nationals, while individuals sometimes enjoy a full range of civil rights even when not governed by their fellow nationals. Members of national minorities who live in liberal democracies — the Quebecois and the Indians in Canada, the aborigines in Australia, the Basques in France — are not deprived of their right to political participation or their freedoms of speech, press, assembly, and association, although they may feel marginalized and dispossessed because they are governed by a political culture and political institutions imprinted by a culture not their own.

Liberal Nationalism

Yael Tamir

"This is a most timely, intelligent, well-written, and absorbing essay on a central and painful social and political problem of our time."

—Sir Isaiah Berlin

"In this remarkable book, Yael Tamir seeks and finds a 'decent' compromise between liberal and nationalist policies. But her real achievement is a critical theory of nationalism, which explains why the compromise is morally necessary. Working through historical and contemporary examples, Tamir describes the value of national commitments and defines their moral limits. She explores a set of problems that philosophers have been notably reluctant to take on, and leaves us all in her debt."

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Individuals wish to be ruled by institutions informed by a culture they find understandable and meaningful. When they are able to identify their own culture in the political framework, when the political institutions reflect familiar traditions, historical interpretations, and norms of behavior, individuals come to perceive themselves as the creators, or at least the carriers, of a valuable set of beliefs. Fortunately, the right to a public sphere where one's national culture may find expression may be achieved through a variety of political setups, including federative and confederative arrangements, local autonomies, or the establishment of national institutions. Were the creation of a separate nation-state the only way of realizing the right to national self-determination, its implementation would remain the privilege of only a fortunate few.

The Universality of National Rights

Liberal nationalism holds that because national rights rest on the value that individuals attach to their membership in a nation, all nations are entitled to equal respect. The justification of national rights is thus separated from the glorious or tormented past of each nation, from its antiquity, or from its success in attaining territorial gains. Because liberal nationalism is predicated upon a commitment to the existence of national groups as such, it insists that a nation can affirm its identity without disregarding the dignity and value of other nations.

This conception is well expressed in the writings of the Polish revolutionary Kazimierz Brodzinski, who insisted that national egoism, wherein each nation regarded itself as "the goal and center of everything," had to be replaced with a liberal perspective. Brodzinski's writings convey the extraordinary combination of particularistic pride and universal commitment typical of the progressive-romantic version of liberal nationalism prevalent in mid-nineteenth-century Europe:

the Polish nation alone (I say it boldly and with patriotic pride) could have a foreboding of the true movement of the moral universe. It has recognized that every nation is a fragment of the whole and must roll on its orbit and around the center like the planets around theirs.

Brodzinski promoted the idea of the brotherhood of nations, which shared a sacred duty to be mutually helpful in the struggle for freedom and international justice. It is in this spirit that Mazzini addresses his fellow Italians:

A people, Greek, Polish, Circassian, raises the banner of the Fatherland and of Independence, fights, conquers, or dies for it. What is it that makes your hearts beat at the story of its battles, which makes them swell with joy at its victories, and sorrow over its defeats? ... And why do you eagerly read the miracles of patriotic love recorded in Greek story, and repeat them to your children with a feeling of pride, almost as if they were stories of your own fathers?

Ethnocentric nationalists, who rely on arguments exclusively related to one particular nation, rule out a universal justification of national rights and lose the ability to hold a meaningful dialogue with members of other nations. This limitation is one that the tradition of liberal nationalism seeks to overcome.

The aspiration of creating an independent state for each nation must be replaced with more modest solutions. Were the creation of a separate nation-state the only way of realizing the right to national self-determination, its implementation would remain the privilege of only a fortunate few.

A Postnational World?

Recent versions of nationalism seem to lend little credibility to the liberal nationalist position I have offered. Witness the bloody struggles in Yugoslavia, the violent clashes between Sikhs and Hindus in India, and the frequent outbursts of ethnic hatred within and between the new republics of Eastern Europe. A cursory glance at the surrounding reality could easily lead to the conclusion that liberal nationalism is a rather esoteric approach.

Yet there are reasons to think otherwise. Since the end of the Second World War, independent nation-states have agreed to restrict their autonomy, and cross-national economic cooperation — involving the development of joint policies, effective regulations, and continuous coordination — seems to have become the order of the day. Some observers assume that such cooperation will necessarily lead to a postnational world. But one can imagine nations enjoying the right to national self-determination along with the benefits accruing from membership in broader political alliances — especially if, as liberal nationalism proposes, the aspiration of creating an independent state for each nation is replaced with more modest solutions, such as local autonomies or federative or confederative arrangements.

Many of Europe's small nations, which failed to establish independent nation-states, look forward to European unification. The Corsicans, Basques, Catalans, and Irish nationalists assume that, as a self-professed multinational entity, the EC will not seek to shape a homogeneous cultural community, nor will it follow the undesirable tradition in which international organizations include only states. The EC could become a community of nations that openly recognizes the diversity of its constitutive units.

On the other hand, as technological development and economic prosperity increasingly depend on cross-national associations, assimilation is, more than ever, a feasible option. This could mean that the real test for cultural and national affiliations has arrived. Will national groups accede to pressures to melt together into a larger culture, or will they be motivat-

ed to invest in the preservation of their own cultural heritage, their language, their distinctiveness?

Individuals may, in the future, choose to surrender their particularities and assimilate into one international culture. But the need for mediating communities makes this scenario unlikely. As Mazzini rightly argued, "the individual is too weak and Humanity is too large."

— Yael Tamir

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Disability, Discrimination, and Fairness

It is widely agreed that people with disabilities are treated unfairly in our society: that they are the victims of pervasive discrimination, and that they have been denied adequate accommodation in areas ranging from housing construction to hiring practices to public transportation. As Congress declared in enacting the Americans with Disabilities Act (ADA) in 1990:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.... [emphasis added]

Yet people with disabilities were largely bypassed by the civil rights revolution of the past generation. Congress found that "unlike individuals who have

experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."

The ADA is intended to provide that legal recourse. It requires employers, transit systems and public facilities to modify their operations, procedures, and physical structures so as to make reasonable accommodation for people with disabilities. The ADA recognizes broad exceptions in cases where these modifications would result in "undue hardship" or pose risks to third parties. But in principle, the statute treats the failure to ensure that people with disabilities have an "equal opportunity to benefit" from a wide range of activities and services as a form of discrimination.

The ADA's anti-discrimination framework serves several important functions. It emphasizes similarities between the treatment of people with disabilities and the treatment of other minorities. It encourages society to find the source of the disadvantages experienced by people with disabilities in its own attitudes and practices, rather than in the disabilities themselves, and it supports the proposition that accommodating people with disabilities is a matter of justice, not charity.

The ADA encourages society to find the source of the disadvantages experienced by people with disabilities in its own attitudes and practices, rather than in the disabilities themselves.

But the anti-discrimination model offers little guidance on how much accommodation justice requires in the face of limited resources and severe disabilities. Its requirement of equal opportunity to benefit is ambiguous, and its emphasis on remedial action by private individuals and organizations overlooks our collective responsibility for constructing a more accommodating environment. The difficult problems of social justice raised by disabilities cannot be resolved by a simple injunction against discrimination.

The Civil Rights Analogy

The ADA has obvious similarities with recent civil rights legislation. It is designed to protect members of a group long subject to exclusion and prejudice, and it does this by removing barriers to the employment and accommodation of that group. The ADA recognizes that people with disabilities have suffered from false beliefs about their capacities, just as blacks and women have, and that their exclusion has been insidiously self-perpetuating, denying them the experience needed to overcome such biases.

The tendency to devalue those with "visible differences" goes beyond overt prejudice. A recent study of the impact of disability on neo-natal treatment decisions found that doctors and parents were both more likely to decline treatment for premature infants in cases involving a disability, while denying that the disability played any role in their decisions. The researchers saw this as "testimony to the insidious depths to which social stigmas associated with disability can embed themselves in individual consciousness."

Like earlier civil rights law, the ADA recognizes that such deeply embedded prejudice will work its way into the design of social structures and practices, and that stringent measures may be necessary to root it out. The enduring and pervasive impact of prejudice has long prompted the courts to give close scrutiny to "facially neutral" policies with an adverse impact on mistreated and disfavored groups. If public officials, for example, decide that children should attend schools in their own neighborhoods, this may appear to be a neutral basis for school assignment, but in fact it perpetuates the effects of residential covenants and other discriminatory practices that have kept minority families out of affluent suburban communities. Forced busing is not intended to achieve racially diverse schools *per se*, but to undo the enduring effects of those practices. Similarly, affirmative action is not designed to achieve demographic representativeness so much as to surmount the barriers to employment left by generations of exclusion.

The ADA's requirement of "reasonable accommodation" serves many of the same remedial functions, helping to overcome the enduring effects of conscious and unconscious discrimination. As Gregory Kavka notes, the rationales for affirmative action under earlier civil rights law are equally applicable to reasonable accommodation under the ADA: to establish the kinds of role models and "old-boy" networks that dominant groups now enjoy; to correct for the systematic errors in evaluation that result from stereotyping and over-generalization; and to compensate for the effects of past and ongoing injustice, such as exclusion from relevant training.

Deeply embedded prejudice works its way into the design of social structures, and stringent measures may be necessary to root it out.

On the other hand, the assumption that any adverse impact can be traced to prejudice, hatred, contempt, or devaluation — to what Ronald Dworkin has called "invidious discrimination" — is clearly less tenable for disability than for race or ethnicity. The ADA itself recognizes that the physical endowment of people with disabilities contributes to their disadvantage: the statute defines disability as "physical or mental impairment" that "substantially limits [the impaired person's] pursuit of major life activities." Thus, while the ADA rightly holds the attitudes and practices of the larger society responsible

for much of the limitation experienced by people with disabilities, it also recognizes an objective category of biological impairment; a person whose major life activities were limited *only* by other people's attitudes or practices would be "disabled" only in a derivative sense. The disadvantages experienced by people with disabilities arise from the interaction of their physical conditions and their social environment; those disadvantages can rarely be attributed to biology *or* social practice alone.

But this understanding of disability raises a critical question about the meaning of "equal opportunity to benefit" under the ADA. In one obvious sense, we assure equal opportunity by removing *legal* barriers to entry or access. (Keep in mind that legal barriers have, in the not-too-distant past, been oppressive and pervasive: in an era when one of the great liberal Supreme Court justices could declare that "three generations of imbeciles is enough," people with disabilities were often forbidden to work, to marry, to have children, or even to be seen in public.) Yet equal opportunity conceived as freedom from legal restriction is clearly inadequate to encompass the kind of accommodations to which people with disabilities seem entitled. A more demanding notion of equal opportunity would require us to undo the effects of invidious discrimination, past and present, *de jure* and *de facto*. But even this would fail to address the severely constricted opportunities available to many people with disabilities.

A much stronger sense of equal opportunity is suggested by the ADA's mandate to eliminate "architectural barriers" and other structural impediments to access and mobility. In order to provide equal opportunity in this sense, we must remove not only barriers imposed intentionally by law and prejudice, but also barriers imposed incidentally by designs and structures that ignore the needs of people with disabilities. We must reconstruct the social world to better accommodate the range of abilities of those who inhabit it.

Structural Accommodation and Equal Opportunity

This stronger conception of equal opportunity emerges from the feminist critique of earlier civil rights laws, with their focus on invidious discrimination. Many feminists argue that the design of physical structures and social practices to accommodate one group – able-bodied males – denies equal opportunity to everyone else. The structures and practices of our society embody a dominant norm of healthy functioning, just as they embody a dominant norm of male functioning. As Susan Wendell argues:

In North America at least, life and work have been structured as though no one of any importance in the public world... has to breast-feed a baby or look after a sick child.... Much of the world is also structured as though everyone is physically strong... as though everyone can walk, hear and see well....



*A paraplegic sportsman riding a monoski
Photograph by Bruce Barthel
National Handicapped Sports*

The public world provides stairs to the able-bodied so that they can overcome the force of gravity; it is less consistent about providing ramps so that paraplegics can do the same. To build stairs for the one group without building ramps for the second denies the latter equal opportunity to benefit.

This position was anticipated a generation ago by Jacobus tenBroek, who argued that the right of people with disabilities "to live in the world" required comprehensive changes in our physical and social order: not just in the design of buildings and public spaces, but in the duties of care owed by "abled" pedestrians, drivers, common carriers, and property owners to people with disabilities as they travel in

It has been argued that the refusal to make comprehensive changes in our physical and social order denies people with disabilities their right to live in the world.

public spaces. The refusal to make these changes denies people with disabilities their right to live in the world — the same right that was denied to blacks and women when they were excluded from public facilities.

However, providing equal opportunity for people with disabilities involves a more ambiguous and problematic commitment than the example of stairs and ramps might suggest. Ramps cost little more than stairs and are useful for people of widely varying abilities. The same is true for most of the design standards mandated by the ADA. These standards were developed more than 30 years ago, when tenBroek was writing, and their prompt implementation at that time would have probably brought about dramatic improvements in mobility and access at very slight cost.

But other opportunities to benefit do not come so cheaply. Technology sometimes offers considerable benefits, but only at enormous cost: one thinks of the devices that allow Stephen Hawking to "speak." More often, perhaps, the benefits of costly technology are slight or uncertain. Does the failure to provide quadriplegics with the latest advances in robotics deny them equal opportunity? We could spend indefinitely more on robotic research and equipment, but no matter how much we spent, the opportunities of some quadriplegics would remain severely constricted.

More broadly, we cannot reasonably expect to raise all people with disabilities to a level of functioning where they can receive the same benefit from facilities and services as able-bodied people. There are many areas of employment, transit, and public accommodation where it would be impossible to achieve absolute equality in the opportunity to benefit, and where significantly reducing inequalities in the opportunity to benefit would exhaust the resources of those charged with the task of equalization.

In addressing the issue of how much a decent society should spend to improve the opportunities of people with disabilities, an equal opportunity standard is either hopelessly ambiguous or impossibly demanding. Within the ADA, moreover, there is an unresolved tension between the equal opportunity standard it affirms and the degree of inequality that will remain acceptable under its regulatory guidelines. For example, although the public transit provisions of the statute speak of equal opportunity, the accompanying regulations will leave most people with disabilities with a far greater burden of mobility than most able-bodied people. Perhaps the regulations should require more. But however much they required, they would fall short of assuring equal mobility.

The fact of biological impairment, recognized by the ADA in its definition of disability, makes the notion of "equal opportunity to benefit" problematic. This is a serious defect in a statute that treats the denial of such opportunity as a form of discrimination.

Disability and Biological Misfortune

Recognizing impairments as biological disadvantages raises the question of the extent to which a decent society must accommodate natural misfortune. Such misfortune matters greatly in determining fair treatment within the smaller unit of the family. Consider, for instance, the father's dilemma presented by Thomas Nagel:

Suppose I have two children, one of which is quite normal and quite happy, and the other of which suffers from a painful handicap.... Suppose I must decide between moving to an expensive city where the second child can receive special medical treatment and schooling, but where the family's standard of living will be lower and the neighborhood will be unpleasant and dangerous for the first child — or else moving to a pleasant semi-rural suburb where the first child... can have a free and agreeable life.... [Suppose] the gain to the first child of moving to the suburb is substantially greater than the gain to the second child of moving to the city. After all, the second child will also suffer from the family's reduced standard of living and the disagreeable

environment. And the educational and therapeutic benefits will not make [the second child] happy but only less miserable. For the first child, on the other hand, the choice is between a happy life and a disagreeable one.

Because the second child is worse off, his interests have a greater urgency than those of the first child. Moving to the city would be the more egalitarian decision, and, if the difference in benefit to the two children is only slight, the fairer decision. But the urgency of the second child's interests does not give

The anti-discrimination framework limits the social response to disabilities by imposing the costs of accommodation primarily on individuals.

them absolute priority; we would think it unfair to the first child to reduce him to the same level of misery as the second for very slight gains in the second child's well-being.

This dilemma is writ large in the allocation of educational resources for children with learning disabilities. Special education is very expensive, and many financially strapped school systems find that providing more than minimal benefit to severely disabled children would require drastic cutbacks in other programs, such as honors classes for gifted students. Yet the Education for All Handicapped Children Act of 1975 (EHA) mandates "free appropriate education" for all children, regardless of ability. This mandate has been variously interpreted to mean that children with disabilities must receive "some educational benefit," that they must receive benefit "commensurate" with that accorded to normal children, or that they must receive the "maximum possible" benefit.

William Galston makes a powerful argument for a commensurate benefit standard:

In spite of profound differences among individuals, the full development of each individual — however great or limited his or her natural capacities — is equal in moral weight to that of every other.... [A] policy that neglects the educable retarded so that they do not learn how to care for themselves and must be institutionalized is, considered in itself, as bad as one that deprives extraordinary gifts of their chance to flower.

But technology makes "natural capacity" and "full development" very elastic notions, and this raises serious problems for a standard of equal opportunity that requires a comparison of actual and potential development.

If a society were a family, some loss of educational benefit to the most gifted students might seem justified in a school system intent upon enhancing opportunity for students with disabilities. But even in that case, an allocation that left the most gifted at the same low level of educational development as the most grievously disabled would seem grossly unfair. And it is not clear that even the modest sacrifices that would be appropriate within a family would be appropriate for the larger society; perhaps one feature that distinguishes families from larger, impersonal social units is a greater concern for the welfare of each member than for each one's share of external resources.

Clearly, biological misfortune raises issues about the meaning of fair treatment that the ADA's anti-discrimination framework gives us little guidance in resolving. That framework also limits the social response to disabilities by imposing the costs of accommodation primarily on individuals. As we saw in the case of special education, the larger society may not always be able to bear such costs. But in other cases, burdens that would be excessive for an individual or agency may well be reasonable for a city or state. An individual should not have to plead undue hardship in order to avoid costs properly imposed on the community; a person with disabilities should not be denied accommodation because it

In order to help those with the most severe and pervasive disabilities, the government must significantly increase its investments in welfare, employer subsidies, and job training.

imposes an undue hardship on an individual employer.

A recent analysis of the employment provisions of the ADA predicted that its anti-discrimination framework would have the effect of confining its benefits to a "disability elite" — those workers "who have the least serious disabilities and the strongest education, training, and job skills." Because employers have to bear the costs of accommodation, they will "skim the 'cream' of the population with disabilities," bypassing those with more severe and debilitating conditions. In order to help those with the

most serious and pervasive disabilities, the government must significantly increase its investments in welfare, employer subsidies, and job training. But such measures are matters of distributive justice, and the fact that they are not among the remedies mandated by the ADA suggests the limitations of the anti-discrimination model upon which the current law rests.

Nevertheless, the specific provisions of the ADA on employment, transit, and public accommodation reflect, in Chief Justice Earl Warren's famous phrase, "the evolving standards of decency that mark the progress of a maturing society." To say that the question of fair treatment for people with disabilities does not have an obvious or final answer is not to say that we cannot reach a consensus on what fairness requires at our level of affluence and technological development. The ADA represents a major step towards achieving such a consensus.

— David Wasserman

Sources: S. Trowers-Crowley, *ADA Primer: A Concise Guide to The Americans With Disabilities Act of 1990* (Prentice Hall, 1990); Daryl Evans, "The Psychological Impact of Disability and Illness on Medical Treatment Decisionmaking," *Issues in Law & Medicine*, vol. 5, no. 3 (1989); Gregory S. Kavka, "Disability and the Right to Work," *Social Philosophy & Policy*, vol. 9, no. 1 (1992); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); Ron Amundson, "Disability, Handicap, and the Environment," *Journal of Social Philosophy*, vol. 23, no. 1 (1992); Michael A. Rebell, "Structural Discrimination and the Disabled," *Georgetown Law Journal*, vol. 74 (1986); Susan Wendell, "Toward a Feminist Theory of Disability," *Hypatia*, vol. 4, no. 2 (1989); Jacobus tenBroek, "The Right to Live in the World: The Disabled in the Law of Torts," *California Law Review*, vol. 54 (1966); Thomas Nagel, "Equality," in *Readings in Social and Political Philosophy*, edited by Robert M. Stewart (Oxford University Press, 1986); William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge University Press, 1991); Richard V. Burkhauser, "Beyond Stereotypes: Public Policy and the Doubly Disabled," *The American Enterprise* (September/October 1992).

Defining Basic Benefits: Oregon and the Challenge of Health Care Reform

On March 19, the Clinton administration approved Oregon's proposal to extend Medicaid benefits to thousands of poor people who are currently ineligible for the program while limiting Medicaid coverage of health services to include only those that are judged to be most effective. The Medicaid reform is part of a larger plan designed to assure access to health care for all of the state's residents. The Bush administration had rejected an earlier version of the Oregon proposal, ruling that it violated provisions of the Americans With Disabilities Act (ADA). But Bill Clinton endorsed the proposal

during the presidential campaign, and in February he promised the nation's governors that he would be open to innovations in the Medicaid system, which operates with state and federal funds.

The decision to allow implementation of the Oregon proposal comes at a time when a White House task force is developing a national health care reform plan. The two goals of this task force are the same ones that Oregon officials have been pursuing since their own reform process began in 1989: to secure health care for all citizens and to gain control of rising health care costs.

The Health Care Crisis

As Mr. Clinton has repeatedly observed, the current problems in the American health care system affect not only the poor and disenfranchised, but also many people who once took affordable health care for granted. According to the Kaiser Commission on Medicaid, about 36 million Americans have no health insurance. Working people are continually joining the ranks of the uninsured — as their employers drop health plans, as they lose their jobs, or as those with preexisting conditions are turned away by insurance companies. Workers who are insured, and their employers, are feeling the pain of rising health care costs, as more and more of the burden of paying for health care shifts to private payers.

The President has framed the health care issue in human terms, speaking with empathy of people he has met who are without insurance or fearful of losing it. He has also emphasized the impact of the health care crisis on long-term economic strength. Rising health costs make it more difficult for American businesses to compete globally and are driving much of the expected growth in the budget deficit. Federal spending for Medicare and Medicaid was \$200 million in 1992, and is expected to double by 1998; the two programs account for 46 percent of the projected increase in federal spending from 1992 to 1998.

Hidden Costs and Necessary Choices

At first glance, the two goals of national health reform — universal coverage and cost containment — might appear to be at odds. It would seem that covering more people will cost a great deal more money than we spend now. But under the current system, people with health insurance are already paying for the care provided to those who don't have insurance; the costs of that care are being passed on, routinely and invisibly, in the form of higher insurance rates and higher fees for medical services. Such cost-shifting also occurs whenever the government cuts Medicare or Medicaid reimbursements, which is why such cuts offer only an illusion of savings. Universal access would allow us to control costs we can't control now because the system is so fragmented. It would also allow more people to receive preventive and primary care before their health conditions became serious and costly to treat.

As one way of containing costs, most reform plans that provide for universal coverage, including the Oregon plan and the "managed competition" model that Mr. Clinton is likely to propose, require the formulation of a basic benefits package. What we call "basic benefits" are those that we think any decent society would offer to all its citizens. Because the

idea of excluding some health services from coverage is a political land mine, the talk surrounding basic benefits has often been less than precise: even as politicians endorse the idea of a basic or core benefits package, they tend to indicate that nothing will be left out of it. In his campaign manifesto, *Putting People First*, Mr. Clinton promised that "every American will be guaranteed a basic health benefits package that includes ambulatory physician care, inpatient hospital care, prescription drugs, basic mental health... [and] expanded preventive treatments. We'll provide more services to the elderly

Because the idea of excluding some health services from coverage is a political land mine, the talk surrounding basic benefits has often been less than precise.

and disabled by expanding Medicare to include more long-term care."

In true campaign style, this statement seems to have something for everyone. More recently, in a televised town meeting on February 10, Mr. Clinton suggested that there is enough administrative waste in the current system to fund all care, including a government long-term care program. His use of the phrase "basic benefits" seemed to imply, in the end, *all* benefits.

And yet, inherent in the word "basic" is the notion that not all medical services would be universally available under the plan. This, after all, is what makes a basic benefits package a cost-containment measure: it embodies a recognition that perhaps we cannot afford to provide all possible care to all people. And as soon as we ask what services *won't* be provided, we find ourselves confronting a complex ethical problem.

Oregon faced this problem head-on when it decided to amend its Medicaid program; and as a result of its efforts to develop a reform plan, it now has the most comprehensive experience of any state in constructing a basic benefits package based on clearly articulated principles. This experience holds important lessons for health care reform on the national level, since the question of how a basic benefits package should be constructed is likely to be a subject of continuing debate, even after the White House task force makes its recommendations.

The Oregon Approach

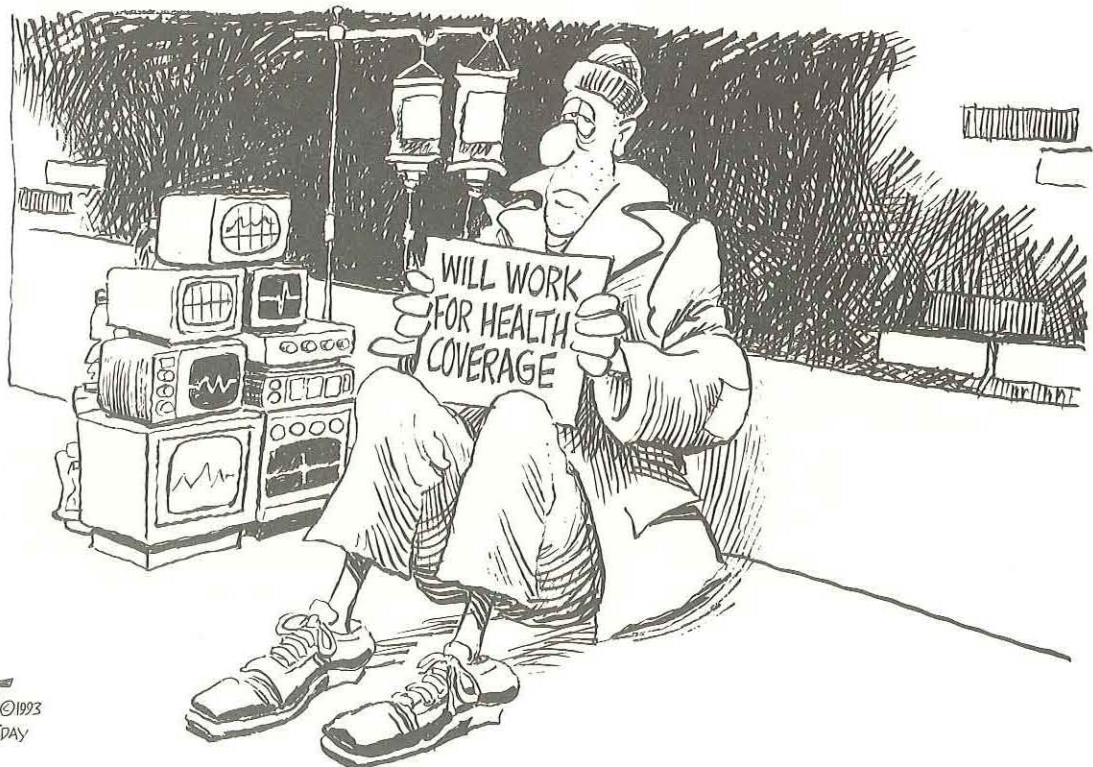
From the beginning of its reform process, Oregon's view was that the current system rations health care according to ability to pay. Such rationing is not explicit, but instead is the result of decisions about things other than health care benefits, such as the distribution of insurance coverage and provider reimbursement. The baffling categories of Medicaid eligibility are also a form of rationing, allowing some citizens to qualify for care but not others.

The Oregon plan will reform this system by bringing all citizens with incomes below the poverty line into the Medicaid program, increasing the number of eligible residents from 240,000 to 360,000. (At present, fewer than half of the poor people in the state qualify for Medicaid benefits.) However, in order to help finance this extension of coverage to more people, the state will restrict its Medicaid funding of health services to those that are most effective. It will not cover some services that are of limited benefit, and it will add others (hospice care, for example) that Medicaid does not cover now.

As Oregon set out to formulate its basic benefits package, it asked citizens to articulate community values that would guide the process, and gathered health experts' assessments of the effectiveness of

particular services. After a series of revisions in methodology, a state commission prepared a prioritized list of these services, and the state legislature agreed to fund 568 of the 688 items on that list. Oregon will require private employers to offer this same basic benefits package to an additional 330,000 workers and immediate family members who currently have no insurance, and it will create an insurance risk pool for otherwise uninsurable Oregonians.

In future years, if the state faces budgetary pressures, the legislature can vote to fund a smaller portion of services. This feature of the proposal came under sharp criticism last year from Sara Rosenbaum of the Children's Defense Fund, who argued that there was no assurance that the legislature would continue to finance an adequate level of health care for the state's most vulnerable citizens. Oregon responded by noting that under its proposal, the legislature could not save money by cutting *people* from Medicaid, as many states currently do. More recently, Gov. Barbara Roberts has promised that for the first two years of the program, the funding cutoff will not be lowered below #568, and the Clinton administration has said that any future cutbacks in service coverage must be approved by the Department of Health and Human Services.



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Doug Marlette, New York Newsday

Ranking Health Care Services

In its first attempt to develop a prioritized list of health care services, the Oregon commission looked at three categories of data and combined them into a formula for ranking medical treatments for specified conditions: 1) expected clinical outcomes of condition/treatment pairs; 2) net cost of these treatments; and 3) public values concerning various health states. The data on expected clinical outcomes were gathered from expert practitioners and researchers across the country. Public values were gleaned from a telephone survey in which respondents gave relative rankings to various health states.

In May 1990, the commission ran these three sets of data on a computer and came up with a ranking of

The pursuit of equity and efficiency in allocating health care resources inevitably collides with other competing values.

services based on measurements of how cost-effective they were. But this approach often led to non-sensical results. For example, almost everyone would say that an appendectomy is more important than tooth capping: though the latter procedure may relieve suffering for a great many people, appendectomies save lives. But since an appendectomy costs about 150 times as much as tooth capping, it ranked below tooth capping on Oregon's first list.

As David Hadorn, one critic of this approach, observed, the pursuit of equity and efficiency — the most health for the greatest number of people at the lowest cost — inevitably collides with other competing values. These values include what ethicists call the Rule of Rescue: our perceived duty to act when an identified person's life is threatened and it is possible to save it. Although some analysts proposed alternative methodologies that would still have kept cost as a factor in determining what health services to cover, Hadorn concluded that the commission should consider *only* the net benefit of services, without regard to cost.

The Oregon commissioners largely agreed with Hadorn's view, and in revising the first list they all but removed cost as a factor, relying instead on net benefit as the primary basis on which to evaluate health services. The commission also developed a set of categories that describe types or degrees of health benefit. The highest-ranking category was

"Treatment of acute, life-threatening conditions, where treatment prevents imminent death with a full recovery and return to previous health state." The lowest-ranking category was "Treatment of fatal or nonfatal conditions with minimal or no improvement in quality of well-being or life span." The commissioners assigned each of the condition/treatment pairs to one of the categories, and ranked them within categories according to their degree of net benefit. In this ranking scheme, where cost was no longer a significant factor, expensive but effective lifesaving treatments that may have been at the bottom of the first list moved up higher on the second. Those treatments that provide little benefit, or whose effectiveness is uncertain, were at the bottom of the list.

Finally, after this second list was generated, the commissioners made adjustments in the rankings in response to the views expressed at citizens' meetings concerning health care priorities. They gave added priority to preventive measures, moved maternity care services higher on the list, funded some services for reasons of compassion, and denied funding for conditions that get better on their own or for which a home remedy is sufficient. At this stage in the process, the commission allowed cost to be a minor consideration in some cases.

In response to citizens' views, the commissioners gave added priority to preventive measures, moved maternity care services higher on the list, and funded some services for reasons of compassion.

Characterizing Treatments and Outcomes

Oregon's revised list, which was completed in August 1992, met some of the objections that had been brought against the earlier scheme, but it also continued to meet with criticism. In his evaluation, David Hadorn argued that the condition/treatment pairs were not defined in sufficient detail to take different types of patients into account. For example, in determining whether breast cancer is "treatable," the commission did not distinguish among different cell types and stages of breast cancer, or among all the different treatments for the disease (chemotherapy, surgery, radiation).

Hadorn believed that it was possible to fine-tune the scheme so as to remedy this flaw. But other critics weren't so sure. They wondered whether the subtleties of case-by-case medicine can be reflected in official definitions of conditions and treatments. Won't there be patients who would receive a signifi-

cant net benefit from treatment, but whose claim to services will go unrecognized because their specific condition hasn't been adequately differentiated on the list? If so, then does the cost of overlooking such cases outweigh the gains in equity and efficiency produced by use of the definitions?

As the federal government's recent creation of the Agency for Health Care Policy Research suggests,

Critics wondered whether the subtleties of case-by-case medicine can be reflected in official definitions of conditions and treatments.

increasing attention is being focused on the development of clinical outcomes data that would be nuanced and reliable enough to assuage such concerns. Many policymakers, including Mr. Clinton, have called for a larger investment in outcomes research. But experts agree that most of the data now in hand are not yet adequate to distinguish appropriate from inappropriate care, and it is unclear when and if they will be adequate to provide a basis for making coverage decisions. On the other hand, some supporters of Oregon's approach have pointed out that case-by-case medicine yields a significant amount of inappropriate and harmful care, and so should hardly be held up as an ideal standard against which clinical guidelines based on outcomes data are to be judged. They argue that it would be folly to wait for "perfect" guidelines before implementing reforms that would improve the current system.

Evaluating Different Health States

In creating its prioritized list of services, the Oregon commission acted on the view that some health services are more effective than others, and that effectiveness is measured by the benefit a service produces in terms of improved functioning and/or life span. In order to measure this improvement, Oregon placed a value on different health states. It did so by conducting a telephone survey in which Oregonians were asked to rank such states, including various physical and mental impairments, on a scale ranging from perfect health to death. These ratings were then used, along with the clinical outcomes data, to calculate the net benefit resulting from treatment (as opposed to non-treatment) of each condition on the commission's list.

It was Oregon's use of the telephone survey data that provided the grounds for the initial rejection of its Medicaid proposal. The Bush administration argued that the quality of life experienced by persons with disabilities is systematically undervalued by others who do not share their condition. As a result of this bias, treatments of particular importance to persons with disabilities were said to have received unfairly low rankings on the prioritized list. The Bush administration therefore found that the Oregon proposal violated the ADA, which says that "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

This aspect of the first Oregon proposal raises both legal and ethical questions. The ethical question is: does the assignment of differential values to particular health states treat persons with disabilities unfairly? The legal question is: does the ADA trump any attempt at reform that includes judgments about outcomes of medical procedures?

It is certainly true that the values placed on different health states affect the probability that persons with disabilities will receive treatment. The philosopher Paul Menzel describes a trade-off that persons with disabilities face in these circumstances. The

The Bush administration argued that the quality of life experienced by persons with disabilities is systematically undervalued by others who do not share their condition.

lower their initial health state is rated in the survey, the less likely persons with disabilities are to receive *lifesaving* treatment, but the more likely they are to receive treatment that would *improve their condition*. On the other hand, if the functional state of persons with disabilities is rated almost as high as that of the non-disabled, that will improve their position in competition for lifesaving treatment, but treatment that would improve their functioning will no longer be as high on the list.

In his analysis of the first Oregon proposal, Menzel argued that persons with disabilities were underrepresented in the statewide survey, and that therefore

the reform plan was discriminatory. It is persons with disabilities, Menzel wrote, who should decide whether they want to make the trade-off between lifesaving and condition-improving treatment. Furthermore, he argued that it is dangerous if ratings of functional states "represent some people rating other people's lives — especially lives of which they know little and whose conditions they never anticipate sharing."

David Hadorn disagreed with Menzel's criticism. He wrote that "Oregon was correct in surveying generally healthy citizens... because the inevitable biases

Some scholars maintain that it is impossible to average the perceptions of persons with and without disabilities in order to produce a valid valuation of outcomes.

of [acutely ill patients] would hopelessly confound the rating process." But it seems unreasonable to describe the views of people with disabilities as inevitably biased and therefore unworthy of consideration. If we are to construct a basic benefits package that rests on clinical outcomes and that values those outcomes differentially, it is not only more valid, but ethically imperative, to include the perceptions of persons with disabilities about their own conditions.

Some scholars, however, maintain that it is impossible to average the perceptions of persons with and without disabilities to produce a valid valuation of outcomes, and that a social policy based on such an average would be unethical even if the views of people with disabilities were fairly represented. Although Oregon officials continue to believe that an average of citizens' perceptions provides legitimate grounds for making coverage decisions, their revised proposal no longer proceeds on that basis.

Lawful Reasons for Excluding Services: Oregon and the ADA

A passage from the Bush administration's analysis of the Oregon proposal goes to the question of whether the ADA makes it *illegal* to consider clinical outcomes data in allocating coverage for health services. In formulating its list of services, Oregon was free, the analysis said, to "consider, consistent with the ADA, any content-neutral factor that does not take disability into account or that does not have a particular exclusionary effect on persons with disabilities." However, "a decision not to cover a treatment based *entirely* on the existence of a disabling condi-

tion... would violate Title II of the ADA" [emphasis added].

In support of this distinction, the Bush administration cited the 1985 Supreme Court case *Alexander v. Choate*, in which the Court ruled that Tennessee Medicaid could shorten the length of hospital stay that it would pay for, even though that action might have a disparate impact on persons with disabilities. In that opinion, the Court found that there is a difference between a factor that has a disadvantageous effect on some persons with disabilities, and one that contains a bias against persons with disabilities as a class.

One aspect of the Oregon proposal that received extended discussion in the Bush administration analysis will further illustrate this point. Oregon initially ranked liver transplants for patients who are alcoholics at #690, below the funding cut-off, while it ranked transplants for non-alcoholics at #367, well above the cut-off. The Bush administration claimed that this difference in ranking seemed to rest "entirely on the basis of a disabling condition (alcoholism)," and therefore violated the ADA.

But Oregon officials say that the presence of a disabling condition alone was not the deciding factor in their original ranking. The state commission, they

There is a difference between a factor that has a disadvantageous effect on some persons with disabilities and one that contains a bias against persons with disabilities as a class.

say, acted on the basis of data indicating that patients with alcoholic cirrhosis of the liver have poorer outcomes from transplants than patients with other kinds of cirrhosis. Subsequently, the commission learned that it had been misinformed: the outcome of liver transplants is not actually related to the underlying cause of the cirrhosis. But it is true that an alcoholic patient who continues drinking after a transplant is more susceptible to recurrence of the disease than a non-alcoholic or a rehabilitated alcoholic. That is why, for example, the Medicare program makes coverage of liver transplants for alcoholic patients contingent upon "evidence of sufficient social support to assure assistance in alcoholic rehabilitation." Such a policy does not deny transplants to alcoholic patients because they are alcoholics, but rather because their disability diminishes the ultimate likelihood of success for that particular treat-

ment. If Oregon were to adopt the same policy, it would not be violating the ADA. In fact, though, its new list includes coverage of liver transplants for all patients with cirrhosis of the liver.

In response to the Bush administration's concerns about quality-of-life judgments, Oregon has removed assumptions about the value of different health states from its methodology. It did so by discarding the results of its telephone survey and by dismantling the list of categories assigning values to various degrees of health benefit. In the latest ranking scheme, condition/treatment pairs are initially ranked based on the probability of preventing death. If two items tie, they are then ranked based on the probability that the patient will return to an asymptomatic state. If there is still a tie between two items, the one that costs less receives the higher ranking.

Finally, Oregon's revised proposal offers coverage for a number of treatments – intensive care for extremely low-birthweight babies, for example – that were not covered on the initial list. Though some groups representing persons with disabilities were satisfied with these changes, more than 70 advocacy organizations joined on March 18 in submitting an appeal to Mr. Clinton, urging him to reject the Oregon proposal. Clearly, the danger of discrimination in a program designed to allocate coverage for health services is one of the lessons that Oregon's experience, and the reaction to it, has made explicit.

The Prospects for National Reform

As Oregon's long struggle to win approval of its reform plan suggests, there are ethical and technical problems, as well as political ones, with explicit refusal to fund even minimally effective treatments as a means of controlling costs. Even the Oregon plan, as approved, funds almost all effective services. The state expects to save only about 3 percent of its Medicaid costs over time. However, it will realize additional savings through the introduction of managed care and the new mandates requiring employers to provide health coverage to their workers. As a result, although the Medicaid program will now increase the number of people it covers by 50 percent, the reform plan as a whole is budget-neutral.

If there is to be any limitation at the national level on the use of health services, it will probably be accomplished at first through methods less direct than denying coverage for particular services. One such method, common in other countries, is global budgeting – a form of "supply-side" rationing which would limit the availability of health care resources, including expensive technologies. For example, doctors and hospitals with fixed budgets could no longer

buy as much state-of-the-art diagnostic equipment (such as MRI machines) as they do now. A smaller supply, in turn, would limit utilization of such costly services. Another method is to rely on managed care to reduce the provision of inappropriate and harmful treatment, which by some estimates accounts for one-quarter to one-third of all care. Outcomes data and resulting clinical guidelines are likely to be used in this way before they are used to make coverage decisions on a national basis.

Since Oregon submitted its original proposal in 1989, this country has come a long way towards recognizing the inequities in the health care system and the need to limit health care spending. Whatever its shortcomings, the Oregon plan is the first to go beyond rhetoric to define a basic benefits package. Although a national health care reform plan enacted in the next year or two is unlikely to imitate Oregon's approach, denial of coverage for some beneficial services is inevitable in the long run. New technology and an aging population ensure that less controversial cost-containment measures will only temporarily slow the rise in health care spending. Sooner or later, Americans will have to decide just what they view as basic health care.

— Jane Forman

Jane Forman is a doctoral candidate in health policy at the Johns Hopkins School of Hygiene and Public Health. Sources: personal communication with Professor Ruth Faden, Johns Hopkins School of Hygiene and Public Health; telephone interview with Lynn Read, director of the Oregon's Prioritized Health Care System, March 24, 1993; *The New York Times*, March 18, 20, and 28, 1993; *The Washington Post*, March 20, 1993; Bill Clinton, *Putting People First* (1992); the Kaiser Commission on the Future of Medicaid, *Medicaid at the Crossroads* (1992); John A. Kitzhaber, "Rationing Health Care: The Oregon Model," *The Center Report: The Center for Public Policy and Contemporary Issues*, vol. 2, no. 1 (Winter/Spring 1990); John A. Kitzhaber, speech to the Estes Park Institute, Monterey, Ca., October 25, 1992; Sara Rosenbaum, "Poor Women, Poor Children, Poor Policy: The Oregon Medicaid Experiment," and Joseph M. Wiener, "Rationing in America: Overt and Covert," in *Rationing America's Health Care: The Oregon Plan and Beyond* (Brookings Institution, 1992); David C. Hadorn, "The Problem of Discrimination in Health Care Priority Setting," *JAMA*, vol. 268, no. 11 (1992); David C. Hadorn, "Setting Health Care Priorities in Oregon: Cost-effectiveness Meets the Rule of Rescue," *JAMA* (May 1, 1991); California Public Employees Retirement System, "Designing a Fair and Reasonable Basic Benefit Plan Using Clinical Guidelines" (1992); Louis Sullivan, letter to Oregon Governor Barbara Roberts, accompanying "Analysis Under the Americans With Disabilities Act of the Oregon Reform Demonstration" (August 3, 1992); Paul T. Menzel, "Oregon's Denial: Disabilities and Quality of Life," *Hastings Center Report*, vol. 22, no. 6 (1992).

The Rights of the Living Generation: Jefferson and the Public Debt

I set out on this ground, which I suppose to be self evident, "that the earth belongs in usufruct* to the living": that the dead have neither powers nor rights over it.... Then no man can, *by natural right*, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.

What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals.... Then no generation can contract debts greater than may be paid during the course of its own existence....

On similar grounds it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please.

Thomas Jefferson to James Madison
Paris, September 6, 1789

* in trust. "Usufructus," wrote the 18th-century scholar Sir Robert Chambers in his Oxford lectures on Roman and English law, "is a right to make all the use and profit of a thing that can be made without injuring the substance of the thing itself."

Jefferson's letter of September 6, 1789, to James Madison, setting out the principle that "the earth belongs in usufruct to the living," is a key text in the Jefferson canon. He was writing home from Paris, at an early stage in the French Revolution; a few weeks before, the French nobility had renounced its feudal privileges, and Jefferson now set about providing Madison with a catalogue of the difficult tasks facing the National Assembly, from revising the laws of inheritance to deciding whether the French nation was obliged to pay off the debts of the crown. This was also the year the new American Constitution

went into effect — a constitution which, in light of Jefferson's principle, ought to have been made binding only for a length of a generation. For if one accepts the idea that all powers and rights belong to the living, it follows that "no society can make a perpetual constitution, or even a perpetual law."

The letter to Madison argues that each generation must leave its successors freedom — freedom from debt and freedom to make their own political choices. At the same time, by making his principle universal, Jefferson also places a significant limitation on both the present and the future, since the freedom each generation enjoys is circumscribed by the duty to respect the rights of its successors.

"The Right of Successive Generations"

The immediate context for Jefferson's thoughts on debt was an ongoing conversation, begun late in 1788, with a number of his Parisian friends. That discussion grew out of the crisis provoked by Louis XVI's decision to summon the Estates General, after all other possibilities of restoring the monarchy's finances had apparently failed. For Jefferson and his French friends — above all, Lafayette — there was suddenly and unexpectedly an opportunity to remake the French state, to "regenerate" it, in the patriotic language of the day, and place it on a constitutional basis. "Every body here," Jefferson reported early in 1789, "is trying their hands at forming declarations of rights."

By mid-1789, Jefferson and Lafayette had arrived at the idea of a right in each generation to revise the constitution at fixed intervals — "le droit des générations qui se succèdent," they called it, in a version worked out in late June and early July. Lafayette introduced this version to the National Assembly on July 11, only three days before events in the streets of Paris overtook the theorizing at Versailles. But when, on August 26, the Assembly adopted a final version of the *Déclaration des droits de l'homme et du*

citoyen, it was silent on the right of each generation to revise the constitution. For Jefferson and his friends, this must have been a sharp disappointment, though Jefferson did not say so, limiting his comments on the subject to the remark that "Their declaration of rights is finished."

But if the declaration was finished, Jefferson was not. The "*droit des générations qui se succèdent*" was obviously much on his mind that summer, and by September he was pondering the wider implications of the generational principle.

The themes of debt and the rights of the living generation were clearly tied to Jefferson's vision of an American society permanently liberated from the "contagious and ruinous errors" of the Old World. And, from a more strictly biographical point of view, the two themes were also tied to his own increasingly problematic financial situation. Jefferson belonged to an elite class of Virginia planters whose dependence on British merchants and British credit had helped to fuel pre-Revolutionary tension in the Old Dominion, and debt remained a powerful issue for Virginians like Jefferson even after independence. In the autumn of 1789, Jefferson himself knew that unless he could reach agreement with his creditors, ruin was a real prospect, and he was preparing to take his long-deferred leave and return to Virginia for six months or so in order to put his affairs in order.

Jeffersonian Legacies

Peter S. Onuf, editor

A group of leading scholars, including Herbert Sloan, Gordon S. Wood, Merrill D. Peterson, Joyce Appleby, and Jack P. Greene, among others, re-evaluate the legacy of Thomas Jefferson for our time.

Jeffersonian Legacies provides the next generation of students, scholars, and citizens a better understanding not only of Jefferson in his own world but also of his influence in the shaping of ours.

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Replying in 1786 to questions posed by the French writer Jean Nicholas Dêmeunier, Jefferson described the debts that he and other Virginians owed to British creditors as "hereditary from father to son for many generations, so that the planters were a species of property annexed to certain mercantile houses in London" (or, he could have added, annexed to houses in Bristol and Glasgow as well). In suggesting that the debtor was the slave of his creditor, Jefferson was exposing the rawest of raw nerves. To raise the prospect of slavery was a standard move in late-eighteenth-century Anglo-American political rhetoric, and one with particular resonance in slave-holding Virginia. That slaves had no independence went without saying, and without that independence, without control over one's own resources, there was no material basis for republicanism as the founding generation understood it. Debt as a kind of slavery, debt as the practical negation of liberty — Jefferson could hardly have been more explicit.

The Eighteenth-Century Background

Much of what Jefferson had to say about public debts derived from a full stock of late-eighteenth-century ideas and attitudes, and his text is a compendium of the standard assumptions of his day, examined and unexamined alike, about politics and economics. His was the conventional wisdom, codified in the works of Hume and Adam Smith and a hundred other commentators and capable of being summed up in the notion that a nation, like an individual or a family, cannot spend more than it takes in without risking bankruptcy and ruin. Jefferson accepted this premise without question; it conformed to the teachings of history as he understood them, and it was validated by his own experience as a Virginia planter. Debts were dangerous, and it was best to avoid them whenever possible; the thought that they could be made a lever of sound public policy was, as Jefferson might have put it, sheer heresy. Moreover, it was beyond dispute for Jefferson and most of his contemporaries that public debts sooner or later turned into instruments of political corruption. As Jefferson was to insist again and again in the 1790s, public debts created a dangerous and separate interest in the legislature fundamentally at odds with the good of society as a whole.

Similarly, the idea that the earth belongs to the living was not at all extraordinary in late eighteenth-century thought. When Jefferson observed in 1785 to the Rev. James Madison, president of the College of William and Mary, that "The earth is given as a common stock for man to labour & live on," he simply echoed a theme that natural law writers had insisted on since at least the seventeenth

century. By Jefferson's day, it was a cliché, but an important one nonetheless. God, after all, had given the earth to mankind, and if Jefferson's presentation remained resolutely secular, the point was as well established among the religious as among those of a more philosophical bent.

Even in the criticism of the dead hand of the past, Jefferson's arguments were by no means novel in 1789. The late eighteenth century had to be reminded — vehemently reminded — by Edmund Burke in 1790 that the past, as well as the present and the future, had its rights, and with that commanding intervention the terms of debate would begin to shift decisively. But in September 1789, Jefferson could assume that what he had to say about the oppressive weight of the past was accepted by all thinking men. Turgot's championing of the living generation in his essay on endowments for the *Encyclopédie* set the tone for progressive opinion throughout Europe. And it was entirely in keeping with that opinion to say that a people ought to be free to make its own decisions about political arrangements, and that constitutions, no longer regarded "with sanctimonious reverence," should be frequently revised.

Jefferson's Originality

In all of these respects, then, Jefferson was doing little more than repeating the standard arguments of late-eighteenth-century political thought. Yet in the end there is still something different about Jefferson's principle, and it is not simply that he goes to extremes others might have avoided, though that is part of it. The difference chiefly lies, I think, in Jefferson's modification of the standard terms of reference: a modification that involves both his use of the word "generation" in place of the standard Anglo-American and French practice of referring to "the people/le peuple," and his addition of the qualification "in usufruct" to the otherwise familiar notion that the earth belongs to the living.

Jefferson's adoption of "generation" as the favored term is an especially striking linguistic shift. Political discourse in the late-eighteenth-century United States made little if any use of the word; it does not, for example, appear in the pages of *The Federalist*. Instead, one normally referred to "the people," and while that phrase certainly included the present generation, it was somewhat different in emphasis and significance. To speak of "the people" is to speak abstractly; as Edmund S. Morgan has reminded us, "the people" is perhaps the ultimate fiction. "The people" never dies; it has the same corporate immortality and collective right of sovereignty that attached to the king's political body in earlier theory.

A "generation," on the other hand, and certainly a

"generation" as Jefferson defined it, is specific and identifiable. (Using demographic tables compiled by the French naturalist Buffon, Jefferson had arrived at the conclusion that a new generation comes of age and assumes power every nineteen years.) Unlike "the people," a generation has a limited duration, so that there will be a time after which it no longer has rights. That limitation is critical, for it allows Jefferson to establish with precision who can exercise

It should be possible, Jefferson said in his second inaugural address, "to meet within the year all the expenses of the year, without encroaching on the rights of future generations . . ."

rights and when. With "the people," rights are, in effect, inchoate; with a "generation," we know exactly what we are dealing with.

The addition of the phrase "in usufruct" is another means by which Jefferson brought greater precision to a familiar principle. Unlike "generation," which comes into the picture midway in the course of his deliberations preceding the letter to Madison, "in usufruct" is the product of the final stages in the formulation of Jefferson's doctrine. It expressly appears only in the letter to Madison, and not in any of the earlier documents. Yet it may be this late addition that most distinguishes Jefferson's doctrine from other versions in circulation. As Jefferson envisioned it in the letter to Madison, the estate any generation enjoys would be an estate for life only, an estate that must be passed on intact to the next in line of succession. Thus any generation would have only the limited interest and rights of a tenant for life. It could not commit waste or burden the estate with debts for the next tenant to pay; it could appropriate for itself only the current proceeds.

Like a trusted family counselor, Jefferson accordingly drew up a deed of settlement ensuring future generations the right to benefit from the common property, and the means he employed to effect this — a restriction, or entail, upon the use of that property — is the one a good eighteenth-century Anglo-American lawyer might have chosen. But "entail" was not a word that Jefferson could have used without raising eyebrows; as the leading American law reformer of his day, he was filled with hostility for anything that smacked of the "feudal system." Hence his need to find a more acceptable

way of putting the matter, and, in all probability, his resorting to "in usufruct," with its Roman, civil law overtones and its relative lack of connection to the common law tradition.

Even if Jefferson was only speaking metaphorically in 1789, his willingness to revive an outmoded legal doctrine he had consistently decried must strike us as paradoxical. We might further note the almost Burkean cast of Jefferson's letter. A year later, in 1790, Burke, who saw society as a "partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born," would write passionately of the limits on the right of any one generation to do as it wished, of its duty to preserve and pass on unimpaired to the future the heritage entrusted by the past to the present. To be sure, any suggestion of similarity would have outraged Jefferson, but authors are not always the best readers of the texts they create.

It is apparent from the eagerness with which he writes to Madison, the almost breathless quality of the catalogues of past abuses and the visions of the future, that Jefferson knew he had done something important, important enough that he was willing to assign to himself something he rarely claimed — priority. (As he notes in the letter, "The question Whether one generation has a right to bind another, seems never to have been started either on this or our side of the water.") The principle that the earth belongs in usufruct to the living generation of nineteen years' duration was, he felt, something new, and it confirms what historians have long argued: the standard doctrines of the Enlightenment had a radical potential that made them far more incendiary than some of their authors intended. Taking pride in his accomplishment and asserting the originality in his way of seeing things, Jefferson was convinced that his principle would preserve and further the republican experiment.

A Skeptical Reply

We can appreciate what must have been Jefferson's disappointment when James Madison politely but firmly told him that it would not work. Madison's February 4, 1790, letter says virtually everything that can be said about the problems the principle would cause if applied in the literal fashion Jefferson proposed. For unlike his older colleague, whose efforts at making constitutions had largely been in the realm of theory, Madison knew a thing or two about the practicalities. It had been hard enough to get the new federal Constitution adopted, and the prospect of having to repeat the process every nineteen years can only have filled Madison with alarm. For Madison, and others, the republic was still an "exper-

iment" and needed a chance to establish itself firmly — a chance the automatic expiration of the Constitution in 1807 would hardly supply.

More interesting in the reply is Madison's objection to the notion that one generation cannot impose obligations on the next. Madison suggests that there

Jefferson's notion of what the state could and should do never went beyond the idea of investing in capital improvements that would be of genuinely national benefit.

are, in fact, some public undertakings — "improvements" is his term — significant enough to justify a burden on "the unborn," and the American Revolution is his case in point. Would it be better to have foregone the armed struggle out of deference to the burden of debt on "posterity"? Madison cannot believe it; the addition to the estate was worth the cost, even if some of that cost was left to future generations.

But Madison's rejection was not the end of the matter, and Jefferson did not consign his principle to the realm of discarded ideas. On the contrary, almost from the outset of his resumption of public life in America in the spring of 1790, the principle was relevant to the conditions Jefferson encountered. The man who had placed a nineteen-year limit on public debts and confidently predicted that America's would easily be paid within that time was not prepared to accept the gospel according to Alexander Hamilton, least of all the notion that public debts could be turned into public blessings. We might read Jefferson's political path in the 1790s as an extended defense of the principle contained in his letter to Madison, and the debt reduction policies his administrations favored as practical efforts to implement it. The Jefferson who insisted in his second inaugural address of 1805 that even in times of war, it should be possible to "meet within the year all the expenses of the year, without encroaching on the rights of future generations, by burdening them with the debts of the past," had surely not given up on the insights of 1789.

Yet to note that Jefferson continued to advocate his principle in one way or another is not to suggest that it remained static. Jefferson was to live nearly thirty-seven years after writing the letter to Madison, nearly the length of two of his generations, and over time we find him placing an ever greater emphasis

on limiting and eliminating the public debt, and rather less on the need for constitutional change. That is to say, while Jefferson seems to have set aside his principle in the case of the United States Constitution (no doubt for reasons of prudence), he continued to envision a world free of the burdens and corruptions the national debt creates, a world that could give birth to a political culture very different from the one he knew and operated in. Without the ability to contract lengthy debts and wage costly wars at the expense of the future and to indulge in the other forms of waste that occupied so much of eighteenth-century Anglo-America's practical political energies, there would be little left to do except promote the good of the community.

Jefferson in fact sketches something of this vision in his final messages to Congress, particularly in conjunction with his request for a constitutional amendment that would allow Congress to undertake the sort of projects the nineteenth century called "internal improvements." Ever the strict constructionist, Jefferson had no wish to see Congress exceed its delegated powers and insisted on the amendment as the necessary prerequisite to spending the sums liberated through debt reduction on roads and canals and other additions to the national infrastructure. Wary of pork barrel politics, he wanted these projects funded out of current surpluses, and his notion of what the state could and should do never went beyond the idea of investing in capital improvements that would be of genuinely national benefit. And all of it was predicated on freedom from debt, on the practical application of the principle that the earth belongs in usufruct to the living.

Jefferson's Relevance

If the letter to Madison has roots in Jefferson's biography, as well as in a specific eighteenth-century setting, it may be worth asking, briefly, what it has to say in 1993. This is probably not the sort of thing historians are equipped to do, but the philosophical legacy represented by Jefferson's letter invites just such efforts.

Whatever else his principle may have meant to Jefferson, it was decidedly not an invocation of the "living constitution" — a constitution continually reinterpreted to address current needs — though the New Deal tried hard to make it appear so. Jefferson did imagine that each generation should have *its own* constitution, but that is a rather different matter. For Jefferson's constitutionalism was decidedly of the strict constructionist variety, and the notion that the text could be interpreted other than through the "original intent" he rejected out of hand. Convinced that all constitutions become corrupt over time, Jefferson understood that limiting their duration was

the best way of correcting the abuses that invariably creep in, of curbing the inherent tendency of judges and legislators to usurp the power that belongs only to the sovereign people.

If, on the other hand, Jefferson's hostility to public debt strikes a real chord in late-twentieth-century America — the 1992 presidential campaign provides ample evidence of how potent an issue debt can be — it is difficult to imagine that we will be able to achieve his dream of abolishing the debt altogether. Madison was probably right to suggest that some projects are worth the burden on future generations, and perhaps the most we can expect is a gradual reduction in the debt's rate of growth, if and when the deficit is finally brought under control. Still, the argument that the debts this generation has incurred will remain to blight the prospects of those who come of age in the twenty-first century has a good deal more relevance now than it might have had two or three decades ago, and Jefferson's principle is likely to find a place in the emerging debates over generational accounting.

Others, too, may discover new uses for Jefferson's principle. Environmentalists, I suspect, will find it attractive, and it is surprising that they seem not to have made much of it — they could do so with only minor violence to Jefferson's intentions. Equally, the current republican revival among constitutional lawyers and theorists should be fertile soil for this part of the Jeffersonian legacy. Yet these days the notion of the people's reinventing itself every nineteen years is more likely to frighten than to invigorate; if there is a hero for the republican revivalists, it is Madison, especially the Madison who entrenches the rights of minorities, not the Jefferson who argues for regular and repeated exercises in majoritarianism.

Jefferson's dream of being able to control the future by limiting the rights of the present has thus far proven illusory. If we cannot share his confidence that his principle will set all to rights, we can at least admire his capacity to entertain hopes for the future. That capacity is in short supply as the republic enters its third century, and perhaps in the end Jefferson's legacy is simply to remind us, in a disturbing way, of our own diminished expectations.

— Herbert Sloan

Herbert Sloan is assistant professor of history, Barnard College, Columbia University, and the author of the forthcoming book *Principle and Interest: Thomas Jefferson and the Problem of Debt* (Oxford University Press). This article is adapted and condensed from his essay in *Jeffersonian Legacies*, edited by Peter S. Onuf (University Press of Virginia, Spring 1993).

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