

PHILOSOPHY & PUBLIC POLICY

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Multiculturalism and Cultural Authenticity

Recent years have seen the emergence of two inter-related trends in our cultural politics. First, there has been a call for multiculturalism: for greater diversity in artistic and educational offerings, for a broadening of the spectrum of society's interest beyond the activities and experiences of dead or living white males. Thus, students demand courses in black, Hispanic, and women's studies; children's librarians clamor for more books about Native American and Asian youth; viewers of all races protest if their stories are not told on television's nightly news and prime-time sitcoms. Second, there has been an insistence that those offering representations of previously unrepresented groups be themselves members of the group in question — that courses in black studies be taught by black faculty, books about Native American youth be written by Native American writers, and reporters covering the Hispanic community be of Hispanic descent. It is this second and more controversial requirement that I wish to submit to examination here.

The thesis that interests me is what I will call the authenticity thesis. The authenticity thesis maintains that the individuals representing the experiences of group A should (generally or even always) be members of group A. The thesis can be put forward in both a broad and a narrow form. In the narrow form, it applies when group A is what we may call a victim group, a group that has previously suffered and currently continues to suffer from oppression and discrimination — e.g., blacks, Native Americans, women.

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In This Issue

MULTICULTURALISM AND CULTURAL AUTHENTICITY

Claudia Mills.....1

ETHNOCENTRISM AND EDUCATION IN JUDGMENT

Robert K. Fullinwider.....6

JUDICIAL ACTIVISM AND THE CONCEPT OF RIGHTS

David Luban.....12

DELIBERATION IN AMERICAN LAWMAKING

Joseph M. Bessette.....18

In the broader form, it applies to any group A, whatever its history or status. Of course, we will not be able to apply the authenticity thesis without having some clear notion of what defines the boundaries of the group in question and what legitimates claims of membership in it, problems I shall touch upon in closing.

There has been an insistence that those offering representations of previously unrepresented groups be themselves members of the group in question.

Why should individuals representing or discussing the experiences of group A be A's rather than B's? We may identify four possible arguments here. The first two, the Argument from Opportunity and the Argument from Ownership, focus on the expressive claims of A-group members — the view that they are uniquely entitled to provide representations of their own experiences. The next two arguments examine the interests of the audience for representations of A-group experiences: the Argument from Accuracy focuses on the general audience, made up of both A's and B's; the Argument from Solidarity focuses on the narrower A audience. I shall discuss each of these in turn, with the aim of demonstrating that together they offer at best qualified support for the authenticity thesis. In closing, I shall suggest why concerns about authenticity are nonetheless difficult to dismiss, and observe how a more expansive conception of group identity might begin to address them.

The Argument from Opportunity

In some cases, where a B is selected for a job that involves the discussion or representation of A-group experiences, this means that some A is rejected for the position in question. In hiring a male professor for an open position in women's studies, a university turns away all the competing female applicants. The director who notoriously cast a Caucasian actor in the role of a Eurasian pimp in his production of *Miss Saigon* denied that role to aspiring Eurasian actors. When women face such keen prejudice in much of academia, why hire a man to teach in a women's studies department? When roles for Eurasian actors are so sparse, why give the one meaty Eurasian role to a Caucasian? So the first argument for the authenticity thesis is that its violation constitutes a denial of crucial opportunities to members of group A. If A's cannot get jobs for which their identity or experiences as A-group members would seem to make them especially suitable, what jobs *can* they get?

Where it is applicable, the Argument from Opportunity seems fairly compelling — as in the *Miss Saigon* example — but it applies in only a limited range of cases. It defends only the narrow version of the authenticity thesis, where A is a victim group whose members face severely limited opportunities elsewhere. And it applies only when some fixed position is to be awarded within a competitive framework, where by choosing one person, I am passing over another. Many applications of the authenticity thesis are not naturally viewed in this way. The white man who writes a novel about a black woman need not be viewed as thereby silencing or stifling black female voices; the editor who accepts that novel for publication may not have received any competing publishable novel from a black female author for that season's list. Objections to violations of the authenticity thesis cannot all be cashed out in terms of the value we assign to equal opportunity.

Its limited scope aside, the greatest danger in the Argument from Opportunity is that it may appear, rightly or wrongly, to reinforce the authenticity thesis not just in its narrow version, but in the broader one as well. And in its broader form, the authenticity thesis works on balance to limit rather than to expand opportunities for members of victim groups. If the activities and experiences of any group should be represented only by members of that group, then the majority of opportunities for representation will continue to go to dominant-group members. If the bulk of the curriculum concerns dead white males and only (dying) white males are seen as entitled to teach in those areas, this ensures that only a handful of non-white-males can find employment in the university. Now, if this is our model, it does seem that, on equal opportunity grounds, the remaining opportunities should go to non-white-males. But the model itself should be challenged, on equal opportunity grounds. Actors of color will get more roles through non-traditional casting across color lines than through color-bound casting. Black and Hispanic scholars will teach and publish more widely if we permit all scholars to join voices in examining all subjects with equal freedom. Moreover, even if multiculturalism gives rise to a theater with a more diverse repertoire, or to a curriculum in which the works and lives of dead white males are no longer dominant, the authenticity thesis may still unacceptably limit the opportunities of women and minorities if it reinforces expectations that they will confine themselves to exploring the activities of the victim group to which they belong.

The Argument from Ownership

A related argument for the authenticity thesis proceeds from the claim that A-group activities and experiences are in some way the *property* of A-group mem-

bers, so that members of other groups who seek to imitate or represent those experiences are guilty of a kind of expropriation. Thus, many Native American leaders decry New Age adoption of Native American religious practices as the last in a long series of thefts: first, the whites took the land, then the buffalo, and now, in the gravest assault of all, Indian spirituality. Likewise, when a white author retells indigenous folktales, or writes fiction portraying indigenous life, this may seem a species of plagiarism, of profiting from stories that are not one's own. It is one thing for me to write a novel about my life; it is another thing for *you* to write a novel about my life.

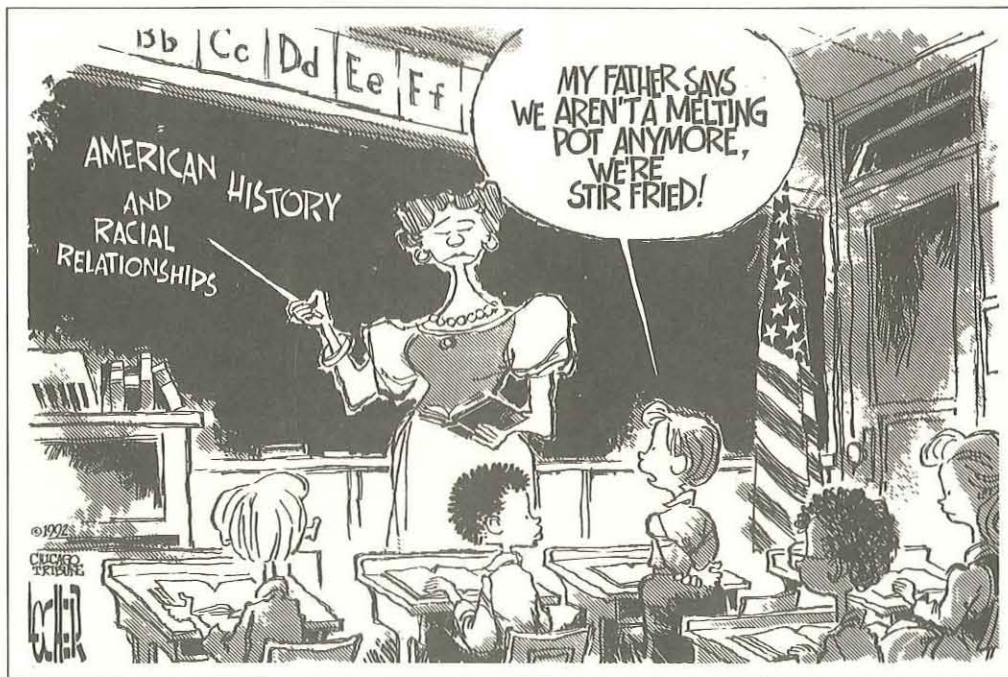
It is not clear, however, that stories, or spirituality, or, in its totality, a culture, are the kinds of things that *can* be owned; I can copyright sentences, paragraphs, and pages, but not plots, themes, or truths. Furthermore, my retelling of your stories or my imitation of your rituals does not violate your right or opportunity to perform them as well. In this sense, I can make your experience my own, without its thereby ceasing to be yours.

In part, however, the charge against B's appropriating A's stories, spirituality, and culture arises precisely because in many cases B himself seems to be treating these as property — as *his* property, as a commodity that can be bought and sold for a profit, for *his* profit, in a marketplace that continues to exploit and improv-

erish A. Sharing in someone's spirituality is one thing; trafficking in it is another. We may feel that no one should be making a profit off certain experiences; and where profit from A's experience is appropriate, it should be A who reaps it, not B. In the Native American example, these concerns are heightened by instances of outright fraud, as when shopkeepers falsely claim that trinkets manufactured in Taiwan are the "authentic" products of Native American artisans.

Sometimes, what sound like simple assertions of ownership actually reflect worries about the misrepresentation or distortion of certain beliefs and practices. In other words, the Argument from Ownership may look for support to the Arguments from Accuracy and Solidarity, which I discuss below. For example, the *New York Times* recently interviewed an Osage professor of theology who argued that whereas Indian spirituality focuses on the larger community, New Age adaptations are "centered on the self, a sort of Western individualism run amok." "The danger," this professor explained, "is that these mutations of spirituality will make their way back into the Indian world." If this were to happen, then the attempts of others to make Indian experience their own *would* attenuate Native Americans' hold on that experience, their capacity to safeguard and perpetuate it.

Nonetheless, where a B-group member represents an A-group experience respectfully and conscientiously,



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rather than opportunistically, it seems that the Argument from Ownership in its strongest form will fail to apply.

The Argument from Accuracy

Perhaps the argument invoked most often to defend the authenticity thesis is that members of group A simply do the best job representing the experiences of group A, that "it takes one to know one," that you have to be a member of group A to *get it right*. This argument focuses on group A membership as an epistemological requirement for knowledge about group A. Thus understood, the argument defends the authenticity thesis in both its broad and narrow versions: whatever kind of group we consider, dominant or victim, its experiences will be discussed most accurately and knowledgeably by its own members.

The first thing to note about the Argument from Accuracy is that it is an empirical and not a normative argument. It does not say that only members of group A have the *right* to talk about group A; it merely claims that representations of A by A's will be more accurate than representations of A by B's.

Now, accuracy is not an all-or-nothing affair, and the Argument from Accuracy can best be understood as pointing to a *likely* difference in the *degree* of accuracy of representation. It does not maintain that *no* B can know *anything* at all about A's, but only that A's are better placed to gather accurate information about A-group experiences and to submit these to more penetrating analysis and interpretation. This generalization is bolstered by commonsense appeals to the need for firsthand experience of one's subject; it posits limits to the powers of imagination, in comparison with the vitality and immediacy of "real life."

As an empirical argument, the Argument from Accuracy is subject to empirical evaluation. One possible test here might be some form of controlled experiment. For example, we might take novels about black life and experience written by both black and white authors and submit them, in a blind screening, to a panel of black readers. If the black readers succeeded in identifying the race of the author, by noting systematic inaccuracies in presentation, this would provide some support for the Argument from Accuracy; if they could not detect any telltale traces of the author's racial background, the Argument from Accuracy would be undermined. One can certainly point anecdotally both to striking examples of whites getting the black experience wrong (blackface minstrel shows) and of their getting it right (Bruce Brooks's recent young-adult novel *The Moves Make the Man*, acclaimed by many black librarians). Our conclusion here would seem to be that it is *possible* for B's to do a good job representing the experiences of A's — but perhaps sufficiently unlikely that the Argument from Accuracy pro-

vides good reason to uphold the authenticity thesis as a cautionary standard.

Some defenders of the authenticity thesis would go further and maintain that no B can ever (really) know about A's, any more than an A can ever (really) know about B's. One trouble with this claim is that it may overestimate the extent to which A's or B's know themselves; that is, it ignores our capacity for evasiveness, partiality, and self-deception. That which we have failed to recognize in ourselves is sometimes visible to outsiders. Even though they are bound to approach us with biases of their own, we gain from seeing ourselves as others see us, as well as from gazing into our own inner mirrors.

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The Argument from Solidarity

The final argument also focuses on the audience for representations of A-group experiences, but now specifically on the A audience. It asserts that the interests of A's as an audience for material about their own lives and culture go beyond an interest in merely receiving an accurate representation of these. The provision and reception of such representations is one way to create or foster a sense of community among A's, and thus it is important that A's can band together, with some exclusivity, to provide and receive them.

In this way, a women's studies course serves as more than just another academic offering in a university's curriculum, on a par with mathematics and geology; it is also a protected space where women may engage in a shared journey toward awareness of their own personal and social identities. Thus, female students may feel cheated and betrayed if they arrive on the first day of class to find a male professor, or even male students, in the class.

The Argument from Solidarity, like the Argument from Opportunity, seems to provide significant support for the authenticity thesis, but, again, only within certain limits. Group solidarity is arguably most important for victim groups — it seems to have far less (perhaps even negative?) value for dominant ones — and so the Argument from Solidarity supports the authenticity thesis only in its narrow version. Even among victim groups, solidarity may not be a value of *overriding* importance; in many contexts it may be secondary to some other value. University seminars, for example, serve many functions, only one of which

might be to provide the occasion for an identity-forming experience. Moreover, not every representation of group-A activities works as a crucible for the formation of group identity; this effect may be muted, for example, when individuals experience a representation in isolation from each other, as readers engage books in essentially private rather than shared space.

Finally, we might want to encourage a vision of the possibility of forms of social solidarity that cross fixed racial, gender, and ethnic boundaries. It is important to belong to some community; it is less important, and perhaps ultimately undesirable, that these communities be defined solely in racial, gender, and ethnic terms.

Larger Identities

Whatever the force of these four arguments in favor of the authenticity thesis, one may feel that they fail to capture something of the sheer unseemliness of a member of group B waltzing into a room, waving his A-ish syllabus or novel or painting, having the nerve to think that he can successfully discuss or represent the experience of group A.

In our initial negative response to such nervy B's, we may hear first an echo of the Argument from Accuracy. Given the daunting magnitude of the task in question — to step outside the boundaries of your own group and accurately and sympathetically represent the character of another's group — how *dare* you think you have gotten it right? But if our response above to the Argument from Accuracy is a good one, some members of B *will* get the A-group experience right, even if most will not. I believe it was Dizzy Dean who said that braggin's only when you ain't got nothing to back it up. If a white male author purports to have created a vivid, vital, black female character, and actually has done it — well, more power to him.

And yet . . . it seems that there is still something troubling about a member of group B trying to tell a member of group A what it is like to be an A — when B takes upon himself the superior role of teacher, adviser, consciousness-raiser, and so forth. I find myself drawn here to challenge B's standing to speak to A on the subject of A-ness. I am tempted to say that B has no *right* to speak to A about A-ness, that there are subjects that are simply closed to those who have not — actually, not imaginatively — experienced the necessary initiation. If a victim group is characterized in part by its shared sufferings, then those who have never felt any wounds have no business holding forth on the general subject of scars.

But while this objection strikes an emotional chord, I think it fails to stand up to closer scrutiny. While it may be arrogantly inappropriate for a B to claim that he fully understands the scope and depth of the sufferings of A, it remains the case, if our reply to the

Argument from Accuracy holds true, that he may be able to provide accurate accounts of and enlightening commentary on A-group experiences. Ten or twenty years of intense scholarly study may give a professor some claim to be able to educate students even on topics closer to their historical experience than to his own.

Finally, one may want to say to the white man toiling importantly away on his wrenching novel about a black woman dying while giving birth to her eleventh child: Write your own story! And many would say the same thing to the black woman writing her novel about a white man. We may be drawn to the general authenticity thesis in part because we believe that people should not try to pretend to be something they are not. Why try to tell someone else's story, when your own story is right there, staring you in the face? I once had a male friend whom I found rather pathetic in his attempts to be one of our group of women, in his yearning identification with everything female. His girlish giggle was particularly irritating. Oh, just give up and admit you're a boy!

But the principle that each of us should tell our own story cannot entail that this story must be the story of our own gender or race or ethnic group. It may seem naive at this moment to assert the existence of relations and commonalities that cut across these divisions; yet the effort to identify the experiences and qualities we share may well be an urgent cultural task in its own right. True, the authenticity thesis receives some qualified support from the Argument from Opportunity, the Argument from Ownership, the Argument from Accuracy, and the Argument from Solidarity. But finally, the thesis is not compelling as a response to our current cultural conflicts. For the more we make good on the hope that our authentic identity can transcend our physically and socially assigned group characteristics — the more the authenticity thesis in the end proves to be false — the better off we, as individuals and as a society, will be.

— Claudia Mills

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Ethnocentrism and Education in Judgment

Go unto this people, and say, Hearing ye shall hear, and shall not understand; and seeing ye shall see, and not perceive: For the heart of this people is waxed gross, and their ears are dull of hearing, and their eyes have they closed; lest they should see with their eyes, and hear with their ears, and understand with their heart, and should be converted . . .

Acts 28:26-27

Our human condition . . . is always that of spiritual bondage within a cave-like horizon of moral, religious, and political presuppositions so deeply rooted they are almost imperceptible to the inhabitants of each cave-like age and culture. We all begin with our minds ordered and predisposed by terminologies, categorizations, beliefs, and prejudices that we mistake for the natural or necessary ordering of human existence. . . . How can we even begin to step outside our own souls, our own upbringings, our own deepest moral presuppositions?

Thomas Pangle

That we commonly hear and do not understand, see and do not perceive, is a pervasive human failing. We manifest it toward people and customs in our immediate neighborhood and, even more so, toward people and customs that are distant and unfamiliar. One form of this failing — *ethnocentrism* — preoccupies theorists of multicultural education. For them, the ethnocentrism that permeates textbooks, curriculum plans, teachers' assumptions, and students' interactions constitutes the main impediment to successful cultural pluralism and cross-cultural understanding.

But what is ethnocentrism? At least two definitions turn up in the literature. For Christine Bennett, author of a leading text on multicultural education, ethnocentrism is the habit of thought that prompts us to make judgments from "our own culturally biased viewpoint." This way of putting the matter tracks a common social science characterization of ethnocentrism as "the practice of judging another culture by the standards of our own culture." For Donna Gollnick and Philip Chinn, authors of another leading text, the essence of ethnocentrism lies in an assumption we make in judging from our viewpoint: that our culture

is *superior* to others. Ethnocentric judgment falls into error because this assumption of superiority is unwarranted. Avoiding ethnocentrism, Gollnick and Chinn explain, means recognizing "other cultures as equally viable means for organizing reality."

Several deep problems await these multiculturalist approaches to ethnocentrism. The first account suggests that the remedy for ethnocentrism is to judge matters not from our own viewpoint, but from someone else's. But it is not easy to make sense of this idea; are we required simply to *understand* another viewpoint, or to *endorse* any and all opinions and actions associated with it? The second account does not explain how we come by the conclusion that all cultures "are equally viable alternatives for organizing reality." If standards of appraisal lie *within* cultures, from where do we get the *external* yardstick along which we place our culture and others to discover their equality? The prospect of finding a neutral metric seems all the more doubtful given Gollnick and Chinn's assertion that our values "are determined *totally* by our culture." If this determinism is true, then how can any judgment of ours — any application of values — issue from a cultural perspective not our own? And how can this determinism be reconciled with the multiculturalists' claim that ethnocentrism is an *avoidable* bias — one remediable by a proper multicultural education?

For theorists of multicultural education, ethnocentrism constitutes the main impediment to successful cultural pluralism and cross-cultural understanding.

There are two further difficulties with the multiculturalists' argument. We know that individuals, groups, and institutions *within* cultures vary enormously in their ability to "organize reality." Not all individuals or groups succeed equally by any means. Yet the cultural equality thesis asserts that this ubiqui-

tous feature of life is somehow cancelled out when we move to yet larger groupings of persons, that is, to whole cultures. Moreover, the idea that all cultures are equal does not prove as much as its advocates might wish. The fact that one culture *overall* "organizes reality" as well as another by no means implies that it "organizes reality" as well in *each particular*. For this reason, judging a particular practice or custom in another culture as inferior to our own isn't actually foreclosed by the cultural equality thesis.

That their analysis of ethnocentrism begins to crumble at a touch doesn't mean we can't understand what the multiculturalists are getting at. Their warning us away from assuming our ways are superior makes plain, I believe, that they mean to identify and correct a moral failing. They want students to avoid *smug*, *arrogant* judgments of others. They want them to avoid the *obtuseness* of those who hear and do not understand, see and do not perceive, and who, in their obtuseness, unfairly *denigrate* or *disparage* other people's accomplishments and traditions.

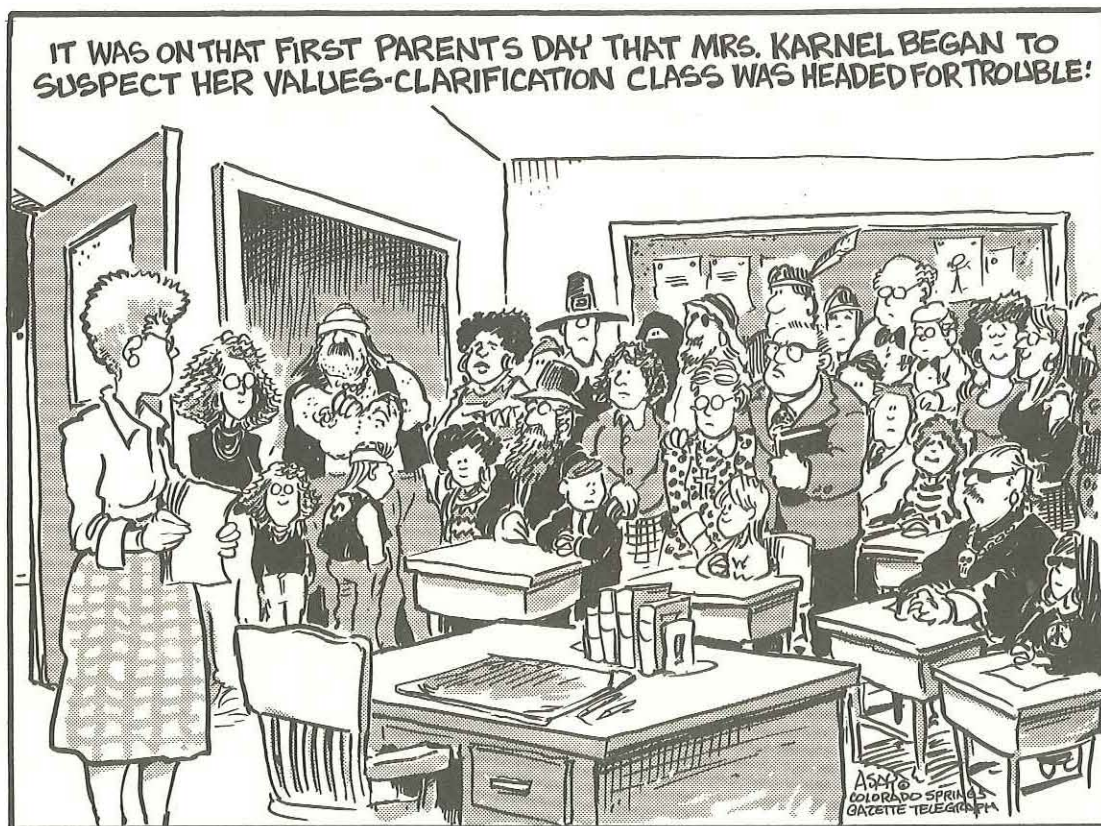
What multiculturalists need, then, is an appropriate moral language within which to state their essentially moral aims. Recourse to the quasi-anthropological

notion of ethnocentrism leads multiculturalists astray. It prompts them to recommend an uncritical attitude toward cultural difference when they should be describing instead the virtues of an open mind.

Form and Value

Crucial to understanding sympathetically any other culture is the distinction between *form* and *value*. The same value can be manifested or realized in many different forms. For example, the valued goal of safe and efficient driving is achieved in both the United States and Great Britain by their respective rules of the road, though those rules have us driving on the right side of the highway and the British driving on the left. Similarly, basic values having to do with personal intimacy, shared fate, and care of children give rise in various societies to different forms and conventions of family life. And so on for a range of basic values.

Sensitivity to the form/value distinction is important because it allows us to gauge how, and in what way, another society differs from our own. In some cases, it may well be that another culture differs from ours in the values it serves and promotes. For the most part, however, charitable interpretation of another



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culture proceeds on the assumption that it tries to realize the same deepest values we do, and that its outward differences are simply differences in form. A similar situation exists when we attempt to translate a strange language; we must assume that its speakers are making intelligible claims, and we modify and adjust our translations until we have rendered them intelligible in our language. If we took the strange language (and its speakers) not to obey the basic principles of logic, we would be at an utter loss how to translate it (and them).

Charitable interpretation of another culture proceeds on the assumption that it tries to realize the same deepest values we do, and that its outward differences are simply differences in form.

This point complicates the multiculturalists' admonition that we shouldn't judge others by "our standards." If the phrase "our standards" refers to *our forms* — our conventions, customs, rules, and routines — then the multiculturalist admonition is basically sound. But if "our standards" means *our basic values*, then the admonition is problematic.

Of course, we can easily fall into the error of conflating our forms with our values. We may think that, say, our particular family arrangements are the only possible means to realizing the values of intimacy, shared fate, and care of children. We may think that other forms must be signs of backwardness, ignorance, or even depravity. This suggests that our ability to judge other peoples charitably and accurately depends not so much on how extensively we know their culture but on how deeply we know our own. In order not to stack the deck against an alien group, we must describe putatively shared values in a way that abstracts from the details of our own practices. It is typically our failure to do so, and thus our failure to appreciate the meaning of our own basic values, that makes us uncritical of our social arrangements and hypercritical of other societies.

There is still the possibility that our abstract descriptions of our values will remain loaded, even though we think we have succeeded in making them neutral. For example, what if our most basic description of *rationality* — an attribute we ascribe to human nature as well as a value we prize in ourselves — actually incorporates features distinctive of our own social organization of goal-seeking and information-gathering? Then we will observe how much less rational than ourselves the alien group is; and the partiality of our judging — done with scrupulous care, we may

suppose — will remain wholly invisible to us. We will misjudge the other group while congratulating ourselves on our open-mindedness.

According to some culture critics, just this sort of problem generally characterizes the thought of the "West" as it perceives and acts toward communities in the non-Western world. The West projects its loaded descriptions onto the rest of the world as "universals" of human nature. It imposes its particularity as universality. Indeed, the critics locate the flaw in Western thinking in its very penchant to universalize, to offer abstract descriptions of value, to search for a true description of human nature. It is this penchant, the critics say, that is most deeply ethnocentric and oppressive. We Westerners must therefore stop (at least for a while) interpreting others by reference to general "truths" about human beings because our framework invariably distorts the reality of other ways of life.

The corrosive self-doubt this indictment of the West supports feeds off our contemporary general revulsion toward several centuries of Western imperialism and colonialism. We have too often in the past plainly and egregiously dismissed other ways of life as inferior to our own, and busily promoted the substitution of our superior customs for the indigenous ways of the "backward" peoples we took under our tutelage, assuming all the while a mantle of self-satisfaction at our objectivity and rationality. Looking at this unlovely picture in retrospect, we may succumb to doubt about our current ability to judge others fairly, seeing our present conceptions of universal human nature as just further pretenses for promoting our own disparagement and domination of others. And from our doubt may flow the resolve to defer or suspend judgment, or take our guidance from the authentic voices of culturally different communities. We may decide simply to shut up and listen.

Our ability to judge other peoples charitably and accurately depends not so much on how extensively we know their culture but on how deeply we know our own.

It is difficult to adjudicate between this extreme self-denial and other, less diffident views about when and how we should evaluate others. Certainly, though, we may believe that our abstract descriptions of values are not nearly so loaded as some culture critics suppose. Or we may believe that our suspicions of loaded descriptions should prompt us to yet further efforts to frame purely neutral ones. On either view, we would

want to press distinctions between proper humility in judgment and disabling self-doubt, between the avoidance of dogmatism in judgment and capitulation to the dogmatism of others. And on either view, we would retain some (greater or lesser) degree of confidence in our ability to be open-minded, while seeking the addition of new, previously dominated or silenced voices to the conversation about culture and human nature. The point is that the quarrel I've described here moves *within* the ambit of the concept of open-mindedness. The different parties divide on how deeply the impediments to open-mindedness go.

The Grounds of Tolerance and Generosity

"Instilling an open mind" is how multicultural education should characterize its basic project. An open mind is not the same as an uncritical mind, nor does it rest on or require dubious propositions of equality. Open-mindedness simply doesn't raise the issue of ranking persons or groups by some metric. I don't have to think my neighbor's taste in art or wine is as good as other people's, or even as good as mine, to exhibit toward him generosity, sensitivity, and curiosity. I don't have to think his children are as smart as all others, his occupation as challenging, his manners as engaging, his jokes as entertaining, his knowledge as penetrating, his accomplishments as edifying. I certainly don't have to believe he "organizes reality" as well as everyone else. I can be open-minded toward him and toward everyone else, from the lowliest to the most exalted, from the meanest to the most angelic, because open-mindedness doesn't force the issue of equality onto the table.

The multicultural educator's embrace of the cultural equality thesis is well-motivated: she wants to instill open-mindedness in students, and the generosity and tolerance that goes with it. Nevertheless, the embrace is unwise. Tolerance and generosity aren't functions of some equality of accomplishment, as Paul the Apostle's admonition to the Romans aptly illustrates. Paul reminds the Romans of the variability in people's beliefs and customs and advises against judgmentalism:

For one [person] believeth that he may eat all things; another, who is weak, eateth herbs. Let not him that eateth despise him that eateth not; and let not him which eateth not judge him that eateth. . . . One man esteemeth one day above another: another esteemeth every day alike. Let every man be fully persuaded in his own mind.

The advice not to despise alien beliefs or customs is not predicated on the assumption that all beliefs or customs are true:

I know, and am persuaded by the Lord Jesus, that there is nothing unclean of itself: but to him that esteemeth any thing to be unclean, to him it is unclean.

Being persuaded by the Lord that nothing is unclean, Paul couldn't have greater certainty or assurance on this matter, yet he counsels forbearance and noninterference toward the person who believes a thing unclean. "To him it is unclean" means that the believer has as much invested in her belief as we have in ours — and that alone, *not the truth of her belief* (for it isn't true), is enough to require our caution about challenging or overriding it; that alone, *not the untruth of our belief* (for it is true), suffices to forbid our addressing her belief in a manner that "puts a stumbling-block" in her way.

When Paul counsels the Romans against judging one another, he is not recommending to them an uncritical attitude toward conduct and belief; he is warning them against certain moral failings attached to judging. He urges on his fellow Christians this policy: "Him that is weak in the faith receive ye, but not to doubtful disputations." Even in a matter as important as shoring up another's faith, we must not be *disputatious*. In your commitment to the truth, Paul advises, avoid being *contentious, quarrelsome, argumentative, bickering, querulous, fault-finding*.

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The fault in disputatiousness lies not in the fact that the disputatious person wants to be right in what he believes but in the fact that he wants always to be acknowledged to be right. He wants error openly to yield to his rightness. He cannot tolerate uncorrected error; he cannot abide weak faith. He is always picking a fight; he pushes too far; he lacks sensitivity to dimensions beyond the literal truth or falsity of the belief at issue; he lacks even the prudence to be canny and subtle in promoting that very belief he desires to be acknowledged by others. His adamancy reveals the self-importance he gains from defeating others in argument.

The antidote to disputatiousness is moral sensitivity to the less savory projects to which promoting belief and correcting error can be put.

The corrective, here, is not to stop believing in things. The antidote to disputatiousness is not critical flabbiness or intellectual indiscriminateness. The antidote is moral sensitivity to the less savory projects to which promoting belief and correcting error can be put. The antidote is the moral generosity enjoined by Paul.

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Laurie Ann Mazur, editor

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Against Judgmentalism

The same is true for a vice akin to disputatiousness, namely *judgmentalism*. The antidote to judgmentalism isn't to abandon judgment but to understand the moral complications and nuances associated with judging. In the case of cross-cultural judging, in particular, these moral complications and nuances are not clarified by the quasi-anthropological notion of ethnocentrism. On the contrary, invoking the notion of ethnocentrism misleadingly draws attention to the cultural *content* rather than the moral *manner* of judging. It prompts us to think that a certain content ("their culture") is an inappropriate object of judgment. But manner rather than content is the real object of multicultural education's concerns, properly understood. Just as Paul warns the Romans away not from believing the truth of their faith but from being *disputatious* about it, multicultural education properly warns students away not from judging but from being *judgmental* about culture.

Judgmentalism, according to Caroline Simon's felicitous characterization, "is the disposition to derive satisfaction from making negative moral assessments of others because one believes one's own moral worth is enhanced by the failures of others." Judgmentalism, then, fronts for an attitude of moral superiority. The judgmental person is quick to judge, draws blanket conclusions from slender evidence, always finds others less perfect than herself. No wonder that she invites being labeled as smug and sanctimonious. Professor Simon identifies the moral failing at the heart of judgmentalism:

The judgmental person . . . misconstrues the whole point of moral assessment. Moral worth does not work on a competitive point system, and the point of moral assessment is not the relative ranking of individuals. The ultimate point of thinking about ethics is practical. This suggests that the primary point of my making moral assessments is so that I can act well and do what I can toward being a better sort of person. First-person assessments are primary; third-person assessments are appropriate only to the extent they contribute to each person acting well.

Where assessing (silently, in our hearts) the faults of others doesn't bear upon or contribute to our own self-improvement, better to desist from judging others badly. Yet, as the nineteenth-century ethicist Francis Wayland observed, we commonly "dissect" other people's characters as if to demonstrate our "power of malignant acumen," as though "another's reputation were made for no other purpose than the gratification of the meanest and most unlovely attributes of the human heart!"

Such dissection is the stuff of our daily conversations, filled as they are with gossip and backbiting. We delight in tearing down others. Much of the ethnocentrism that multiculturalists worry about simply

extends the circle of our judgmentalism, from those familiar and nearby to those culturally different and distant. The proper antidote to this ethnocentrism lies not in some special cultural studies but in freeing ourselves from the general disposition to look for and pronounce upon faults in others. The proper antidote is sensitivity to the moral meanings of judgment.

*Where assessing (silently, in our hearts)
the faults of others doesn't bear upon
or contribute to our own self-improvement,
better to desist from judging others badly.*

Dimensions of Moral Judgment

These meanings are complex and many-layered because judgment has at least two dimensions. One dimension has to do with *groundedness*: is a negative (or positive) judgment of something's worth well-founded in the facts? Does it interpret the thing in its best rather than its worst light?

A second dimension has to do with effects: publicly made judgments encourage, rebuke, chastise, honor, and vindicate; they can resolve disputes or they can perpetuate hostilities. Thus, the moral propriety of a judgment derives not only from its well-groundedness but also from the strength of the case for bringing about such effects.

An effective lesson in the moral meanings of judgment, thus, is a complex affair. It is not reducible to a simple formula or mechanical rule (e.g., "don't judge other cultures"). It means acquiring sensitivity to the way the dimensions of judgment interact in different cases. It means acquiring a vocabulary that enables discriminating the nosy from the properly concerned, the moralistic from the moral, the preachy from the instructive. It means learning when to judge, whom to judge, and how to judge; and it means realizing that the answers to the *when*, *whom*, and *how* don't automatically track cultural boundaries — boundaries which are, in any case, less determinate than multiculturalists generally suppose.

The elements of open-mindedness certainly seem teachable in school. We can rehearse students at waiting to make up their minds until they've heard the different sides of a case and we can train them how to follow and evaluate arguments and evidence. We can habituate them to inquire, ask questions, follow leads, seek more information, invite comment, and welcome different perspectives. We can impress upon them cautionary tales of the wrongs that flow from hasty, careless, reckless, and ill-considered judgments.

Of course, students will vary in how well they pick up and practice the attributes of open-mindedness.

Moreover, even when teachers and curriculum prove as good as we could expect, schooling won't by itself produce uniformly and successfully open-minded graduates. Still, schooling can plant the seed that further education may nourish. In many practical contexts, telling the difference between open and closed minds is not difficult, nor is there anything mysterious about the school routines needed to inculcate the habits that constitute open-mindedness.

Learning the *when* and the *how* — that is the task of a moral education in judgment, a task that belongs in the schools. Best that the schools begin the task with the right vocabulary and the right aims. Multicultural education is most usefully conceived as an extension and special application of the general moral education all students should have. For this reason, multicultural educators need a moral, not anthropological, language to make plain to themselves and to others the aims and means of multicultural education. Then we have some prospect that students really will become people who hear with their ears, and see with their eyes, and understand with their heart.

— Robert K. Fullinwider

Sources: Thomas Pangle, "Entering the Great Debate," *Academic Questions*, vol. 2 (Spring 1989); Christine I. Bennett, *Comprehensive Multicultural Education: Theory and Practice* (Allyn and Bacon, 1986); Donna M. Golnick and Philip C. Chinn, *Multicultural Education in a Pluralistic Society*, 2nd ed. (Charles E. Merrill Publishing Company, 1986); Gerry Davis, "Strategies for Change," in R. K. Arora and C. G. Duncan, eds., *Multicultural Education: Towards Good Practice* (Routledge and Kegan Paul, 1986); Louis Cohen and Lawrence Manion, *Multicultural Classrooms: Perspectives for Teachers* (Croom Helm, 1983); Madan Sarup, *The Politics of Multicultural Education* (Routledge and Kegan Paul, 1986); Sally Tomlinson, "The Origins of the Ethnocentric Curriculum," in Gajendra K. Verma, ed., *Education for All: A Landmark in Pluralism* (Falmer Press, 1989); Gloria Ladson-Billings, "Culturally Relevant Teaching: The Key to Making Multicultural Education Work," in Carl A. Grant, ed., *Research and Multicultural Education: From the Margins to the Mainstream* (Falmer Press, 1992); [New York State Education] Commissioner's Task Force on Minorities: Equity and Excellence, "A Curriculum of Inclusion" (New York State Department of Education, July 1989); W. V. Quine, *Word and Object* (MIT Press, 1960); Donald Davidson, *Inquiries Into Truth and Interpretation* (Clarendon Press, 1984); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990); Caroline J. Simon, "Judgmentalism," *Faith and Philosophy*, vol. 6 (July 1989); Francis Wayland, *The Elements of Moral Science*, ed. Joseph Blau (Harvard University Press, 1963; originally published in 1835).

Judicial Activism and the Concept of Rights

When President Clinton made his first Supreme Court appointment last summer, he chose someone with a decidedly centrist view of the judiciary's role in American society. Nonetheless, on the first day of Ruth Bader Ginsburg's confirmation hearings, a number of Senate Republicans expressed concern that her nomination might signal a return to the "judicial activism" of the recent past. Senator Orrin Hatch took up the theme with these cautionary words:

Under our system, a Supreme Court justice should interpret the law, and not legislate his or her own policy preference from the bench. The role of the judicial branch is to enforce the provisions of the Constitution and laws we enact in Congress as their meaning was originally intended by the framers. Any other philosophy of judging requires unelected Federal judges to impose their own personal views on the American people in the guise of construing the Constitution and Federal statutes.

There is no way around this conclusion. Such an approach is judicial activism, plain and simple, and it is wrong, whether it comes from the political left, or whether it comes from the political right.

It does not seem to me, as it does to Senator Hatch, that there are only two philosophies of judging — that one must be either a strict constructionist or, by default, a freewheeling judicial activist. That dichotomy by no means exhausts the possible strategies and shadings of constitutional interpretation. For the moment, however, there is a second feature of his argument that interests me more. Although he condemned judicial activism *per se*, the Senator's account of its consequences focused chiefly on the rulings of liberal jurists over the past thirty years. "Since the advent of the Warren Court," he declared, "judicial activism has resulted in the elevation of the rights of criminals and criminal suspects, and the concomitant strengthening of the criminal forces against the police forces of our country." It has also led, he argued, to reverse discrimination, "prayer being chased out of the schools, and the courts creating out of thin air a constitutional right to abortion on demand."

Now the social issues invoked by this list — desegregation, the rights of criminals, school prayer, and abortion — have sharply divided liberals and conservatives for nearly three decades. And for much of this time, conservative theorists have criticized the key judicial decisions in these areas by accusing the Warren Court and subsequent liberal judges of reading their own views into the Constitution and usurping the powers of the executive and legislative branches. For polemical purposes, the phrase "judicial activism" has thus become a code word for judicial protection and promotion of social engineering, left-wing protest, crime on the streets, atheism, and sexual promiscuity.

Conservative theorists have accused the Warren Court and subsequent liberal judges of reading their own views into the Constitution and usurping the powers of the executive and legislative branches.

This characterization of the Warren Court and its legacy, however, is deeply mistaken. The Court's lasting significance does not lie in its supposed expansion of the judicial role, or even in the specific decisions to which Senator Hatch objects. Rather, its significance lies in a seemingly abstract issue of jurisprudence: the nature of a legal right. Each of the Warren Court's controversial decisions proceeded from a self-conscious and sophisticated understanding of the manner and scope of rights protection. My purpose here is to explain and defend that understanding.

Two Concepts of Rights Protection

Philosophers and legal scholars have offered various definitions of a right, but all agree that rights are values of particular importance and that their protection is a central aim of public institutions. For this reason, the question of what it takes to secure rights is a cen-



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tral question facing any political and legal theory that includes the concept of rights in its vocabulary.

According to one common understanding, rights are protected *reactively*: an individual whose rights have been infringed may seek satisfaction of some sort after the fact, either in the form of compensation or from punishment of the infringer. For example, prior to the Warren Court's decision in *Mapp v. Ohio* (1961), an individual's right to be free from illegal searches by police was protected only reactively; the victim of an illegal search could seek monetary damages or internal police disciplinary action, but the illegally seized evidence could still be used at trial.

The Warren Court criticized this entire approach to rights protection on the grounds that reactive remedies, such as "aroused public opinion and internal police discipline," had proved to be "without deterrent value." In their place, the Court adopted the exclusionary rule, which forbids introducing illegally seized evidence at trial, as a more effective way of deterring police misconduct.

The exclusionary rule differs from the remedies available before *Mapp* in that it protects rights *prospec-*

tively, not reactively. That is to say, by preventing the state from introducing illegally seized evidence at trial, it removes *in advance* much of the incentive for the Nasty Boys to batter down one's door at 5 o'clock in the morning. Analogously, by ruling that suspects' statements to police are inadmissible in court unless those suspects have been advised of their right to counsel and their right to remain silent, the Warren Court in the *Miranda* case minimized in advance the possibility of grueling interrogations and coerced confessions. Without such protections, the Court believed, victims of police overreaching are given over to the tender mercies of the tort system or the police discipline system for redress of the violation of their rights.

It is too easily forgotten that before the Warren Court criminal procedure cases, police departments (particularly in rural areas) often consisted of poorly trained, poorly screened goons. In the early 1960s, as Richard Neely observes, suspects were "routinely picked up off the street without a warrant" and subjected to interrogations that frequently involved "humiliating insults and a good deal of slapping

around." Nor were local officials likely to provide redress — not when politicians were eager to impress the electorate with their determination to "crack down on crime," and when judges were often the allies and personal friends of sheriffs and police chiefs.

After the criminal procedure cases, however, municipalities suddenly discovered that the badly trained muscleheads in their police departments were bringing cases that would be thrown out of court. The prospect of criminals walking out the door because "the constable had blundered" by jamming his nightstick into the suspect's kidneys brought considerable political heat down on prosecutors and police chiefs. The result was a transformation of police departments into better-trained, better-educated, more professional organizations that relied more on finesse and less on force in conducting investigations. The prospective protections of rights established by the Warren Court created ripple effects leading to further and better prospective protections.

In the aftermath of the Rodney King beating case, as well as thousands of less publicized instances of police brutality, it is obvious that police departments still include a number of sadists, racists, and fascists who have nothing but contempt for procedural niceties and even for basic human rights. Yet this fact, which might appear to cast doubt on the effectiveness of the Warren Court's prospective approach in criminal procedure cases, demonstrates only that the Court's successors erred in declining to extend its approach from the context of investigation to those of arrest and ordinary patrolling.

When the ordinary working of institutions creates typical, persistent, and chronic threats to our rights, we have a derivative constitutional right to have the threats dissolved.

In 1983, for example, in *City of Los Angeles v. Lyons*, the Supreme Court heard the case of a 24-year-old black man who had been stopped by Los Angeles police because of a burned-out taillight on his car. Mr. Lyons was searched, beaten on the head, and choked until he blacked out. In subsequent legal action, he asked not only for damages — a reactive remedy — but also for an injunction forbidding the police from using choke holds in the future against suspects not threatening violence — a prospective remedy. Although the Court agreed that Mr. Lyons could sue for damages, it denied him standing in seeking the injunction. If the Court had adopted a prospective

rather than a reactive conception of rights, it would have decided the case differently, with practical consequences for the prevention of police brutality about which one can only speculate.

Safeguards against a "Standard Threat"

As a general principle, the Warren Court insisted that to enjoy meaningful protection, and thus to count as rights at all, primary constitutional rights must often be hedged about with derivative, prophylactic rights designed to forestall infringements before they happen. This is not to say that *every* right must be protected by this strategy; in many cases, reactive remedies will suffice. Prospective protection is required principally when a rights violation is part of an institutional pattern. To understand why, let me introduce a concept from Henry Shue's analysis of rights — the concept of a "standard threat."

The ordinary working of institutions often creates typical, persistent, and chronic threats to our rights. When officers from a poorly disciplined police force brutally interrogate a suspect, or when segregationist institutions violate the rights of blacks, it is clear that we are not confronting isolated incidents or the actions of a single misguided official. Rather, we are confronting the predictable effect of an institutional cause — a standard threat. And it is principally in cases of standard threats that we have a derivative constitutional right to have the threat dissolved.

There is a simple reason why this right to prospective protection is limited to forms of standard threat: the world is so chock-full of non-standard threats that it would be virtually impossible to protect us against them prospectively. To anticipate and guard against the full range of non-standard threats would require an omnipresent, omnipotent, omni-intrusive, and omni-expensive government that had abandoned all activities except one: the spinning out of improbable right-threatening scenarios that must be warded off. It makes more sense, therefore, to leave the unusual rights violations to a system of purely reactive remedies. Only the standard threats need be guarded against in advance. And thus both prospective and reactive approaches to rights protection have a place in a system of rights.

It is important to see, however, that the two strategies differ markedly in their understanding of the manner and scope of rights protection. Reactivists deny that rights by their nature demand protection from merely potential infringements. Such a premise, they argue, amounts to a presumption that public officials, given half a chance, will violate the Constitution. Instead, reactivist opponents insist, we should presume — pending decisive evidence to the contrary — that officials will respect constitutional rights, and that those who fail to do so are mavericks, single "rotten

apples," rather than typical members of an untrustworthy system.

Prospectivists, in contrast, tend to entertain suspicions about the government and the authorities. They are willing to scrutinize powerful institutions in order to see whether a rights violation was merely an isolated incident or, on the contrary, the consequence of the institution's standard operating procedure. Thus, built into the prospectivist outlook is an anti-authoritarian tilt coupled with a penchant for considering social and structural explanations for rights violations.

It is, I believe, this double tendency of the Warren Court's prospectivist account of rights protection — toward anti-authoritarianism and toward structural explanations — that draws down the wrath of conservative theorists, just as the particular results the Court achieved draw down the wrath of conservative politicians. If this is true, then the fundamental divide between the Warren Court and its critics has to do not with the clash between judicial activism and judicial

restraint, but rather with the difference between prospectivist and reactivist approaches to the securing of rights. When Senator Hatch argues otherwise, he misconstrues the Warren Court decisions and actions that he opposes. The restructuring of institutions in order to abolish racial segregation "root and branch," the Court-approved judicial takeover of prisons and mental hospitals that abused and tormented their inmates, the rigid separation of church and state that the Warren Court believed essential to prevent believers from pressuring religious minorities to pray to an alien god — all these may be best understood not as instances of judicial activism, but as prospective protections of constitutional rights. They grew out of the Court's belief that primary constitutional rights create derivative, or secondary, rights whose purpose is to forestall standard threats to those primary rights.

The Example of Privacy

Having presented the Warren Court's prospectivist credentials, I can now offer two qualifications of my argument. First, not all conservative theorists reject the prospectivist approach to rights protection, nor do all critics of the Warren Court fail to acknowledge its commitment to that approach as the basis for its controversial decisions. Second, and perhaps more important, not all of the Warren Court's expansions of rights can be explained as prospectivist protections of primary rights. Take the Court's famous finding of a general right to privacy, in the 1965 case *Griswold v. Connecticut*.

The *Griswold* decision struck down a Connecticut statute forbidding the sale and use of contraceptives; it held that the statute violated a right to privacy implicit in the First, Third, Fourth, Fifth, and Ninth Amendments. Now, none of these amendments in fact mentions privacy, and none has anything to do with contraception — let alone cohabitation or copulation. Nevertheless, in the key passage of the *Griswold* opinion, Justice William O. Douglas argued that these amendments provide grounds for believing that the Constitution guarantees a general right of privacy. His metaphorical language has since become a source of bewilderment for law students and an object of ridicule in law school faculty lounges:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . . The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.

There are at least two ways of understanding this passage. The first is to read it as a restatement of the prospectivist view, asserting that the specific guarantees in the Constitution create derivative, secondary,

Legal Modernism

David Luban

Modernism in legal theory is no different from modernism in the arts: each responds to cultural crisis, a sense that institutions and traditions have lost their validity.

In his new book, legal philosopher David Luban argues that pragmatism, traditionalism, and nihilism are each a flawed response to the modernist predicament. Invoking Walter Benjamin's reflections on narrative and historical consciousness, he explores the nature of justice by analyzing Martin Luther King, Jr.'s "Letter from the Birmingham Jail," the Nuremberg trials, and trial scenes in Homer, Hesiod, and Aeschylus. With these examples, Professor Luban articulates several of the tensions that motivate contemporary legal theory — tensions between order and justice, obedience and resistance, statism and communitarianism.

Addressed to literary and social theorists as well as lawyers and philosophers, *Legal Modernism* provides important discussions of Critical Legal Studies and of writers as diverse as Hannah Arendt, Oliver Wendell Holmes, Anthony Kronman, Richard Posner, Richard Rorty, and Roberto Unger.

Publication date: June 1994
400 pages, \$47.50

University of Michigan Press
P. O. Box 1104
Ann Arbor, MI 48106
Tel: 313-764-4392
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or what Douglas here calls “penumbral” rights. Commentators who adopt this reading assume that wherever Justice Douglas mentions “guarantees,” he is referring (as he does in the opening phrase) to *specific guarantees explicitly stated in the Constitution* as the source of these penumbral rights. This is Robert Bork’s assumption, for example, when he observes,

Courts often give protection to a constitutional freedom by creating a buffer zone, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution. . . . Douglas named the buffer zone or “penumbra” of the first amendment a protection of privacy . . . [and] then asserted that other amendments create “zones of privacy.”

Perhaps surprisingly, Judge Bork has no objection to the idea of penumbral rights; though he finds Justice Douglas’s terminology “exceptional,” he accepts the theory itself. He’s a prospectivist.

However, Judge Bork does not accept the idea, which he also finds in *Griswold*, that the specific privacy rights emanating from various amendments can somehow fuse and create a general, freestanding privacy right — one that exists on an equal footing with the explicit guarantees of the Bill of Rights and is capable of independent growth and development. According to his account of *Griswold*, the Warren Court came to assert the existence of such a privacy right in two steps. First, it inferred penumbral rights of privacy from explicit constitutional guarantees. Then it fused these various penumbral rights into a general right of privacy. The first step, Judge Bork argues, is sound; but the second is not. Rights of specific and limited scope do not magically “fuse” into general, unlimited rights.

As lucid as it is, this account of the Warren Court’s logic in *Griswold* seems to me dead wrong. To see why, we need only examine one of the amendments that Justice Douglas invokes in asserting the right to privacy. I suggest the Third: “No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” If the Warren Court had indeed taken the prospectivist approach in asserting the right to privacy, it would have said that this right derives (or emanates) from the Third Amendment — that the right to privacy is a secondary right protecting our primary constitutional right to exclude soldiers from our homes.

Yet a moment’s thought tells us that the relationship between the two rights only makes sense the other way around. A right to privacy, after all, cannot afford any greater protection — cannot exclude soldiers from our homes any more effectively — than does the Third Amendment itself. On the other hand, the Third Amendment *can* help protect the relevant right to privacy — that is, privacy in our own home. Obviously, having a platoon of soldiers billeted in the basement

would put a damper on the intimate activities of the household. By forbidding the government from installing infantry in the house, the Third Amendment prospectively wards off what might otherwise become a standard threat to privacy.

The Third Amendment thus belongs to the penumbra of the right to privacy, not the other way around. Similarly with the Fourth Amendment right against illegal searches and the Fifth Amendment right against compelled self-incrimination: all of these rights are penumbral rights, derived from our right to privacy understood as a prospective protection against standard threats from the government. In each instance, it is by examining the specific guarantees in the Constitution that we discover and articulate the general guarantees (such as the right to privacy) they are established in order to defend.

At this point, let us return to the key passage from *Griswold*. Our first reading of the passage assumed that all the “guarantees” mentioned in it are *specific and explicit guarantees* understood as the source of penumbral rights. But a second, more plausible reading, proposed by Richard Mohr, argues that the opinion also invokes *general and implicit guarantees*. In the crucial sentence from *Griswold*, it is precisely these general guarantees that help give the specific guarantees “life and substance,” providing the motive and justification for those rights enumerated in the Constitution. In Justice Douglas’s view, the specific textual rights are best interpreted as protections of an unenumerated general right of privacy against a handful of standard threats anticipated by the framers. And once we come to recognize the right to privacy as a principle giving specific textual rights “life and substance,” we may proceed to consider whether contraception, for example, is protected by that right of privacy without attaching the question to any specific enumerated right.

The Human Goods that Rights Secure

There is more to say about the process by which we reason about and identify general guarantees. For this purpose, we may find an illuminating analogy in another area of the law of privacy — the testimonial privileges. These are rights to prevent persons in whom we confide from testifying against us in court, or to refuse to testify against persons who have confided in us. The common law recognized such privileges protecting communication between attorney and client, physician and patient, priest and penitent, and husband and wife. (The privilege against self-incrimination is also a testimonial privilege; while the others protect communication between two parties, the privilege against self-incrimination preserves the sanctity of one’s own thoughts, one’s relation to oneself in inner dialogue.)

The testimonial privileges are best thought of as prospective protections of our right to enjoy confidential relationships with our attorneys, our doctors, our clergymen, our spouses, and even ourselves. The question then arises: "Why just these?" And in turn, how this question is answered determines whether courts and legislatures should extend the privileges to other relationships. The physician-patient privilege, for example, has been extended to psychologists and counselors; the spousal privilege has been extended in three states to parents and children; and several jurisdictions have established accountant-client privileges. What principle is involved? Should the testimonial privilege be extended to financial planners? Insurance salesmen, who often receive sensitive financial information from their customers? Grandparents? Unmarried lovers? Best friends?

*Our inquiry into the Third Amendment
directs our vision to the importance of
private activities to a decent life.
The analysis leads us from the positive law
to the basic values it embodies.*

To answer these and similar questions, one needs some sense of what makes the five original relationships especially important. I suggest that these relationships correspond to five fundamental aspects of the human personality. I am, first of all, a self engaged in my own inner dialogue — a dialogue essential to my integrity. Hence the right against self-incrimination. Second, I am a physical body subject to all the infirmities and corruptions of the flesh. Hence, the right to speak confidentially with my doctors. Third, I am a social and loving being who may find a life's companion to share that love — a love that demands openness. Hence, the spousal privilege. Fourth, I am a moral and spiritual being, with a soul to tend and a burden of guilt that must be given voice. Hence, the priest-penitent privilege. Fifth, I am a citizen, a juridical person living in a network of public rights and relationships that are fragile and shifting and hard to understand. Hence, the attorney-client privilege. Thus, we find that the testimonial privileges are shaped to fit the contours of an entire philosophical anthropology — an answer to Kant's question, "What is man?"

To make sense of the laws granting testimonial privileges, then, we must view these privileges as penumbral protections of the five privileged relationships; and these, in turn, we best regard as themselves penumbral protections of five fundamental aspects of

human existence. The relationships "emanate" from these basic aspects of existence, and the privileges "emanate" from the relationships. Such an analysis allows us to understand what it means to regard a piece of positive law in such a way as to glimpse a more general principle that helps give it "life and substance."

In much the same way, we would begin an analysis of the Third Amendment by asking what is so burdensome about quartering soldiers in one's home. This question directs us to what is valuable about a home. The answer is that a home is a protection of the life that goes on within it, fostering it by shielding it from the outside world. (Of all the horrors of homelessness, the permanent lack of privacy is surely among the worst.) Our inquiry into the Third Amendment directs our vision to the importance of private activities to a decent life. The analysis leads us from the positive law to the basic values it embodies.

The Warren Court's Legacy

When we join this way of viewing legal rights with the prospectivist approach, we can appreciate the full magnitude of the Warren Court's contribution to the theory of rights, particularly constitutional rights. The Court began with specific textual rights, and then proceeded to elaborate them simultaneously in opposite directions: first, reasoning from these rights "down the line" to the secondary rights that must be put in place in order to secure them from standard threats; second, reasoning from these rights "up the line" to the values that the textual rights were themselves put in place to protect against standard threats. In doing so, the Warren Court gave meaning to the notion of a right as the moral and legal embodiment of a value that stands in need of stringent protection. At this moment in our legal history, when the Supreme Court has convened for the first time in forty years without a member of the Warren Court seated among the Justices, this is a legacy worth recalling accurately.

— David Luban

Sources: The New York Times (July 20, 1993); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); Richard Neely, *How Courts Govern America* (Yale University Press, 1981); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980); *Griswold v. Connecticut*, 381 U.S. 479 (1965); Robert H. Bork, *The Tempting of America* (The Free Press, 1990); Richard D. Mohr, *Gays/Justice* (Columbia University Press, 1988).

Deliberation in American Lawmaking

A spirited political reform movement has recently grown up around the idea of creating an "electronic democracy" in the United States. Its proponents say that by taking advantage of modern telecommunications, the American people could re-create the New England town meeting on a national scale — conducting televised debates about current policy issues, calling in their votes, and having the results instantly tabulated by high-speed computers. The aim of such an exercise would be to elicit the majority view and convey it to a government now widely seen as unresponsive to the popular will. Reformers promote electronic democracy as an innovative way of circumventing the "special interests" that appear to dominate policymaking in Washington. At the same time, they tend to see their proposal as a natural extension of the principles that motivated the framers of the American constitutional order.

Gary Tomlinson, a computer expert who has led efforts to organize electronic town meetings in Iowa, accounts for the invention of our representational form of government by observing that in eighteenth-century America, it was not feasible to institute "a direct, public feedback communication system for empowering a fledgling democracy." Technological limitations would have made such a system unacceptably slow. Given these constraints, "the Founding Fathers came up with the next best thing to direct-response opinion polling. That solution was the system of representation." Today, however, when other mechanisms are available for conducting public affairs, Mr. Tomlinson suggests that we should be guided by the founders' commitment to progress and entrepreneurship. "Do you really believe," he asks, "that if they were to travel forward in time, they would not figure out a better way for 'We, the People' to participate in government and take advantage of our light-speed communication systems and television technology?"

In what follows, I do not assume that the value of electronic democracy stands or falls with its supporters' interpretation of constitutional history. Nonetheless, it seems to me that the framers' vision of government and the lawmaking process is deeply at odds with proposals to enhance the role of "direct-response opinion polling" in American politics. I

should add that many features of our current political system may be equally at odds with the framers' conception. That is a point to which I shall return.

*In a deliberative democracy, the laws
will be made, in James Madison's words,
in accordance with "the mild voice of reason,
pleading the cause of an enlarged
and permanent interest."*

The Framers' Design

At the core of the kind of democracy created by the framers is the practice of deliberation. As commonly and traditionally understood, deliberation is a process in which the participants seriously consider substantive information and arguments and seek to decide individually and to persuade each other as to what constitutes good public policy. Thus, deliberation includes a variety of activities often called "problem-solving" or "analytic": the investigation and identification of social, economic, or governmental problems; the evaluation of current policies or programs; the consideration of various and competing proposals; and the formulation of legislative or administrative remedies. In any genuine deliberative process the participants must be open to the facts, arguments, and proposals that come to their attention and must share a general willingness to learn from their colleagues and others. In a deliberative democracy, the laws will be made, in James Madison's words, in accordance with "the mild voice of reason, pleading the cause of an enlarged and permanent interest."

Along with many of the leading liberal statesmen and theorists of their era, the framers believed that in order for reason's voice to prevail, lawmakers must reflect what the *Federalist Papers* describe as "the cool and deliberate sense of the community." Procedures and institutions must have the capacity to check or moderate unreflective popular sentiments and to promote the rule of deliberative majorities. In the particular type of deliberative democracy established by the

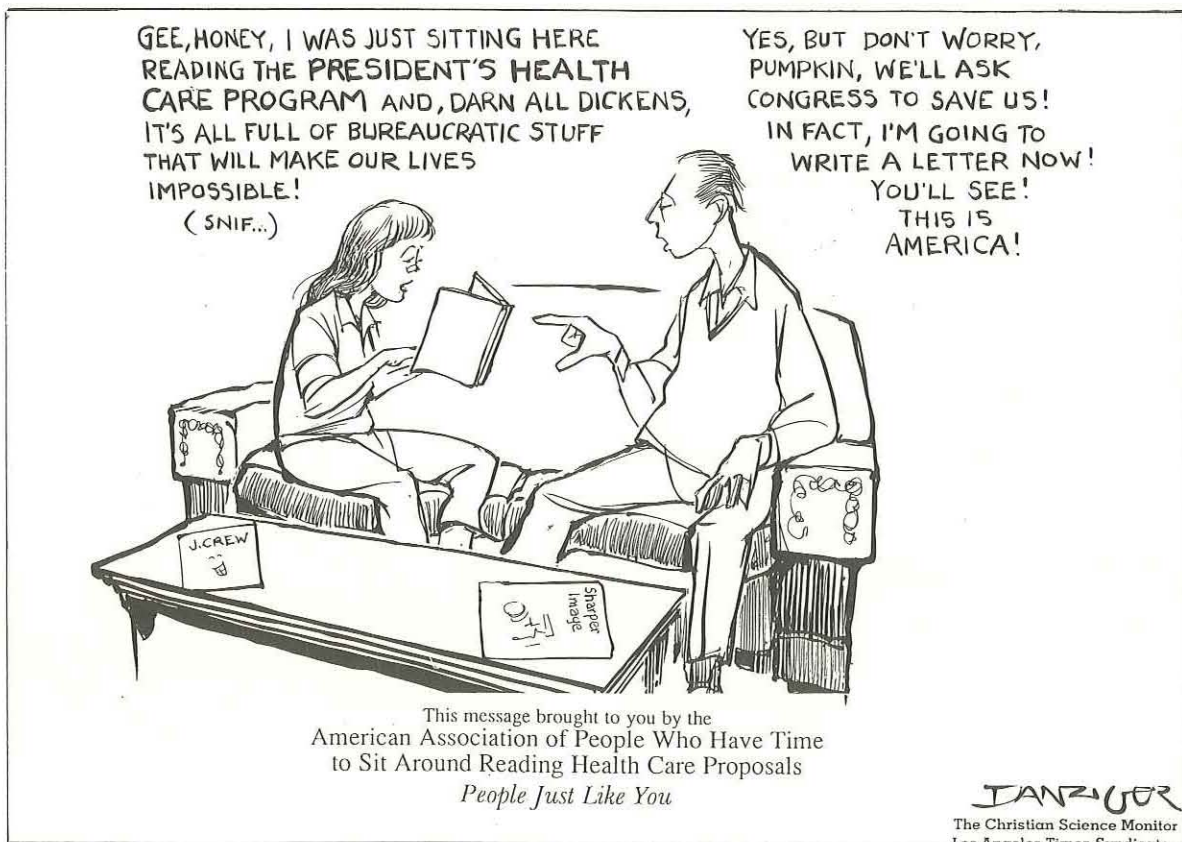
American Constitution, the citizenry would reason, or deliberate, *through* their representatives; on most issues the deliberative sense of the community would emerge not so much through debate and persuasion among the citizens themselves as through the functioning of their governing institutions.

Many structural features of the framers' governmental design are best understood as strategies for creating a deliberative democracy. For example, they created institutions and powers — such as a bicameral legislature, a Supreme Court with lifetime tenure, and an independent presidency with a qualified power to veto legislative acts — that would make it possible for the national government to oppose unwise or unjust popular inclinations. Indeed, those who wrote the Constitution of 1787 could hardly have been more explicit in making the case for moderating, restraining, or even blocking, at least for a time, some public demands on government. The people "know from experience that they sometimes err," Alexander Hamilton forthrightly maintained in newspaper essays addressed to the citizens of New York during the ratification struggle. On such occasions, when "the inter-

ests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection." Thus will the institutions of government "suspend the blow meditated by the people against themselves."

As anyone who has taught the *Federalist Papers* to college students can attest, the rhetoric of the framers is quite jarring to the modern ear; few students have ever heard a politician or government official speak so directly about the need, at times, for representatives of the people to resist public desires. Indeed, there may be a tendency to conclude, as did the Progressive historians, that the framers simply did not believe in majority rule.

Yet those who wrote the Constitution of 1787 consistently maintained that the system they set up was "strictly republican," and they recognized as "the fundamental maxim of republican government" that "the sense of the majority should prevail." The key to the reconciliation of these apparently contradictory



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intentions — to restrain popular majorities but also to effectuate majority rule — lies in the framers' broad purpose to empower *deliberative* majorities at the expense of uninformed, immoderate, or passionate ones. Thus, the genius and the particular challenge of the American system is its conjunction of deliberation and democracy.

Two Kinds of Public Voice

The democratic character of deliberative democracy is assured by its demand that the representatives of the people share the basic values and goals of their constituents; their own deliberations about public policy must be firmly rooted in popular interests. The elec-

toral connection is the chief mechanism for ensuring such a linkage between the values and goals of representatives and represented. If that linkage is sufficiently strong, then the policies fashioned by political leaders will effectively be those that the people themselves would have chosen had they possessed the same knowledge and experience as their representatives and devoted the same amount of time to considering the information and arguments presented in the national councils.

The democratic character of deliberative democracy is assured by its demand that the representatives of the people share the basic values and goals of their constituents.

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Joseph M. Bessette

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Thus, while deliberative democracy in its American form is distinct from direct democracy, where the people themselves make the key political decisions, it is also distinct from the kind of democracy proposed by Edmund Burke, or at least some of his interpreters, in which the wise and virtuous, freely chosen by the community, rule through the exercise of their independent and superior political judgment, disconnected from popular sentiments. The deliberative democracy of the framers, it can be said, is less democratic than direct democracy but more democratic than this version of the Burkean prescription.

According to the American theory of government, there are two kinds of public voice — one more immediate or spontaneous, uninformed, and unreflective; the other more deliberative, taking longer to develop, and resting on a fuller consideration of information and arguments — and only the latter is fit to rule. (The framers also expressed this distinction when they spoke of the opposition between passion and reason, or between inclinations and interests.) Under a well-designed representative system, Madison wrote, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." The deliberations of representatives will in general better promote the public good both because representatives are more knowledgeable and experienced than their constituents and because they make decisions in an institutional environment that fosters collective reasoning about shared interests. Even so, however, Madison insists that representative institutions do not displace public attitudes with the personal views of elected officials, but rather "refine and enlarge the public views." The result can be called "the public voice" even though it is not pronounced by the people directly and

even though it may differ substantially from public attitudes prevailing at any particular time.

The Nature of Public Opinion

Applied today, Madison's argument would suggest that the public opinion registered in polls and computerized call-ins is likely to be less deliberative and less conducive to the public good than attitudes informed and deepened through the operation of representative institutions. The very term "public opinion" implies the existence of developed public attitudes. Yet when attitudes are measured by an opinion poll, they may represent little more than the aggregation of hundreds of offhand, unreflective responses to a pollster's questions.

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Consider, for example, how a national polling organization would measure "public opinion" on the relative merits of competing proposals for a comprehensive national health insurance program. It is likely that 500 to 1500 phone calls would be made to a nationally representative sample of homes. The respondents, interrupted from other activities and largely unprepared to address the subject, would be asked a series of questions. It would be surprising if most respondents had read or thought much about the details of the various health care proposals prior to the telephone call, or, if they had, if they could instantaneously recall the pertinent issues. Consequently, they would tend to voice spontaneous reactions, unsupported by any serious reasoning about the arguments pro and con. Indeed, it could hardly be otherwise. Even if we assume that most people would be fully capable of reasoning about health care legislation if they were exposed to, and given ample time to reflect upon, the relevant information and arguments, we can hardly expect them to produce a deliberative opinion instantaneously. Yet it is not unusual for a sample of such instantaneous reactions to be aggregated to portray "public opinion" on national health insurance. Replace this issue with any other of at least moderate complexity — welfare reform, environmental protection, military spending in the post-Cold War era — and the point is the same. We should not be surprised if instantaneous opinion bears little resemblance to what would result from serious reasoning on the merits.

It is true, of course, that Americans generally are in a better position to deliberate on public matters than were their counterparts in earlier periods. Most citizens today have more leisure, more education, and more sources of information about public affairs. Nonetheless, it would be a mistake to overstate the impact of these changes on the problem of citizen deliberation. The average American may now work an hour or two less each day (and perhaps one day less per week) than in the previous century, but once commuting time, meals, errands, and family responsibilities are factored in, the "leisure" available for the study of public policy is at most a few hours on weekday evenings, and a few more on weekends. Moreover, the same technologies that have given us enhanced access to news and information have also resulted in the creation of an entertainment industry that effectively competes for the attention of the citizenry. Indeed, accounts of the early nineteenth century suggest that Americans of that era, presented with fewer entertainment options to fill what leisure they had, were exposed to more serious political discussions in the form of speeches, lectures, and debates than is the case today.

Finally, even if it were true that Americans are now better educated about public affairs than ever before, the fact remains that technological advancement, the rise of the United States as a world power, and the expansion of the domestic responsibilities of the national government (with regard to social welfare and economic management, for example) have vastly increased the number, breadth, and complexity of public policy issues. Taken together, these factors present a formidable impediment to public attention, understanding, and deliberation.

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The Contemporary Role of Deliberation

Thus far I have tried to show that the founders did not create a system of representation as a "second-best option," and that they would not have preferred "direct-response opinion polling" as the basis of government even if that choice had been available to them.

It is one thing, however, to articulate the framers' design and quite another to show its continuing relevance to contemporary American institutions. Is modern American democracy a deliberative democracy in

any important respect? Do the institutions of American national government, particularly the Congress, "refine and enlarge the public views" so that what emerges as national policy approximates "the cool and deliberate sense of the community"? Our answers to these questions will determine whether we understand the campaign for electronic democracy as a misguided departure from the framers' conception of government, or as a revolt against a political system that has itself fallen away from the framers' deliberative ideal.

It is not unusual for a policy initiative to take up to a decade or more to move from a novel proposal to the law of the land.

There is reason to think that the contemporary Congress is a more deliberative institution than its detractors imagine. The most detailed and extensive policy deliberations occur by design in the committees and subcommittees of both houses. Were the members of the House and Senate to meet only en bloc to consider legislative proposals, time limitations alone would render it impossible for the legislators to gather more than the most cursory understanding of the pertinent information and arguments bearing on each issue. But the committee structure allows for an institutional division of labor; various members can develop expertise in specific policy areas, especially when they serve on the same committee or subcommittee for many years. The vitality of discussion frequently manifested in committee hearings, especially on significant public issues, and the importance that politically sophisticated actors attach to the thorough and careful presentation of testimony, indicate that the hearing process is not generally a *pro forma* exercise.

In principle, these smaller decision-making units deliberate and exercise their judgment for the institutions they serve. By submitting reports to the full body of the house to which they belong, and by defending their decisions in floor debate, the committees seek to persuade non-members of the merits of their decisions; and it is a sign of their effectiveness that on average the House and Senate endorse about 65 to 70 percent of committee recommendations without revision and pass another 15 to 20 percent of committee bills with amendments. In only about 10 to 20 percent of the cases do the full bodies simply reject committee proposals.

On some important issues, the deliberative process within Congress has extended over many years. It is

not unusual for a policy initiative to take up to a decade or more to move from a novel proposal to the law of the land. This is one reason why legislators are not reluctant to introduce proposals that have little chance for passage within the immediate two-year legislative cycle. The Senate, in particular, has been described as an incubator of public policies, making a distinctive contribution, in Nelson Polsby's words, by "gestating [new] ideas, by providing a forum for speeches, hearings, and the introduction of bills going nowhere for the moment." This "process of gestation" encourages policy advocates to "keep information up to date on . . . prospective benefits and technical feasibility." And it accustoms the uncommitted to a new idea."

Congress, in this respect, is not an isolated institution. It is necessarily influenced by the constellation of ideas that predominate in the larger social and political system. As these ideas change over time, so too does thinking within Congress. Although the correspondence is not perfect, changing congressional membership, staff turnover, and electoral considerations all ensure a degree of responsiveness to external opinion. "To a very great extent," writes Paul Quirk, "the direction of policy change depends on the state of opinion about the public interest. That opinion includes the values and attitudes of the mass public; the general ideologies of the attentive public and political elites; the more specific policy and program doctrines of practitioners in each area; and the pertinent theories and research findings of policy analysts and social scientists." It follows that those forces which shape public and elite attitudes on social and political issues will have an impact on Congress and its deliberations about public policy.

Bargaining and Group Interests

It would be naive, on the other hand, to suppose that all the work of Congress is in keeping with the deliberative model of lawmaking. For most of this century, scholars of American government and politics have understood congressional lawmaking chiefly as a bargaining process, and deliberation has seldom been the focus of their attention. The prevailing theory is that politics reduces to the play of group interests, and thus that the reality of legislating lies not in the deliberative activities I have described but rather in the orchestration of deals, the trading of votes, and the hard-headed compromises that are arranged offstage or through subtle manipulation of the formal process itself.

Interestingly enough, many of the theorists who have examined such bargaining devices defend them as a positive good; they argue that by such means, a large, heterogeneous society can aggregate the diverse and often conflicting preferences of legislators, interest groups, or geographically defined constituencies,

while mitigating the potential divisiveness of trying to reach principled judgments in Congress as to "what is good for the nation." But these arguments are not especially persuasive. Whatever the advantages of bargaining in dispersing discrete public benefits, such as water projects, throughout the nation, how could bargains among hundreds of different legislators help Congress to make wise decisions on the great issues of foreign and domestic policy? There are, after all, better and worse answers to the questions that confront us, better and worse policies that Congress might embrace. The task of the legislators is to find the better answer, to fashion the better policy. How else are they to do so responsibly but by reasoning together on the merits of proposed approaches, relying on the best information and arguments available?

Many theorists have defended bargaining devices as a positive good. In recent years, however, some forms of bargaining have often seemed to undermine the deliberative process, or even to subvert the policy goals of their practitioners.

A less celebratory defense of bargaining nonetheless portrays it as a legitimate and necessary means for reaching collective decisions. Because a succession of majority votes — by subcommittees, committees, and the full bodies — is required before a bill becomes law, majorities must be built anew at each stage of the process. This, some theorists argue, puts a premium on the techniques of coalition building. It is hardly surprising, then, that legislators should agree to trade support for one another's proposals, or accept pragmatic compromises, or assume positions with an eye to the non-policy advantages they can secure by voting with one side rather than the other.

In recent years, however, such forms of bargaining have often seemed to undermine the deliberative process, and even to subvert the policy goals of their practitioners. For example, when the Reagan administration was seeking support for its 1981 budget package, it made a series of last-minute concessions to the moderate and liberal Republicans known as the "Gypsy Moths," raising spending levels for some programs and expanding the package of tax cuts. These concessions were projected to cost nearly as much in lost revenue as the 25 percent tax cut at the heart of the original proposal; and as budget director David Stockman later observed, the dozens of private deals he made in order to build a majority for the Reagan plan "shattered the fiscal equation."

Similarly, in the days before the 1993 House vote on the North American Free Trade Agreement, the Clinton administration not only promised certain House members federal funding for projects in their districts, but also agreed to a series of special-interest tariff deals to protect a bewildering array of American products. Gary Hufbauer, a pro-NAFTA economist, estimated that these agreements could "easily cost American consumers hundreds of millions of dollars." The side agreements also gave the impression that any pretense to legislative deliberation had been abandoned. In the words of one Ohio Democrat interviewed by the *Los Angeles Times*, the outcome of the House vote was "strictly because of the buyouts. It had absolutely nothing to do with the debate. It had absolutely nothing to do with the merits of the issue."

If members of the public, and of Congress itself, find reason to believe that the deliberative ideal of the framers no longer guides the legislative process, we should not be surprised if proposals such as that for electronic democracy continue to attract support. But it remains important to judge such proposals, and the democratic character of our political system, by how well they foster the rule of informed and reasoning majorities.

— Joseph M. Bessette

Joseph M. Bessette is associate professor of government and ethics at Claremont McKenna College. Excerpted from *The Mild Voice of Reason: Deliberative Democracy and American National Government*, by Joseph M. Bessette, to be published this spring by the University of Chicago Press. By arrangement with the University of Chicago Press © 1994 by The University of Chicago. All rights reserved. Additional sources: Dan Rodricks, "Electronic Voting Excited Dreamers Before Perot," *The Baltimore Sun* (June 8, 1992); Charles Lewis, "The NAFTA Math," *The Washington Post* (December 26, 1993); James Gerstenzang and Michael Ross, "House Passes NAFTA," *The Los Angeles Times* (November 18, 1993).

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