DEMOCRACY AND THE CONTEST FOR LIBERTY

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Let us launch right into our discussion of democracy. It is an essentially contested concept, as they say in political theory. To paraphrase Ronald Dworkin: We all have the concept of democracy; we can talk about it meaningfully. But we have different conceptions of it. And if we do not get clear on what conception we are invoking, there is going to be confusion rather than actual conversation.¹ I remind us of this because it is something that has been forgotten in American foreign policy.

In 1819, Benjamin Constant, often cited as a Frenchman although technically he was Swiss, discussed the difference between ancient liberty and modern liberty in a brilliant essay that clearly identified some key issues. He said of ancient liberty:

[It] consisted in exercising collectively, but directly, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace; in forming alliances with foreign governments; in voting laws, in pronouncing judgments; in examining the accounts, the acts, the stewardship of the magistrates; in calling them to appear in front of the assembled people, in accusing, condemning or absolving them. But if this is what the ancients called liberty, they admitted as compatible with this collective freedom the complete subjection of the individual to the authority of the community. You find among them almost none of the enjoyments which we have seen form part of the liberty of the moderns.²

And Constant's concern was modern liberty rather than a focus on democracy or popular sovereignty per se.

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¹ RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 130–31 (2006).

² Speech by Benjamin Constant at The Athénée Royal in Paris (1819), *in The Liberty of the Ancients Compared with that of the Moderns*, *in* BENJAMIN CONSTANT, POLITICAL WRITINGS 309, 311 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988).

We were warned again fifty-four years ago by J.L. Talmon, in his book, *The Origins of Totalitarian Democracy*, that democracy is not an inherently liberal concept.³ Fareed Zakaria's fine book, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, also focused on the possibility of illiberal democracy.⁴

Iran, mentioned earlier, is a fairly good example of such. Plausibly, you can change power through elections. Indeed Iran is not even a single-party totalitarian state; it has a multitude of different power centers. But it is hardly a liberal society, hardly an example of modern liberty.

The dangers of unlimited democracy should be obvious to all who will but consult history. For one thing, it undermines itself. You run the risk of "one man, one vote, one time," which is one of the legacies of some modern democratic thinking.⁵ Students of Roman history should be aware of the dangers of Marian-style democratic movements, which tend to focus power on one man or one party as the carrier of the will of the people, as the Roman popular politician Gaius Marius considered himself.⁶

A desirable democracy—a democracy that is stable, that can persist in any sense—requires limited government. It requires, for example, a loyal opposition. This is what we just witnessed in American politics. One party replaced the other in control of the Congress, and everyone expected the opposition to be a loyal opposition. They are not going to take to the streets or blow up train stations because they lost the election. But such loyalty is impossible, or at least extremely unlikely, if the losers who form the opposition fear that by losing an election, they risk losing everything: their goods, their property, their rights, perhaps even their lives. You cannot have a loyal opposition without limitations on the power of the party that has won to punish those who lost. And without a loyal opposition, you cannot have a democracy.

Liberals, and I include in that most, if not all, of the people present at this panel discussion (regardless of what you may call yourselves in the context of American or French politics), reject the single-minded focus on popular sovereignty that constitutes so much of the discourse of modern democracy; they instead favor constitutional liberalism, which crucially includes a democratic component. As I noted, the people just went and turned one party out of office and put another in charge of the Congress. To be successful as a democracy there must be clear limitations on the domain of public choice. It must be limited, or it will not be stable.

³ See generally J.L. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY (1952).

 $^{^4\,}$ Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad (2004).

⁵ See One Man, One Vote, One Time is Not Democracy: Interview with E.P. Djerejian, 13 NEW PERSP. Q. 12 (1996).

 $^{^6}$ See Robert Morstein-Marx, Mass Oratory and Political Power in the Late Roman Republic 110–11 (2004).

Stable and lasting democracy not only requires a framework of limited government, it requires a separation of powers—most particularly, a judiciary that is at least substantially independent of swings in the popular mood and undue influence from the elected or popular branches of government. Mancur Olson, the late political economist, very neatly pointed out:

[T]he conditions that are needed to have the individual rights needed for maximum economic development are exactly the same conditions that are needed to have a *lasting* democracy. Obviously, a democracy is not viable if individuals, including the leading rivals of the administration in power, lack the rights to free speech and to security for their property and contracts or if the rule of law is not followed even when it calls for the current administration to leave office. Thus the *same* court system, independent judiciary, and respect for law and individual rights that are needed for a lasting democracy are also are required for security of property and contract rights.⁷

So, there's a very close connection between democracy, the rule of law, and also economic and social development.

Douglass North, a Nobel Prize winner in economics, pointed out in a series of papers with his coauthor Barry Weingast that a key role of constitutionalism is facilitating commitments by those in power.⁸ Once the holders of power have made a commitment, they face the problem of time inconsistency. They made some commitment to get into office, but now they hold power and have no more incentive to fulfill that commitment. What is needed is a system that can require office holders—force them—to fulfill their commitments, including commitments to respect individual rights.

The second point I would like to bring up is that such a system of limited government is an *achievement*. That has been forgotten in recent years, particularly in this country. It is an *accomplishment*. Students of constitutional history know very well the struggles, compromises, and bitter fights that went into that achievement. It is not the natural equilibrium to which human societies move if some little obstacle is removed. What we have witnessed in this country is an astonishingly naïve understanding, or misunderstanding, of law and social and political development. We were told by the now much-maligned neoconservatives that all you need to do is get rid of some psychopath who stands in the way of a society moving towards natural equilibrium; that the natural equilibrium, the default condition, of human societies is Oregon.

The single-minded focus on elections in the constitution of a democracy or in its definition has had serious negative consequences for the pro-

⁷ Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 572 (1993).

⁸ See, e.g., Douglass C. North & Barry R. Weingast, Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England, in EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 134, 134–35, 162 (Lee Alston et al. eds., 1996).

motion of authentically liberal democracy. The more foundational and indeed inherently valuable elements of liberal democracy have been neglected; likewise, the historical processes that tend to produce them. We have witnessed this in Iraq very, very, very clearly.

Our president "mis-underestimated," as he would put it, not only the difficulty of actually creating a liberal democracy, but also the wickedness and evil of our enemies. Al Qaeda in Iraq does not want to expel the United States from Iraq; they want to drag us in deeper and deeper. That is their purpose. The destruction of the Golden Shrine of Samara, the real turning point of the war, I think, was a deliberate attempt to provoke a terrible civil war. Our political leaders did not understand that there are actually bad and wicked people on this planet who want maximum destruction, who hate liberal democracy, and who will do anything imaginable to stop it from coming about. Quite often when I am in Europe, I am irritated by European intellectuals who claim that Americans are naïve. Usually, I find it irritating. But in this case, it is spot on. Our leaders were astonishingly naïve about the conditions for the creation of constitutional liberalism.

Third, attempts to export or promote democracy by military force have demonstrably negative effects on our own system of constitutional government, which we ignore at our peril. Since we have had this shift to a war mentality, we have seen a serious erosion of civil liberties—most notably, to many of us, the horrifying, effective suspension of the writ of habeas corpus, that most important guarantee of our liberties, that simple Anglo-Saxon legal act that is more important, in my opinion, than elections and political campaigns. We have seen the ballooning of governmental powers; an administration and a Congress that have spent money faster than any other administration since LBJ; the creation of enormous new bureaucracies that are little more than agents of corruption of our constitutional system, spreading largesse and pork-barrel politics all through the country; enormous increases in governmental handouts and interventions into social and economic relations. All of it justified in terms of this war on terrorism and the necessity of promoting democracy.

I should point out, too, how fundamentally irrational and—I will be very blunt—stupid the war on terrorism is. This war is the most misconceived imaginable. Terrorism is a tactic. You cannot wage war on a tactic. An organization or a network such as Al Qaeda, foreign states such as the Third Reich or the Soviet Union—you can wage war on them. But waging war on a tactic is an open-ended commitment. You will never know when

⁹ Robert F. Worth, *Blast at Shiite Shrine Sets Off Sectarian Fury in Iraq: Wide Civil Strife—Calls for Restraint*, N.Y. TIMES, Feb. 23, 2006, at A1.

¹⁰ See, e.g., Editorial, Rushing Off a Cliff, N.Y. TIMES, Sept. 28, 2006, at A22 (criticizing various restrictions on civil liberties and the suspension of habeas corpus for Guantanamo detainees under the Military Commissions Act).

you have won. You will never know whether you have made progress. And you will never know when it is over. It is a fundamental mistake.

I would like to conclude with two things. One is a quotation from one of our other speakers, from an editorial in the *Weekly Standard* from December 2003, a ringing endorsement of the Bush foreign policy and the promotion of democracy as the central element of our foreign policy: "Bush has made it clear that the only exit strategy from Iraq is a victory strategy, with victory defined as 'democracy." I hope there will be some discussion by the author on that remark shortly.

But I would like to conclude by echoing Mr. Briard's comments that the promotion of liberalism is not something we should leave to government. It is something that we can do as individual citizens. My colleagues and I are very active in that process. We have published Hayek, Bastiat, Montesquieu, and Adam Smith in Arabic, Persian, Kurdish, and Azeri. They had never appeared in those languages before. We run seminars for young bloggers and journalists throughout the Middle East. We just did a program in the Republic of Georgia with people from twenty-eight different nations—Uzbekistan, Tajikistan, all the scary Stans, as well as the entire former Soviet Union and the peripheral countries, Iran, Iraq, Turkey, and so on—asking the hard questions about how they can foster the rule of law and enjoy the blessings of individual liberty. I would encourage you not to leave it to our incompetent federal government to promote liberalism. That is the job of citizens.

¹¹ Robert Kagan & William Kristol, An Administration of One, THE WEEKLY STANDARD, Dec. 1, 003, at 8.

¹² See François-Henri Briard, France and the United States: Not So Far from Each Other, 102 Nw. U. L. REV. 437, 439–40 (2008).

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