

Chapter 9

To Secure the Blessings of Liberty**§ 1. The Security of Individual Civil Liberty**

Every one of us, on our natal day, enters the world as a small and helpless outlaw, obedient to no one but himself. In a quite real sense, childhood can be regarded as that singular period in one's life when submission to the authority of others is freely acquiesced through the strength of habits and rituals the child neither questions nor understands. Piaget, the great twentieth century psychologist who is rightly called the father of developmental psychology, wrote

[The] individual, left to himself, remains egocentric. By which we mean simply this – Just as at first the mind, before it can dissociate what belongs to objective laws from what is bound up with the sum of subjective conditions, confuses itself with the universe, so does the individual begin by understanding and feeling everything through the medium of himself before distinguishing what belongs to things and other people from what is the result of his own particular intellectual and affective perspective. . . . And from the moral point of view, egocentrism involves a sort of anomy such that tenderness and disinterestedness can go hand in hand with a naive selfishness, and yet the child not feel spontaneously himself to be better in one case than the other. Just as the ideas which enter his mind appear from the first in the form of beliefs and not of hypotheses requiring verification, so do the feelings that arise in the child's consciousness appear to him from the first as having value and not as having to be submitted to some ulterior evaluation. It is only through contact with the judgments and evaluations of others that this intellectual and affective anomy will gradually yield to the pressure of collective logical and moral laws.

Socially, childhood can and should be seen as that period in a person's life when he comes to know that life will be lived within a society of others, and when he comes to form an understanding of what place in that society he will choose for himself to occupy. Outward manifestations of this developing understanding and judgment appear typically around age 11 or 12 years, and adolescence is that time of life when his social judgments begin to solidify in regard to relationships with others and with the geographical community around him. In a Republic so constituted that liberty with justice for every citizen can endure, childhood is the passage from outlawhood to citizenship.

But no person willingly obligates himself to the body politic in order that he might be tyrannized by it. He can be compelled by threats and force to present the continual appearance of acquiescence to the will of others, but this is nothing more than a mask of prudent and learned expedience. Beneath it will lurk the will and spirit to overthrow the oppression should the opportunity be presented. No one can be *compelled* by others to take onto himself any obligations whatsoever, and without self-assumed obligation to a social compact, he remains an outlaw who finds himself embedded in a geographical community of which, politically, he is no member and to which he owes no duty. It is only to purchase the benefits of civil liberty that he will exchange and willingly forego that freedom of nature which no

power on earth can take from him and which can be gainsaid only by death.

This fundamental law of the nature of political life must always be clearly understood if the geographical community is to also be a civic political community. Yet being and remaining conscious of this is shown in the most rudimentary examinations of sociology to be slippery to grasp and to hold. As human beings, we are all very much more alike than we are different from one another. There appears to be at work in human nature certain psycho-social biases and preferences that exert the most powerful influences over life in the civil community. In *Discourses on Davila* Adams wrote,

Men, in their primitive conditions, however savage, were undoubtedly gregarious; and they continue to be social, not only in every stage of civilization, but in every possible situation in which they can be placed. As nature intended them for society, she has furnished them with passions, appetites, and propensities, as well as a variety of faculties, calculated both for their individual enjoyment, and to render them useful to each other in their social connections. There is none among them more essential or remarkable than the *passion for distinction*. A desire to be observed, considered, esteemed, praised, beloved, and admired by his fellows is one of the earliest, as well as the keenest dispositions discovered in the heart of man. . . . Wherever men, women, or children are to be found, whether they be old or young, rich or poor, high or low, wise or foolish, ignorant or learned, every individual is seen to be strongly actuated by a desire to be seen, heard, talked of, approved and respected by the people about him, and within his knowledge. . . .

A regard to the sentiments of mankind concerning him, and to their dispositions towards him, every man feels within himself; and if he has reflected, and tried experiments, he has found that no exertion of his reason, no effort of his will, can wholly divest him of it. In proportion to our affection for the notice of others is our aversion to their neglect; the stronger the desire of the esteem of the public, the more powerful the aversion to their disapprobation; the more exalted the wish for admiration, the more invincible the abhorrence of contempt. Every man not only desires the consideration of others, but he frequently compares himself with others, his friends or his enemies; and in proportion as he exults when he perceives that he has more of it than they, he feels a keener affliction when he sees that one or more of them are more respected than himself.

This passion, while it is simply a desire to excel another, by fair industry in the search of truth and the practice of virtue, is properly called *Emulation*. When it aims at power, as a means of distinction, it is *Ambition*. When it is in a situation to suggest the sentiments of fear and apprehension that another, who is now inferior, will become superior, it is denominated *Jealousy*. When it is in a state of mortification, at the superiority of another, and desires to bring him down to our level, or to depress him below us, it is properly called *Envy*. When it deceives a man into a belief of false professions of esteem or admiration, or into a false opinion of his importance in the judgment of the world, it is *Vanity*. These observations alone would be sufficient to show that this propensity, in all its branches, is a principal source of the virtues and vices, the happiness and misery of human life; and the history of mankind is little more than a simple narration of its operation and effects.

If the political community is to form and to endure, it must find a way to do so in the present face of psycho-social factors such as these. To the extent it is *inadequate* in its attentiveness to the attending psychology, sociology, and anthropology of these influences on the exercise of natural freedom, to that extent also it will foster the formation and growth within its geographic community of a Toynbee Proletariat that obliges itself to no communal allegiance save the prudence of selfish interest.

It is doubtful whether any people of any nation have ever sufficiently appreciated this. It is one

thing to hold a Platonic speculation of this consideration and quite another to put its obvious tenet into consistent practice. Yet if the political community of a republic is to endure, its social, political, and educational practices must be and remain true to human nature and not trust in some Platonic idea impractical at its very root. This begins with a thorough understanding of the expectations of civil liberty and justice, without the consistent practice of which the political union will inevitably dissolve.

Government and its institutions and practices are central to fostering or hindering this. Here the restrictions imposed upon it are as important, and perhaps even more important, than the licenses granted to it. In *On Liberty* Mill wrote,

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the one end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Again and again in different times in the history of the American Republic agents of government – general, state, and local – have forgotten or neglected this fundamental constraint on the *just* exercise of power. So, too, have factions of private advocates of various social reforms.

When people whose views are today called "conservative" complain of "big government," the complaint is almost always, at its root, based upon transgressions of this limitation to the basic social compact. The best intentions of those whose views are today called "liberal" are often thwarted by too much zeal leading to uncivic neglect of this fundamental tenet of civil liberty. On the other side of the coin, too little regard for the foundation of civil law – namely, mutual self-protection – too often leads those who are called "conservatives" to neglect or oppose needful measures that those who are called "liberals" do understand to be necessitated by human nature or by the nature of the world itself. Too few laws and too many laws both alike rent and tear the fabric of the social compact. The former withhold the contractual expectation of the aid and protection of the common force of the body politic, without which the individual has no reason to forsake his natural freedom. The latter infringes upon the expectation of individual civil liberty, without which the individual would never place himself in a relation of mutual obligation with others. Ideological conservatives and liberals alike, acting as agents

of government or as agents of faction in particular points of law, bring on bad government, aid despotism, promote outlawism, and corrode the communal condition of liberty with justice.

This consideration is to be understood as applicable only in regard to the adult citizens of the body politic, who are capable of assuming responsibility for their own affairs, and not to its youthful minors who are not yet ready to safely and securely fend for themselves independently. Mill was careful to draw a distinction on this point:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

This general doctrine of civil liberty is easy to state, hard to *justly* put into practice. It requires good judgment, careful reflection, a sound liberal education, and, for agents of government, superior faculties of intellect. Above all, it requires constant attention to what Mill called "the permanent interests of a man as a progressive being." These interests are perhaps impossible to exhaustively enumerate in detail and in the particular for every individual. Some, however, are generic, are those to be served by the making of the social compact, and in the service of which are born the deontological *duties* of the citizen. Mill wrote,

Those interests, I contend, authorize the subjection of individual spontaneity to external control only in respect to those actions of each which concern the interests of other people. If any one does an act hurtful to others, there is a *prima facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation. There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform: such as to give evidence in a court of justice; to bear his fair share in the common defense, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow creature's life, or interposing to protect the defenseless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing.

A person may cause evil to others not only by his actions but by his inactions, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make any one answerable for doing evil to others is the rule; to make him answerable for not preventing evil is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception. In all things that regard the external relations of the individual, he is *de jure* amenable to those whose interests are concerned, and, if need be, to society as their protector.

There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: either because it is a kind of case in which he is on the whole likely to act better when left to his own discretion than when controlled in any way which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent.

Mill only states here the conclusion, not the reason why duties arise within the social compact, nor why "society" – the political community – acts justly when it compels a citizen to do his duty. But it is

not in the least difficult to supply the grounding reason¹. The Social Contract is a compact by which each person *pledges* his aid and support to the other members of the association to mutually "defend with the whole common force the person and goods of each associate" *while, at the same time*, "each, while uniting himself with all, may still obey himself alone, and remain as free as before." We see here there are *two* clauses in this Contract. The *first* is the source of individual duty to the association. Each citizen receives the benefits and protections of the association, but in return for this obliges himself to help provide these same benefits and protections for every other citizen.

The *second* clause is the source of *a duty of the association to the individual member*. In making the social compact, the individual does so with the understanding that, subject to the citizenship duties he willingly pledges himself to assume, *the association pledges* that in other matters he shall remain free to govern himself. *This* freedom is what *civil liberty* means. Mill went on to say,

But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; [this is the sphere] comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly and in the first instance . . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combinations among individuals; freedom to unite for any purpose not involving harm to others, the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government . . . The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each to live as seems good to themselves than by compelling each to live as seems good to the rest.

Each citizen, *as an associate in the body politic*, has the duty *to not act* in any way that infringes upon this civil liberty of any other associate *and* the duty *to oppose the actions* of anyone who does act to infringe upon another's civil liberty. The first, the duty of omission, can be called the duty to not be a criminal because *any intentional violation* of the terms of the Social Contract *is a crime*. The second is a duty of commission and it is nothing else than fulfilling one's pledge to defend with the whole common force the liberty of each associate. These two duties, taken jointly, are the *first* duties each

¹ Mill was one of the principal authors of utilitarianism, which is a form of consequentialist ethical theory. There is little doubt that he viewed the grounding reason from this perspective. Here in this treatise, however, we state the *objectively valid* reason from deontological grounds. Mill's conclusion is unaltered by this, but the basis for the conclusion is quite fundamentally different in that the deontological basis is *universally* applicable without regard to the variety of subjectivity. Subjectivity pertains to civil liberty; objectivity pertains to duty.

citizen bears in securing the blessings of liberty for all.

§ 2. The Necessity for Merit in Agents of Government

Securing the blessings of liberty begins with and depends upon the citizens of the Republic, and without citizens fulfilling their duty to this, liberty cannot be preserved. However, while the principle of civil liberty explained above is simple in the general consideration, realizing the security of civil liberty is very difficult in the particular. There are, as Mill knew and pointed out, numerous instances where the dividing line between what affects only the individual and what also affects others is difficult to pinpoint. If I publish a political opinion that distresses you so much you can't sleep at night, did my action "harm" or "affect" you? Some people would say it did; others would say it did not and that the only thing harming you is your own obsessing over the matter. One person's "cute baby picture of my four-year-old in the bathtub" is another person's "child pornography."

There are instances far more serious than either of these two examples. A few years ago there was a story that made the news headlines involving a convicted child molester who had been freed after serving his prison term. While conducting a search of his home – presumably with a legally obtained search warrant, although the story was not too clear on that point – police discovered a manuscript this man had written that was a fictional story of child sexual abuse. Based on this, they arrested the man for "possession of child pornography." Because no actual child was involved and this manuscript had not been published in any way, was the arrest an act of justice or a violation of civil liberty? Some say it was the former; some say it was the latter and a matter of persecution rather than prosecution.

As another example, in recent years one private enterprise company has adopted the policy that none of its employees can smoke cigarettes. We are not speaking here of a ban on smoking on the company premises. The policy is "no employee can smoke," period. The company's policy is backed up by mandatory testing of every employee. The excuse given is that, allegedly, employees who smoke cause the cost of the company's employee health insurance to go up. Is this really a ground for one private person – the head of the company – to dictate the personal and private behavior of another private person, namely the employee? Some say it is; others say it is not.

Another example: Most states currently prohibit same-sex marriages. The most common legal excuse given for this prohibition is that married couples are entitled by law to particular benefits paid for out of state funds, and that the taxpayers at large should not be required to "subsidize" sexual relationships to which, for one reason or another, the majority of the taxpayers object and would like to prohibit altogether. Is the "subsidy" argument valid, or is this an infringement of civil liberty? Some say it is a valid argument, others say it is an infringement.

A final example: A large fraction of the U.S. citizenry are opposed to abortion, and a significant

fraction of these people are violently opposed to it. The argument here is, fundamentally, "abortion is murder." Another large fraction of the population are opposed to the prohibition of abortion under some conditions, such as when the health of the woman is endangered or the pregnancy is the result of rape, but opposed to abortion if the pregnancy is in the late term. Is abortion murder? Science presently cannot answer this question because science has not yet discovered at what point in fetal development the living cells are sufficiently developed to constitute a *separate* living individual distinct from the mother. Religion cannot answer this question; it can only impose an arbitrary dogma. Is prohibition of abortion the protection of a human life or, at least under some circumstances, is it an infringement of civil liberty? Some say it is the former, others say it is the latter.

In these and many other issues, we must ask: whose opinion, if anyone's, should prevail within the political community as a whole? One thing is clear: under the Social Contract, mere majority opinion is not a just basis for ruling on such matters. Tyranny of the majority over a minority is the despotism of democracy, and majority rule is always the rule of compulsion by force or threat. It has been the Achilles heel of democracy since its inception in ancient Athens. Most issues of this sort produce, or are capable of producing, intense heat and passion on the part of those who involve themselves in it and are affected by it. The potential for tumultuous and violent disruption of domestic tranquility and disintegration of the Union are clear and present dangers that walk hand in hand with such issues.

But why is this? The fact is that it is a characteristic of human nature to try to deal with complex and upsetting issues by proposing simplistic tenets or rules that, once pronounced, are to be adhered to dogmatically for all time thereafter. It is an even more regrettable character of human nature that people then attempt to force or coerce other people into obeying such rules. Most rules of this type are commonly the product of passions of the moment or are subjective in the character of their grounds. So-called "moral laws" arising from a premise of either consequentialist ethics or virtue ethics are *always* of a subjectively grounded character and for this reason are not universal. Their enforcement must resort to coercion and force. *No* action taken *because* of the coercion of others, however, can be called a moral action because such an action is nothing more than an act of prudence. This is even more so in the case of so-called moral laws dictated by religious doctrine. But *all just* restrictions of natural freedom within a social compact are, in every case, *moral* restrictions. It is for this reason that moral laws can be congruent with the social compact only if the moral tenet can be applied with universal objective validity, and only deontological tenets are so capable. The moral laws codified in societal expectations can only be grounded in duties inherent in the free acceptance of obligation under the Social Contract.

But the issues, and the objective reasonings from deontological moral grounds, are difficult and complicated. They do, for this reason, call for the utmost exercise of care and reflection in judgment

and the utmost skill in crafting policy and legislation. Nothing less than possession by the policy makers, lawgivers, and judges of the very best grounding in liberal education that a political community is capable of providing can suffice to prepare agents of government to faithfully and justly perform their public duties. A simple and unfortunate fact is that every community includes in its membership a portion of scolds, cry-babies, bigots, and obsessively self-righteous zealots. Such people are singularly unsuitable for being entrusted with the responsibilities of justly governing a free people. The very extremity of their convictions, their ideologies, and their lack of good character stirs counter-passions in others and spreads political conflict like a viral plague throughout the body politic. Unchecked, this only leads to two outcomes: the utter loss of civil liberty and the destruction of the Republic through despotism. The latter eventually and inevitably follows the former.

This is to say that the security of liberty can be entrusted only into the hands of the most meritorious of caretakers. But what is merit? In his lectures on ethics Kant taught,

Meritorious action or merit is the quality of an act whereby more good occurs than to which end the actor was responsible for under laws of right; or, a law-abiding act yet such that the act could not have been compelled in the measure in which it actually took place; e.g. when charity, philanthropy are coupled thereto. An unmeritorious action – fault – on the other hand, is a transgression of obligation in which less than what ought to occur is achieved.

Deontologically, merit is not a thing ascribed to a *person* but, rather, that is ascribed to a person's *deeds*, and the manner in which these deeds are carried out, in the performance of some good service coupled to duty. However, we can call a person who habitually demonstrates merit in his deeds by the honorable title *a meritorious person*. A meritorious person is one who consistently demonstrates not merely fulfillment of duty – which is expected of *every* citizen – but fulfillment in a manner *above and beyond* the call of duty.

The Signers of the Declaration of Independence, who pledged "our lives, our fortunes, and our sacred honor" to the cause, were such men. They were, after all, wealthy men who could hardly be even slightly inconvenienced by a three pennies per pound tax on tea, and whose duty to oppose the despotism of their British rulers did not require them to lead a full-blown revolution against the most powerful military state in the world – in which action, as Ben Franklin observed at the time, "We must all hang together, or assuredly we shall all hang separately." Unfortunately, it is and has always been difficult to find those meritorious persons best suited to serve the Republic as agents of government. This is not because they are rare but because they are unknown to the population at large. John Adams wrote,

There is a voice within us, which seems to intimate, that real merit should govern the world; and that men ought to be respected only in proportion to their talents, virtues, and services. But the question has always been, how can this arrangement be accomplished? How shall the men of merit be discovered? How shall the proportions of merit be ascertained and graduated? Who

shall be the judge? When the government of a great nation is in question, shall the whole nation choose? Will such a choice be better than chance? Shall the whole nation vote for senators? Thirty millions of votes, for example, for each senator in France! It is obvious that this would be a lottery of millions of blanks to one prize, and that the chance of having wisdom and integrity in a senator by hereditary descent would be far better. There is no individual personally known to an hundredth part of the nation. The voters, then, must be exposed to deception, from intrigues and maneuvers without number, that is to say, from all the chicanery, impostures, and falsehoods imaginable with scarce a possibility of preferring real merit. Will you divide the nation into districts, and let each district choose a senator? This is giving up the idea of national merit, and annexing the honor and the trust to an accident, that of living on a particular spot. . . Real merit is so remote from the knowledge of whole nations, that were magistrates to be chosen by that criterion alone, and by a universal suffrage, dissensions and venality would be endless.

That the allure of politics draws into political life men who have their own interests at heart and little public interest other than in being re-elected has been so amply demonstrated so many times over so many years that we need not belabor the point. Adams went on to write,

As no appetite in human nature is more universal than that for honor, and real merit is confined to a very few, the numbers who thirst for respect are out of all proportions to those who seek it only by merit. The great majority trouble themselves little about merit, but apply themselves to seek for honor, by means which they see will more easily and certainly obtain it, by displaying their taste and address, their wealth and magnificence, their ancient parchments, pictures, and statues, and the virtues of their ancestors; and if these fail, as they seldom have done, they have recourse to artifice, dissimulation, hypocrisy, flattery, imposture, empiricism, quackery, and bribery. What chance has humble, modest, obscure, and poor merit in such a scramble? Nations, perceiving that the still small voice of merit was drowned in the insolent roar of such dupes and impudence and knavery in national elections, without a possibility of a remedy, have sought for something more permanent than the popular voice to designate honor.

Adams' point is well-taken. Yet the old historical remedies – title, land, wealth – are also those that lead to the despotism of oligarchy. More recent remedies – e.g., celebrity, endorsement – are hardly any better means. Does exemplary service to a political party demonstrate merit? Perhaps it demonstrates the merit of party loyalty and service, but political parties are divisive special interests that have not demonstrated any inclination, much less merit, to set aside party interests in service of securing the blessings of liberty for all. The present day state of partisan division in the general government is more than an ample demonstration that we must continue to seek new remedies.

Jefferson, too, remarked upon both the need for the agents of government to be meritorious people and the difficulty in accomplishing this goal. In his 1801 "Reply to the New Haven Remonstrance," President Jefferson wrote,

Of the various executive duties, no one excites more anxious concern than that of placing the interests of our fellow citizens in the hands of honest men, with understandings sufficient for their station. No duty, at the same time, is more difficult to fulfill. The knowledge of characters possessed by a single individual is, of necessity, limited. To seek out the best through the whole Union, we must resort to other information, which, from the best of men, acting disinterestedly and with the purest motives, is sometimes incorrect.

A concern for being able to attract meritorious people to service in the general government, and in

particular in the Legislative branch, also influenced the Framers' debates on a number of proposals and clauses during the 1787 Convention. For example, Delegate Robert Yates (New York) recorded in his notes for June 22 the following remarks (Farrand's *Records*, vol. I):

Mr. Wilson [James Wilson, Pennsylvania]: I am for striking out the words moved for. Strong reasons must induce me to disqualify a good man from office. If you do, you give an opportunity to the dependent or avaricious man to fill it up, for to them offices are objects of desire. If we admit there may be cabal and intrigue between the executive and legislative bodies, the exclusion of one year will not prevent the effects of it. But we ought to hold forth every honorable inducement for men of abilities to enter the service of the public. – This is truly a republican principle. Shall talents, which entitle a man to public reward, operate as a punishment?

Alexander Hamilton agreed with Wilson on this point in the question being debated (namely, Article I, Sec. 6 of the Constitution), but he did so from a somewhat darker view of human nature:

Mr. Hamilton [New York]: In all general questions which become the subjects of discussion, there are always some truths mixed with falsehoods. I confess there is danger where men are capable of holding two offices. Take mankind in general; they are vicious – their passions may be operated upon. We have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government. We have taken up many ideas upon trust, and at last, pleased with our own opinions, established them as undoubted truths. Hume's opinion of the British constitution confirms the remark, that there is always a body of firm patriots, who often shake a corrupt administration. Take mankind as they are, and what are they governed by? Their passions. There may be in every government a few choice spirits, who may act from more worthy motives. One great error is that we suppose mankind more honest than they are. Our prevailing passions are ambition and interest; and it will ever be the duty of a wise government to avail itself of those passions, in order to make them subservient to the public good – for these ever induce us to action. Perhaps a few men in a state may, from patriotic motives, or to display their talents, or to reap the advantage of public applause, step forward; but if we adopt the clause we destroy the motive.

In this case, the motion failed and Article I, Sec. 6 remained as it is today. Points and counterpoints on human nature, and the difficulty of ensuring meritorious *government*, if not the merit of all of its agents, drove many of the decisions the Framers made. In his notes from the next day, June 23, Yates recorded the following point-counterpoint between Madison and George Mason:

Mr. Mason [Virginia]: I differ from my colleague [Madison] in his proposed amendment. Let me state the practice in the state where we come from. There, all officers are appointed by the legislature. Need I add, that many of their appointments are most shameful. Nor will the check proposed by this amendment be sufficient. It will soon cease to be any check at all. It is asserted that it will be very difficult to find men sufficiently qualified as legislators without the inducement of emolument. I do believe that men of genius will be deterred unless possessed of great virtue. We may well dispense with the first character when destitute of virtue – I would wish them never to come forward – But if we do not provide against corruption, our government will soon be at an end; nor would I wish to put a man of virtue in the way of temptation. . . I will add that such a government ought to be refused by the people – and it will be refused.

Mr. Madison [Virginia]: My wish is that the national legislature be as uncorrupt as possible. I believe all public bodies are inclined, from various motives, to support its members; but it is not always done from the base motives of venality. Friendship, and a knowledge of the abilities of those with whom they associate, may produce it. If you bar the door against such attachments,

you deprive the government of its greatest strength and support. Can you always rely on the patriotism of the members? If this be the only inducement, you will find a great indifferency in filling your legislative body. If we expect to call forth useful characters, we must hold out allurements; nor can any great inconveniency arise from such inducements. The legislative body must be the road to public honor; and the advantage will be greater to adopt my motion than any possible inconvenience.

When one considers the extraordinarily low esteem in which Congress is held today by the public at large, Madison's final remark quoted above seems more than ironic. The Framers clashed on issues such as whether members of Congress should be elected directly by the people or appointed by the state legislatures – both methods being true to republican principles, in which the people elect representatives and entrust them with making good decisions, such as the decision about who should sit in Congress. It should be remembered that the original Constitution, prior to the seventeenth amendment in 1913, set up a system of government in which members of the House were elected by popular vote and members of the Senate were appointed by the state legislatures. Madison's notes from June 25 recorded the point-counterpoint debate, on the issue of how senators were to be chosen, between James Wilson of Pennsylvania and Oliver Ellsworth of Connecticut:

Mr. Wilson: The question is: shall the members of the second branch [the Senate] be chosen by the Legislatures of the State? . . . The General Government is not an assemblage of the States, but of individuals for certain political purposes – it is not meant for the States, but for the individuals composing them; the *individuals* therefore, not the *States*, ought to be represented in it: A proportion in this representation can be preserved in the second as well as the first branch [the House]; and the elections can be made by electors chosen by the people for that purpose. He moved an amendment to that effect, which was not seconded.

Mr. Ellsworth saw no reason for departing from the mode contained in the Report². Whoever chooses the member, he will be a citizen of the State he is to represent and will feel the same spirit and act the same part whether he be appointed by the people or the Legislature. Every State has its particular views and prejudices, which will find their way into the general councils, through whatever channel they may flow. Wisdom was one of the characteristics which it was in contemplation to give the second branch. Would not more of it issue from the Legislatures than from an immediate election by the people?

In the end, it was the position taken by Ellsworth that prevailed. This attempt to balance representation for the purpose of increasing the prospects of *merit in government* was what was overthrown in the overzealousness for direct democracy in 1913 that brought about popular election to the Senate.

Another, and possibly mortal, blow to merit in government was delivered by the arising of the two party system in American politics. This menace was clearly foreseen by Adams, who wrote of it in *Discourses on Davila*:

National passions and habits are unwieldy, unmanageable, and formidable things. The number of persons in any country who are known by name or reputation to all the inhabitants is, and ever must be, very small. Those whose characters have attracted the affections, as well as the attention of a whole people, acquire an influence and ascendancy that it is difficult to resist. In

² i.e., that senators be appointed by the state legislatures.

proportion as men rise higher in the world, whether by election, descent, or appointment, and are exposed to the observation of greater numbers of people, the effects of their own passions and of the affections of others for them become more serious, interesting, and dangerous. In elective government, where first magistrates and senators are at stated intervals to be chosen, these, if there are no parties, become at every fresh election more known, considered, and beloved by the whole nation. But if the nation is divided into two parties, those who vote for a man become the more attached to him for the opposition that is made by his enemies. This national attachment to an elective first magistrate, where there is no competition, is very great. But where there is a competition, the passions of his party are inflamed by it into a more ardent enthusiasm. If there are two candidates, each at the head of a party, the nation becomes divided into two nations, each of which is, in fact, a moral person, as much as any community can be so, and are soon bitterly enraged against each other.

One need only examine the political landscape of America over the past two decades to realize with what pinpoint accuracy Adams' prediction has come to pass. The only significant difference is that we have not two nations – a Democratic Party nation and a Republican Party nation – but three: the two already mentioned plus a growing Toynbee proletariat disgusted with both of the others. The present system is not only failing to preserve the Union of the Republic, but it is also transgressing upon the security of personal liberty for all its citizens.

There has never been a government of any nation that has exhibited perfect merit over an extended period of time. It would be naive to hope or conceive that better merit in government is an end that can be either quickly or easily achieved; and it would be childishly naive to think *perfect* merit in government is possible. But, to put it bluntly, the government of the Republic – at all levels, not merely in the general government – currently suffers from *inadequate* merit, and this is something we *can* hope to change. We, all of us, have our own private passions and inclinations, and it is a rare individual who does not feel within himself at least some dispositions he calls moral dispositions. Is there anything in human character that provides a signpost or an indicator that one person is more likely to act meritoriously in public service than another? There is. We call it *virtue*.

What is virtue? The word itself comes from the Latin, *virtus*, which meant "the qualities typical of a true man: manly spirit, resolution, valor, and steadfastness." It was from this original meaning that other derivative uses of the word arose: (a) excellence of character or mind, worth, ability; (b) moral excellence, goodness; (c) that in which something excels; and (d) through the merits or services of, as in "by virtue of an action." This last connotation (d) is one that connects an actual end result with the cause of that result, and the civic character of a person can be known objectively to others by this quality of virtue demonstrated by his deeds. In his lectures Kant taught,

The struggle of inclination with moral law, and the constant disposition (unwavering attention) to carry out his duties, therefore constitutes what we call *virtue*.

This is what virtue means when considered deontologically. To seek the remedy to inadequate merit in government is to seek means of choosing our agents of government for their quality of virtue. The

practical question is: By what means can we do so?

§ 3. The Idea and Mechanism of an Electoral College

The Framers of the Constitution produced an idea of a political mechanism that was unprecedented at the time, namely the idea of electors in an electoral college. The modern day flatulence of populist propaganda espousing an alleged universal good in direct popular election of the President by the people has, repeatedly over the years, sought to tarnish this idea by deluding the public into a belief that the vote of the majority must always be held to be sacrosanct. This same propaganda omits to mention that the will of the majority too often and too easily becomes the despotism of the majority over a minority who, correctly, holds itself to be disenfranchised and at the mercy of those whose views happen to momentarily be in the majority. For the disaffected members of the Toynbee proletariat, elections become not a matter of choosing the best or most virtuous candidates but, rather, a matter of opposing the election of the worse or more unmeritorious in the limited slate of candidates. For a member of this proletariat, there is always a missing selection in the ballot: *none of these*.

There is, of course, an important imperfection in the existing electoral college system, and we can trace the cause of this imperfection straight back to the Constitution itself. It is in Article II, Sec. 1:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of the Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

With the benefit of hindsight, we can see today that this decision – namely, to leave the manner by which the Electoral College was to be constituted up to the state legislatures – was an important mistake. During the early nineteenth century, as the power of national political parties arose, the parties came to dominate the state legislative processes. And they saw to it that candidates to be electors would be chosen by the political parties. By this they effectively deprived the people of the ability to choose their representatives – the electors – by either reputation or merit. Even today, most Americans do not realize that the citizen never votes directly for the President of the United States; he votes for a slate of electors whose names he has most probably never even heard.

The electoral college system was all too easily corrupted by the political parties, and this is the first of its crucial imperfections. The other is: the idea was not taken far enough to robustly serve the Republic as it grew in size and population. The number of congressmen is, by practical necessity, limited in size, and as the population grows all of the problems Adams pointed out above grew progressively worse.

Yet if the method adopted was flawed, the objective of the system was not. Gary L. Gregg II, director of the McConnell Center for Political Leadership at the University of Louisville, writes,

The Electoral College was to be a method of electing the president that in many ways would closely resemble the constitutional system writ small. The selection of a good man to be president, it was hoped, would work similarly to the way good public policy was supposed to emerge from the political system – that is, through the efforts of the most qualified people working under conditions that would encourage mature discussions. In the case of the political system, the desired end was public policy that would not threaten the system or any one part of it and would further the national good. Likewise, it was hoped that the Electoral College would result in a president with the qualifications and interests necessary to serve the public well. Properly understood, the Electoral College and its origins point to the ideas and values that undergird the entire American constitutional system as these were embedded in the foundations of the Electoral College itself.

We seek a remedy to inadequate merit in the agents of government – not merely for the office of President, but for all elective offices in the general and state governments. Does the method of an electoral college provide such a possible remedy? As presently set up the answer to this is no, but this does not mean there are no reformations for improving the current situation.

It is a fact that the present Electoral College is a powerful mechanism for preserving the two-party system. This can hardly be called an accident. The Electoral College is a significant barrier to success for any third political party. This is just as well; to have two strong national political parties is to already have two too many. Michael Barone, a senior writer at *U.S. News & World Report* and a supporter of the two-party system, argues that the two-party system moderates and restrains political excesses. He writes,

[The two-party system] forces politicians in a continental republic, with vast differences in cultural attitudes and economic circumstances, to come up with some combination of public policies that is capable of winning the approval of 50 percent of the people. It restrains the fissiparous tendencies of political ideologues and idealists, who seek to impose their will on a majority of those who reject their views. . .

When parties have an incentive to win 50-plus percent of the vote, they also have an incentive to moderate regional enthusiasms, to compromise ideological principles, and to unite voting blocs with very different cultural backgrounds and attitudes and very different economic interests and goals. Without this, it is hard to govern acceptably a republic that is continental in expanse and variegated in culture and ethnicity. In other words, there are powerful reasons, reasons that perhaps even might have proved attractive to the Framers if they had contemplated them, to prefer a two-party system to one which allows the proliferation of parties based on regional, ethnic, economic, or ideological factors.

Reasonable as this sounds, it does not work out. In the first place, the Framers were not ignorant of the nature of political parties, and the early Republic's most prominent leaders – Washington, Adams, Jefferson, and Madison – preferred no parties at all. But there was no direct remedy for them because to ban political parties is to ban the liberty of free association – a blatant transgression of the social compact. In the second place, it is not necessary for any political party to win 50-percent approval of the people; it only needs 50-percent *of the people who vote*. When the policies, favoritisms, and infringements on the liberties of minorities has progressed to the point where a substantial fraction of the people are driven to become part of a Toynbee proletariat, they will withdraw from the election

process, leaving the field to the diehard party members and the boundary fraction of people who are still not disaffected enough to abandon the action of voting against the greater of what they see as the two evils with which they are presented. In the third place, an incentive is not a necessity, and the current state of politics in America is ample evidence that the incentive factor Barone cites is a weak shield against the tyranny of the greater minority over all the lesser minorities.

Barone is, however, correct in his observation that the current Electoral College system does have the beneficial effect of at least moderating the impulses to proliferate political parties. He writes,

Electing the president by popular vote would encourage the creation of more parties and the proliferation of third-, fourth-, and fifth-party candidates. It would give strength to strategists in the major parties who want to rely on the parties' core constituencies to achieve a plurality victory. The result would be more governments unacceptable to a majority of voters. In a continental and economically and culturally diverse republic, that would be a recipe for disaster.

True enough, although there is nothing inherently wrong with having three, four, five, or more viable candidates for president in and of itself. The political ill-being of the Republic in the hands of two parties is not cured by having still more political parties. Proliferation of parties merely hastens the shredding of the social compact and the dissolution of the Union.

However, the fact is that elections today are, and for quite some time have been, nothing else than plurality victories, owing to the sizable fraction of Americans eligible to vote who do not vote. It is also a fact that both the Republican Party strategists and the Democratic Party strategists already rely on their core constituencies and have realized that they need not moderate the party ideology, but merely moderate the ideological tone of campaign rhetoric and propaganda. Again, the existence of a large Toynbee proletariat means that a government might be acceptable to a majority of *voters* and, at the same time, unacceptable to a majority of the *people*. And in any case *rule* by the majority is incompatible with personal civil liberty and is the despotism of democracy.

The absolute control by political parties of the electoral process inevitably, as Adams warned, divides the political community into as many "nations" within one geographical community as there are parties plus produces in addition an unaffiliated Toynbee proletariat. That the despotism might change hands every two or four or eight years does not make it any less a despotism. It merely compounds the general frustration until eventually, as Yeats wrote,

Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned,
The best lack all conviction, while the worst
Are full of passionate intensity. - *Michael Robartes and the Dancer: The Second Coming, st. I*

Abolition of the electoral college system will not pry the reins of political power from the hands of

those well-organized special interests we call the political parties. To think that having more direct democracy can cure the despotism arising from the *rulership* of the election process by the parties is to pay no heed to the repeated lessons of history. A *system* of popular voting arranged so that the bloc of non-party voters is deliberately rendered disorganized and dispersed, and so that the choices presented to them are *controlled* by the energetic and coordinated efforts of *party* organizations, merely entices those parties to employ all the tools of demagoguery and propaganda at their disposal to sway in their favor a single act by the voter made in one brief moment on one specific day in November.

To effect this swaying, the party must promise to *do* something. Nothing compels the winning party to actually fulfill this promise afterwards other than a prudent consideration of whether or not failure to follow through on its promises will rebound against the party at the next election. But even if it does follow through on what its platform pledged to do, there still remains that populace whose votes were cast against them, many of whom see the party's agenda as an infringement and threat to their personal civil liberties. An election system based on promises and propaganda will only place in power a body of agents who feel or claim they have a mandate to enact or repeal more laws, pass or rescind more regulations, and interfere to an ever greater extent with the private lives of individuals – and to do so with little or no regard to the six general objectives of the government of a Republic. Too many laws is just as great an evil visited upon the body politic as too few.

The issue comes back again and again to the merits of the people entrusted with the agency of government. In *The Federalist*, no. 57, Madison wrote,

The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effective precautions for keeping them virtuous whilst they continue to hold their public trust.

Expediency of the election process is no ground for endangering the goal of finding the best and most meritorious persons possible and summoning them to the service of their country. All too often, those who most eagerly step forward to seek power are also those least fit to hold it. The passage of time, the growth of the population, and its dispersion over larger geographical regions all favor expediency over merit, yet the fundamental premise of the social compact of the Republic must not be allowed to be lost, demoted, or misplaced in consequence of institutionalizing processes of expedience. In an 1816 letter to Samuel Kercheval, Jefferson wrote,

For let it be agreed that a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns (not indeed in person, which would be impracticable beyond the limits of a city or small township,) but by representatives chosen by himself, and responsible to him at short periods, and let us bring to the test of this canon every branch of our Constitution.

The *representative principle* is the keystone of republican government. It is near impossible to

judge merit in one who is unknown to you, especially when active political propaganda, sound-bite reporting, and the passions aroused by issues dominate and subdue reflection and reasoning. But it is a far different matter to judge the merit of persons known personally by you, and to decide if you are willing *to trust the judgment* of that person in important affairs. Few affairs are of greater importance than the identification of people of demonstrated superior merit for service in government.

Because the imperfections of the current system are so manifest, and the injury to the Republic so deep, clear, and present, let us ask ourselves: *Is it time to try a new experiment in republican election to office?* In that same letter, Jefferson wrote,

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I also know that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. . . Let us, as our sister States have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils.

Perhaps now, almost two centuries after these words were written, it is time to put them into practice.

In explaining the purpose of the Electoral College in *The Federalist*, no. 68, Hamilton wrote,

It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust [the presidency] was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and the discernment requisite to so complicated an investigation.

It was also peculiarly desirable, to afford as little opportunity as possible to tumult and disorder. . . The choice of *several*, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of *one*, who was himself to be the final object of the public wishes. . .

Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. . . But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the president to depend on preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the president in office.

And so it was at first. But Hamilton was wrong in his appraisal that the convention had guarded

against *all* danger of cabal. That danger – indeed, that reality – appeared in full effect the very instant the political parties gained the power to appoint their own slates of electors *and took from the public* the immediate power to operate in this choice. From that moment to this day, the *electors* have been selected by a preestablished body, namely the political party that *selects* them.

This is not to say that the co-opting of the Electoral College by the parties was on its first occasion the deliberate result of the act of a sinister and dark cabal. In their adolescence in the early nineteenth century, political parties were widely regarded to be honorable associations. Government, however, is hard and the issues the agents of government face are often vexing, urgent, and passionate. Even Hamilton fell prey to the temptation to drift from governing to ruling as the political party of which he was one of the chief founders and leaders – the Federalists – gained power during the first term of Washington's presidency and throughout Adams' presidency. It was the cause of a permanent and acrid rift that developed between himself (then Secretary of the Treasury) and Jefferson (then Secretary of State), much to Washington's distress. The depth of the enmity shows through clearly in a 1792 letter Jefferson wrote to Washington:

When I embarked in the government, it was with a determination to intermeddle not at all with the legislature, and as little as possible with my co-departments. The first and only instance of variance from the former part of my resolution, I was duped into by the Secretary of the Treasury, and made a tool for forwarding his schemes, not then sufficiently understood by me; and of all the errors of my political life, this has occasioned me the deepest regret. . .

. . . That I have utterly, in my private conversations, disapproved of the system of the Secretary of the Treasury, I acknowledge and avow: and this was not merely a speculative difference. His system flowed from principles adverse to liberty, and was calculated to undermine and demolish the republic, by creating an influence of his department over the members of the legislature. I saw this influence actually produced, and its first fruits to be the establishment of the great outline of his project by the votes of the very persons who, having swallowed his bait were laying themselves out to profit by his plans . . . These were no longer the votes then of the representatives of the people, but of deserters from the rights and interests of the people[.]

Harsh words, these, and still harsher ones followed in Jefferson's letter.

If it had been the intent of the Framers to have the Electoral College serve political parties as corporate persons, one would have to admit that all the intentions of such an institution have been fulfilled admirably and consistently. The electors have indeed been overwhelmingly faithful to their parties. But, of course, this was not the intent of the Framers. When they took up debate on establishing the Electoral College in September of 1787, there was surprisingly little disagreement about the College itself; most of the debate centered on the clause by which choice of the president would be thrown to the Congress if the electors did not agree on a majority candidate. The delegates' remarks of 4 Sept. are interesting to review in the convention *Records* (vol. II):

Mr. Randolph & Mr. Pinkney wished for a particular explanation & discussion of the reasons for changing the mode of electing the Executive.

Mr. Gov. Morris said he would give the reasons of the Committee and his own. The 1st was the danger of intrigue & faction if the appointment should be made by the Legislature. 2. The inconveniency of the ineligibility required by that mode in order to lessen its evils. 3. The difficulty of establishing a Court of Impeachments other than the Senate, which would not be so proper for the trial nor the other branch for the impeachment of the President, if appointed by the Legislature. 4. Nobody had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people. 6. The indispensable necessity of making the Executive independent of the Legislature. – As the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible also to corrupt them. . .

Col. Mason confessed that the plan of the Committee had removed some capital objections, particularly the danger of cabal and corruption. It was liable, however, to this strong objection: that nineteen times in twenty the President would be chosen by the Senate, an improper body for the purpose. . .

Mr. Baldwin thought the plan not so objectionable when well considered, as at first view. The increasing intercourse among the people of the States would render important characters less and less unknown; and the Senate would consequently be less and less likely to have the eventual appointment thrown into their hands.

This is, of course, just a part of the comments and observations made by the delegates. But the tone overall was much the same. It comes through very clearly in their remarks that "removal of the danger of cabal" was regarded as the strongest and best feature of the Electoral College method. The delegates' tinkering and amendment of the specifics to reach the final wording in the Constitution was little else than tinkering with the details.

Cabal, however, reasserted as a fundamental defect once the Electoral College fell into the hands of the political parties. The remedy, in broad outline, is obvious: the College must be taken out of their control in determining the appointment of Electors. Less obvious, because not even considered at the Convention, is a more broad-reaching issue. This is the urgent need to disempower the political parties' ability to control the election of Congress. As noted in our previous chapter, it is the Congress itself where the most pressing need for reform exists. There are now individual states in the United States – and even individual cities – where the population exceeds the entire population of the United States at the time of the Constitutional Convention. And what could have been made to work for the country as a whole in 1787 could also be made to work in electing a Congress in the face of even larger state and city populations in 2010.

§ 4. The Objectives of Reformation to Secure the Blessings of Liberty

§ 4.1 The Purpose and Prime Objective of the Reform

In the introductory essay of *United States Magazine and Democratic Review* in October, 1837, John L. O'Sullivan wrote, "The best government is that which governs least." Like most simple bits of folksy wisdom, this is not true yet not entirely false. It echoes in sentiment the more fiery words of Thomas Paine in *Common Sense*,

Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries *by a government*, which we might expect in a country *without government*, our calamities is heightened by reflecting that we furnish the means by which we suffer.

There is something in the human psyche that urges and encourages a drive to oversimplify principles and to drive our ideals toward an extreme. Such is the case in the urgent and rarely questioned maxim of "one man, one vote" that almost serves as the motto for democratic idealism. Most people respond with an instinctive impulse to understand maxims by projecting them onto some simple and Platonic ideal of an absolutely good example. This is nowhere more true than in matters of morals and ethics, which is always what judgments of the goodness of government ultimately come down to be.

But this Platonic simplification is always a harmful, even dangerous, illusion. Kant wrote,

There is nowhere in the world, likewise indeed even beyond it, what is possible to think without restriction as good except a **good will**. Understanding, wit, judgment, and the like *talents* of mind may be called so, or in many aims courage, resolution, perseverance in intention as qualities of *temperament* are no doubt good and desirable; but they can also be of utmost evil and pernicious if the will is not good which should make use of these gifts of nature, and whose distinctive constitution is therefore called *character*. – [*Grundlegung zur Metaphysik der Sitten*]

Aristotle taught that moral excellence is always a *mean* between the extremes of lack and excess; he held the latter two to be the species of vice:

Virtue, then, is a state of character concerned with choice, lying in a mean, i.e. the mean relative to us, this being determined by a rational principle, and by that principle by which the man of practical wisdom would determine it. Now it is a mean between two vices, that which depends on excess and that which depends on defect; and again it is a mean because the vices respectively fall short of or exceed what is right in both passions and actions, while virtue both finds and chooses that which is intermediate. Hence, while in respect of its substance and the definition which states its essence, virtue is a mean, in point of excellence and rightness it is an extreme.

According to his pupil, the Greek historian Xenophon, Socrates also taught that "good" is always relative to and restricted to some context:

When Aristippus attempted to cross-examine Socrates in the same fashion as he had been cross-examined by him in their previous encounter, Socrates, wishing to benefit his companions, answered like a man who is resolved to do what is right, and not like a debater guarding against any distortion of the argument.

Aristippus asked if he knew of anything good, in order that if Socrates mentioned some good thing, such as food, drink, money, health, strength, or daring, he might show that it is sometimes bad. But he, knowing that when anything troubles us we need what will put an end to the trouble, gave the best answer: "Are you asking me," he said, "whether I know of anything good for a fever?"

"No, not that."

"For ophthalmia?"

"No, nor that."

"For hunger?"

"No, not for hunger either."

"Well, if you are asking me if I know of anything good for nothing, I neither know it nor want to know it." – [Xenophon, *Memorabilia*, III, viii]

The character of an ideologue is the character of an extremist. As a lawmaker, as a judge, as an executive, as a juror, or in any role as an agent of government, the ideologue is a provider of bad government and will inevitably become a violator of the social compact, an agent of despotism, and a destroyer of civil liberty. If there is a merit in the American two-party system, bound and restricted as it is by the current structure of the Electoral College, it is that this system is one that works against (even if it does not prevent) the triumph of ideology in national politics. Professor Paul Rahe of the University of Tulsa wrote,

The virtue of this complex system [the Electoral College] is that it inadvertently achieves something of what the Founding Fathers intended. The crucial fact is that it militates against petty factions and regional parties, which have little hope of placing one of their own in the presidency. Given the diversity of our country, this in turn dictates a modicum of moderation on the part of the presidential candidates and of the parties that support them.

These parties and their nominees must aim at the achievement of a national consensus. They must be competitive in an enormous variety of venues. Every four years, they must attempt to present a program and an argument to justify it that will attract support from a plurality of citizens in a great many distinct constituencies – each with its own peculiarities. This discourages religious bigotry and tempers ideologically charged partisanship. It encourages coalition-building and careful attention to the varying needs and concerns of exceedingly diverse groups. It promotes a politics of inclusion. A party may write off a particular state, or even a region in a presidential election. Very, very rarely, however, can it afford to do so for long. Given the fluidity of our politics, our parties generally strive to remain competitive everywhere.

Because of the Electoral College, no party intent on victory can afford to pour scorn on the Jews of New York, the Mormons of Utah, the Muslims of Michigan, the Catholics of Illinois, the Armenians of Massachusetts, or the evangelical Protestants of Oklahoma. No one can ignore the concerns of aboriginal Americans or those of hyphenated Americans – whether they trace their ancestry to Europe, Mexico, sub-Saharan Africa, Asia, or the Middle East. The American Jewish Congress understood what was at stake in 1969-1970 when it opposed the direct election of the president, and it is no accident that the National Association for the Advancement of Colored People (NAACP) treated the proposal under discussion that year as highly suspect and then forcefully joined the defenders of the Electoral College in 1977, when Senator Bayh, with strong support from President Jimmy Carter, once again pressed for its abolition.

Even so, and true as it is, we must take critical note of the soft and equivocal character of Rahe's argument. The present system does "encourage" moderation in presidential politics, but it does not offer a convincingly strong set of conditions to prevent ideology and partisan injustices from taking control of the reins of government. Most recently, the Republican Party during the two terms of George W. Bush adopted an extreme and polarizing political ideology, as did the Republican controlled Congress in the six years leading up to the 2000 presidential election. It likewise maintained this ideological extremity in its loss in 2008 to President Obama. The present system for electing the President of the United States is far better for preserving the character of the general government, as *both* a national government *and* a federal government, than popular election by direct democracy

would be (which would, among a number of divisive and disastrous consequences, convert the general government into a strictly national government in its Executive branch). But it is still a system plagued by uncivic imperfections that promote the despotism of special interests, and it does nothing to guarantee moderation of these impulses on the part of Congress.

There is nothing wrong with a political party as an association providing its members with a forum for coming together to debate, determine, and refine ideas for what the policies of good republican government should be for the times we live in and the outlaw world we inhabit. There is nothing wrong with them promoting their ideas to the public. Nor can political parties be forbidden without tyrannically doing away with the civil liberty of free association. But there is *everything* wrong with placing the mechanics of choosing our agents of government in the hands of political parties. Intrigue, deceptive propaganda, false promises, the destruction of domestic tranquility, and the despotism of the largest plurality of *voters* over the majority of *citizens* are all natural consequences of this.

Good government is deontologically moral government because the agents of government are, in every case and in every instance, required by the Social Contract to be servants of the body politic and *never* the *rulers* of that body. The *rule* of the American Republic belongs to the Sovereign alone. The *justice* subsisting in every rightful act of government subsists nowhere else than in the limitation of laws and regulations to the maintenance, promotion, and security of the *common* well-being of the body politic. Nothing else is ever just, and the price of failing to meet this prime *duty* of government is the loss of individual civil liberty, the sundering of the Social Contract, and the death of the Republic.

Good government, therefore, requires and demands that its power be entrusted to those citizens who *demonstrate* in the conduct of their lives and the soundness of their practical judgment nothing less than the greatest degree of civic merit. There are few people – perhaps none at all – who would today seriously argue that our agents of government are comprised of the most meritorious, or even the better-than-averagely meritorious, among us. Not every agent of government is an unmeritorious person, but far too many are precisely that, and this renders insecure the blessing of liberty for *all* the citizens of the Republic. The **purpose of reformation** in regard to securing the blessings of liberty for ourselves and our posterity is therefore: ***To make more perfect the quality of merit in the actions of the agents of government.***

Again, *merit is the quality of an act whereby more good occurs than to which end the actor was responsible for under laws of right; or, it is a law-abiding act yet such that the act could not have been compelled in the measure in which it actually took place.* Meritorious people consistently display this quality in their actions. The problem and the difficulty in republican government has always been: how to find those exemplary individuals who most display this quality and induce them to take up a duty of public service to the Republic. In a *democratic* republic, this judgment can be safely entrusted

only to the body of citizens at large, and never to a group of unknown strangers at the head of political parties. But, as we have seen above, the rendering of good judgment in this matter is among the most difficult of all judgments, and common experience alone is enough to demonstrate that the individual talent for rendering it varies widely from person to person according to experience, talents of native intellect, and the propensity for thoughtful and well-educated civic reflection. None of us possess either experience, a developed intellect, or the capacity for reasoned reflection on our natal day. We each come into possession of these traits, in the degree to which each of us individually comes to possess them, through the lessons of life.

The Idea of the American Republic contains the best remedy for this crucial problem that political thinkers have yet achieved, namely, the entrusting of crucial public decisions to those who we most trust to place the considerations of the common well-being of us all above every other consideration. Nowhere is this principle more vital than it is for choosing our agents of government who, no matter what office they hold, are, first before anything else, *public guardians of liberty with justice for all*.

This brings us to ***the prime objective of reform in meeting the general objective of securing the blessings of liberty: To provide mechanisms for the selection of candidates for government office that better insure that the choices presented to the citizens of the Republic are drawn from the most meritorious citizens available and willing to accept the call to public service.*** At present the choosing of the slate of candidates for public office is held in the tight grip of the political parties, and the simple, cold truth of the matter is that under this system candidates are selected more upon the basis of the chance they will be elected, which too often depends upon impostures that fan and appeal to the hasty passions of the moment than upon the basis of their personal merit. Simple popularity or mere name recognition is no secure basis for insuring liberty with justice for all. The weakness of popular election is that it can all too easily be swayed by demagogues, a consideration that was of great concern to many of the delegates at the Constitutional Convention in 1787. This weakness, however, can be counteracted and even eliminated if the candidates offered up for choice as agents of the people are those whose personal merits have already been critically ascertained by meritorious Electors.

§ 4.2 The Objectives of Implementation

It is never politic in a republic or a democracy, much less in a democratic republic and so much more the less in the American Republic, to even hint that there are limitations to the ability of the people to make good choices. Yet limitations there are; history is rife with proof of this proposition, and to deny it is to make the Platonic error of trusting to an illusional ideal that has no real foundation. *People are the best judges of things they know best and the worst judges of things about which they possess few or no facts or experience.* The strength of a republic draws upon the first, and from the

second springs its imperfections and mortality. It is far easier to discern a mistake after the fact than it is to judge a decision to be a mistake before the fact. How many people do each of us know who are perfectly willing to agree that some third person lacks some quality of character, but who bristles with indignation at the suggestion that he might possess shortcomings of his own? Yet we all have them.

It was not at all an ascertained given on the first day of the Constitutional Convention that the new government of the United States was to be a democracy of more than a very limited extent. All of the delegates to the Convention were wary of democracy, with its past history of failures and abuses, and differed among themselves only to the extent to which they thought a *republic* could or should be democratic. Indeed, forty years would pass between the framing of the Constitution and establishment of widespread – or, at least, a *wider* spread – popular democracy with the administration of Andrew Jackson. As noted earlier in this book, the democratic leanings of the Founding Fathers were divided up into three broad groups: the Conservatives who desired as little fundamental change as possible, the Liberals whose views were the most moderate of the groups, and the Radicals (also known as the Democrats) who favored many and far-reaching changes and demanded representative democracy. We have also quoted earlier in this treatise some of the views of those delegates who most distrusted the character of democracy and their reasons for this distrust. It is instructive at this point in the treatise to look at some additional remarks, made at the Convention on 31 May, 1787, as recorded by Madison:

Mr. Wilson [Pennsylvania] contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people. In a republican Government this confidence was peculiarly essential. He also thought it wrong to increase the weight of the State Legislatures. All interference between the general and local Governments should be obviated as much as possible. On examination it would be found that the opposition of States to federal measures had proceeded much more from the Officers of the States than from the people at large.

Mr. Madison [Virginia] considered the popular election of one branch of the national Legislature as essential to every plan of free Government. He observed that in some of the States one branch of the Legislature was composed of men already removed from the people by an intervening body of electors. That if the first branch of the general legislature should be elected by the State Legislatures, the second branch elected by the first, the Executive by the second together with the first; and other appointments again made for subordinate purposes by the Executive, the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers too little felt. He was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. He wished the expedient to be resorted to only in the appointment of the second branch of the Legislature [the Senate], and in the Executive and judiciary branches of the Government. He thought too that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislature.

Mr. Gerry [Massachusetts] did not like the election by the people. The maxims taken from the British constitution were often fallacious when applied to our situation, which was extremely different. Experience, he said, had shown that the State Legislatures drawn immediately from the

people did not always possess their confidence. He had no objection however to an election by the people if it were so qualified that men of honor and character might not be unwilling to be joined in the appointments. He seemed to think the people might nominate a certain number out of which the State Legislatures should be bound to choose.

Mr. Butler [South Carolina] thought an election by the people an impracticable mode.

The vote on the question of election of the House of Representatives by the people was passed with six states in favor, two opposed, and two states divided in their vote.

With the benefit of the hindsight of history, Gerry's remark about popular election qualified such that "men of honor and character might not be unwilling to be joined in the appointments" seems in some ways particularly prescient. Is there, after all, a surer route to loss of confidence in and distrust of Congress than the spectacle of congressmen caught engaging in bribery, favoritism, or personal misconduct? As Congress more and more earns the public's distrust, this can only swell the disaffected ranks of the Toynbee proletariat within the body politic.

Yet the remedy cannot rest in abandoning the principle of democracy, for to do so is to do nothing less than wrest the Sovereignty from the citizens of the Republic and place it in the hands of oligarchs. Democracy in and of itself is neither the problem nor the cure. *The merit of the candidates for office* is the problem and the cure.

Let us review and recapitulate the main points raised in this chapter and place them firmly within the context of a reformed and expanded system of electoral colleges chartered to better insure merit in government:

1. Electors are to be citizens personally known and appointed by their fellow citizens in their geographical communities on the basis of their local reputations for merit;
2. These electors are charged with service in the capacity of being *the officers of liberty*;
3. The electors' task is to identify persons of high national civic merit for the call to service in the general government, and persons of high state civic merit for the call to service in state government; where larger cities, towns, and counties are concerned, they are to likewise identify persons of high local civic merit for the call to service in city, town, and county governments;
4. The new system of electoral colleges must also assume the task of appointment of Presidential Electors, to be listed on the ballot for selection to the task of electing the President of the United States, in the proportion of the whole number of Representatives and Senators held by each state under the Constitution;
5. The electors are to elect *candidates of merit* for ballot presentation to the citizens during elections, and are to exclude from candidacy on the ballot those individuals seeking office who are lacking in *demonstrated* merit for government service;
6. The electoral colleges must be statewide in the extent of those who they represent, and of sufficient number to insure that the electors themselves are appointed locally by a small enough portion of the citizenry to be known to them by personal reputation;
7. The electoral colleges should, at the end of their college caucus, publish a report to the

citizens at large summarizing the meritorious factors that led them to include each presented candidate for the citizens' consideration in the election;

8. Because the judgments of the college involve deliberations and debate concerning the personal reputations of those considered for candidacy, and must remain free of influence by public passions, the deliberations of the college should be done out of the eye of the public – as was the Constitutional Convention of 1787 – and its proceedings should be closed except for its journal and the final public report of item (7);
9. The colleges should be empowered to recruit the most able and meritorious citizens it can find and attempt to persuade them to answer the call to public service, but do so without coercion and with recognition that there are limits to which a citizen's duty to answer the call to public service justly extends.
10. Because the number of electors in a state-wide electoral college will necessarily be large and must be adaptable to changes in population level and local population densities, a system of collegiate organization, perhaps in the form of a pyramidal system, must be specified in the enactment of the reform; the task of organizing the college cannot be delegated to existing state governments because it must reflect the Sovereignty of the citizenry itself and serve nothing but the Sovereign of the state;
11. Because of the crucial role of the college in the electoral process, and because of the limited duties with which its members are charged, the members of electoral colleges must be reappointed or re-elected prior to every Constitutionally mandated election with a sufficient time being granted between the assembly of the college and the election so that the electors have sufficient time for their deliberations and decisions;
12. The system and manner of appointment or election of electors by the citizens must be made secure against all influences of any kind by political parties, political action committees, private enterprise corporations, or any other influences or interests other than that of the local body of citizens from whose rank the electors are to come.

A well wrought electoral college system such as this *is a system of democracy writ small and local*, which is precisely the township-level base where democracy works best and the judgments of the citizens are the keenest and least susceptible to the deceptions of propaganda. An elector is to be one's own neighbor whose personal merits and qualities of judgment have *earned* the personal trust and esteem of his neighbors. It can be anticipated that this *decentralized democratic control* will require even small cities and larger towns to be represented at the college by more than one elector in order that the critical factor of *personal* knowledge of the elector's own civic merits may be satisfied.

In regard to (9), mere common sense is enough to make it obvious that no citizen can justly be held to an expectation that duty requires him to completely forego attention to his private affairs and to dedicate his life exclusively to public affairs, no matter how much his service is desired by the greater body of his fellow citizens. In 1782 Thomas Jefferson desired nothing so much as to retire from public office and public service. In a letter to James Monroe, dated 20 May, 1782, he wrote,

I considered that I had been thirteen years engaged in public service, that during that time I had so totally abandoned all attention to my private affairs as to permit them to run into great disorder and ruin, that I had now a family advanced to years which required my attention and

instruction, that to this was added the hopeful offspring of a deceased friend whose memory must be forever dear to me who have no other reliance for being rendered useful to themselves and their country . . . If reason and inclination unite in justifying my retirement, the laws of my country are equally in favor of it. Whether the state may command the political services of all its members to an indefinite extent, or if these be among the rights never wholly ceded to the public power, is a question which I do not find expressly decided in England. . . Nor yet does reason, for tho' I will admit that this does subject every individual if called on to an equal tour of political duty, yet it can never go so far as to submit to it his whole existence. If we are made in some degree for others, yet in a greater we are made for ourselves. It were contrary to feeling and indeed ridiculous to suppose a man had less right in himself than one of his neighbors or all of them put together. This would be slavery and not that liberty which the bill of rights has made inviolable and for the preservation of which our government has been changed.

It was fortunate for the American Republic that later circumstances were such that Jefferson could be persuaded to give up his political retirement and again answer the call to public service. While the political community has no unlimited call upon the service of any one of its members in the particular, it is equally the case that *every* member has *some* duty to answer calls to public service because it is by duties of service that a Republic founded upon liberty with justice for all is possible.

The points enumerated above describe a system of electoral colleges tasked, not with the selection or appointment of agents of government but rather, with the duty of sifting qualifications for the identification of persons of superior civic merit who are best suited to serve their country in government. The **first objective of reformation** is therefore obvious: *To provide for a mechanism of candidate identification and filtration that improves the general degree of merit in the candidates offered up to the citizens for election to office.*

Yet the accomplishment of this objective immediately runs into the old Roman issue of *Quis custodiet ipso custodes?* Any method of filtering the slate of candidates for Congress, for president, or even for the state legislatures and governors' offices requires screeners. And who shall judge them? How shall they be appointed? By political parties? We already know that cannot be the remedy we seek because the parties have become the problem; we seek to defang and de-claw them, not empower them even more. Here is where an amendment and expansion of the idea of an electoral college offers a fresh and promising better approach. Here, too, is where a modification of Wilson's idea of a basic pyramid has promise – not as a pyramid of *government*, but a pyramid of a *process of candidate slate identification*. Nothing in this forbids any citizen from making known to the public his desire to stand for elected office and of receiving his due and unimpassioned consideration by the college. It does make civic merit the prime factor of qualification to hold office, as the Framers intended it should be. Those who would be set to judge merit must themselves be meritorious persons, and this brings us to the **second objective of reformation**: *To provide mechanisms for insuring that only persons known by their local community as meritorious persons are to serve in the office of elector.*

It is obvious that in every state its electoral college will be a large body tasked with a great scope of

responsibilities covering national, state, and local (in the cases of larger cities and towns) elections. Although most of the fine details of how this college is to function can and should be left to the judgment of the electors themselves, it is unwise to commence such a major amendment to the process of elections without having at least some initially established general structure for the college. For example, out of a body numbering most likely in the hundreds, only a handful of electors can serve as a state's Electors in presidential elections under the Constitution of the United States. How shall this handful be appointed by the college? In election matters concerning a single city or larger town practical as well as common sense considerations argue in favor of putting jurisdiction for local candidates solely in the hands of the electors representing that city or town because these are the persons who are familiar with the local candidate pool. At the same time, meritorious persons suited to be candidates for statewide offices can come from nowhere else than from the local communities, and therefore a means must exist by which the collegiate body as a whole can come to know of the qualities of merit – or lack thereof – demonstrated by local citizens whose reputations will sometimes be unknown at the state level. Furthermore, the slate of candidates for office must be published to the citizenry with adequate time for the voters to form their opinions and choices. Finally, in order that the electors provide the citizens with a real choice, safeguards and rules must be established so that a *slate* of candidates, not just single candidates for each office, be identified by the college. Otherwise, if the college should only select a single candidate for each elective office, this would amount to the same thing as the abolition of election by the citizenry and would vest the members of the electoral college with too dangerous an amount of political power. There is, in short, a need for general rules and the statement of specific powers to be held by the electoral college. This is the **third objective of reformation: to implement the electoral college according to an established general constitution.**

Lastly, it is an obvious necessity that in order for the electors to render their best judgments they will require the assistance of staff and means for obtaining information regarding the individuals who are under consideration for appointment to candidacy by the college. To forestall deceit and propaganda in the campaign process, which is essential to disempowering the corrupting influence of political parties, the college must have the power to regulate the manner in which election campaigns are carried out. Specific political issues and political problems come and go; what is permanent in the task of appointing agents of government, at every level, is the requirement of merit. The **fourth objective of reformation is to provide the necessary mechanisms and regulatory authority to the college for insuring a fair and honest election process based on political issues alone.**

The practical success of this reformation for securing the blessings of liberty will turn upon a great many more fine details than can be laid out by one person or in one treatise. Let us admit what is clear and obvious: the reforms discussed here are significant and are attended by the need for a great deal of

reflection and refinement of the idea in all its details. A change of this magnitude and of such an unprecedented character in the way in which free election is viewed cannot safely be made in haste. An ancient proverb states: a journey of a thousand miles begins with a single step. But it is senseless to embark upon a journey without knowing where one is going, and it is the destination with which this treatise is primarily concerned. Of all the ideas and consequences of the Social Contract, the most fundamental of its requirements is securing liberty with justice for all the members of the citizenry of the Republic, and this security hinges upon the merit of its agents of government.

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