

Revisiting Democracy's Place

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Introduction

Democracy in 1996

Democracy's Place appeared in 1996, a heady moment for democracy's partisans in many parts of the world. Five years had passed since the Soviet Union's collapse; long enough for people to believe that it was real. The Russian disenchantment with the West that would follow NATO's bombing of Kosovo and subsequent expansion lay in the future, as did the creeping revival of Russian authoritarianism that we have witnessed in recent years. It was not yet clear that most of the Asiatic republics of the former Soviet Union would fail to replicate the comparatively easy East European transitions to democracy. Russia was still giddy from the dramatic transition from Gorbachev to Yeltsin, and much of its population remained in the magnetic thrall of western consumerism. China might not yet be showing signs of a political transition, but there, too, central planning was giving way to market capitalism—fostering much speculation that democratization might not be far behind. Democracy seemed to be on the march in the former communist world.

No less striking than the largely bloodless transitions in the former Soviet bloc were developments in southern Africa. Against all predictions, in 1990 F.W. DeKlerk's Apartheid government had freed all political prisoners, unbanned the African National Congress, and agreed to the elections that installed Nelson Mandela as President in April of 1994. Close observers of South Africa's spiraling economic and political decline during the 1980s would have given heavy odds against any such outcome—had it occurred to anyone to ask. By December of 1996 the provisional constitution had been replaced by a permanent one that was widely recognized as one of the most progressive constitutions in the world, though not before it had been sent back to Parliament for a variety of changes by the new Constitutional Court. This procedural probity suggested that the new democratic South Africa would be respectful of the rule of law. To the north, the appalling Rwandan genocide that had killed more than 800,000 people had subsided. Robert Mugabe, who had just been reelected President of Zimbabwe, was yet to atrophy into the corrupt dictator he would become. South African Deputy President Thabo Mbeki declared that an African Renaissance was in the offing.¹

If democracy and the rule of law were entrenching themselves in the post-communist world and South Africa, the picture elsewhere was more mixed. In the Middle East, promising negotiations between Israel and the PLO that had produced the Oslo Accords on a two state solution in August of 1993 had been blown apart by Yitzhak Rabin's assassination by a disgruntled right winger in November of 1995. In 1996 it was not yet clear how big the missed opportunity was, or how badly the conflict would deteriorate into a second major *Intifada* five years later and massive escalations of conflicts with Hezbollah in Lebanon and Hamas in Gaza and the West Bank after that. The huge loss of American prestige across the region that would follow George W. Bush's invasion of Iraq in March of 2003 had not yet occurred, making it still plausible that, with a bit of luck, the U.S. might yet broker a settlement.

Latin America also presented a mixed picture for democrats in 1996. The breakdown of democracy across the region in the 1960s and 70s had been followed by an era of redemocratization, despite the “lost decade” of economic crises in the 1980s. There had been democratic transitions in several Southern Cone countries as well as El Salvador, yet authoritarian legacies had not been entirely dispatched. Augusto Pinochet, the architect of Chile’s 1973 coup and then its authoritarian dictator, was still commander in chief of the army—a position he would retain until retiring to the Senate in 1998. In 1992 Peruvian President Alberto Fujimori had shut down Congress, suspended the constitution, and purged the judiciary. Fujimori had nonetheless been comfortably reelected with almost two thirds of the vote in 1995—a less than prepossessing development for those who see fidelity to the rule of law as integral to democracy’s health in the longer run. There was cause for cautious optimism in Venezuela. Hugo Chavez’s coup attempt had failed in 1992, and his election as President lay in the future. In Mexico, fragile democratic institutions had survived the 1994 peso crisis, suggesting that Mexican democracy might be more deeply rooted than many had thought.²

Democratic political competition seemed to be alive and kicking in many older democracies in 1996. Italy and Japan had recently instituted major electoral reforms, replacing systems that had been widely seen as fostering corruption with mixed systems combining proportional representation and single-member districts. New Zealand had made a similar move, with an eye to producing governments that better reflected voters’ preferences.³ In the United States the Democrats had lost control of both Houses of Congress for the first time in a generation two years earlier, yet Bill Clinton had comfortably defeated Bob Dole to be returned to the White House. In Britain, the corrupt and dispirited Tories whom John Major had inherited from Margaret Thatcher were on their last legs, and a charismatic new leader of a reinvented Labour Party was waiting in the wings. Long-dominant monolithic parties had lost their political monopolies in Japan and India. It seemed that political scientists might soon be able to dispense with the rather awkward category of “single-party dominant democracies” in order to accommodate them. For those who saw political competition and alternation in power as a vital ingredient of democratic politics, this was poignant—if anecdotal—evidence of democratic vitality.

More systematic data was also encouraging. By 1996 there were 81 democracies in the world, up from 59 at the start of the decade—a number that had itself represented a substantial recent increase. From 1960 through the mid-1980s democracies in the world had numbered in the 30s. Though this was close to a doubling of the 19 democracies that existed at the end of World War Two, the number of democracies in the world seemed to have plateaued. In 1984 Samuel Huntington expressed the conventional wisdom in asserting that it was unlikely that many more democracies would become into being.⁴ By 1996 events had proved Huntington clearly wrong. Not only had the number of democracies doubled; for the first time democracies outstripped non-democracies. In 1974, when there were 36 democracies, 100 countries were non-democracies. The number of non-democracies had fallen to 85 by 1990, whereas democracies had risen to 59. The balance had shifted by 1996 to 79 non-democracies as against 81 democracies. Most of the world’s population continued to live in non-democratic regimes, but most political systems were for the first time democracies.⁵

Pyrrhic victory?

Despite democracy's recent triumphs and what plausibly seemed to be encouraging trends, democracy's partisans had cause for concern in 1996. It was far from clear how much difference democracy actually made in people's lives. Notably more consequential than democracy seemed to be the growing pressure on governments, of whatever stripe, to embrace an emerging economic orthodoxy known as neoliberalism. Implementing neoliberal policies involved granting unprecedented authority to technically well-schooled economic elites who promised to liberate their economies from stultifying regulators and open them to the widely touted benefits of free trade. With communism off the table everywhere except such vestigial outposts as Cuba and North Korea (and somewhat ambiguously in China), it was becoming virtually impossible for governments to resist the pro-market, anti-regulatory, and anti-redistributive policies that traveled under the neo-liberal banner. Poverty, inequality, and the inherited injustices that so often motivate people to demand democracy would be tackled, on this view, but only as byproducts of the rising tide that neoliberal policies promised.

Technocratic faith in the prevailing market wisdom was ascendant. Political economists and prognosticators of many ideological stripes were voluble about the virtues of "shock therapy" in the transition from communism to capitalism, despite its manifest human costs.⁶ Indeed, one influential commentator from the political left had argued that market reforms should be rammed through before democratization, lest those harmed by the reforms deploy their new-found political strength to block them.⁷ This was at a time when the widely touted "East Asian miracles" had occurred either in authoritarian countries like Hong Kong, Singapore, South Korea, Indonesia, Thailand, and Taiwan, in the partial democracy in Malaysia, or in the dubiously democratic Japan that had been continuously governed by the Liberal Democratic Party since its founding in 1955. True, these economies had often been protectionist and they were managed by activist states whose decisions bred major market distortions. But the costly dimensions of these choices would not become evident until the Asian bubble burst later in the decade.⁸ In 1996, the name of the game was economic growth, to which democracy was widely seen as at best irrelevant and quite possibly an irritant.

Developing country governments, keen to elide local opposition to the policies that might attract international investors, went so far as to ask the IMF and World Bank to tie their hands with even more draconian austerity packages than deemed necessary by those institutions.⁹ The new ANC government in South Africa began distancing itself from its frankly redistributive *Reconstruction and Redevelopment Programme* almost as soon as it took office in 1994. By 1996, RDP had been unceremoniously dumped in favor of GEAR. The order of the nouns in its title made GEAR's neoliberal priorities clear. *Growth, Employment, and Redistribution* meant reversing RDP's logic (which had been couched in a pastiche of post-Marxist and Keynesian rhetoric) in favor of pro-growth incentives for market actors. These, it was said, would produce employment that would in turn generate redistribution.¹⁰

By the mid-1990s a comparable dynamic had been observed in Latin American country after Latin American country. Pro-labor and populist governments had come into office in the late 1980s in Argentina, Mexico, and Venezuela. Once in power, they quickly reversed their protectionist and

interventionist policies, opened their economies internationally, and reduced state intervention.¹¹ True, there had been some resistance to the wave of neoliberal policies. Venezuela's Carlos Andrés Pérez had faced two coup attempts in 1992 before being impeached the following year. In Ecuador, President Abdalá Bucaram's austerity measures led to street riots that forced him from office in 1996. There was considerable social unrest in parts of Argentina. But for the most part the reversals had been accepted as necessary. Indeed, many of the leftist governments that engaged in radical policy-switches to implement them were subsequently reelected.¹²

Nor was the ascendant faith in neoliberalism limited to the post-communist and developing worlds. In Britain and the U.S., "New" Labour and the Democratic Leadership Council had reinvented their respective parties to an extent that would have been unimaginable a decade earlier. The Labour Party debate had centered on whether Clause IV of its constitution calling for nationalization of the means of production, drafted by Sidney Webb in 1917 and adopted by the party the following year, should be abolished. For the New Labourites, Clause IV was an antediluvian albatross. They saw it as emblematic of everything that had rendered James Callaghan's government vulnerable to defeat by Margaret Thatcher in 1979 and kept Labour, first under Michael Foot's left wing leadership and then the timid tinkering of Neil Kinnock and John Smith, in the political wilderness ever since. When Tony Blair ascended to the Labour leadership in 1994 it was clear that Clause IV, which he had long opposed, was on the way out.

On the western side of the Atlantic, the Democrats' historic drubbing in the 1994 Congressional elections had empowered the DLC, which Bill Clinton had led for the two years prior to his election as President in 1992. Any doubts about where the New Democrats were heading ideologically were put to rest by their majority support for the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which had been designed, as President Clinton said in his 1996 reelection campaign, to "end welfare as we know it."¹³ Aid to Families with Dependent Children, a stalwart of the New Deal enacted in 1935, was abolished. The idea of welfare as an entitlement was replaced by time-limited programs linked to work and with a two year lifetime cap. The market reigned supreme; henceforth people would have to sink or swim in it. The toothless rage that erupted on the left of the Democratic Party confirmed, to the New Democrats, that they were on the right track.¹⁴

In politics few things beat success, or at least the appearance of success. It was far from clear in 1996 what fruit, if any, the attempts by New Labour and the New Democrats to reinvent themselves would bear. Tony Blair's electoral ascendancy lay in the future, and the Democrats would be kept at bay on Capitol Hill for the next dozen years. But it was testimony to the perceived success of the emerging neoliberal orthodoxy that Blair and Clinton had thrown their lots in with it. On coming into office President Clinton had created a new National Economic Council to direct economic policy out of the White House under the supervision of Robert Rubin, a man who had spent the preceding twenty-six years rising through the ranks at Goldman Sachs. First at the NEC and then as Treasury Secretary, Rubin partnered with Federal Reserve Chairman Alan Greenspan (whom Clinton inherited from Ronald Reagan and reappointed) to reduce deficits, regulation, and trade barriers. The Greenspan-Rubin approach gained credibility as the deficits that had called forth doomsday scenarios from groups like the Concord Coalition in the early 1990s began trending downward—from above four-and-a-half percent of GDP in

1992 to below one-and-a-half percent by 1996, and a projected surplus (which did, indeed, eventuate) two years later.¹⁵

By 1996 the Clinton Administration was also taking bold steps to advance neoliberal policies internationally. Its strong support for replacing the half-century old General Agreement on Tariffs and Trade with the World Trade Organization (dedicated to promoting growth through free trade) in 1995 made clear that the U.S. agenda to liberalize world trade went well beyond the regional agreements like NAFTA. The Administration's management of the Mexican currency crisis cemented its reputation for deft handling of the global macro-economy. Contrary to the apocalyptic predictions of Republicans who had fought the \$20 billion in cash and loan guarantees the U.S. offered as part of a \$50 billion international plan to forestall a contagious collapse of the Peso, Mexico's Zedillo government repaid the U.S. three years ahead of schedule.¹⁶ The stock of the neoliberals at the helm was high, along with the Dow Jones Industrial Average—which had more than doubled during Clinton's first term.¹⁷

The U.S. and the world were in the midst, and under the spell, of the biggest economic boom in history. Parties, and even political institutions, seemed increasingly irrelevant to the policies that would be adopted to ensure stable growth and full employment. So long as smart pragmatic hands were on the tiller, crises could be managed, if not averted, and prosperity guaranteed. In his 1992 election campaign candidate Bill Clinton had lambasted then President Bush for "coddling aging rulers with undisguised contempt for democracy." Exhibit A was China, from which Clinton insisted that all trade privileges would be withdrawn, if he was elected, pending significant improvements in their human rights record.¹⁸ Yet within four months of taking office President Clinton had unilaterally reversed himself. The Administration renewed China's coveted MFN trading status with the assertion that "we are hopeful that China's process of development and economic reform will be accompanied by greater political freedom." But Clinton left no doubt that China's size and importance for the world economy made this move imperative regardless of any domestic political changes.¹⁹ It was almost as if Frederick Engels had been right, after all, that a time would come when politics would be displaced by administration; he just got the mode of production wrong—confusing socialism with capitalism.²⁰

If many who had expected democracy to foster meaningful political competition were disappointed in 1996, so were many others who thought democracy would be an instrument for reducing inequality and promoting social justice. The idea that majority rule will lead to egalitarian redistribution has a venerable history. Nineteenth century elites resisted expansion of the franchise because they feared that widespread democracy would produce exactly that result. Socialists who endorsed the "parliamentary road to socialism" (including Karl Marx toward the end of his life) agreed, hoping that the workers would do through the ballot box what they had not done at the barricades. The intuition both groups shared was that if majority rule is imposed on a massively unequal status quo, then most voters should be expected to favor taxing the rich and transferring the proceeds downward. With their collective action problem solved, the poor would soak the rich. This was formalized in political science via the median voter theorem which predicts majority support for downward redistribution, given a distributive status-quo like that in the advanced capitalist democracies.

Yet one of the great puzzles of modern democracy has been the lack of any systematic relationship between expanding the franchise and downward redistribution. Democracies often redistribute income and wealth, but they do so in a bewildering variety of directions. The generalization, if there is one to be had, seems to be that although democracies spend somewhat more than non-democracies on the poor, this spending has little, if any, ameliorative effect on inequality, and it leaves significant proportions of the populations in poverty.²¹ This was dramatically the case with the sharp rise in inequality in the U.S. between the early 1970s and the mid-1990s, even though the Voting Rights Act was passed in 1965 and the voting age was reduced to eighteen in 1971. Real incomes of many toward the lower end of the income distribution fell during this period (or were sustained only by replacing single-earner with two-earner households), and the gap between the poor and the wealthy widened substantially.²² By 1996 it was clear that the U.S. had entered a second Gilded Age. Similar, if less extreme, distributive patterns could be observed in other advanced industrial democracies. In much of the developing world, as I have noted, leftwing governments, once in office, were often quick to junk redistributive agendas under the joint pressures of skittish capital markets and neoliberal orthodoxy. Democracy's spread was impressive in 1996, but its impact was questionable.

The academic assault on democracy

Surprising as this state of affairs might have been to citizens and activists, it raised few eyebrows in the academy. Scholars of varying ideological stripes had for decades been questioning democracy's capacity to produce rational—or even coherent—decisions, as well as its value in promoting social justice. John Roemer expressed the prevailing academic wisdom when he warned against idealizing democracy by defining it “to consist of all good things” in the same way that, during the 1960s, many on the left had idealized socialism.²³ Rather than encourage people to harbor unrealizable expectations from democracy, better to get them to alter their expectations. Thus Giuseppe Di Palma insisted that the democratic ideal should be disengaged “from the idea of social progress” if it is to endure, and Huntington advised political leaders to avoid linking their attempts to consolidate democracy to their constituents' demands for social justice.²⁴

I dissented from this consensus in *Democracy's Place*, arguing instead that democratic legitimacy depends on the possibility democracy holds out of reducing domination. If people who were oppressed under apartheid or communism experience no improvement in their lives from the successor democratic regimes, then their allegiance to democracy should be expected to atrophy. And if disadvantaged groups in established democracies find that no government ameliorates their oppression, then they, too, face increasing incentives to defect. The better course for democrats, I argued, is to design and then work to promote variants of democracy that can reduce domination. To be sure, not every form of democracy will achieve that. But some will do better than others. The creative challenge is to discover which they are, and how to move things in their direction. That was the agenda I sketched in the last chapter of *Democracy's Place* and developed more fully in *Democratic Justice*, published in 1999.

My central focus in *Democratic Justice* was on civil institutions; political institutions were dealt with only incidentally. The present volume takes them up directly. Its chapters detail elements of a comprehensive democratic account of public institutions. They deal with its philosophical foundations;

its implications for competing theories; how democracies are best created, sustained, and defended in the post-cold war world; the nature of public opinion and its role in democratic politics; and the relations between majoritarian and non-majoritarian institutions in democratic systems. As a prelude to describing its contents more fully, I revisit the attacks on democracy that have been put forward by the partisans of reason and justice. The attacks might have seemed increasingly moot, along with democracy itself, in the years of neoliberal ascendancy. But the global financial collapse of 2008-09 has called neoliberalism more radically into question than most people could have imagined possible before it happened. This moves democracy—and, a fortiori, democracy’s critics—back to center stage.

The friends of reason mounted a double attack on democracy. Most fundamentally, they denied that democratic procedures can be counted on to reflect voters’ preferences, insisting that apparent majorities are often the chimerical artifacts of decision rules. They pointed out that deft agenda-setters can manipulate outcomes by taking advantage of features of majority rule first noticed by Condorcet in the late eighteenth century. Even when outcomes are not consciously manipulated, the argument went, they are often arbitrary: had options been considered in a different order, a different outcome could have prevailed as the majority winner. Why, then, accord legitimacy to the results that majority rule actually generates?²⁵

The alleged lack of legitimacy attending democratic decisions was buttressed by a second assault in the name of reason, to wit, that democracy subverts, undermines, or distorts “normal” outcomes that would occur but for democracy’s meddlesome interference. Arbitrary coalitions, masquerading as agents—if not embodiments—of the general will, were only part of the story. Other commonly adduced culprits were powerful lobbies that work their wills through the political process, millionaires and billionaires who fund their own political campaigns and then enjoy disproportionate political influence, campaign contributors who buy influence with checkbooks and credible threats to fund opponents when their agendas are thwarted, “rents” extracted from activists and contributors by venal politicians, uncontrollable bureaucrats with agendas of their own—the list was long.

The “normal” counterfactual—how things would be but for the odious political interference in question—was often specified implicitly, if at all. Usually it was some kind of market shadowing idea: what markets would have produced had they been left to their own devices. This view naturally lent itself to the notion that majority rule should be limited, whether by constitutional courts, independent banks, or other agencies that can be insulated from the insidious influences of electoral politics. The academic agenda to constrain majority rule in the name of rationality thus provided ideological ballast to neoliberalism in the real world. Powerfully ascendant as this orthodoxy had seemed in 1996, it had a long way to run.

After 1996: Neoliberalism versus democracy

An important signal and symbol of neoliberalism’s accelerating momentum came from Tony Blair’s New Labour government the following year. Five days after his landslide victory, Blair declared that the Bank of England would be granted independent authority over interest rates. This was a dramatic move even for a Post-Clause Four Labour Party—an early indicator that Blair and his Chancellor

Gordon Brown would outdo Margaret Thatcher's pro-market orientation of the 1980s. No less remarkable was Parliament's ready acquiescence in the emasculation of its institutional authority. Expecting developing countries to accept technocratic medicine as a condition for IMF loans was one thing. For the mother of all parliaments to cede authority that had been extracted through civil war and revolution, and jealously guarded for centuries, was quite another. The Tories flirted with advocating reversal of Labour's move from time to time,²⁶ but never proposed it in either of their vain attempts—in 2001 and 2005—to unseat Blair's government.

The reason was plain. The American model that combined aggressive deregulation with trade-openness and technocratic control of fiscal and monetary policy seemed unbeatable. Encouraging as things had looked from this point of view in 1996, the major economies took off like rockets for the next dozen years. There were setbacks, to be sure—most notably the burst of the technology bubble in 2000 and the dislocations resulting from 9/11 the following year. But the global economic juggernaut shrugged them off. The U.S. stock market began what would turn out to be the biggest bull market in its history in 2003. The Dow peaked comfortably above 14,000 in October of 2007 with worldwide stocks following suit.²⁷ Economic growth rates were more modest (which should, perhaps, have been recognized as a warning that a colossal new equities bubble was in the making), but strongly robust for almost all the advanced economies.²⁸ Some countries performed less well, but this was often blamed on their not adopting the full neo-liberal diet. For instance, many west European countries protected wages from the downward pressures wrought by increased capital mobility, and they had to endure higher unemployment rates as a result. But the general trends were impressive by almost any measure. They were dramatized by notable anecdotal cases, with countries like Ireland and Iceland often touted as exemplifying the benefits of heeding the neoliberal consensus.²⁹

Nor was economic success limited to the advanced industrial democracies. The late 1990s had been a difficult time in Latin America. Following the Mexican crisis, there had been protracted financial crisis in Colombia and Brazil, and a major financial and concomitant political crisis rocked Argentina between 2001 and 2002. But for the most part in the new century Latin American economies benefitted from the growth and stability in the world economy. They played ball with the new global orthodoxy, opening up to world trade and shrinking their public sectors. A resurgence of left parties (which would control the presidencies of 11 out of 18 countries in the region by 2008) brought modest growth in public spending, but no retreat from the world economy.³⁰

Thabo Mbeki's prediction of an African Renaissance moved into the realm of the thinkable. Growth rates accelerated to six percent a year between 2004 and 2008, placing Africa on an unprecedented par with Latin America. Africa's foreign trade increased dramatically, as did direct foreign investment in the continent. Stock markets began proliferating across sub-Saharan Africa, their capitalization rising from virtually nothing in 1990 to \$245 billion by 2009 (excluding South Africa which has long had a developed stock market).³¹ Recovery in most of East Asia was also rapid, Japan being the exception that proved the rule. A decade after the East Asian collapse the World Bank was crowing about a regional renaissance there.³² East Asia became the global direct foreign investor's destination of choice, achieving annual growth rates in the nine per cent range and lifting hundreds of millions out

of poverty. This is to say nothing of the rapid economic advances in India which provided additional ballast, were it needed, for the perceived wisdom of the new economic model.³³

It is scarcely surprising that those who raised skeptical questions about the rationalist assault on democracy drew little attention outside the academy in the years following 1996. We were shouting at the wind. The likes of Adam Przeworski and Jeffrey Sachs might have backed away from their earlier flirtations with shock therapy in the face of mounting evidence that its economic benefits were ambiguous at best—scarcely justifying its collateral social costs. But the mainstream of political and economic opinion was in the grip of what seemed increasingly to be the One True Model of the Only Viable Economy. There were no plausible competitors in the world, and none even on the horizon.

The new preoccupation with militant Islam after 9/11 did nothing to change that. Just how much militant Islam had replaced communism as a political threat to the West after the Cold War was hotly debated between Samuel Huntington and the critics of his “clash of civilizations” hypothesis.³⁴ But it was abundantly clear to anyone who cared to look that, like communism, Islamic fundamentalism lacked a viable political economy. Where Islamic fundamentalists had come to power, in Afghanistan and Iran, the economic results had been disastrous. To the extent Islamic fundamentalism had a socio-economic model at all it was focused on the fourteenth-century, not the twenty-first. For all practical purposes, democratic capitalism had won the day and those with what seemed to be the demonstrated capacity to run it had the bit between their teeth and the wind at their backs.

And the emphasis, increasingly, was on capitalism rather than on democracy. The chattering classes in the West were agog at China’s double-digit growth rates—especially when compared with Russia’s manifestly corrupt and sputtering transformation.³⁵ Democracy might be slow to arrive and often precarious when it did, but the dynamism and resilience of the expanding capitalist world order seemed beyond question. The fiscal crises early in the new century had been deftly managed without systemic breakdown. This fed the perception that those who had their act together in the global economy were on an endless up escalator and that, to stay on it, countries had simply to shape up and hew to new orthodoxy. How they managed the domestic political fallout of implementing the troika of trade openness, deregulation, and technocratic management of macroeconomic policy did not much matter; the important thing was to Get It Done.

Revisiting Democracy’s Place

Not that democracy was in full retreat in the years after 1996. To be sure, the authoritarian tendencies in Russia troubled many democrats, as did the dearth of democracy in much of Asia. Democracy suffered major setbacks in Pakistan and Zimbabwe, and elections in the Congo in 2006 did little to increase the country’s governability or stem continuing conflicts in Ituri and Kivu. Arab kingdoms that had long been impervious to democracy’s pull were no less so following the disastrous American attempt to impose democracy in Iraq. The neo-conservative domino theory—that democracy would quickly flourish there and then spread across the region—turned out to be as inaccurate as an earlier and opposite domino theory that had predicted an unstoppable communist advance if South Vietnam was allowed to fall to the Vietcong.³⁶ Despite these setbacks, the overall trend toward

democracy had continued. By 2007 democracies in the world outnumbered non-democracies by 95 to 67, another sharp increase in the number of democracies over the previous decade.³⁷

And there were heartening anecdotal stories to accompany the trend. The peaceful inauguration of opposition leader John Atta Mills as Ghana's president in January of 2009 following a razor thin upset victory over the incumbent Nana Akufo-Addo in the 2008 election revealed Africans to be at least as adept as Mexicans and Americans at coping with political transitions following knife-edge elections.³⁸ South Africa's survival of the leadership crisis that led to Mbeki's orderly replacement by Kgalema Motlanthe and then Jacob Zuma was another potential train wreck averted by a fledgling democracy.³⁹ In short, democracy remained an important—and growing—force in the world, even as it took a back seat to the economic demands of globalization.

An important truth underscored by the most serious financial collapse since the Great Depression is that experts often know less than they are willing to admit—even to themselves. The sheer complexity of the financial crisis has forced governments to continue working with many of the architects of the system that failed, and, partly for that reason, pressure has mounted to subject them to new regimes of accountability. As governments have scrambled to pick up the pieces, questions concerning by whose authority they act and for what purpose are thrown into sharp relief. If technocrats are to be subservient, once again, to democratic control, we need to know what that means, why it is justified, how it is established and maintained, and how it can work in the face of contemporary challenges. With the technocrats on the defensive, democrats might have the upper hand—at least for a while. This makes it all the more incumbent on them to rethink democracy from the ground up, doing what they can to help it rise to the occasion. That is my agenda here.

Chapter one is concerned with the bedrock justification for majority rule, the presumptive decision rule of choice—on my account—for large-scale politics. Most contemporary discussions of democracy start from Rousseau's framing of the problem, but I make the case that, for pluralist societies, Locke offers more serviceable conceptual tools. Americans have long associated Locke with the robust defense of individual rights. However, they typically miss the fact that his account of political rights is embedded in—and in the end depends on—majority rule as the trumping font of political legitimacy. Locke's account has the added advantage of not requiring the possibility of anything akin to Rousseau's general will, or what modern social choice theorists following Kenneth Arrow have referred to as a social welfare function. Locke's reasoning casts the alleged irrationality of majority rule in a decidedly different light. It rests on more realistic assumptions about politics than does the neo-Rousseauist literature, and it appeals to something close to what John Rawls has described as a political, rather than a metaphysical, view of ultimate justification in politics.⁴⁰

If individual rights depend, ultimately, on the power of the majority for their recognition and enforcement as Locke contended, this still leaves open the question whether majoritarian politics is more desirable than the alternatives before a society crosses that threshold of ultimate extremis marked by what he described as “a long train of abuses” of the people by the sovereign. That is my concern in chapter two. Locke, who was a theorist of democratic legitimacy on my account but not of democratic procedures, had little of interest to say on the organization of everyday politics.⁴¹ Modern

discussions of this subject are traced, instead, to the late eighteenth century preoccupations of the American founders. They sought to create what James Madison described as a “non-tyrannical republic” rather than a pure democracy, due to their fear that a “majority faction” might invade the rights of the minority. Madison was convinced that factions, whose causes are “sown in the nature of man,” cannot be eliminated. Instead the answer was to multiply factions by expanding the republic.⁴²

Like Locke, but in a different way, Madison saw more deeply into democracy than our contemporary friends of reason who attack its alleged irrationality. Whereas they object to voting cycles as indicating the lack of a rational social ordering of voters’ preferences, Madison saw the potential for fluid and changing majorities as forestalling the potential for one group to tyrannize over others. This would subsequently become known as the pluralist theory of democracy, for which cross-cutting divisions and unpredictable outcomes are necessary. If cleavages of race, class, religion, and ethnicity are all mutually reinforcing, then minorities know that they will always lose. They might as well go to war if they think they can win, or turn to crime if they cannot. If, by contrast, cleavages are crosscutting, then majorities will vary from issue to issue as coalitions form and reform—holding out the possibility that today’s losers might become tomorrow’s winners. In my view Madison was right that political competition, motivated by institutionalized uncertainty over outcomes, is the best guarantee against domination of some groups by others. As my survey of recent literature on democracy and domination in chapter two underscores, it has done better over time than any going alternative.

In chapter three my focus shifts to the project of creating national democracy, and particularly the extent to which it can, or must, be imposed from above. It is often observed that democracy is not adept at providing public goods, a view I endorsed in *Democracy’s Place*.⁴³ At least since Jeremy Bentham’s time, political economists have been aware that the impossibility of preventing anyone from enjoying the benefits of public goods creates perverse incentives for people to avoid paying for them. As a result, coercion is conventionally judged to be necessary in the provision of public goods.⁴⁴ Coercion is seldom appealing, but it is especially vexing if the public good in question is a democratic constitutional order. This is partly because those doing the coercing might have questionable motives, and partly because consent of the governed is democracy’s legitimating ideal.

In chapter seven of *Democracy’s Place* Courtney Jung and I had argued that during the South African transition it was unsurprising that attempts to find a democratic path to democracy through roundtable negotiations in 1991 and 1992 broke down. Giving all stakeholders a seat at the table meant including groups, such as the far right white elements and the ethnic Zulu Inkatha Freedom Party, neither of whom wanted to see a transition to majority rule. They torpedoed the negotiations, and were eventually excluded from the secret talks between the National Party government and the ANC which led to an agreement that was for all practical purposes imposed on the society. The far right’s attempt to derail the agreement by starting an insurrection in Bophuthatswana in March of 1994 was put down by force, and Inkatha finally abandoned its boycott two weeks before the first democratic elections the following month—when it became clear that they could not be stopped. Much of the world cheered as this happened because few doubted that a public good was being provided.

Viewed in retrospect, our discussion of democratic imposition was too simple. Closer examination of the successful South African transition, the failures in the Middle East, and the ambiguous results in Northern Ireland over the past three decades reveals the importance of combining decisive leadership from above with building vital support from below. Writing now also with Ellen Lust, Jung and I explore the dynamics of these three cases in chapter three. We show how, like the American Federalists, Mandela and F.W. DeKlerk understood the importance of building constituencies for the new dispensation they sought to create, and then taking advantage of that support to solve essential commitment problems at key junctures of the negotiations over the creation of the new democratic order. It is true that leadership, understood in this context as the capacity and willingness to take unusually great personal political risks in order to achieve political settlements, is vital at junctures when decisive steps have to be taken. If it is lacking when it is needed, as it was following Yitzhak Rabin's assassination in November of 1995, then transition negotiations fail.

But while necessary, leadership is not sufficient. The Clinton Administration's failure to understand this prevented their seeing why a two-state solution to the Israel-Palestine conflict eluded them at Camp David in the summer of 2000. Five years earlier the reality had been quite different. The same two-state solution that was rejected at Camp David had been agreed to in Oslo in August of 1993, after which Rabin and Yassir Arafat worked hard—and effectively—to build support for it in their communities. By the summer of 2000 Arafat, who had by then been humiliated for years by successive Israeli governments, lacked the popular support to deliver anything like that agreement. His manifestly corrupt PLO had lost ground to Hamas, whose support would henceforth be essential to an agreement. Israeli and American administrations since that time have been unwilling to deal with Hamas, despite its unambiguous victories in elections in Gaza and the West Bank in 2006. So long as that remains the case and Hamas retains its support on the ground, there will be no chance of a settlement.

This raises the question when to negotiate with adversaries in the quest for democratic settlements, a subject Lust and I explore further in chapter four via a consideration of the options facing the Obama administration in the Middle East. Part of the reason why democracy has, partly, to be imposed, is that political parties and movements involved in negotiations are not monolithic. Typically they are divided over whether to negotiate settlements, and those who stand to lose if democracy is instituted will stop it if they can. As a result, it is in the interest of those who are bargaining to create a new democratic order—reformers within the ancien régime and the moderates in the opposition—to do what they can to help their negotiating partners to convince, co-opt, or marginalize the potential spoilers on the other side. Transition negotiations thus present a complex challenge in which each side has an interest in maximizing what it will get from the eventual settlement, while ensuring that their adversaries can satisfice—do well enough that the spoilers on their flanks cannot derail the process.

An under-noticed corollary of this mutual dependence of government reformers and opposition moderates concerns the role of preconditions in negotiations. Most transition negotiations are complicated by the impulse of various players to insist on conditions that the other side must meet for talks to start or to keep going. Requirements to end violence, decommission arms, accept certain “non-negotiable” features of an eventual settlement, or exclude particular groups as beyond the pale are often insisted upon—partly to placate standpatters and revolutionaries on the negotiators' flanks. But

when those flankers are spoilers as they often are, they have every incentive to violate whatever preconditions the other side has established—to weaken the hands of the negotiators on their side and reduce the likelihood of a settlement. Lust and I note that it was vital to the success of South Africa’s negotiations that both sides resolutely avoided establishing preconditions. We explore the implications of this for the Middle East, explaining why it should lead to a different approach than that adopted by the Clinton, Bush, and early Obama administrations.

If democracy is the best system of government and negotiations to produce it are so fragile, perhaps the better course for democrats is to be less squeamish about imposing it from the outside when they can. This is my subject in chapter five. Addressing it in today’s world puts a larger question on the table. If democracy is the best system of government, perhaps the whole world should be a single democracy. After all, the division of the world into sovereign nation states is morally arbitrary. This division underwrites massive global inequalities via a scheme of global apartheid that is euphemistically known as the Westphalian system. Evolving technologies of force make military power increasingly global in its reach. Economic integration renders decisions taken in one part of the world hugely consequential elsewhere, as the 2008 banking crisis and attendant financial meltdown made patently clear. If we are to be cosmopolitan democrats, as I argue that we should, then should we not favor the creation of a democratic world state?

Some eyes will, understandably, glaze over at the posing of such questions. They call to mind the lost traveler who approached a farmer in Donegal to ask for directions to Dublin and got the answer: “Well, I wouldn’t start out from here.” But understanding why pressing for world government should be judged undesirable, for cosmopolitan democrats, even if it were feasible is useful to illuminate their best stance toward the project of exporting democracy. World government, I argue, would not solve the problems that lead cosmopolitan democrats to support it. There is no good reason to suppose that world government would diminish worldwide conflict or injustice, or even bring decision-making into closer conformity with the democratic principle of affected interest than is currently the case. World government’s proponents commit the fallacy of comparing the reality of the nation-state system with the ideal of world government, not with what it would be like in practice. We should favor delinking rights to participate in decision-making from national citizenship, but this should be done decision by decision. Sometimes it means devolving authority downward to sub-national units, sometimes upward to regional units such as the European Union, and sometimes to international entities like the United Nations. We should also favor the creation of institutions to buttress the international rule of law. But this is a far cry from abolishing national government in favor of the creation of a world state.

With democratic world government off the table, more pertinent questions arise: how much international proselytizing should democrats do, and what policies, if any, should they support to assist democracy’s spread? One potential answer is that they should be isolationists. If democracy is vitally dependant for its legitimacy on support of the governed, then arguably the stance toward other countries should be to let them create their own democracy if the support exists—and otherwise ignore them unless they attack us. Against this view, I argue that democrats should indeed be committed to opposing domination in the world and reducing it if they can. With respect to the internal politics of

other countries, this means supporting viable democratic oppositions if they seek our support and if we can provide it without jeopardizing democracy at home.

Opposing tyrannical regimes in order to resist the spread of domination and reduce it where possible is a worthy goal for democrats, but best viewed through the prism of containment. I have argued elsewhere that this doctrine, first developed by George Kennan to face down the Soviet threat in the 1940s, provides the best available basis for confronting threats to democracy and encouraging its global diffusion.⁴⁵ Some critics of my view took me to be defending US national security policy during the Cold War. In fact my argument was that during the Cold War the U.S. was least successful when it abandoned containment. In the 1952 election Dwight Eisenhower and his future Secretary of State John Foster Dulles attacked containment, vilifying it as appeasement and advocating “rollback” of the Soviets instead. Ironically, once in office the Eisenhower Administration abandoned rollback in favor of containment in Eastern Europe. In Iran, by contrast, in 1953 they toppled the democratically elected government, replacing it with the hugely unpopular Shah. Subsequently the U.S. fought a failed war of choice in Vietnam, again abandoning containment—much to Kennan’s chagrin. Today Eastern Europe is democratic whereas the sites where we were more aggressively interventionist are not.

Containment’s critics have leveled many of the same attacks in the post-Cold War era that the advocates of rollback pushed in the 1950s. I respond to these arguments in chapter five, explaining why containment is not appeasement now any more than it was then, but why, during the post-Cold War era, containment nonetheless stands in need of a new kind of authorization and implementation that involves both international institutions and cooperation among regional powers. I also explore, more fully than I did in the book, containment’s foundations in democratic theory. Whereas Kennan’s defense of containment was strategic all the way down, I make a normative case for its desirability that is rooted in containment’s elective affinities with the ideal of non-domination. This account does not require agreement on basic values or world views, or even on an expectation that there can be such agreement. Rather, it takes deep pluralism of values and world views for granted. We do not need others to accept, or even understand, our beliefs or practices. Nor do we need to accept or understand theirs. We need only insist that we will not allow adversaries to impose their ways of life on us, or on others so long as we are in a position to stop them.

Democracy against Justice?

In chapter six my focus shifts to the tensions between democracy and justice. The advent of neoliberalism was well underway by 1996 as we have seen, but the extent of its eventual impact on the distribution of income and wealth had yet to be fully appreciated or, indeed, experienced. Between the 1970s and mid-1990s the world saw significant overall reductions in poverty, though its distribution was uneven. High growth rates in China and India dragged tens of millions out of poverty, but there were few improvements in Africa and Latin America after the 1970s. The advanced countries enjoyed comparatively low poverty rates, but these have been increasing since the mid-1970s.⁴⁶

More striking have been the increases in inequality. There had been some reductions in inequality when measured worldwide in the 1970s and ’80s, but this tailed off in the 1990s. Inequality

between rich and poor countries increased sharply, as did inequalities within many countries—including the world’s wealthiest democracies.⁴⁷ The evaporation of significant amounts of wealth in the global real-estate and stock-market crashes of 2008-09 has reduced the portfolios of many of the very wealthy.⁴⁸ The resulting impact on employment, commodity prices, international aid, and trade will be reverberating for years, so that the overall impact of the collapse on poverty and inequality will not be known for some time. It is hard to conjure up plausible scenarios in which this will not be regressive.

Some of the most unequal countries are democracies, a fact that throws the tension between democracy and justice into sharp relief. In South Africa, for instance, the ANC won reelection by well over sixty percent of the vote in 1999, 2004, and 2009, even though the great bulk of the redistribution promised to trickle down as a result of GEAR has not taken place. A small black wealthy class has developed and there has been a modicum of redistribution from whites to blacks. But overall inequality has not decreased. Indeed it increased in the decade following the transition, and poverty deepened.⁴⁹ South Africa still has one of the highest Gini coefficients in the world. It has one of the highest rates of HIV infection, partly because of the Mbeki government’s recalcitrance in acknowledging its causes and distributing retroviral drugs.⁵⁰ Land reform since the transition has been negligible. At least a third of the population remains unemployed.⁵¹ Yet the ANC continues winning easy reelection even though it parries or ducks most pressures to redistribute income, wealth, and other resources.⁵² Indeed the top marginal tax rate, which had been set at 60 percent by the Apartheid government in 1979, was reduced to 42 percent in 2000 and further to 40 percent in 2003.⁵³

That democracies can engage in regressive redistribution is a truth not only about developing countries that are “price-takers” in edgy international capital markets. Substantial increases in inequality in many of the advanced democracies have been aided and abetted by neo-liberal policies. It is, to be sure, often difficult to know to what extent changes in inequality in a country result from government policies. As Robert Nozick noted long ago, endogenous changes in the economy are a constant source of new inequalities that should be expected often to operate at cross-purposes with the redistributive policies of governments.⁵⁴ There have, nonetheless, been notable instances of democracies enacting tax changes, sometimes with widespread popular support, that were predictably regressive in their distributive effects. Perhaps the most dramatic of these in recent years was the repeal of the federal estate tax in the U.S. in 2001, which shifted some \$40 billion a year in taxation from America’s wealthiest taxpayers to those lower down the income scale. On the books since 1916, the federal estate tax had been the most progressive measure in the tax code. All of it was paid by the wealthiest two percent of taxpayers, and more than half of it was paid by the wealthiest half of one percent. In 2005 Michael Graetz and I tried to explain why it was repealed in *Death by a Thousand Cuts*.⁵⁵

The estate tax repeal presents a profound puzzle because it defied the standard accounts of why democracies fail to engage in the downward redistribution that the median voter theorem predicts. For instance, John Roemer, among others, has suggested that the presence of issues other than distribution that voters care about—such as race or abortion—explains why politicians in search of the median voter

do not favor more downward redistribution.¹ But we found that public support for estate tax repeal is robust regardless of other issues. Indeed, in surveys people favored repeal by *larger* margins when they considered it in isolation from other issues than when they did not. Moreover, stand-alone bills (that were neither parts of any log roll nor bundled with other legislation) calling for estate tax repeal repeatedly passed both houses of congress with significant bipartisan support. The puzzle about it arises from distributive concerns alone; it does not depend on other existence of other dimensions of politics.

An implication of our study is that that, for some distributive issues at least, the logic of dividing a dollar by majority rule might supply better theoretical intuitions than the median voter theorem—however modified through the addition of other dimensions. If three voters must divide a dollar by majority rule, there is no distribution that is not in principle vulnerable to upset by some majority coalition. If A and B agree on a 50/50 division, giving C nothing; then C will propose a 60/40 division to A in his favor, excluding B; and so on ad infinitum. There is no division that avoids this potential instability. This suggests that a good deal of the politics of distributive conflict in democracies involves coalition busting, coalition building, and sustaining coalitions that others have incentives to destroy. The story of the estate tax repeal was a story of building a coalition of unlikely bedfellows that included representatives of the ultra-rich, but also small business, environmental activists, the Congressional Black Caucus, lobbyists for gay rights, farmers, and newspaper owners, among others. Their success depended on great political creativity in building the repeal coalition, holding it together in the face of forces that threatened to splinter it, and using it to smash the coalition that had kept the status quo on estate taxes in place for decades. It is a story that suggests that we might get a better grip on the dynamics of distributive politics in democracies, and new possibilities for downward redistribution, by studying other unlikely distributive coalitions in history. The coalition to abolish the slave trade, the coalition to enact the Civil Rights Act, and the coalition to pass the Americans with Disabilities Act come to mind as suggestive possibilities. They all involved the creation of broad innovative coalitions to produce substantial distributive changes that benefitted previously disadvantaged minorities.

The battle over estate tax repeal illuminates dimensions of the interaction between public opinion and distributive politics that Graetz and I did not explore as fully as we might have done. Writing now also with Mayling Birney, we note in chapter six that the intensity of public opinion has a significant effect on the ways in which distributive politics play themselves out. A little-known fact is that American mass preferences about tax questions (as distinct from the preferences of tax activists) are not particularly intense. Mass preferences about the estate tax are especially lacking in intensity. It is easy to get as many as seventy percent of Americans to say that they favor estate tax repeal when this is polled as a stand-alone issue, but the support quickly dissipates when people are asked either to rank estate tax repeal with other possible tax cuts or when repeal is linked to cuts in popular programs. The great bulk of the polling that was done in the run-up to the 2001 repeal asked about repealing the estate-tax as a stand-alone issue. It was done by groups working for the repeal who knew in advance what the

¹ John Roemer, "Does democracy engender justice?" in Ian Shapiro and Casiano Hacker-Cordón, *Democracy's Value* (Cambridge University Press, 1999), pp. 56-68 and John Roemer, Woojin Lee, and Karine Van der Straeten, *Racism, Xenophobia, and Distribution: Multi-Issue Politics in Advanced Democracies* (Russell Sage Foundation Books at Harvard University Press, 2007).

results would be. Their aim was to create momentum by wide dissemination of the results, and to convince politicians that they would not pay an electoral cost for supporting repeal. Once the politicians were convinced of this, the battle became one of organized coalitions that actually had little to do with public opinion. Beliefs about the estate tax turn out to be comparable to many issues in the “culture wars,” such as gay rights, abortion, and gun control. As Morris Fiorina et. al. have shown, although activists are intensely split about them, they do not sharply polarize mass opinion.⁵⁶

The George W. Bush Administration followed its 2001 individual tax cuts with business-oriented tax cuts the following year. Incumbent administrations usually lose seats in midterm elections, but the Republicans made gains in both the House and the Senate in 2002, underscoring—had there been any doubt—that their tax-cutting agenda involved no electoral cost. The following year Congress passed additional tax cuts, this time in capital gains and dividend rates. In 2004, President Bush won the election by some 2.5 percent or 3 million votes over John Kerry. The Democrats, still reeling from their loss of control of Capitol Hill a decade earlier, were indisputably on the ropes.

Yet when the newly legitimated President Bush, backed by an even further strengthened Republican Congress, made privatizing social security his first order of business in his second term, he ran into a brick wall. The same tactics that had been so effective with the estate tax repeal were all deployed. Conservative think tanks funded media campaigns. Studies and plans promoting privatization were aired on the Capitol Hill. Huge quantities of Presidential time and political capital were expended, with George W. Bush spending almost two months on the road promoting privatization in 2005. None of it was to any avail, however. Public opinion remained overwhelmingly opposed to privatization and, in sharp contrast to the battle over the estate tax, senators and congressmen learned in overwhelming numbers from their constituents that any attempt to enact it would come at a massive electoral cost.⁵⁷ Hopeless as the median voter model is for understanding estate tax repeal, it thus supplies a pretty good account of the politics of social security privatization.

An implication of this contrast is that the politics of distributive conflict play out exceedingly differently depending on just how intense mass preferences about it turn out to be. Consider another example. Bill and Hillary Clinton believed that they had a winning issue in universal healthcare in the 1992 campaign, but the rug was pulled out remarkably fast once the opponents got to work. Unlike the failed crusade to alter public opinion about social security privatization, the campaign to destroy public support for President Clinton’s healthcare reform with the infamous “Harry and Louise” commercials in 1993 seems to have been remarkably effective.⁵⁸ Public support for universal healthcare turns out to be notably less tensile than many Democratic activists, for whom its merits are all but self-evident, have hoped. This is a lesson the Obama administration was forced to relearn in the fall of 2009. Perhaps it is not surprising that most middle- and upper-income US taxpayers are as disinclined to fund health insurance for tens of millions of low-income Americans as they are to fund welfare.

It is hard to guess about these matters with much confidence, because we lack a developed body of knowledge—or even informed theoretical speculation—about what determines the intensity of public opinion about distributive questions. From the haphazard ways in which politicians tackle these issues, it seems that their consultants and pollsters are flailing in the dark as well. We know little, if

anything, about why media campaigns and “push-polling” succeed in altering opinion on some issues and not others. We do not even have systematic data on the intensity of mass preferences over a range of distributive issues or on how this has evolved over time. There have been isolated studies showing that mass preferences for public goods are more price-inelastic than for private goods,⁵⁹ and that people are more inclined to pay for public goods if they expect to derive personal benefits from them⁶⁰ or they believe the goods in question cannot be provided privately.⁶¹ But the systematic study of these issues is in its infancy in the U.S., and it seems even less developed elsewhere.

The tension between democracy and justice is not exhausted by the subject of distributive politics, meager as our understanding of it might be. At least since Plato wrote *The Republic*, democracy’s skeptics have worried that majority rule can foster domination. The authors of *The Federalist* were greatly concerned about the power of majority factions, as we have seen. Commentators from Alexis de Tocqueville (who coined the phrase “tyranny of the majority”) and John Stuart Mill through contemporary defenders of constitutionalism all share in common the view that the cross-cutting cleavages comprising a pluralist society are insufficient to protect against majority tyranny. In their view, institutional checks and balances, geared to frustrating—or at least slowing—majoritarian politics are also needed. There are many ways to do this. Supermajority requirements, bicameral legislatures, over-representation of particular groups, staggered elections, and federalism are all features of the U.S. institutional scheme that throw sand in the wheels of majoritarian politics. But what has garnered the most attention is the separation of powers system in which enumerated powers are allocated to the legislature, the executive, and the judiciary—a modern incarnation of the Aristotelian polity in which the best regime is a composite of government by the one, the few, and the many.⁶²

The American Founders were convinced that such a system would contribute both to political stability and to limiting tyranny. Because “power is of an encroaching nature,” as Madison put it in Federalist # 48, it “ought to be effectually restrained from passing the limits assigned to it.”⁶³ Just how this was supposed to happen was, however, less than clear. Unlike the role played by cross-cutting cleavages, where people’s interests can be counted on to get them to form and re-form coalitions rather than try to take over the country, the separation-of-powers scheme relies on everyone’s accepting its legitimacy.

Madison was among the first to acknowledge that “a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”⁶⁴ Yet he supplied no mechanism by which “ambition” would be made, as he insisted in Federalist # 51 that it should be made, to “counteract ambition.”⁶⁵ This lack of a mechanism means that no player has an incentive to check his own behavior, which in turn means that there is no particular reason to expect the institutional separation of powers to promote stability or to limit tyranny. Indeed, subsequent experience in Latin America and elsewhere suggests that the opposite might be true—at least with respect to competition for power between the legislature and the executive. Presidential systems, in which chief executives enjoy independent electoral mandates and authority, are less stable and more coup-prone than parliamentary systems.⁶⁶

Most of the attention garnered by discussions of the separation of powers has focused, however, on the role of courts in interpreting constitutions and bills of rights. The U.S. Supreme Court's powers are laid out in Article III of the Constitution, but it was not clear that this included the power to strike down legislation until Chief Justice John Marshall did just that in 1803, declaring in *Marbury v. Madison* that it is "emphatically the province and duty of the Judicial Department to say what the law is."⁶⁷ The question remains, however, whether bills of rights, and independent courts whose job it is to guard them, actually make any difference to the protection of rights on the ground. Many constitutional lawyers, particularly those who came of age during the heyday of the Warren Court in the 1950s and '60s, believe that they do.⁶⁸ If the third wave of democratizations in the world that began in 1984 is anything to go by, their belief has won the day.⁶⁹ As Donald Horowitz has pointed out, whereas the American taste for federalism and independently elected presidents have not proved popular, bills of rights and independent courts have become near-universal in new democracies—especially those created since 1989.⁷⁰

This is curious in view of how hard it is to show that judicial review matters for the prevention of tyranny. Countries like Britain, Sweden, Norway, and until recently the Netherlands, which have shown little appetite for judicial review, have not done any less well at protecting human rights than has the United States. There have been periods in the U.S. when the federal judiciary has successfully championed individual rights and civil liberties against the legislative branch of government, that of the Warren Court being the best known.⁷¹ But there have also been eras when the Court has legitimated racial oppression, denial of civil liberties, and concentration of power in the executive branch.⁷² The behavior of the White, Taft, Taney, Burger, Rehnquist, and Roberts Courts suggest that the Warren Court might well have been an historical anomaly. Certainly the Supreme Court's tepid response to the incursions on civil liberties in the Patriot Act⁷³ and the behavior of the Executive Branch since 1991 does not suggest that it is much of a bulwark for their protection.⁷⁴

Yet the question remains: if there *is* a constitutional court, what role should it play in a democratic constitutional order? I take this question up in chapter seven via a consideration of the U.S. Supreme Court's involvement with abortion rights. The Court's abortion jurisprudence has evolved considerably in the three-and-a-half-plus decades since the Justices identified a woman's constitutionally protected right to abortion in *Roe v. Wade*.⁷⁵ This evolution partly reflects changes in the court's personnel, all of whom have been replaced since Justice Harry Blackmun penned his majority opinion in January of 1973. But the evolution also reflects ongoing struggles between the Court, state legislatures, and, more recently, the United States Congress. These struggles, in turn, reflect larger political currents. The National Organization for Women, founded in 1966, quickly grew into the largest women's organization in the country. Securing and protecting a woman's right to abortion has always been central to NOW's agenda, included as part of their proposed Equal Rights Amendment that was first introduced into Congress in 1982. Cultural conservatives have been mobilizing against them since 1970s. The Moral Majority, founded in 1979, and the Christian Coalition, created eight years later, have worked relentlessly to reverse *Roe* through political action, litigation, and attempts to influence appointments of federal judges. These campaigns and counter-campaigns have fueled controversy over

why the Court intervened in the abortion conflict by recognizing a woman's right to abortion as part of a constitutionally guaranteed right to privacy that is nowhere specified in the constitution.

I explore this debate here for the light it sheds on a conception of democracy that is geared toward minimizing domination. One helpful way to think about judicial review from this perspective takes off from our understanding, in the wake of Arrow, that there are no perfect democratic decision rules—no mechanisms of collective decision that do not create losers with legitimate grievances. In *Democracy's Place* I rejected the libertarian response to this conundrum: that collective action should be minimized. What libertarians think of as the private sphere of non-collective action turns out on inspection to be sustained by a particular collective action regime that is imposed on those who would prefer some alternative. It is hard to see how anyone who witnessed the governmental response to banks and businesses that were judged "too big to fail" in 2008 and 2009 could conclude otherwise. The real choice is never over whether-or-not collective action; rather it is over what sort of collective action.

Granting that collective action is inescapable does not, however, undermine the observation that all mechanisms of collective decision are problematic. Recognizing this means seeing that it is misguided to fetishize any particular collective decision as the final word in democratic politics. Even when they result from procedurally proper decisions, all collective outcomes are better thought of as provisional and open to revision—as their costs to those who are disadvantaged by them come into view and possibilities for mitigating those costs materialize. Courts play a constructive role in this process not when they usurp legislative functions, but rather when they get legislatures to revisit their collective decisions—revising them so as to minimize domination. I illustrate this contention via an examination of the Court's evolving abortion jurisprudence. I explain why the imperialistic character of Justice Blackmun's decision in *Roe* undermined the Court's legitimacy, but how it has developed a more defensible and effective stance since the late 1980s. This involves restricting itself to a reactive role in which the Court strikes down legislative decisions that foster avoidable domination, but invites further legislative action that can vindicate the legislature's goals in a less oppressive way. The search for accommodation can only succeed up to a point, but the history of the abortion controversy reminds us that necessity can be the mother of invention. There is often more scope for accommodation than people realize before they have to try to find it.

Even when the possibilities for accommodation have been exhausted, courts that adopt the reactive and iterative posture I recommend offer advantages from the perspective of minimizing domination. They provide forums in which divisive conflicts can be played out incrementally and at the margin, rather than as winner-take-all conflicts in which losers have no incentive to continue working within the system. Here the "cases and controversies" requirement of Article III of the U.S. Constitution offers decided advantages. It prohibits courts from supplying advisory opinions to the other branches on the constitutionality of proposed legislation, and it limits them to deciding only those issues that are actually litigated in particular cases. This means that there are always gaps in time, and often gaps in predictability, as to just what will transpire between the enactment of a statute and its being tested in the courts. These gaps can help blunt zero-sum conflicts even if they do not contribute to their resolution. Defending judicial review on these grounds parallels my neo-Lockean defense of majority

rule. In both cases the aim is to arrive at collective decisions that minimize domination rather than those that converge on “the right” answer.

This, too, is well illuminated by the conflict over abortion in the U.S. In 1992, in his opinion in *Planned Parenthood v. Casey*, Justice Antonin Scalia took issue with the majority’s embrace of a standard that allows states to regulate abortions so long as they do not place an “undue burden” on women. Scalia denounced this as “amorphous,” and bound to invite litigation because it is “inherently manipulable and will prove hopelessly unworkable in practice.”⁷⁶ Subsequent litigation revealed Scalia’s claim about the unworkability of the undue burden standard to be at least partly wrong as my discussion in chapter seven reveals, but his objection that the standard invites litigation misses the benefits this can offer in managing conflict over deeply divisive issues in pluralist societies. In 1835 Alexis de Tocqueville remarked that “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.”⁷⁷ This is not to be sniffed at when the alternative is an unambiguous resolution that leaves losers with the incentive to reach for their guns.

In the final chapter of *Democracy’s Place* I sketched a democratic conception of justice that built partly on this intuition that mechanisms for the pursuit of loyal opposition are important in forestalling disloyal opposition. The rationale underlying that argument is that much of what draws people to demand democracy is the desire to escape domination. Joseph Schumpeter was the first in a long line of self-styled political realists, as we have seen, to insist that it is wrongheaded to expect democracy to diminish injustice on any definition, and that it is dangerous to democracy’s health to foster expectations that it might.⁷⁸ The contrarian case that I sketched in *Democracy’s Place* and developed more fully in *Democratic Justice* was incomplete. I explored democracy’s implications for the governance of civil institutions over the course of the human life cycle, reserving the subjects of distribution and public institutions for subsequent volumes that are now in preparation and for which the material published here serves as a prolegomenon. *Democratic Justice* has attracted its share of critical discussion over the past decade, much of which has been helpful to me in refining my general account. Some of those criticisms are responded to in chapter eight.

Notes

¹ Thabo Mbeki, "I am an African." Speech on the adoption of the South African Constitution Bill, May 8, 1996. <http://www.polity.org.za/article/mbeki-i-am-an-african-adoption-of-sa-constitution-bill-1996-08051996-2004-01-01> [07-22-2009].

² This supposition would turn out to be correct in the 2000 election. Outgoing President Zedillo conceded his Institutional Revolutionary Party's defeat, leading the PRI voluntarily to relinquish power after more than seven decades in office.

³ See Takayuki Sakamoto, "Explaining electoral reform: Japan versus Italy and New Zealand," *Party Politics*, Vol. 5, No. 4 (1999), pp. 419-38.

⁴ Samuel Huntington "Will More Countries Become Democratic?" *Political Science Quarterly*, Vol. 99, No. 2. (1984).

⁵ These data are taken from "Polity IV Project: Political Regime Characteristics and Transitions, 1800-2007" <http://www.systemicpeace.org/polity/polity4.htm> [06-02-2009]. Following convention here, a country is considered a democracy if it has a score of 6 or higher on the Polity scale.

⁶ Jeffrey Sachs and Wing Thye Woo, "Structural factors in the economic reforms of China, Eastern Europe, and the Former Soviet Union", *Economic Policy*, Vol. 9, No. 18 (Apr., 1994), pp. 102-145. Jeffrey Sachs, "Privatization in Russia: Some Lessons from Eastern Europe," *The American Economic Review* 82, no. 2 (1992): pp. 43-48. David Lipton and Jeffrey Sachs, "Creating a market economy in Eastern Europe: the case of Poland," *Brookings Papers on Economic Activity* 1 (1990), pp. 75-133. Juan Antonio Morales and Jeffrey Sachs, "Bolivia's Economic Crisis", in Jeffrey Sachs (ed), *Developing Country Debt and Economic Performance*, Vol. 2 (Chicago and London: The University of Chicago Press, 1990), pp. 159-266. And Janos Kornai, *The Road to a Free Economy* (New York: W. W. Norton, 1990). For a discussion of other neoliberal economists of the period, see Ganez Venelin "The 'Triumph of Neoliberalism' Reconsidered: Critical Remarks on Ideas-Centered Analyses of Political and Economic Change in Post-Communism," *East European Politics and Societies* Vol. 19, No. 3 (2005), pp. 343-78.

⁷ Adam Przeworski, *Democracy and the Market* (Cambridge University Press, 1991).

⁸ They were, for example, entirely opaque to Joseph Stiglitz at the time. See his "Some lessons from the East Asian Miracle," *The World Bank Research Observer*, Vol. 11, No. 2 (August 1996), pp. 151-77. <http://wbro.oxfordjournals.org/cgi/reprint/11/2/151> [06-09-2009].

⁹ See James R. Vreeland *The IMF and Economic Development* (Cambridge University Press, 2003).

¹⁰ Asghar Adelzadeh, "From RDP to GEAR: The Gradual Embracing of Neo-Liberalism in economic policy," *Transformation*, No. 31 (1996), pp. 66-95.

¹¹ See Victoria Murillo, *Labor Unions, Partisan Coalitions and Market reforms in Latin America* (Cambridge University Press, 2001).

¹² See Susan C. Stokes, *Mandates and Democracy: Neoliberalism by Surprise in Latin America* (Cambridge University Press, 2001).

¹³ House Democrats voted for the final bill by a majority of 98 to 97, with two not voting. In the Senate the Democrats divided 25 to 21 with one not voting. Since all Senate Republicans and all but five House Republicans voted for it, the bill passed in a landslide. See "Vote tallies: 1996 Welfare Amendments." <http://www.ssa.gov/history/tally1996.html> [06-08-2009].

¹⁴ See Barbara Vobejda and Dan Balz, "President seeks balm for anger over welfare bill," *The Washington Post* (August 22, 1996), p. A1. <http://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf082296.htm> [06-08-2009].

¹⁵ See usgovernmentspending.com http://www.usgovernmentspending.com/federal_deficit_chart.html [06-08-2009].

¹⁶ David Sanger, "Mexico Repays Bailout by U.S. Ahead of Time," *New York Times* (January 16, 1997) <http://www.nytimes.com/1997/01/16/business/mexico-repays-bailout-by-us-ahead-of-time.html?pagewanted=all> [06-08-2009].

¹⁷ "Dow Jones Industrial Average (DJIA) History," <http://www.nyse.tv/dow-jones-industrial-average-history-djia.htm> [06-09-2009].

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¹⁹ Weekly Compilation of Presidential Documents Volume 29, Number 21 (Monday, May 31, 1993), pp. 981-982. U.S. Government Printing Office. <http://www.gpo.gov/fdsys/pkg/WCPD-1993-05-31/html/WCPD-1993-05-31-Pg981.htm> [05-09-2009].

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²¹ See David Nickerson, "Do autocracies obey Wagner's law?" Mimeo, Yale University (2000).

²² Andrew Winnick, *Toward Two Societies: The Changing Distribution of Income and Wealth in the United States Since 1960* (New York: Praeger, 1989); Carol Shammass, "A new look at long term trends in wealth inequality in the United States," *American Historical Review* Vol. 98, No. 2 (1993), pp. 412-31; and Edward Wolff, "Trends in household wealth in the United States," *Review of Income and Wealth*, Vol. 40, No. 2 (1994) pp. 143-74. For data on the changing absolute and relative shares of income and wealth for the bottom quintile of the population in the United States over the past half-century, see Lawrence Mishel, Jared Bernstein, and John Schmitt, *The State of Working America 1998-9* (Ithaca: Economic Policy Institute/Cornell University Press, 2000), pp. 48-51, 261-64.

²³ John Roemer, "Does Democracy engender justice?" in Ian Shapiro and Casiano Hacker-Cordón, eds., *Democracy's Value* (Cambridge University Press, 1999), p. 56.

²⁴ Guiseppe Di Palma *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley: University of California Press, 1990), p. 23 and Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) pp. 165-9.

²⁵ For standard statements of this view, see William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (San Francisco: W.H. Freeman, 1982); and William H. Riker and Barry R. Weingast, "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures." *Virginia Law Review*, Vol. 74 (1988), pp. 373-401.

²⁶ See, for example, Andrew Grice and Philip Thornton, "Tory heading for U-turn on Bank," *The Independent* (July 27, 1999) <http://www.independent.co.uk/news/tory-heading-for-uturn-on-bank-1108930.html> [06-24-2009].

²⁷ Dow Jones Indexes <http://www.djindexes.com/DJIA110/learning-center/> [-7-04-2009].

²⁸ In the U.S., GDP growth was above three percent per year for six of the dozen years after 1996 and above four percent for three of them. It fell below two percent only in the 2001-02 recession and in 2008. Comparable statistics could be cited for most of the advanced industrial democracies. Statistics taken from the U.S. Department of Agriculture, which combines data from The World Bank's World Development Indicators, the IMF's International Financial Statistics, Global Insight, and Oxford Economic Forecasting, and the Economic Research Service. <http://www.ers.usda.gov/Data/Macroeconomics/#HistoricalMacroTables> [-7-28-2009].

²⁹ See "Lessons from the Irish Miracle," *The Economist* (October 14, 2004) http://www.economist.com/opinion/displaystory.cfm?story_id=E1_PNRGVPG [07-03-2009]; "Tiger, Tiger, Burning Bright," *The Economist* (October 14, 2004) http://www.economist.com/surveys/displaystory.cfm?story_id=E1_PNGTDQS [07-03-2009]; and Hannes Gissurarson, "Miracle on Iceland," *The Wall Street Journal* (January 29, 2004) <http://courses.wcupa.edu/rbove/eco343/040Compecon/Scand/Iceland/040129prosper.htm> [07-03-2009].

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³¹ Ethan B. Kapstein, "Africa's capitalist revolution," *Foreign Affairs*, Vol. 88, No. 4 (July/August, 2009), pp. 119-20.

³² Indermit Singh Gill and Deepak Bhattachali, *An East Asian Renaissance*, (The World Bank, 2007). http://books.google.com/books?hl=en&lr=&id=yLPfjx5PEZ4C&oi=fnd&pg=PA43&dq=east+asia+recovery+financial+crisis&ots=Rt3UV_93A&sig=SU7Kv1bNzgE3APSEPGHO3ZLbtcE [07-23-2009].

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³⁴ Huntington's *Foreign Affairs* article appeared in 1993, "The Clash of Civilizations?" *Foreign Affairs*, Vol. 72, No. 3 (Summer, 1993), pp. 22-49, and the book in 1998, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1998). The debate accelerated after 9/11 and especially after the invasion of Iraq. As one indirect measure of this within academia, by 1996 there had been a combined total of 8 citations of Huntington's work on the ISI Web of Science citation index. This increased to 37 citations for 1997; 75 for 1998; 84 for 1999; 111 for 2000; 86 for 2001; 124 for 2002; 138 for 2003; 142 for 2004; 130 for 2005; 127 for 2006; 121 for 2007; and 142 for 2008. Computed from the ISI citation web site at http://apps.isiknowledge.com/WOS_GeneralSearch_input.do?highlighted_tab=WOS&product=WOS&last_prod=WOS&SID=1E6B6eKefGPL8PaH24L&search_mode=GeneralSearch [06-26-2009]. Google Scholar, which (unlike the ISI index) captures many non-academic citations as well, showed a cumulative citation of 3,468 for the article and 4,955 by July of 2009.

http://scholar.google.com/scholar?hl=en&q=huntington%20clash%20of%20civilizations&rlz=1R2SKPB_enUS332&u=m=1&ie=UTF-8&sa=N&tab=ws [06-26-2009]. On the response to Huntington see then President Mohammed Khatami's advocacy of a dialogue among civilizations in his address to the UN in September of 2000. <http://www.unesco.org/dialogue/en/khatami.htm> [07-28-2009]. See also Edward Said, "The Clash of Ignorance", *The Nation* (October 4, 2001) <http://www.thenation.com/doc/20011022/said> [07-28-2009] "The Myth of 'The Clash of Civilizations'". <http://video.google.com/videoplay?docid=-6705627964658699201&hl=en> [07-28-2009].

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³⁶ The fear of a domino effect in Southeast Asia, commonly associated with Henry Kissinger, was first proposed by William Bullitt, a former ambassador to Moscow. See Gearóid Ó Tuathail, Simon Dalby and Paul Routledge, *The Geopolitics Reader* (Routledge: 1998), p. 69. On the George W. Bush Administration's democratic domino theory for the Middle East, see Greg Miller, "Democracy Domino Theory 'Not Credible'," *Los Angeles Times*, (March 14, 2003) <http://articles.latimes.com/2003/mar/14/world/fg-domino14> [07-28-2009].

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³⁹ See Ian Shapiro and Kahreen Tebeau eds., *After Apartheid: The Second Decade* (University of Virginia Press, 2010).

⁴⁰ John Rawls, "Justice as fairness: political, not metaphysical," *Philosophy and Public Affairs*, Vol. 14, No. 3 (Summer, 1985), pp. 223-251.

⁴¹ Locke held the conventional view that different institutional arrangements made sense for different types of polity, but he never explored any of them in any depth. See John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. by Ian Shapiro (Yale University Press, 2003 [1681]), pp. 157-8.

⁴² “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” James Madison, *Federalist* #10 in Alexander Hamilton, James Madison, and John Jay *The Federalist Papers*, ed by Ian Shapiro (Yale University Press, 2009), pp. 47-58.

⁴³ See *Democracy’s Place* pp. 251-54.

⁴⁴ See my discussion in *The Moral Foundations of Politics* (Yale University Press, 2003) pp. 22-23.

⁴⁵ Ian Shapiro, *Containment: Rebuilding a Strategy against Global Terror* (Princeton University Press, 2007).

⁴⁶ See Xavier Sala-i-Martin, “The world distribution of income (estimated from individual country distributions)”. NBER Working Paper 8933 (2002) and “Growing Unequal? Income Distribution and Poverty in OECD Countries” OECD Summaries, (2008) <http://www.oecd.org/dataoecd/45/42/41527936.pdf> [07-27-2009].

⁴⁷ “Growing Unequal?” and Almas Heshmati “The World Distribution of Income and Income Inequality” IZA Discussion Paper No. 1267 (2004).

⁴⁸ “Under Attack: A special report on the rise and fall of the wealthy,” *The Economist* (April 4-10, 2009), pp 4-16.

⁴⁹ Jeremy Seekings and Nicoli Nattrass, *Class, Race, and Inequality in South Africa* (Yale University Press, 2005), pp. 300-75.

⁵⁰ See Nicoli Nattrass, *The Moral Economy of Aids in South Africa* (Cambridge University Press, 2004) and *Mortal Combat: AIDS Denialism and the Struggle for Antiretrovirals in South Africa* (University of Kwazulu-Natal Press, 2007).

⁵¹ *South Africa Human Development Report 2003* UNDP (Oxford University Press, 2003); Shapiro and Tebeau, *After Apartheid*.

⁵² Shapiro and Tebeau, *After Apartheid*.

⁵³ Nicoli Nattrass, Jeremy Wakeford, Samson Muradzikwa, *Macroeconomics: Theory and Policy in South Africa*, 3rd ed. (Cape Town: David Philip, 2003), p. 289

⁵⁴ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), pp. 160-64.

⁵⁵ Michael J. Graetz and Ian Shapiro, *Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth* (Princeton University Press, 2005).

⁵⁶ See Morris Fiorina, Samuel Abrams and Jeremy Pope, *Culture War? The Myth of Polarized America* (New York: Pearson Longman, 2005).

⁵⁷ Jill Zuckman, “Bush finds Congress is no pushover”, *The Chicago Tribune* (May 31, 2005). <http://www.encyclopedia.com/doc/1G1-132874430.html> [07-28-2009].

⁵⁸ Raymond L. Goldsteen et. al “Harry and Louise and Health Care Reform: Romancing Public Opinion,” *Journal of Health Politics, Policy and Law*, Vol. 26, No. 6 (2001), pp. 1325-1352 http://muse.jhu.edu/journals/journal_of_health_politics_policy_and_law/v026/26.6goldsteen.html [09-07-2009].

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⁶⁰ Donald P. Green and Irene Blair, “Framing and the Price Elasticity of Private and Public Goods,” *Journal of Consumer Psychology*, Vol. 4, No. 1 (1995), pp. 1-32.

⁶¹ Daniel Kahneman and J. Knetsch, “Valuing public goods: The purchase of moral satisfaction,” *Journal of Environmental Economics and Management*, Vol. 22 (1992), pp. 57-70.

⁶² See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1974).

⁶³ *The Federalist Papers*, p. 251.

⁶⁴ *The Federalist Papers*, p. 255.

⁶⁵ *The Federalist Papers*, p. 264.

⁶⁶ See Juan Linz, *The Breakdown of Democratic Regimes: Crises, Breakdown and Reequilibration* (Johns Hopkins University Press, 1978) and “Presidential or parliamentary democracy: does it make a difference?” In Juan J. Linz and Arturo Valenzuela, eds., *The Failure of Presidential Democracy* (Johns Hopkins University Press, 1994), pp. 3-90. Presidentialism’s instability seems to be mitigated somewhat when the president’s party has a majority in the legislature, when there are favorable conditions for coalition politics in the legislature, and when centralized executive authority in the government. See Joe Foweraker, “Institutional Design, Party Systems and Governability—Differentiating the Presidential Regimes of Latin America,” *British Journal of Political Science* Vol. 28 (1998) pp. 651-676; and José Cheibub and Fernando Limongi, “Democratic Institutions and Regime Survival: Parliamentarism and Presidentialism Reconsidered,” *Annual Review of Political Science*, Vol. 5 (2002), pp. 151-79. For additional discussion see my *The State of Democratic Theory* (Princeton University Press, 2005), pp. 86-100.

⁶⁷ *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803), at 177-78.

⁶⁸ Prominent among these is Ronald Dworkin. See his *Law’s Empire* (Harvard University Press, 1986) and *A Bill of Rights for Britain: Why British Liberty Needs Protection* (Chatto & Windus, 1991). For other classic statements see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) and Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986). For a contrarian view from a lawyer, see Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000) and *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2007).

⁶⁹ “Third wave” is Samuel Huntington’s term, deployed to distinguish the wave of democratization that began in 1984 (and is presumably still ongoing) from the two previous waves that took place between 1828 and 1926, and 1943 and 1962. Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991).

⁷⁰ Donald L. Horowitz, “*The Federalist* abroad in the world,” in Shapiro ed., *The Federalist Papers*, pp. 502-32.

⁷¹ There are terminological issues at stake here on which substantive issues turn. For instance, in the *Lochner* era the Supreme Court struck down much legislation in the name of protecting individual freedoms, but the legislation in question was aimed at increasing social and economic guarantees—promoting civil rights at the expense of social rights. See *Lochner v. New York* 198 U.S. 45 (1905). For discussion of the *Lochner* era, and for a general discussion of evolution of American constitutional law through the years of the Warren Court (1953-69), see Lawrence H. Tribe, *American Constitutional Law* (New York, Foundation Press: 1978).

⁷² See Rogers M. Smith, *Civic Ideals: Conflict Visions of Citizenship in U.S. History* (Yale University Press, 1997), pp. 165-409.

⁷³ The USA PATRIOT Act was passed in October of 2001 and renewed in March of 2006. Public Law 107-56. 107th Congress. <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/html/PLAW-107publ56.htm> [07-23-2009].

⁷⁴ See Frederick Schwartz and Aziz Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: New Press, 2008).

⁷⁵ *Roe et. al v. Wade*, District Attorney of Dallas County 410 U.S. 113 (1973).

⁷⁶ *Planned Parenthood of Southeastern Pennsylvania et. al v. Casey et. al.*, 505 U.S. 833 (1992), at 986.

⁷⁷ Alexis de Tocqueville, *Democracy in America*, Vol. 1, translated by George Lawrence and edited by J.P. Mayer (New York: Harper Perennial, 1969 [1835]), p. 270.

⁷⁸ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, 1942), pp. 250-83.