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SMOKING, PROGRESSIVE LIBERALISM, AND THE LAW

ABSTRACT: *In his dissection of the 1998 tobacco settlements, W. Kip Viscusi provides a window on how the ostensibly liberal public philosophy behind the modern American regulatory state betrays its foundational commitments. Animated by a moralizing concern with preventing harm to self, and a leftist antagonism towards corporate capitalism, "progressive liberalism" at first foundered in its war against the tobacco industry in the face of traditional liberal counterarguments about individual autonomy, knowledge of risk, and choice. Only when progressive liberals translated their paternalist impulses into science-centered arguments about ignorance and addiction, which involve barriers to autonomous choice and harm to others, did they succeed in turning the legal and regulatory tide against smoking. This dynamic raises questions about the future of individual autonomy in a science-centered, progressive-liberal modern polity.*

"The habit of smoking is disgusting to sight, repulsive to smell, dangerous to the brain, noxious to the lung, spreading its fumes around the smoker as foul as those that come from Hell." So pronounced James I in 1604. Since then, numerous ambitious and successful political leaders—including Louis XIV, Napoleon, and Adolph Hitler—have concluded

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that smoking sapped the strength of a rising people, and crusaded fervently against it.

In 1898, the Supreme Court of Tennessee, in upholding the constitutionality of a law banning the sale of cigarettes in the state, confidently asserted that cigarettes are "wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. . . . Beyond question, their every tendency is toward the impairment of physical health and mental vigor." That court added that the character of cigarettes "is so well and so generally known . . . that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become generally known" (*Austin* v. *State* 1898). Likewise, long before the current campaign against "Big Tobacco," many Americans knowingly referred to cigarettes as "coffin nails" and "cancer sticks" (Klein 1993, 11–12, 63; Goodin 1989, 8, 20–21). A 1954 Gallup Poll showed that an astonishing 90 percent of Americans were aware of a scientific study by the American Cancer Society demonstrating a link between cigarette smoking and lung cancer. In 1957, the U.S. surgeon general testified before Congress that public awareness of the risks of smoking was high. In 1966, a top official of the American Medical Association asserted in the same forum that requiring warning labels on cigarettes was not likely to have any great effect, as "the health hazards of excessive smoking have been well-publicized for more than ten years and are common knowledge" (Viscusi 2002, 140).

To be sure, as W. Kip Viscusi reports in *Smoke-Filled Rooms* (University of Chicago Press, 2002), a book on the 1998 settlements reached between the major tobacco companies and the states attorneys general, our knowledge of smoking's harms has advanced over the years. But what leaps out from Viscusi's study of the risks, knowledge of the risks, and regulatory policy concerning cigarette smoking—notwithstanding the Matterhorn of evasions of the tobacco companies (which Viscusi chooses not to discuss; see Kluger 1996 and Goodin 1989, 16–20)—is how little dispute there has been over the basic scientific facts concerning the health effects of smoking. The story here, for the most part, is not one of "junk science" fooling people or of a "battle of the experts" duking it out in court (Huber 1991; Foster and Huber 1997, 17). It is rather the story of people continuing to smoke, known dangers be damned (see Feinberg [1971] 1983; Daniels 1985, 156–58). *Smoke-Filled Rooms* provides an illuminating window on how

paternalistically inclined political activists and policy makers conscripted the physical and social sciences to construct an alternative plot-line to the tobacco story—one focused on individual ignorance, addiction, and social harm—with the aim of suppressing personal liberty in favor of professionally administered public health.

Thus, so far as cigarettes are concerned, there are really two stories seeking public legitimation. The plot, tone, and, ultimately, the moral of each story is deeply rooted in the storyteller's political ethos. Viscusi's ethos—which I will call "traditional liberalism"—is liberal and individualist. He believes that the proper role of government is to provide self-directing, independent people with the best information about the risks of cigarette smoking so that they can, in turn, make informed choices and live as they see fit. In contrast, the ethos of the modern regulatory state, which is supported by cadres of public-health advocates purporting to speak for a broader "public interest," stems from a new form of liberalism (which some may choose not to call liberalism at all)[1] adulterated by a curious (but, by now, familiar) admixture of old-time moralism, leftist anti-corporatism, and a fixation on administering what it conceives to be autonomy's preconditions. Like Viscusi's, this ethos places an ostensibly high value on the informed choices of individuals. But, unlike Viscusi, progressive liberals are driven to identify certain choices as irrational and perverse. Clearly disturbed by the prospect of individuals doing themselves harm by smoking, and animated by a palpable moralism, this progressive liberalism alights on the processes by which consumer capitalism has allegedly destroyed the conditions of autonomy so as to argue for the state's intervention. Along the way, it characteristically goes to enormous lengths to translate its concern with harm to self into an argument about harm to others.

At one time, the irrationalities and perversities involved in activities such as smoking would have been addressed in the language of religion and morals. It is one of the peculiarities of paternalism in the modern liberal state that its charges of perversion are described in rationalist, consequentialist terms, with scientific evidence adduced for its conclusions. Viscusi's book is a case study in the strange and willful ways the progressive-liberal regime engages science and anti-capitalism to shrink the sphere of individual autonomy while eschewing the moral arguments that had long served as the touchstones of paternalism.

Science has been drafted in the service of the paternalist itch in two distinct areas of the tobacco wars. The first involves people's knowledge

of the dangers of smoking. If people choose wrongly, modern liberalism assumes that they must be doing so because they are either misinformed or enslaved (that is, addicted). Seeing that others continue to make the bad choices they avoid making, progressive liberals are characteristically preoccupied with the promise of education to save the misguided (as are all liberals, including Viscusi; see Douglas 1985, 31–32). Given the extent and availability of data on smoking's ill effects, progressives conclude that if people continue to smoke, there must have been some contamination of their education—with the agent of contamination being, predictably enough, corporate capitalism, acting through cover-ups, propaganda, conspiracies, and lies. It is hardly mere happenstance that the only successful wave of the crusade against smoking is the most recent one, which has focused relentlessly on the misinformation campaigns and informational stonewalling of the tobacco companies (see, e.g., Mann 1999; www.thetruth.com; Haltom and McCann 2004, ch. 7).

Progressives' second willful use of science is aimed at demonstrating the ostensible damage done by smoking. For most of the second half of the twentieth century, smokers' lawsuits against tobacco companies foundered on the traditional liberal grounds that individuals knew and assumed the risks of their actions (Jacobson and Warner 1999; Haltom and McCann 2004, ch. 7). One of the central principles of liberalism, identified at least as far back as the 1850s by John Stuart Mill, is that individuals should be free to make choices about their lives that affect only them, "directly, and in the first instance," without interference from the state. This is the case even if others "think our conduct foolish, perverse, or wrong," and even if our conduct runs counter to what others judge to be our "physical or moral good."

At the same time, however, Mill's "harm principle" also stipulates that it is one of the state's proper roles to regulate actions that, in their consequences, spill beyond individual agents and inflict harm on others (Mill [1859] 1975, 15, 17, 18). One of the most notable aspects of the current wave of the anti-tobacco campaign—including the recent tobacco settlements—is that it has shifted what lawyers call "the theory of the case" from the first part of Mill's harm principle (which had torpedoed one lawsuit against the tobacco industry after another) to the second. The states now argue that the injuries done by smoking to smokers cause identifiable and calculable injuries to others, including society as a whole (such as through increased Medicaid costs). In this way, the second half of Mill's harm principle swallows the first.

Knowledge of Risk

Despite centuries during which the ill effects of smoking on smokers' health have been widely understood, first due to common experience and later to meticulous, well-publicized scientific studies, it is an article of faith for many progressive liberals that the only reason people continue to smoke is that they are either misinformed or uneducated about the dangers of smoking; or that, once informed of these dangers, they are helplessly enslaved by an "addiction," and have lost all power to act on their knowledge as autonomous, self-determining individuals.

Why this faith? At a deep level, liberalism has long been ambivalent about people harming themselves, or risking harm for what privileged analysts have decided is no good (i.e., no rational) reason.

The modern science of government begins with the will to safety and bodily health. In contrast to the political science of the ancients, such as Plato and Aristotle, who launched their quest for the best political life by inquiring into the nature of the good, such modern writers as Machiavelli, Hobbes, and Locke began empirically, asking simply *what is* (Strauss 1953). For Hobbes, the first fact, from which all else would follow, was the corporeal equality of man: no man was so much weaker than any other that he could not kill him in his sleep, with the aim of making himself master of other men's "persons, wives, children, and cattell." The purpose of the social contract was to bring the "warre . . . of every man against every man" to a close, halting the killing, or the continual threat of it. The passage out of the state of war made it possible for the first time for individuals to pursue in relative safety their individual and collective ends (Hobbes [1651] 1968, ch. 13). Locke's more benign version of the same process (he characterizes the position of man before government as a "state of nature" rather than a state of war and, unlike Hobbes, evinces a foundational liberal concern for individual rights) similarly begins with the imperative of physical security and safety (Locke [1690] 1979, ch. 2). In the subsequent development and refinement of liberal thought, it was usually held that matters of the good were to be left largely to individuals to define and pursue according to their own lights. This was the "low but solid ground" upon which the modern liberal outlook was built (Strauss 1953, 246–47).

As liberalism is a philosophy of safety and self-perservation, risk-taking has long had an ambiguous place in liberal thought (see, e.g.,

Nozick 1974, 73–78). Traditional forms of liberal theory, devoted to replacing anarchy with government and to justifying the rule of law, were risk-averse only in their fundamentals. Some influential modern variants, in a somewhat natural extension of these fundamentals, have broadened the scope of liberalism's concern for safety into a risk-averse public philosophy preoccupied with the formulation of an aggressively interventionist state that works to guarantee what progressive theorists have agreed are the preconditions of autonomy—a process helped immeasurably by the leftist conviction that many ills, including self-inflicted ones, can be traced in one way or another to capitalism and its agents.

Modern progressive liberals stand manifestly ill at ease in the company of many human types—like the entrepreneurial businessman and others—who promote, celebrate, engage in, reward, and profit from daring and passionate risk-courting (or gambling) and bold and creative individualism. Clearly, important forms of liberalism (particularly liberal capitalism) and other paradigms with deep roots in the West consider such risk-taking to be socially productive, heroic, or romantically attractive (e.g., De Quincy 1985; Douglas 1985, 6, 43–44; Friedman 1962; Homer 1938; Klein 1993; Schumpeter 1976, 82–85). But progressive liberals tend to find the choice to smoke, its array of sensual and social pleasures, and its deliberate courting of death to be perverse, incomprehensible, and alien (Klein 1993; Douglas 1985, 75). "The proverbial visitor from a distant planet," anti-tobacco crusader Richard Kluger tellingly opines, "would find no earthling custom more pointless or puzzling than the swallowing of tobacco smoke followed by its billowy emission and accompanying odor" (Kluger 1996, xiii).

Smokers in some respects do hail from a different planet than progressive liberals. Smokers consider themselves above-average risk takers, and the evidence bears them out. Male smokers are 16 percent less likely to use their seatbelts than male non-smokers. The gap for women is 13 percent (Viscusi 2002, 169–70; Viscusi and Hersch 1990; Viscusi and Hersch 1998; Viscusi and Hersch 2001). Smokers are significantly less likely to monitor their blood pressure and floss their teeth than non-smokers. They are, moreover, more likely to take risks and suffer accidents at work and home. These data on the disposition of smokers toward risk in general makes it possible, if not likely, that, far from being a canard concocted by the tobacco companies, as is commonly alleged (see e.g. Haltom and McCann 2004, ch. 7), it may simply be a fact that smokers know the risks of smoking and choose to smoke nonetheless.

But do they in fact understand the gravity of this particular form of risk-taking? Influential studies of the perceived risks of smoking have taken as their yardstick the differences in risks perceived by smokers and non-smokers. These studies have found that smokers see smoking as less risky than non-smokers do. This result has then been interpreted—without any comparison to the *actual risks* of smoking as determined by epidemiological studies—as evidence that smokers have been deprived of crucial information concerning the dangers of smoking.

Viscusi's yardstick for answering the question is different. He examines the accuracy of people's risk perception—that is, he compares their perception of the risk with the actual risk. He finds that both smokers and non-smokers overestimate the life-expectancy loss and lung cancer risk caused by smoking. The risk perceptions of smokers, however, are consistently more accurate. The perceived health risks of secondhand smoke to non-smokers, who see this danger as about half as great as the perceived risks to smokers themselves, are "off the charts, by any reasonable standard," when compared to the best measurements of the actual risks. "I found," Viscusi reports drolly, "that if people understood the lung cancer risk of smoking accurately as opposed to overestimating it, the societal smoking rate would increase by 6.5–7.5 percent" (Viscusi 2002, 120, 154–64).

To the outside observer, what is most striking in the juxtaposition of Viscusi's studies with others he presents in his book is how the latter group of studies smuggles progressive liberalism into its ostensibly value-neutral science (see also Jasanoff 1990, 3–4, 6). Strictly speaking, for example, there is nothing inaccurate in comparing the risk assessments of smokers and non-smokers: it is "good science" in a narrow sense, at least. But the decision that this comparison is the appropriate one, and the assumption that its results are telling, make sense only if one is already wedded to the view that if only people knew the true risk of smoking, they would choose not to smoke at all. This unwarranted view may be an artifact of the highly inaccurate risk calculations of those harboring a paternalist impulse, who may systematically exaggerate the risks of smoking. If so, those who design and cite the studies may, in fact, be consistently less rational than the smokers themselves. Perfectly accurate scientific data can be meaningless or misleading if not read in the context of other relevant data. The decision to isolate certain findings, to have them "speak for themselves," is an ideological decision, whether consciously taken or not.

Many of the most illuminating (and humorous) moments in Viscusi's

analysis arise from his willingness to place survey data adduced by reform-minded, paternalistically inclined scientists on stage alongside research in other, seemingly unrelated but revealing areas. A case in point is the data Viscusi provides on the general public's belief (as assessed by the Gallup Poll) that "smoking is one of the causes of lung cancer." The proportion believing this was already over 50 percent by the late 1940s, over 60 percent by 1970, over 80 percent by 1980, and around 98 percent by 1999. Viscusi reports that, by comparison, in 1999, only 55 percent could identify Jerry Seinfeld as the star of the hit sitcom "Seinfeld," and only 79 percent were aware that the earth revolves around the sun. "Viewed in these terms," Viscusi (2000, 143) writes, "the smoking awareness figures are quite impressive." To the extent that the general public knows anything, it certainly knows the risks of smoking.

But perhaps certain especially vulnerable subsets of the population remain in the dark. What about the children? Viscusi shows that, when it comes to risk perceptions concerning smoking, young people, far from being unaware that smoking is dangerous, are actually more closely attuned to the risks of smoking than those in any other age group. Surveys taken between 1991 and 2000 measuring the relative risk assessments of young people showed that between 69 and 73 percent of twelfth-graders judged smoking a pack or more of cigarettes a day as a "great risk" to their health. Only 48 percent viewed smoking crack cocaine as posing as great a risk or a greater one (Viscusi 2002, 186).

Yet progressive liberals insist that if young people were truly aware of the dangers, they would never light up. This conviction leads ineluctably to the conclusion that a young person's decision to smoke must be due to ignorance, deception, or enticement. One prominent argument is that the young are seduced by "master manipulators" and "marketing Svengalis" (Kluger 1996, xii) who depict "a fantasyland populated by heroically taciturn cowboys, sportive camels, and an array of young lovers, auto racers, and assorted bon vivants all vibrantly alive with pleasure" (Goodin 1989, 20).

A full response to such charges would amount to a book in itself. But Viscusi helpfully reports that the rise in youth smoking in 1993 bears no relationship to the introduction of Joe Camel in 1988, and that young people continued to smoke Marlboros over Camels by a wide margin. The retirement of Joe Camel, moreover, had no notable effects on levels of youth smoking (Viscusi 2002, 184).[2]

This does not mean, however, that the young (or the rest of us) are

not impressionable or deterable. What did have a significant effect on teen smoking was whether smoking was permitted at home. Studies have shown that teenagers who live in households where smoking is not allowed smoke only one-third to one-half as much as those who live in households where it is (Hersch 1998; Viscusi 2002, 187). Charging American parents with "crimes against humanity" (Kluger 1996, xvii) for permitting their children to smoke in the house, however, is a less attractive political strategy for modern liberals than taking on Joe Camel and the machinations of corporate capitalists.

A final argument made by progressive liberals turns on how knowledge of risk affects actual decision making. Psychologists have identified the ways in which cognitive effects such as "wishful thinking," "anchoring," and "time discounting" lead to irrational decision making. Wishful thinking leads one to think one can get away with behavior that one knows will harm others if they try it. Anchoring leads people to base their understanding of actual harms on their own experience to date. Thus, unless and until smoking harms an individual, that individual is unlikely to take seriously its potential to do so. Similarly, time discounting leads people to underestimate the reality of threats that are likely to come home to roost only in the long term, as with most threats from cigarettes (such as lung cancer and heart disease) (Goodin 1989, 21–23).

Viscusi does not so much as mention these challenges to individual rationality. Yet he is coauthor of a book on decision making in tort cases that argues that these cognitive problems necessitate removing punitive damages determinations from the province of civil juries (Sunstein et al. 2002; Kersch 2003). It would seem that even staunch advocates of individual autonomy do not dispute that individuals may reason poorly, even when well informed.

Progressives go from there to the conclusion that individuals should not be allowed to choose when their choices are dependent upon poor reasoning. A proper rejoinder to this conclusion would of necessity be a political one. It would emphasize the serious consequences for liberty if government became too eager to override individuals' claim that they know what they are doing, on the ground that they are laboring under the effects of scientifically demonstrable cognitive defects.

All the evidence indicates that smokers know the risks. Studies that attempt to gainsay their knowledge have been unpersuasive. And efforts to dismiss their knowledge through recourse to cognitive psychology are highly paternalistic (if not totalitarian) in their implications.

Slaves of Their Addiction

Of course, it is possible to be fully aware of the dangers of smoking, to continue to smoke, and yet for that "choice" to be no real choice at all. Such would be the case if smoking were an addiction, a behavior which, despite one's intentions, one is simply unable to stop (Goodin 1989, 25–30). It turns out, however, that just as was the case for knowledge of the risk, a moralizing, leftist paternalist ideology has infused scientific studies purporting to show the "addictive" nature of smoking.

For many years, Viscusi reminds us, smoking was referred to by the U.S. government not as an addiction but as a "habit." The switch to the term "addiction" by the U.S. Surgeon General's office in 1988 did not precede, but in fact was coincident with, the decision to launch a political campaign against it. At the time the Surgeon General made this decision, cigarettes were actually less habit-forming than ever. Levels of nicotene—the ostensibly addictive ingredient in cigarettes—had been declining relatively consistently for a long period prior to the 1980s. The government's decision to characterize increasingly safe and decreasingly habit-forming cigarettes as addictive was part of its effort to push the public to identify cigarette smoking with other stigmatized "addictions" plaguing American society, like cocaine and heroin, and to dissociate it from an array of unhealthful, but less serious, bad habits—like not getting any exercise, nibbling one's fingernails, and overeating fatty foods. The government seems to have largely succeeded in this regard (Kersh and Morone 2002; Viscusi 2002, 167).

How "addictive" is smoking? One measure, Viscusi explains, is to compare the price elasticity of demand for cigarettes (or the decline in the number of cigarettes purchased for each unit increase in their price) with that of other products.

If any substances are addictive, heroin and crack cocaine are. Addicts will do anything—abandon their families and homes, beg, steal, and kill—to get their next fix. The elasticity of demand for heroin and crack cocaine is thus very low; its price barely affects the amount consumed. The price elasticity of demand for cigarettes, by contrast, is about −.4 to −.6. That is comparable to the price elasticity of demand for other consumer products that no one (except jocularly) refers to as addictive—such as jewelry, watches, stationery, newspapers, and magazines. The demand for theatre and opera, toys, and legal services is actually less elastic than that for cigarettes, suggesting that people are "no

more addicted to cigarettes than they are to lawyers or the opera" (Viscusi 2002, 172).

The effect on demand of a unit price increase for cigarettes, as for other products, is greater for lower-income consumers and smaller for those with higher incomes. But when people want to cut back on their smoking, most are perfectly capable of doing so, and do so routinely (Viscusi 2002, 168–72; see also Goodin 1989, 96–97; Tollison and Wagner 1988, 39).

But what of those surveys that report that nearly 70 percent of smokers would like to quit? Progressive liberals interpret such surveys as signs that cigarette smokers are slaves to their addiction. Viscusi considers them alongside similar surveys revealing that comparable numbers of people would like to leave their jobs or spouses, or to move out of L.A. "Ultimately," Viscusi (2002, 173) concludes, "such quit-intention attitudinal questions tell us very little except that people are not generally pleased with all the attributes of cigarettes." This may be overstated. As Robert Goodin (1989, 98–99) has argued, "At least sometimes, what a person says is a better indicator of the true state of his mind than what he does. Such would be the case if he were physically restrained, in a way that rendered him simply unable to do what he said he wanted to do." Viscusi might have reported, as is almost certainly the case, that at least some people are chemically addicted to nicotene in the way that others are to heroin or crack cocaine (ibid., 26). Nonetheless, the old "habit" label probably fairly captures the essence of smoking for most people.

Harm to Society

Until quite recently, tobacco companies were consistently able to skirt liability for smoking's harms with the assertion that smokers knew the risks and were fully capable of quitting. In the first two waves of tobacco lawsuits, anti-smoking advocates and plaintiffs' lawyers did their best to challenge these assertions. In the first wave (1954–1973), suits by individuals seeking damages on the grounds of tobacco-company negligence predominated. In the second (1983–1992), plaintiffs anchored their case in the products-liability claim that cigarettes were dangerous (hence, defective) and injurious consumer products that should be held to a standard of strict liability. They were butting their heads against a wall. The tobacco companies suffered not a single loss in these first two

waves of lawsuits (Derthick 2002, 27–33). Progressive-liberal scholars, in accordance with their anti-corporate convictions, attributed these victories in part to the sheer wealth, power, and tenacity of Big Tobacco's legal defense teams—the nefarious "Scorched Earth, Wall of Flesh" (i.e., of lawyers) (Haltom and McCann 2004).

But critics also blamed the dexterity with which the Wall of Flesh played upon the ideological predisposition of the American people—and, hence, American juries—to invoke the ethics of liberal individualism: to invoke, that is, personal choice and individual responsibility (see, e.g., Haltom and McCann 2004). Given the stranglehold of the "ideology" of personal responsibility in American life, a creed brilliantly manipulated by fat-cat lawyers for Big Tobacco, anti-smoking forces didn't stand a chance.

Faced with a long string of losses, however, anti-smoking paternalists regrouped. Beginning in 1994, with a newfound sensitivity to the ideological environment, they launched a third wave of lawsuits that deliberately shifted the terms of the argument (Haltom and McCann 2004; Jacobson and Warner 1999, 775–77). Putting aside the type of claim that left them most vulnerable to charges of paternalism, the anti-smoking forces decided to focus less on harm to self and more on harm to others. Recall that even Mill, the consummate liberal individualist, considered it perfectly acceptable for society to coercively prevent people from, or punish them for, harming others (see e.g. Goodin 1989, 64). In these third-wave lawsuits, non-smokers (such as flight attendants and restaurant workers) and state governments sued the tobacco companies for injuries, whether physical or economic, that they allegedly suffered on account of the decisions made by other people to smoke.

This new tactic succeeded. For the first time, the tobacco companies suffered a succession of losses, eventually prompting them to accede to a massive settlement agreement (MSA) reached with the states' attorneys general (Derthick 2002, ch. 9). Once modern liberals worked with the grain of traditional liberalism instead of against it, pursuing paternalist ends under the "pretense" (Mill [1859] 1975, 101) of non-paternalist means, victory was at long last theirs.

These recent victories, however, turn out to be anchored in scientific findings, and calculations of social harm, that are every bit as dubious as the junk science wafting from the Tobacco Institute (which had doggedly claimed that the jury was still out on the link between cigarette smoking and disease). Viscusi recounts how, when pressed by paternalistically inclined progressive liberals to go after second-hand

smoke in the workplace despite the absence of evidence about its harm, federal regulators massaged and manipulated the data. Lacking reliable knowledge of the effects of second-hand smoke, they simply extrapolated from the effects of first-hand smoke, assuming both a linear dose-response relationship and no safe level of exposure (Viscusi 2002, 103). In other cases, the regulators just suppressed unwelcome evidence. In still others they altered their regular standards to arrive at predetermined results. In one particularly egregious case, a federal court invalidated an EPA risk assessment of the dangers of lung cancer posed by second-hand smoke because the agency refused to cite scientific studies that did not fit its regulatory theory; altered the usual confidence intervals for its statistical tests; and failed to take account of potential intervening causes of injury, such as living in polluted areas or with a spouse who smokes (Viscusi 2002, 106–9).

Now traveling in the sheep's clothing of social harms, the progressive liberals hit the jackpot in a case that, by agreement with the tobacco companies, was never tested in court. That case involved lawsuits brought by state attorneys general alleging financial injury to the public from individuals' decisions to smoke. In their suits, the states, in high dudgeon, alleged that the medical and pension bills resulting from smoking-related injuries constituted a major drain on the public treasuries. For this reason, the smoking that was abetted and encouraged by the defendants—the tobacco companies, not the smokers themselves—caused harm not only to smokers but to everyone else.

The evidence for these allegations was extraordinarily shaky. It was so dubious, in fact, that federal officials who were no friends of the tobacco industry advisedly passed up an opportunity to bring a similar lawsuit themselves. When asked why the Clinton Justice Department had refrained from bringing a parallel federal suit, Viscusi recounts an official's reply that the money saved by Social Security due to smokers' early deaths may well have outweighed the "social costs" of caring for them before they died. In this context, a federal lawsuit would have had the effect of broadcasting the huge net-cost savings, undermining the states' lawsuits (Viscusi 2002, 99).

Viscusi's assessment of the actual social harms of smoking is limited to the class of harms alleged in these state lawsuits.[3] Cigarette smoking, he acknowledges, leads to higher health-insurance costs, including those stemming from government obligations under Medicaid and other health-insurance programs. It also affects nursing home and pension expenditures, and an array of other items. But, as Viscusi emphasizes, cal-

culating the *net* financial injury (the relevant concern when determining damage awards) in these lawsuits was thwarted by the states' insistence that it is acceptable to take account of the financial costs of smoking, but morally reprehensible to calculate the financial benefits. In assessing the net economic damages, the states refused to adjust their health-care cost estimates to account for the reduced life expectancy of smokers. They claimed, that is, that they were entitled to collect for years of health-care costs of people they stipulated were ill from smoking but who, in fact, were dead.

When Viscusi (in an early working paper) undertook a full cost-benefit analysis that corrected these calculations, the State of Mississippi, one of the plaintiffs, characterized him as having produced a "ghoulish . . . perverse and depraved argument" that is "utterly repugnant to a civilized society" and lacking in "basic human decency." "Seeking a credit for a purported economic benefit for early death," the state added, "is akin to robbing the graves of the Mississippi smokers who died from tobacco-related illnesses" (Viscusi 2002, 87).

Viscusi (2002, 87) asks, "If the states truly believe that the cigarette companies are 'merchants of death,' one wonders why they have not banned cigarettes" altogether. The answer is that the states themselves have long reaped financial benefits from the "merchants of death" by collecting excise taxes on cigarettes. The states, Viscusi points out, omitted these benefits, too, from their lawsuits. In a series of intricate calculations that seem both careful and conservative, Viscusi perseveres to calculate the real economic costs to the states of cigarette smoking, and then subtract both the cost savings to them due to the reduced life expectancy of smokers and the amount of costs previously recouped through excise taxes on cigarettes. The results vary by state. Nonetheless, he reports, "in every instance the excise tax level roughly equals or exceeds the medical care cost per pack" (ibid., 97). Given their current tax levels, in other words, states, just like tobacco companies, receive a net profit from cigarette sales.

It is, of course, possible for experts to dispute Viscusi's calculations (see Goodin 1989, 37–38). But the actual behavior of the states in the aftermath of the settlement of these cases seems to bear him out. The $243 billion the states corralled out of the tobacco companies, Viscusi (2002, 55) writes, was "almost all profit." This was immediately evident when the states used the windfall from these settlements not to offset the alleged hit to their health-care systems, but rather to balance their budgets without raising taxes, reduce crowding in public schools, pro-

vide college scholarships, build roads and bridges, improve jails, provide wheelchair access for sidewalks, and build parks in poor neighborhoods. A large portion of California's take of $300 million went to pay for legal fees defending abuse claims against the Los Angeles Police Department. Connecticut used the money to provide AIDS testing for newborns and establish a Child Advocates Office. North Dakota used it for flood-control projects (ibid., 55–57).

Viscusi does not tell us whether, given the fungibility of state funds, this failure to earmark tobacco payments for health-care expenses is a common modus operandi for states, even when financial injury is undisputed. But, in light of his earlier cost-benefit analyses of the financial impact of smoking on the public purse, his argument here is entirely plausible.

Science, Culture, and Regulation

What are we to make of the various uses to which science has been put in these cases? For one thing, it is clear that a particular political ethos comes first, and that science is used to reach conclusions that are justified by that ethos. It is clear, moreover, that, so far as smoking is concerned, in a liberal polity, scientific evidence alleging harm to others is likely to go much farther (whether accurate or not) than evidence of harm to self.

But what if we have reached a point in the sciences where it is possible to deconstruct that distinction? Mill, who wrote in a liberal individualist spirit, foresaw this temptation, and warned against paternalist attempts to govern harms to self under the guise of regulating harms to others. He classified these moves as appeals to "social rights," and argued that once one moved beyond "direct" harms to particular individuals, those appeals essentially asserted "the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular violates my social right, and entitles me to demand from the legislature the removal of the grievance." Mill ([1859] 1975, 110) aptly concluded that "so monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify." No one thinking about freedom in good faith, Mill suggested, would dare head down this road.

But as Theodore Lowi (1986, 217–18) has observed, "the new welfare

ethics" of the modern liberal state has done just that. "Under some conditions," he writes, " any and all conduct can produce harmful consequences. This means that liberalism has a tendency, *unless self-consciously restrained*, to spread toward the entire society and all conducts of all individuals" (emphasis added). Once the modern, progressive-liberal spirit infused the outlook of policymakers, its "inherently yeasty quality" ensured that "everything became good [for the state] to do, because all injuries and dependencies, regardless of source or cost, became 'social costs.'"

Mill ([1859] 1975, 118, 121) recognized that finding the right spirit in which to assign the costs in a particular case, either to society or the individual, is not easy. A particular controversy will often "lie on the boundary line between two principles [the liberty of the individual versus the promotion of the 'public weal'], and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides." These are therefore "the most difficult and complicated questions in the art of government" (ibid., 139). Nevertheless, there seems to be a palpable divergence in spirit between liberal individualists like Mill, who are preoccupied with preserving freedom in a "direct" sense, and progressive liberals who are preoccupied with formulating and administering freedom's subtle preconditions. The antismoking crusaders clearly fall into the latter category. Where they first pursued their paternalism undisguised, they are now using the language of social harm to reach the same ends by more effective means.

Progressive liberals proceed in law and politics by presenting narratives, in a familiarly liberal vocabulary, about what it is that they are doing. The scientific evidence they adduce is both shaped by and deployed through these narratives. Such evidence, in regulatory policy as elsewhere, is a social phenomenon that comes to life only as part of a story (see Kuhn 1996; Jasanoff 1995). This does not entail the more flighty postmodern claim, exposed by the Sokal hoax, that all of science (including not just its discovery procedures but what is thereby discovered) is "socially constructed." It means simply that scientists divide an immensely complex world into a part that contains facts and questions that appear interesting and relevant to them and a part that, in light of their research interests, seems irrelevant. Starting with the conviction that certain problems are important—and, hence, that others are not—researchers collect data and perform experiments. Studies that don't speak to these problems are ignored or not undertaken at all. Careers

devoted to them are either ignored or mocked, and they founder (Kuhn 1996, 4, 16).

The production and uses of legal evidence at trial are socially determined in a similar way. This does not mean that "law" does not exist, any more than the narrative dimension of science means that the law of gravity doesn't exist. The most crucial decision a trial lawyer makes in preparing for trial involves developing a "theory of the case," or a story through which he evokes some of the understandings and prejudices of the surrounding culture and ignores others, appealing to the jury in a manner that is designed to be compelling. To be sure, the pre-existing evidence will help the lawyer shape the story. But the story, in a mutually constitutive process, will also aid him in his choice of what evidence to gather and to produce at trial. The rules of evidence permit a lawyer to introduce facts that are relevant to telling his story. They exclude as irrelevant the introduction of other data. As such, cases, too, have paradigms, although, as Kuhn (1996) himself notes, legal paradigms are more frequently and publicly contested than the paradigms of the physical sciences (cf. Jasanoff 1995, 8–11).

Paradigms and stories involving injury are central to tort cases, just as, in a more diffuse sense, they are central to liberalism itself. Allegations involving injury are not simply questions of physical causation. They imply ethical stories involving responsibility and blame. For this reason, to see the latest study that is on everyone's lips as the breakthrough that will finally allow us to look objectively at "real causes" and assign "real blame" is to be drawn to a mirage. "News that is going to be accepted as true information," anthropologist Mary Douglas (1992, 7–10, 19) has observed, "has to be wearing a badge of loyalty to the particular political regimes which the person supports; the rest is suspect, deliberately censored or unconsciously ignored."

The meanings of words are transformed by political regimes, typically under conditions far less extreme than those Orwell described. In a culture infused with the liberal-individualist spirit, people tended to associate the word "risk" with the value-neutral term "probability." Today, however, as progressive liberalism has become more influential, "the word risk . . . means *danger*; high risk means a lot of *danger*. . . . The word has been preempted to mean *bad risks*." The language of risk is more attractive to us today than the language of danger, Douglas (1992, 25) argues, because it entails "the aura of science . . . [and] the pretension of a possible precise calculation." This mirage serves to distract us from what is really going on, which, Douglas (1992, 24) reminds us, is

"political talk about . . . undesirable outcomes." "A risk," she writes, "is not only the probability of an event but also the probable magnitude of its outcome, and everything depends on the value that is set on the outcome. The evaluation is a political, aesthetic, and moral matter" (ibid., 31).

In a liberal-individualist spirit, traditional American jurisprudence assumed a constitutionally limited state; it therefore tended to assign blame in light of considerations of individual rather than state responsibility. Legal doctrine involving civil injury (or tort)—including doctrines about determining harm to others, establishing proximate causation, considering whether the injury could have been prevented, and asking who should have prevented it—elicited evidence, scientific and otherwise, that was legible in the terms set by a liberal-individualist ethos. By contrast, Continental European "police states," which operated in a paternalist spirit (whether liberal or not), assumed a constitutionally unlimited government, and tended to take on harm reduction as the responsibility of the centralized administrative bureaucracy. Whatever regulatory measures the state asserted were necessary to advance the public good were a prerogative of its (unlimited) sovereignty.[4]

Consistent with its anti-centralist and liberal-individualist spirit, the United States long rejected the Continental police-state model in favor of a "police-powers" approach that permitted state governments (and not the central government) to impose regulations on behalf of injured individuals only upon proof of demonstrable harm to the public health, safety, and morals. In a telling departure from the police-state model, judges, armed with state and national constitutions, had the final word on whether an alleged harm was real or a subterfuge—that is, an excuse for either special-interest power grabs, or for impermissible paternalism (Gillman 1993). In the United States, "the interventions were presumed to be closely tailored to proven harms; and the courts retained the prerogative of invalidating them should they stray too far from this nexus" (Morag-Levine 2003, 71–73). The chief situation in which proof of harm was not required in the United States involved morals laws, in which the injuries caused by blasphemy, for example, were simply presumed as a matter of moral (and, often, religious) consensus (ibid., 73; Novak 1996, 66–67).

Around the turn of the twentieth century, the builders of the modern American liberal state—who were serious students of European administration—began touting the efficiencies of the police-state ethic

and working to transplant it onto American soil. For the first time, the national government asserted that it, too, had police powers. And the courts, subject to the same intellectual currents, went along, although never as fully as some progressives would have liked. The police-state ethic was superimposed on traditional liberal individualism, creating a kind of ideological palimpsest. Proof of harm was still required to empower an authority to remedy or prevent an injury. But there was a new disposition, in assessing causes and blame, to emphasize the systemic interconnectivity of individual actions, with the aim of protecting the sort of "social rights" from which Mill had recoiled (Haskell 2000; *West Coast Hotel* v. *Parrish,* 1937). So long as one was willing to follow such chains of causation, the nexus could be quite attenuated. Modern social science was, to a significant extent, created to aid the state in tracing out these chains, and hence to legitimize major state initiatives designed to prevent social harms (Haskell 2000). As such, social science was supposed to serve as an alternative to traditional liberal individualism. Its disposition toward constitutional government itself was vexed, when not hostile.

Viscusi's study demonstrates that regulatory policy concerning tobacco in the liberal United States, whether announced by the Surgeon General, the Food and Drug Administration, Congress, the states, or the courts, is a confused amalgam of individualism, paternalism, and moralism. Contending ethical stories are slugging it out at every level of government, and in every sort of governing institution. Traditional moralism—which required no proof of harm—is a strong influence (Morone 2003). Traces of liberal individualism, which requires calculable proof of harm, remain strong, too. Fortunately for paternalists, the ethic of the modern liberal welfare state permits such proof to come in the form of evidence of indirect harms produced by elaborately extended causal chains.

Viscusi shows how the scientific evidence adduced by the anti-tobacco forces in this ongoing struggle is crafted to serve a distinct ethical story concerning blame that, by the lights of another narrative—say, Viscusi's—seems irrelevant. In this fashion, certain forms of evidence are ruled out of bounds a priori. Studies that either yielded or promised to yield evidence contrary to the theory of the case against tobacco were either suppressed or never undertaken. Taken together, these narrative practices demonstrate that the underlying thrust of the antismoking argument is, simply put, an a-priori determination to stamp out smoking.

Since, even today—perhaps only because of our instructive experience with Prohibition at the height of early twentieth-century state-building—it is too nakedly paternalistic to propose a national ban on the production, sale, and smoking of cigarettes, the anti-smoking forces, working within the culture they've got, choose to churn out a seemingly endless succession of scientific studies showing that people have been misled about the harms of smoking and that smoking causes measurable financial harms to society as a whole. Even when these studies are accurate in a narrow sense, they often do not prove the propositions they are enlisted to support. Sometimes, as with the net financial cost of smoking-related injury, the ethical story about the chain of injury leading to social harm is so spellbinding that the transparent inaccuracy of the calculations is simply brushed aside as morally irrelevant.

Sensible Public Policy on Tobacco

This oddly conflicted ethics, this tug-of-war between liberal individualism and a morally infused, anticorporate progressive liberalism, has suffused the evasive and obfuscatory politics of tobacco regulation in very concrete ways. Playing to the various ethical stories involving risk, injury, and social harm in courtrooms and public debates, both sides have fudged, dissembled, and deceived with "scientific" precision. The tobacco companies distorted the science of the harms of smoking (even though everyone knew better), just as the anti-smoking forces distorted the science of people's knowledge of the risks of smoking.

The $243 billion MSA (along with the side agreements reached with four additional states) is nearly a Platonic embodiment of these evasions. Under its terms, the tobacco companies that were party to the settlement were prohibited from targeting youth in their marketing campaigns. Severe restrictions were placed on their ability to sponsor public events. Outdoor advertising of cigarettes was banned, as were paid product placements and brand-name merchandising. The companies were forced to disband the Tobacco Institute and the Council for Tobacco Research and to sharply limit their political lobbying campaigns. The cigarette industry was forced to provide $250 million over ten years to pay for a new foundation that would try to reduce youth smoking. A more general fund of $1.45 billion was set up to educate the general public about the dangers of smoking. A new tax on ciga-

rettes, paid by the companies agreeing to this settlement directly to the states, was imposed to offset the financial losses the states ostensibly suffered due to the choices made by their citizens. For initiating the suit, and negotiating these terms, the private trial lawyers who brought the cases for the states were paid at rates estimated at $100,000 to $200,000 an hour. The total payments dictated by the MSA, which are to continue in perpetuity, add up to half a billion dollars a year (Derthick 2002, 163–203).

The MSA is premised on the false assumption that people smoke because they are addicts or because they do not understand that smoking is dangerous. It pays the states for net economic damages that they never incurred. In so doing, it provides them with an ongoing revenue stream available for a broad array of uses without the distasteful necessity of raising taxes. This revenue stream is provided by smokers, the bulk of whom have low incomes. Since it is derived from cigarette sales, it gives the states a vested interest in encouraging the future sale of cigarettes (Viscusi 2002, 57).

The advertising restrictions imposed by the settlements work to lock in current brand preferences. Moreover, they discourage any competition between the tobacco companies based on the relative safety of different brands of cigarettes. The taxing mechanism similarly disregards considerations of relative safety (Viscusi 2002, 38–40).

The gargantuan legal fees handed over to private tort lawyers effectively subsidize their activities in this area—the agreement does not preclude future private lawsuits—and in whatever others they choose to pursue (such as the latest campaign against "Big Food"). The magnitude of the settlement itself is likely to serve as a point of reference, or "anchor," in the future, encouraging juries in similar tort suits to "to think in billions rather than millions" (Jasanoff 1995, 13; Viscusi 2002, 58). In the process, the settlement energizes the agents and mechanisms of paternalism. Finally, the very opaqueness of the process by which the terms of this agreement were hashed out means that it contributes little to the future rationality of the regulatory regime (Viscusi 2002, 59). Something was done, but nothing was learned. It is quite possible that this is precisely why it worked.

Statist, modern, progressive liberalism, which incorporates vestiges of earlier, less risk-averse liberalisms, prizes risk-taking in the service of socially desirable outcomes, but, perhaps even without limit, endeavors to eliminate risk-taking that seems either socially harmful or simply gratuitous. Cigarette smoking is a natural target for such an adulterated

liberalism. This liberalism operates on the faith (despite all historical evidence) that it is normal and rational for human beings to avoid risks the only benefit of which is sensual, aesthetic, or social pleasure (Douglas 1992, 41; Jasanoff 1995, 13).

People know that smoking is dangerous. But they like to do it. And, for that reason, they do it despite the risks. How to deal with that? All of the weirdness of the tobacco wars ultimately comes back to that central question: what is to be done with people who willfully risk their well-being?

Sheila Jasanoff (1990, 7), a leading student of the relationship between science and the law, has noted that by now it has become "widely recognized that the questions regulators need to ask of science cannot in many instances be adequately answered by science." Tolerating smoking, put simply, "cuts against the managerial preferences of the nation's scientific and technological elite" (Jasanoff 1995, 13).

In earlier times, tobacco's opponents, when they could, would have simply called smoking immoral and unproductive, and banned it outright. The proofs of the laboratory sciences and the causal chains identified by the social sciences would have been utterly unnecessary. Today's moralists, though, associate "moral" righteousness with the religious Right (whom they despise as, amongst other things, premodern and antiprogressive). Given the American experience with Prohibition, they avoid calling for a national ban on cigarette smoking. These days, they fight their war by filing tort suits.

Such suits require the parties to address questions of risk and blame through the logic of liberalism, anchored in questions of individual responsibility, and to address harm in the language of scientific causation and proof. At the same time, since at least the public-interest law revolution of the 1960s and 1970s, lawyers, judges, and juries have been predisposed to use these ostensibly individualized suits as vehicles for implementing regulatory regimes that have implications well beyond the interests of the litigating parties (Chayes 1976; Feeley and Rubin 1998). "The question of acceptable standards of risk," Mary Douglas (1985, 82) has observed, "is part of the question of acceptable standards of living and acceptable standards of morality and decency. . . . There is no way of talking seriously about the risk aspect while evading the task of analyzing the cultural system in which the other standards are formed."

Given advances in medical and social science, it is often relatively easy to demonstrate how a harm to oneself harms others. It is also rela-

tively easy to demonstrate that people act irrationally. Under these conditions, unless regulators and judges both acknowledge the potential seductions of paternalism, and, like Ulysses to the mast, self-consciously restrain themselves, the tendency of the state will be to become increasingly invasive. More significantly, perhaps, it will be able to do so with new, technical defenses that hide the fact that it is acting paternalistically. Neither principles (such as Mill's harm principle) nor scientific knowledge will avail in stanching this trend. Either can be variously interpreted and ignored. Indeed, it is more likely that science and principles will be bred to feed the maw of paternalism.

Liberal principles and modern science conduce to human freedom only if they are applied, as John Stuart Mill applied them, in a spirit suffused by a deep belief in and practical commitment to human liberty. With the tobacco settlements, as in the war against smoking more generally, those informed by that spirit have lost yet another round. And the long march toward paternalist managerialism continues.

NOTES

1. Some will object to my decision to use the word "liberalism" in my "progressive liberalism" label. I believe it is an open question whether the liberal strands in this admixture outweigh its anti-liberal ones. I use the term both because I am interested in the substantive interaction between these strands, and because, in contemporary political parlance, people with these views are commonly referred to either as "liberals" or (increasingly, and perhaps more accurately) "progressives."
2. Viscusi does not discuss one possibility that would undercut his broader claim: Perhaps Joe Camel was simply a failure, and young people continued to be more impressed, as in olden days, by the cowboy than the camel.
3. This is fair, given the focus of his book, but it hardly addresses the full class of social harms that a legislator, regulator, or theorist not involved in a tort suit might see fit to consider.
4. As Michael Foucault said, "The police includes everything" (quoted in Novak 1996, 14).

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Austin W. Bramwell

AGAINST ORIGINALISM: GETTING OVER THE U. S. CONSTITUTION

ABSTRACT: *In* Restoring the Lost Constitution, *Randy Barnett defends the idea that judges should interpret the U.S. Constitution according to its original public meaning, for in his view the Constitution, rightly understood, satisfies the appropriate normative criterion for determining when a constitution is legitimate and should be followed. As it turns out, however, even if the Constitution did mean what Barnett says it does, it would not meet his criterion of legitimacy, and therefore should not be followed. Moreover, Barnett is just as guilty of reading certain clauses out of the Constitution as are his critics. Given the lack of a persuasive reason to follow the original Constitution consistently, judges must turn to sources of authority other than the Constitution in deciding constitutional cases.*

It is commonly supposed that the United States are governed by a single document, known as the "Constitution," drafted in 1789, received by universal acclamation in 1792, revised by sundry amendments, and preserved today in the National Archives. This document every American schoolchild learns to revere, and to it every federal official swears allegiance; for it is, as it says itself, the "supreme Law of the land."

Ironically, however, the very class of persons entrusted with understanding, interpreting, and applying the Constitution—namely, lawyers—regards this common supposition as a polite fiction, if not a noble lie. What lawyers know as "constitutional law" derives not from

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the Constitution but rather from, among other sources, some 500 volumes of Supreme Court opinions, many of which, even as they profess allegiance to the Constitution, have very little to do with it. To take just one example, the Supreme Court decides some "constitutional" cases not on the authority of the actual Constitution, but rather on the basis of *stare decisis*—which is to say, on the authority of the Supreme Court itself, since it is the Court that sets the precedents in the first place.[1] This exercise in jurisprudential bootstrapping divorces "constitutional law" from the Constitution almost by definition.[2]

Why, then, don't lawyers frankly repudiate their co-citizens' commitment to the Constitution? A cynic might say that they pretend to honor the Constitution only because it furnishes a convenient myth with which to justify their own power. But however dismal their popular reputation, few lawyers are actually so duplicitous. On the contrary, many of them sincerely uphold the Constitution because they believe that even if it has not been followed in the past, it ought to be followed in the future. For them, the Constitution provides the normative standard against which constitutional law should be measured.

This view, loosely called originalism, was refuted two hundred years ago by the Savoyard aristocrat Josef de Maistre ([1810]1965, 147):

> One of the grand errors of an age which professed them all was to believe that a political constitution could be written and created a priori; whilst reason and experience unite in establishing . . . that that which is most fundamental, and most essentially constitutional, in the laws of a nation, is precisely what cannot be written. . . . The essence of a fundamental law is that no one has the right to abolish it: but how is it beyond human power if it has been made by someone?

In other words, if a nation were capable in the first place of enacting and enforcing a written constitution (or "fundamental law"), it would already be fully constituted; if, on the other hand, a nation were not already fully constituted, it would never be capable of enacting and enforcing a written constitution.[3] The unwritten constitution always trumps the written one.

Originalism therefore is false because it is impossible. It is, in the strict sense, a utopian and revolutionary doctrine. The originalist's hope of restoring the written Constitution echoes the Protestant's hope of restoring the early church, the republican's hope of restoring ancient liberties, and the socialist's hope of restoring primitive equality. In no

case did the imagined state of prelapsarian bliss ever exist, and the attempt to recreate it has usually succeeded only in replacing old injustices with new ones.

As its title might suggest, *Restoring the Lost Constitution* (Princeton University Press, 2004), a major new work of constitutional scholarship by Randy Barnett, does not dwell on such worries. Professor Barnett knows well the liberal and radical challenges to originalism; to meet them, he has produced one of the most sophisticated defenses of originalism available. His argument, though richly developed, can be briefly stated. (1) A constitution is legitimate and should be followed if it provides adequate assurance that the laws will be just. (2) The U.S. Constitution, as written, happens to provide more of this assurance than any plausible alternative. Therefore, (3) the U.S. Constitution is legitimate and should be followed.

Barnett knows less well, however, the conservative challenges to originalism. As a result, his defense of originalism fails, as does his originalist defense of an aggressively libertarian jurisprudence. In fact, his defense of an aggressively libertarian jurisprudence fails precisely because it is originalist.

The U.S. Constitution as a Libertarian Document

Restoring the Lost Constitution comes in three parts.[4] The first elaborates a theory of constitutional legitimacy.

Wisely rejecting the fiction that legitimacy can (at least in a large republic) derive from the consent of the governed,[5] Barnett argues instead that a constitution is legitimate if it contains adequate procedures for ensuring that the laws will be just. While Barnett himself prefers a libertarian version of justice, he emphasizes that one need not accept that theory in order to conclude that legitimacy is procedural. In other words, a constitution is legitimate if the legal mechanisms it establishes ensure that the laws will be just—as defined by any theory of justice.

Barnett next gives a theory of constitutional method. He starts by distinguishing two different kinds of originalism, which he calls "original intent originalism" and "original meaning originalism."

According to original-intent originalism, the Constitution means whatever its authors or ratifiers intended or hoped it would mean. According to original-meaning originalism, by contrast, the Constitution means whatever its words would have meant to a "reasonable" (92)

reader of them at the time. The two types of originalism can lead to quite different results. To take a recent and controversial example, the framers of the Fourteenth Amendment almost certainly did not believe that the right to liberty included the right to commit sodomy. Nonetheless, given that the text of the Fourteenth Amendment protects "liberty" rather than "liberty as understood by the authors of the Fourteenth Amendment," a Fourteenth-Amendment right to sodomy is not out of the question for an original-meaning originalist. "Liberty," like all abstractions, may entail more than what any particular writer expects it to entail.

Barnett rejects original-intent originalism just as strongly as he endorses original-meaning originalism. He notes, among other objections to the former, that it is practically impossible for judges, or anyone else, to aggregate the often-conflicting intentions of a multitude of Framers and ratifiers. Original-meaning originalism does not (he alleges) present such practical difficulties. Moreover, according to Barnett (106), if we are to be governed by a written constitution at all, then officials must understand it according to its original public meaning, for "writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment." Thus, those who dismiss original-meaning originalism are rejecting not just one method of constitutional interpretation, but the very idea of a written constitution.

Barnett recognizes, however, that so long as language remains vague, an appeal to original meaning cannot resolve all controversies that arise under a written constitution. To apply such a constitution, therefore, we must sometimes construe it rather than simply interpret it, for often etymological research will not a single, definitive interpretation. The need for construal does not mean, however, that all constructions consistent with a constitution's original meaning are equally permissible. On the contrary, Barnett argues, the best construction will enhance the legitimacy of the lawmaking process—that is, the protection of liberty.

Finally, Barnett turns his attention to particular clauses in the U.S. Constitution. Although he has separate chapters on the Vesting Clause of Article III, the Necessary and Proper Clause, the Privileges or Immunities Clause, the Ninth Amendment, and the Commerce Clause, some of these clauses do more work in his theory than others.

First in importance is perhaps the Vesting Clause of Article III, which says that "the judicial power shall be vested in the Supreme

Court and in such inferior courts as Congress may from time to time establish."

Barnett largely accepts the consensus view that this language obliges judges to nullify laws inconsistent with the Constitution. This obligation—also known as the power of judicial review—lays the crucial groundwork of Barnett's theory, for if he can later show that laws infringing on people's rights should be presumed unconstitutional, then an independent federal judiciary with the power to nullify them can confer legitimacy on the Constitution.

Next in importance are the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment. The Ninth Amendment, in Barnett's view, requires the government to respect all rights equally. In other words, officials may not, as the Supreme Court has done since the New Deal, favor some rights, such as the right to free speech, over others, such as the right to sell one's labor. The Privileges or Immunities Clause, in turn, requires that *state* governments protect all rights equally. These two clauses combine to generate the *pièce de résistance* of Barnett's theory: the Presumption of Liberty, a rule of construction that places the burden on government to justify any infringement of individual rights. Accordingly, the Necessary and Proper Clause,[6] in Barnett's view—unlike that of virtually other every court and commentator, including, as Barnett boldly admits, John Marshall in *McCulloch* v. *Maryland* (1819)—should be read to protect unenumerated rights by requiring the government to justify as both "necessary" and "proper" any restrictions imposed on individual liberty.[7]

A theory as comprehensive as Barnett's invites engagement at any number of points.[8] I have three principal criticisms.

Form without Substance

First, the Presumption of Liberty, paradoxically enough, can no more restrain government than can its opposite, which Barnett calls the Presumption of Constitutionality.

To start with a humble example, if I break a contract, the government will typically force me to provide a remedy to the aggrieved party if he or she successfully sues me. Is this not an example of the government restricting my liberty to break my promises? If so, then it must be justified, according to Barnett, as being both necessary and proper. And such justification requires in turn a method of distinguishing between

rightful and wrongful exercises of liberty. Thus, as Barnett freely admits, the way that the Presumption of Liberty should be applied turns on what background theory of rights one chooses. This theory ultimately determines what infringements on liberty are "necessary" and "proper."

It is no secret, however, that rights-based theories of justice differ widely as to what counts as a rightful exercise of liberty (of the sort that rebuffs legislation as unnecessary or improper) and what counts as wrongful indulgence in license (of the sort that may properly be regulated). Barnett happens to favor a libertarian theory, according to which it is "liberty" for the millionaire to keep his riches and "license" for the pauper to take it from him. According to this view, a law redistributing wealth from the pauper to the millionaire is unnecessary and improper. A socialist judge, however, might just as easily say that it is license for the millionaire to keep his riches and liberty for the pauper to appropriate them, such that income redistribution passes the necessary-and-proper test. Indeed, a socialist judge might, on just these grounds, find unconstitutional traditional common-law rights to property and contract.

The Presumption of Liberty, in sum, requires only that all of our liberties (whatever they may be) be protected. It says nothing about what liberties we actually (should) have. If, as Barnett contends, we need not accept his libertarian theory of justice, then his book will prove just as useful to a socialist (or anyone else with a coherent rights theory) as to a defender of capitalism.

Barnett does try to reassure his readers that judges can distinguish right from wrong without relying on controversial moral or political theories. The methods he urges upon them, however, do little to flesh out the implications of the Presumption of Liberty.

First, Barnett says that we can understand what our rights are by looking at what the Supreme Court has defined as a "liberty interest." "A 'rightful' exercise of freedom," he writes, "roughly corresponds to what courts today refer to as a 'liberty interest'" (262). He even quotes liberal Justice Earl Warren: "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective" (*Bolling* v. *Sharpe,* 1954). Simply heighten, and even out, the scrutiny due to all liberty interests, and Chief Justice Warren has accurately characterized the Presumption of Liberty.

The Supreme Court, however, has never equated "liberty interests" with natural rights, whether libertarian or not. In the Court's view, liberty interests exist "by virtue of the fact that they have been initially recognized and protected by state law" (*Paul* v. *Davis,* 1976). A liberty interest, in other words, is simply whatever the government allows us to do. The freedom to collect a welfare check, to keep a government job, or to own a driver's license can all qualify as liberty interests (or as property interests, depending on how one looks at it) if the government treats them as such (as in, respectively, *Goldberg* v. *Kelley,* 1970; *Perry* v. *Sindermann,* 1972; and *Bell* v. *Burson,* 1971).

Accordingly, the government can avoid trampling on "liberty interests" as long as it refrains from creating a reasonable expectation of a benefit and then taking it away without due process of law. Any government, however, could meet this requirement, no matter what background theory of rights it adopts. The Supreme Court's procedural due-process jurisprudence, endorsed by Barnett, thus tells us nothing about what rights the Presumption of Liberty would actually protect.

Barnett next suggests that judges can distinguish right from wrong through traditional methods of common-law adjudication. Common-law judges, he observes (262–63), created sophisticated systems of tort, property, and contract without ever resorting to explicit moral or political theory. (Indeed, according to some libertarians, common-law rights and obligations are exactly what we intuitively understand as "liberty.") Identifying common-law rights with justice, however, begs the question unless we have some theory establishing that the liberties the common law does such a good job of protecting are, indeed, natural rights.

The Supreme Court, for one, has not treated the rules of common law as conclusively constitutional; rather, it has preempted them whenever they violate constitutional rights, whether those rights are libertarian or not. For example, the Court has constitutionalized the common law of defamation so that it does not chill free speech (*New York Times* v. *Sullivan,* 1964), and has amended the common law of property so that white property owners cannot prevent blacks from moving in next door (*Shelley* v. *Kraemer,* 1948). Whether or not these cases were correctly decided, the Supreme Court is surely right that in principle, a judge-made rule (of the sort that make up the common law) may infringe on our rights as much as a statute can.

On the other hand, perhaps Barnett does mean to subject even judge-made rules to constitutional scrutiny. Perhaps, that is to say, courts should go about their usual business of creating judge-made law, but

only those rules of which the Supreme Court approves will be deemed constitutional.

Under the earlier interpretation of Barnett's theory, the Constitution protects common-law freedoms as defined (mostly) by state judges; but maybe his original intent was to say that the Constitution protects common-law freedoms as defined by the Supreme Court. (The document in question is difficult to interpret.) In either case, however, the Presumption of Liberty would simply shift the power to make the laws from the legislative to the judicial branch. This move certainly has its advantages, especially if one believes that judge-made law tends to outperform statutory law. (Barnett himself seems simply to assume that judge-made law does a better job of protecting our rights—perhaps because common law rights typically look more "libertarian" than the rights guaranteed by statute—than does statutory law.) But whether this belief—which might justify the Presumption of Liberty on consequentialist grounds—is true or not is irrelevant to whether Barnett's defense of originalism is sound. Barnett argues that a constitution is illegitimate unless it imposes an independent check on the power of the branch of government authorized to make the laws to infringe on liberty. But if all that the Presumption of Liberty does is shift the power to make the laws from the legislative to the judicial branch, it cannot support Barnett's conclusion that the U.S. Constitution is legitimate, since it merely substitutes the judiciary for the legislature as the institution that needs to be checked. In his very appeal to common-law decision making, in other words, Barnett undermines his argument for following the original Constitution.

The Constitution that Barnett envisions not only fails to guarantee that some particular set of rights will be respected; it gives us no protection against government actors—in this case, common-law judges—intent on trampling them.[9] Another way of putting the point is that there is no escape from a substantive theory of justice. If Barnett refuses to provide one, then the interpreters of the Constitution, willy-nilly, will do it for him. And if they don't share his preference for libertarian rights, neither will the Constitution that emerges from their decisions—whether they are state judges or Supreme-Court justices. If the Constitution, even in Barnett's reading, does not provide any assurances that the laws will be just, then by his own logic we have no reason to regard it as legitimate. Barnett criticizes the Supreme Court for protecting only a few "islands of liberty" within a "sea of government of power," but his theory doesn't allow us to say where the sea ends and

the land begins. Barnett hopes to ground legitimacy in constitutional procedure rather than libertarian substance, but without substantive guarantees, we cannot predict what laws—libertarian, socialist, Islamic?—will pass muster under the Constitution.

Barnett seems to assume that a judiciary that accepted his Constitutional theory would continue to leave undisturbed the common-law freedoms of contract and property that he himself prizes, no doubt because of his libertarian political theory. If his case for legitimacy rests on this premise, however, he has not made an argument for the Constitution's legitimacy, but rather for the legitimacy of the Constitution *as it would be applied by a particular class of people in a particular time in history*—i.e. contemporary judges, who, though not necessarily libertarians, are for one reason or another disinclined to invalidate common-law rights. Needless to say, such a conclusion belies Barnett's plea for originalism. It is not originalism per se that he likes, but originalism combined with the hypothesis (or, less charitably, the vain hope) that future judges will not change common-law rules so that they favor libertarianism less than some other substantive vision of justice.

Overconfidence in Judicial Review

Second, even if judges applied the correct theory of justice, the U.S. Constitution still wouldn't satisfy Barnett's criterion of legitimacy. Despite the Presumption of Liberty's Sphinx-like silence on what rights the Constitution actually protects, we should not overlook its radical implications. Let us suppose that one day every federal judge woke up and agreed that the Constitution imposes the Presumption of Liberty. Let us also imagine that the placeholder in Barnett's constitutional theory that is actually filled in by his political theory were kept open, as he claims that it is, to nonlibertarian alternatives, such that judges might converge on any other background theory of liberty: perhaps the theory that all actions that meet with my grandmother's approval are permissible, and that all actions that do not are licentious. Call this theory "Grandmotherism."[10] The judicial branch would then set to work striking down every law (both judge-made and statutory) that cannot be justified under the tenets of Grandmotherism, on the ground that these laws cannot overcome the Presumption of Liberty. What would happen next?

We cannot say for sure, but we can speculate. Here is one plausible

scenario. First, scholars and pundits would castigate the judiciary for its Grandmotherist approach to the Constitution. Their arguments would sound very much like the arguments leveled against courts today. Federal judges, they might say, are "judicial activists"; under the guise of following the Constitution, they are imposing their own substantive policy preferences on the rest of us. The response of the judiciary would likewise sound familiar. Perhaps citing Barnett's own book, Grandmotherist judges could maintain that they *are* following the Constitution. Against critics who say that the Framers never would have approved of Grandmotherism, the judges need only explain that, like Barnett, they are original-meaning rather than original-intent originalists. The text of the Constitution, after all, protects "privileges or immunities," not "some writers' particular expectations as to what the phrase 'privileges or immunities' will accomplish." Given their greater insight into what our "privileges or immunities" actually are, Grandmotherist judges could insist that they are not only allowed but required to strike down un-Grandmotherist laws.

Having fended off its academic critics, the Grandmotherist judiciary might well continue to face political opposition. Officials in other branches of government might do whatever they could think of to stop judges from striking down un-Grandmotherist statutes and common-law rules. They might first resort to those techniques for constraining judges already familiar to us. Just as they do today, the political branches could appoint and confirm only judges who have acceptable opinions about the Constitution; and, just as they do today, they could refuse to raise judicial salaries until judges stopped striking down so many laws.

If these more familiar techniques fail, the political branches could resort to more *outre* tactics. The president, for one, could simply refuse to enforce the judiciary's decisions.[11] To justify his lack of deference, he could quote Andrew Jackson's famous remark: "[Chief Justice] Marshall has made his opinion—now let him enforce it"; or even Lincoln's critique of judicial supremacy (Lincoln [1861] 1992, 290):

> If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Congress might also get into the act. Until the courts shape up, it could—as Roosevelt once attempted—decide to pack the Supreme Court with justices more attuned to its thinking. It could—as it has occasionally threatened—strip the courts of jurisdiction to hear cases involving constitutional rights. It could—as it attempted to do in the early 1990s—try to overrule Supreme Court decisions through its Fourteenth-Amendment enforcement powers. It could—as conservatives in the 1950s wanted to do to Earl Warren—impeach judges for issuing opinions with which the legislators disagreed. It could—as it attempted to do in response to *Miranda* v. *Arizona*—overrule Court decisions not obviously grounded in the Constitution. And it could resort to techniques that have yet to be tried in our constitutional history: It might condition increases in salary on judges deciding cases a certain way, or instruct the executive branch to ignore opinions that the legislature rejects.

In sum, the political branches have powerful weapons for imposing their interpretation of the Constitution, compared to which the power of judicial review appears rather weak.[12] Like other powers conferred by the Constitution, judges cannot heedlessly exercise the power of judicial review without inviting resistance from the other branches. The oft-heard claim that "the judges interpret the Constitution" turns out to be a half-truth. Yes, judges interpret the Constitution, but their interpretation does not always prevail. Rather, the interpretation of the Constitution that actually prevails represents a de facto consensus of the three branches of government.

We must therefore distinguish the power of judicial review from the power to interpret the Constitution. Judicial review is only one way in which government officials may interpret the Constitution. It is not the only way. The actual Constitution gives each branch various means of imposing its interpretation of the Constitution. Given that the different branches' powers are so evenly balanced as to check each other, the real method of constitutional interpretation is not Supreme Court decision-making but interbranch consensus-building.

The distinction between the power of judicial review and the power to interpret the Constitution fatally undermines Barnett's argument for following the original public meaning of the Constitution. Barnett admits that other branches have powers to enforce their own interpretation of the Constitution; indeed, quoting Madison, he worries that the most "likely practical deficiency of a Presumption of Liberty is that government judges are not sufficiently independent of government or

of a majoritarian faction to provide 'an impenetrable bulwark against every assumption of power in the legislative or executive'" (268). He should have dwelt on this concern at greater length. If his argument for legitimacy is to succeed, the judiciary must have the power to follow its own interpretation of a constitution rather than that of other branches. It turns out, however, that under the U.S. Constitution, the judiciary has no such power. The Presumption of Liberty requires consistent enforcement of a single theory of justice, but few if any theories of justice are not at least in some respects controversial. Under the Constitution's scheme of checks and balances, therefore, the judiciary can protect equal liberty only if it adopts a theory of justice that will not provoke resistance from the other branches.

This rules out any number of theories, including, perhaps, the correct one. (At the very least, it almost certainly rules out Barnett's libertarian theory, which is accepted by virtually nobody.) The Constitution therefore contains little assurance that the laws will be just, and so we have no reason, by Barnett's own logic, to enforce the Constitution.

To be sure, there may be excellent reasons to enforce *parts* of the Constitution. In particular, it may be a great idea to enforce the Privileges or Immunities Clause in its original meaning. Barnett (355) himself confesses, however, that he does not like the original meaning of everything in the Constitution, in particular the Sixteenth Amendment (which authorizes an income tax), popular election of the Senate, the Takings Clause, Congress's power to grant monopolies to authors and inventors, and the lack of congressional term limits.

If the original Constitution has so many defects, and does not adequately safeguard its virtues, why shouldn't government officials do what they can to improve it? Nonoriginalist judges, for example, could aggressively try to restrict the other branches' powers to tax, to take property, and to grant monopolies. In this way, wouldn't we end up with what Barnett would regard as a better constitution than the one originally ratified?

Barnett's answer to this question is to claim that by ignoring original meaning in order to improve the Constitution, we undermine its power, as a written document, to restrain government. One can question, however, whether the benefits of adhering to the Constitution just because it is in writing truly outweigh the costs.

Judges have never followed the original Constitution, precisely because the negative consequences of doing so often outweigh its putative benefits. To take just one example, Article III vests the "judicial

power" in a single Supreme Court and such inferior courts as Congress may from time to time establish. From its very first session, however, Congress also vested judicial power in non-Article-III tribunals such as courts martial, courts of claims, and administrative courts. The Supreme Court, in turn, long ago abandoned any hope of keeping the judicial power within its prescribed Article-III limits.[13] Today no scholar seriously advocates Article-III literalism, for strict adherence to Article III would catastrophically upend federal law.[14]

Moreover, even if Barnett could show that the original Constitution *as a whole* beats the current, hyperinterpreted alternative, he cannot show that judicial review will necessarily ensure that our rights (whatever they are) will be protected. The Constitution, wisely or not, makes sure that even the most originalist judiciary will succumb to the other branches' wishes if it turns out that they do not much like the originalist interpretation of the Constitution. By Barnett's own theory of legitimacy, therefore, we have no reason today to tolerate the bad parts of the Constitution in the hope of preserving the good parts: the original meaning of the written document concedes its own unoriginalist malleability. Barnett's argument for originalism proves both too much—that judges should displace the other branches as the arbiters of *all* of our rights—and too little—that judicial review is the only means at their disposal for doing so.

None of this is to say that a written constitution serves no useful purpose at all. The American Founders knew both the merits and the dangers of writing down the fundamental law. Observing that Pennsylvania never followed the "parchment provision" in its Bill of Rights declaring that standing armies ought not to be kept in times of peace, Hamilton ([1787] 1961, 166–67) warned that

> wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

Poorly designed written constitutions, in other words, contribute to disorder and the unraveling of the fundamental laws; well-designed written constitutions, by contrast, instill deep respect for the fundamen-

tal laws. Unlike the Roman republic, America does not have a constitution sanctified by long-established religious practice. Respect for the fundamental law in America derives instead from the widely accepted myth that we have a written constitution to which all Americans have consented. By teaching this myth to each new generation, Americans have (for the most part) avoided the civil strife and tyranny that follow almost by definition when the fundamental laws are thrown into doubt.

Alternatives to Originalism

Nonoriginalists are often asked how judges should go about interpreting the Constitution if they do not feel bound by it. The answer is that judges should interpret the Constitution just as other political actors do; like other political actors, they should use their powers in the way that seems to them most sensible. To borrow Richard Posner's apt expression, they should be "everyday pragmatists." The best constitutional theory, to put it another way, is not to have a constitutional theory.

A model of good constitutional decision making would, in this view, be something like the Supreme Court's line of "commercial speech" decisions. Advertising advances none of the putative values of free speech (such as Justice Holmes's rather nihilistic notion that the best test of an idea is whether it can survive in the "marketplace of ideas"). Nonetheless, in the mid-1970s, the Supreme Court began using the Free Speech Clause to strike down protectionist regulations on advertising, in order, as the Court explained, to protect "the consumer's interest in the free flow of commercial information" (*Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 1976). This approach aims at the same result as such heroic examples of fundamental-rights jurisprudence as *Lochner* v. *New York* (1905), but in a less vulnerable rhetorical fashion. Barnett prefers a more kamikaze approach, but the arguments he invokes to justify it ultimately fail. Judges neither can nor should enforce the entire Constitution as written; the best they can do, therefore, is make it the best constitution it can be.

As a last objection to anyone who advocates ignoring the Constitution, Barnett (357) assures us that "such a person does not really believe in constitutionalism." Having admitted earlier that a constitution need not be written, he surely cannot be serious here. One can believe that America, like England, has a constitution, and yet not believe that it is, or ever can be, written down. A constitution does not consist of a set of

rules frozen in time; instead, it resembles a "certain kind of harmony," as Cicero put it in *De re Publica* (II.59):

> Just as in the music of harps and flutes or in the voices of singers a certain harmony of the different tones must be preserved, the interruption or violation of which is intolerable to trained ears, and as this perfect agreement and harmony is produced by the proportionate blending of unlike tones, so also is a State made harmonious by agreement among dissimilar elements, brought about by a fair and reasonable blending together of the upper, middle, and lower classes, just as if they were musical tones. What the musicians call harmony in song is concord in a State, the strongest and best bond of permanent union in any commonwealth; and such concord can never be brought about without the aid of justice.

Admirers of Cicero, the American Founders succeeded in establishing one of history's most harmonious constitutions. Even after a sanguinary civil war, the fundamental law has survived in recognizable form for over two hundred years. Given how infrequently human beings have enjoyed the blessings of peace and security, this in itself is a good enough reason to uphold our (unwritten) constitution.[15]

Have Judges Really Misread the Constitution?

The Constitution, even read through an originalist lens, does not differ from the current constitutional dispensation as much as Barnett believes. On the contrary, the very Fourteenth Amendment that he believes establishes the Presumption of Liberty actually establishes the Presumption of Constitutionality that he opposes.

The Fourteenth Amendment sets forth three restrictions on the power of state governments: that they may not abridge the privileges or immunities of citizens of the United States; deprive any person of life, liberty, or property without due process of law; or deny to anyone the equal protection of the laws. But in the Enforcement Clause, it grants additional authority to Congress: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Just as Congress may make laws "necessary and proper" to execute its Article-I powers, then, it may also make laws "appropriate" for the enforcement the Fourteenth Amendment. Barnett proposes that the words "necessary and proper" limit Congress's discretion to pass certain laws. What,

then, of the word "appropriate"? In its original meaning, does it restrict congressional power, in the same way that the words "necessary" and "proper" supposedly do?

The evidence suggests not. Indeed, the word "appropriate" not only fails to limit Congress's power, but if anything expands it, for the word echoes the very opinion, *McCulloch* v. *Maryland* (1819), that Barnett condemns as inordinately deferential to Congress.

In *McCulloch*, Chief Justice Marshall held that the Necessary and Proper Clause empowers Congress to use any means that it finds convenient for achieving one of the ends authorized by its enumerated powers. According to Marshall,

> the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, *and all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (Emphasis mine.)

Rightly or wrongly, by lifting the word "appropriate" out of Marshall's famous opinion, the Framers of the Fourteenth Amendment incorporated by reference the *McCulloch* theory of congressional power.[16] In other words, they gave Congress just as much discretion to enforce the Fourteenth Amendment as *McCulloch* gives it to execute Article I. Whether or not Justice Marshall correctly interpreted the Necessary and Proper Clause, his opinion, by definition, provides the correct original meaning of the Fourteenth Amendment's Enforcement Clause.

Furthermore, the authors of the Fourteenth Amendment may have done more than just incorporate *McCulloch*; they may have incorporated a radicalized interpretation of it.

In Barnett's view, even *McCulloch* did not give Congress as much discretion as modern courts and scholars give it today. However, the meaning of "necessary and proper" in 1789 and in 1819—when *McCulloch* was decided—may have expanded by 1868, when the Fourteenth Amendment was ratified. By 1865, the Thirteenth Amendment had already granted Congress the power "to enforce" its provisions (against involuntary servitude) "by appropriate legislation." Thirteenth-Amendment ratifiers such as Senator Trumbull, relying on

McCulloch, understood "appropriate" to mean that Congress had the power to "pass any law which, in our judgment, is deemed appropriate" (*Congressional Globe* 1866, 475). If Trumbull's understanding prevailed at the time of the Fourteenth Amendment's ratification, the word "appropriate" today confers on Congress the virtually unlimited discretion that Barnett abhors.

The incorporation of *McCulloch* into the Fourteenth Amendment has far-reaching implications. First, the words "appropriate legislation" in the Thirteenth and Fourteenth Amendments retroactively alter the meaning of "necessary and proper" in Article I. That is to say, the ratifiers of the Fourteenth Amendment dispelled any doubt about the proper interpretation of "necessary and proper" by instructing courts to construe it as a grant of wide discretion to Congress.[17] *Pace* Barnett's scholarship on the meaning of the Necessary and Proper Clause in 1789, since 1868 it has authorized Congress to decide for itself how to exercise its Article-I powers. Thus, the U.S. Constitution has, at least since the adoption of the Fourteenth Amendment, violated Barnett's liberty-conserving rationale for a written constitution.

Second, Congress's Fourteenth-Amendment powers are virtually absolute. Ironically, this means that the more we accept Barnett's theory that the amendment's Privileges or Immunities Clause incorporates a background theory of natural rights, the more we must allow that in light of the Enforcement Clause, Congress can decide what those rights are. A background theory of natural rights, after all, is nothing other than a theory of distinguishing rightful liberty from licentious wrong. Hence, once Congress can interpret the phrase "privileges or immunities" for itself, it can also prohibit whatever it thinks is wrong and regulate whatever it thinks is right—which is to say, it can do whatever it wants.

To be sure, the Fourteenth Amendment is, by its own terms, self-executing. In other words, even without authorization from Congress, courts may protect persons' privileges or immunities against state infringement. The power to pass "appropriate legislation" protecting "privileges or immunities," however, entails the power to determine the scope of the "privileges or immunities" themselves. The Fourteenth Amendment therefore makes Congress the ultimate arbiter of our Fourteenth-Amendment rights.[18] If one stops reading the Constitution four-fifths of the way through the Fourteenth Amendment, one might very well end up agreeing with Barnett that it establishes a Presumption of Liberty; if one goes on to the next sentence, however, one must

conclude instead that the Constitution establishes a Presumption of Constitutionality.

Indeed, so radically did the Fourteenth Amendment expand the scope of federal power that the Supreme Court initially pretended that nothing had happened. Justice Miller, in the much-reviled majority opinion in the *Slaughter-House Cases* (1873), expressed the judicial equivalent of horror when first contemplating the newly amended Constitution:

> Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

Whatever the merits of Justice Miller's legal reasoning, his clairvoyance is awe-inspiring. Each of his predictions has come to pass. The federal government has become the ultimate protector of our civil rights, Congress has acquired enormous power to overrule state laws, and the Supreme Court has made itself a "perpetual censor" of state legislation of which it does not approve.

To be sure, official constitutional history has not always cited the Fourteenth Amendment's Enforcement Clause as the catalyst for these momentous changes. Historians usually focus instead on the later invention of "substantive" due process and the expansion of Congress's Commerce-Clause power. This interpretation has obscured the fact that the Fourteenth Amendment authorizes virtually every federal power usually said to derive from these other clauses. The Supreme Court, in other words, rather than overruling *Slaughter-House*, used other provisions to accomplish what the Fourteenth Amendment achieves directlty.[19]

The one significant difference between the current regime and the one contemplated by the Fourteenth Amendment is that the Supreme Court has recently usurped Congress's power to enforce a select and largely arbitrary list of fundamental rights. The Court held in *City of Flores* v. *Boerne* (1997), which stopped Congress from expanding the right to free exercise of religion, that the Supreme Court's interpretation of the Fourteenth Amendment always trumps that of Congress. *Boerne* thus rendered invulnerable to attack (according to the Court's jurisprudence) a host of postwar Supreme Court decisions dealing with free speech, abortion, and school prayer that Congress, if it felt free (politically) to do so, probably would have long since overruled.

Other than that, however, the current constitutional order instantiates the amended Constitution with remarkable precision. The American Right's traditional interpretation of the Civil War—that it spelled the end of limited government in America—turns out to be vindicated. If the written Constitution is no longer, as the abolitionists put it, "a compact with hell," it has become a compact with the sort of mild despotism that Tocqueville feared.

* * *

Barnett's argument for originalism fails for three reasons. First, the Presumption of Liberty does not impose any real check on the government's power to make laws, because its only effect is to shift the power to make the laws from one branch of government (the legislative) to

another (the judicial). Second, the Vesting Clause of Article III does not empower the courts to protect all of our constitutional rights, because judges must inevitably yield to the views of other branches. Finally, the Necessary and Proper Clause does not limit the scope of congressional power, because it has been overwhelmed and superseded by the Enforcement Clause of the Fourteenth Amendment.

In short, the original Constitution, as altered in accordance with the amendment procedures it spells out, does not establish an institutional mechanism strong enough to ensure that the laws will be just. By Barnett's own criterion of legitimacy, therefore, we have no reason to uphold the original Constitution.

Originalism really consists of two doctrines rather than one. The first is that a written constitution *is* whatever its words meant at the time of its ratification; the second is that such a constitution *should be* followed. Barnett's arguments for the first doctrine, although hardly novel, are not in dispute. But his arguments for the second, although innovative, are unsatisfactory. And if, as a result, we have no reason to follow the Constitution in its original public meaning, then we have no reason in principle to figure out what its meaning is.

Barnett's argument testifies to the observation that one's normative commitments always determine one's approach to the Constitution. Barnett himself defends originalism only because he believes (wrongly) that it satisfies his criterion of legitimacy, which in turn represents his libertarianism dressed up to appear nonideological in front of a scholarly audience. As Barnett's own approach shows, we must first settle on our substantive commitments before picking the constitutional theory that best satisfies them.[20] Originalists cannot rightly claim that their policy preferences don't determine their jurisprudence. Their wine, like all others', is made of grapes.

Contrary to Barnett's hopes, parchment provisions can never protect us against baleful changes (however "baleful" is defined) in the climate of opinion. But for just that reason, there is cause for hope, even on the part of those who share Barnett's substantive views. Judges under the current constitutional dispensation have enormous and surprising powers that they can use for the good. If a cadre of judges properly educated about what they can do and why they should do it rose to power, much beneficent constitutional reform could result.

In the meantime, trumpeting the virtues of the original Constitution will accomplish very little.

NOTES

1. See, e.g., *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992).
2. Richard Fallon (2001, 596) defends *stare decisis* even as he acknowledges that its legitimacy "does not turn on consent to be governed by the written Constitution."
3. For this paraphrase of de Maistre's insight, I am indebted to Mark C. Henrie.
4. Barnett himself divides his book into four sections.
5. Here Barnett acknowledges the influence of the nineteenth-century anarchist Lysander Spooner, whose essay, "No Treason: The Constitution of No Authority," remains the best refutation of the view that the Constitution ever had the consent of the people (Spooner [1870] 1992, 77–122). The radical Spooner may as well have lifted his critique of written constitutions from the reactionary de Maistre. As de Maistre ([1810] 1965, 147) wrote, "the agreement of a people is impossible; and even if it weren't, an agreement is not a law and obliges no one unless there is a superior authority guaranteeing it." Rather than embrace anarchy, however, de Maistre locates a constitution's legitimacy in its divine origins: "Locke sought the character of law in the expression of combined wills, an unlucky chance to choose the precise characteristic that excludes the idea of law. As a matter of fact, combined wills form a settlement and not a law, which necessarily and obviously presupposes a superior will enforcing obedience" (ibid., 147–48).
6. Strictly speaking, given that the Privileges or Immunities Clause and the Ninth Amendment suffice to establish the Presumption of Liberty, Barnett would reach the same conclusions even if the Necessary and Proper Clause did not exist. Like commentators since Madison (in Rossiter 1961, 285), Barnett believes that the Necessary and Proper Clause merely underscores a principle already implicit in the Constitution.
7. Although Barnett devotes a lengthy chapter to it, the Commerce Clause is almost an afterthought to his theory. Barnett takes a narrow view of the scope of commerce power, but points out that a more expansive interpretation would not change Presumption of Liberty. A larger federal commerce power would shift the right to enact certain laws from state governments to the federal government, but in either case the government would have to justify its regulations against the standard set by the Presumption of Liberty.
8. One peculiar implication of Barnett's theory—peculiar, that is, for a self-described libertarian—is that some individual rights would receive less protection under the Presumption of Liberty than they receive under the current constitutional dispensation. At present, for example, the courts give free-speech rights unique procedural protections; unlike any other constitutional claim, to take one instance, one can bring a Free-Speech Clause challenge on behalf of a third party who *might* be harmed by a law, even if nobody actually is harmed. In Barnett's theory, by contrast, all rights must be treated equally. Consequently, just as economic rights would have to be given more protection, free speech rights would have to be given less.

9. This is, incidentally, the complaint of many abortion opponents today.
10. Never mind that Grandmotherism may not meet even basic formal requirements of justice, such as that it not be a product of someone's arbitrary will. According to Grandmotherists, what is truly arbitrary is not to listen to my grandmother.
11. To picture what would happen if the executive branch refused to accept the Supreme Court's interpretation of the Constitution, recall President Eisenhower's decision to send federal troops to Arkansas in order to force integration of Little Rock Central High School. People today generally remember *Brown* v. *Board of Education* as a great Supreme Court opinion; they often forget, however, that if President Eisenhower had elected not to send federal troops into Arkansas, we would instead remember *Brown* as a great folly. Without Eisenhower's support, the Supreme Court would have come to be seen not as the final arbiter of the Constitution but as a weak branch of government given to petulant outbursts.
12. Before 1865 (and, to some extent, before the Sixteenth Amendment mandated the popular election of senators), state governments also had various means of enforcing their interpretation of the Constitution. The antebellum "states' rights" doctrine that any state could withdraw from the Union entailed that states could nullify federal laws. Nullification rights were asserted in 1798–99 by Virginia and Kentucky in response to the Alien and Sedition Acts, by New England states in 1814–15 in response to Madison's war policies, by South Carolina in 1832 in response to protective tariffs, and by the Wisconsin Supreme Court in 1854–55 in response to the Fugitive Slave Act. The Civil War, of course, put an end to the doctrine of state nullification, and state governments lost whatever power they once had to enforce their interpretation of the Constitution.
13. See *American Ins. Co.* v. *Canter* (1828).
14. Congress's power to issue paper money is likewise constitutionally problematic. See *Hepburn* v. *Griswold* (1970) (overruled by the *Legal Tender Cases* [1871]). This does not mean, however, that courts should wreak havoc on the entire international financial system by threatening to enforce the Weights and Measures Clause.
15. It may be objected that one ought not to support a Nazi constitution even if it does survive 200 years. However, while stability may not be a decisive reason to support a constitution, it is still one good reason to do so. In addition, it may be the case that stable constitutions are the least likely to be infected with radical ideologies such as Nazism. North Korea furnishes perhaps the most troubling counterexample, although its hermetically sealed nature makes it difficult for outsiders to understand what is really happening there.
16. I rely heavily here on Engel 1999.
17. This is not the only example of an amendment altering the meaning of an earlier clause. The words "due process" and "equal protection" in the Fourteenth Amendment, for example, are widely understood to have retroactively altered the meaning of the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe* (1954).

18. This result is unsurprising, given that the framers of the Fourteenth and Thirteenth Amendments bitterly resented the Supreme Court's decision in *Dred Scott* v. *Sandford* (1856).
19. The Supreme Court has often tried to correct its false interpretation of one clause by falsely interpreting another clause. The Court's invention of the so-called "dormant" Commerce Clause, for example, is largely an attempt to fix the many problems caused by its stingy interpretation of the Export-Import Clause. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison* (1997) (Thomas, C., dissenting). When it comes to constitutional law, it seems, two wrongs can sometimes make a right.
20. See generally Fallon 1999.

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Robert B. Talisse

DOES PUBLIC IGNORANCE DEFEAT DELIBERATIVE DEMOCRACY?

ABSTRACT: *Richard Posner and Ilya Somin have recently posed forceful versions of a common objection to deliberative democracy, the Public Ignorance Objection. This objection holds that demonstrably high levels of public ignorance render deliberative democracy practically impossible. But the public-ignorance data show that the public is ignorant in a way that does not necessarily defeat deliberative democracy. Posner and Somin have overestimated the force of the Public Ignorance Objection, so the question of deliberative democracy's practical feasibility is still open.*

There is much disagreement among contemporary deliberative democrats over the details of their view; however, the core of the deliberativist program has been captured well by Amy Gutmann and Dennis Thompson (2004, 3):

> Most fundamentally deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return.[1]

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Although there are several competing views among deliberative democrats concerning what is to count as a "reason," there is general agreement that appeals to power or expressions of private interest do *not* count as reasons.

If we follow the deliberativists in understanding democratic politics in terms of processes of justification by means of reasoned exchange, we are led to the view that such processes must be continual and ongoing. Again, Gutmann and Thompson (2004, 6) express the point well:

> Although deliberation aims at justifiable decision, it does not presuppose that the decision at hand will in fact be justified, let alone that a justification today will suffice for the indefinite future. It keeps open the possibility of a continuing dialogue, one in which citizens can criticize previous decisions and move ahead on the basis of that criticism.

Deliberative democracy thus expects a lot from democratic citizens. If political decisions are to reflect the ongoing rational deliberations of democratic citizens, then citizens must be capable of rational deliberation. The kind of rational deliberation envisioned by deliberative democrats requires, at the very least, the ability to draw correct inferences from given premises.[2] More importantly, deliberative democracy requires that citizens' deliberations begin from true, or at least justified, premises. Thus, if citizens prove incapable of drawing correct inferences, or if they prove unable to understand the basic political facts from which inferences are to be drawn, they are unfit for deliberative democracy.

The Public Ignorance Objection

Richard Posner (2002; 2003; and 2004) and Ilya Somin (1998 and 2004) have recently championed an objection to deliberative democracy according to which citizens are demonstrably lacking in the cognitive abilities requisite for rational deliberation. In a searching review of the research concerning public ignorance, Somin (1998, 417) finds that ignorance of even the most basic political facts is so pervasive that "voters not only cannot choose between specific competing policy *programs*, but also cannot accurately assign credit and blame for highly visible policy *outcomes* to the right office-holders." Noting that deliberative democracy "imposes a substantial . . . knowledge burden"

upon citizens, Somin (1998, 440–41) laments that "deliberative democrats have generally overlooked the widespread ignorance that prevents most voters from achieving even . . . modest levels of political knowledge." Somin concludes that deliberative democracy is a naïvely idealistic impossibility.

Posner (2003, 151–52) agrees with Somin on the fact of public ignorance, and contends that the extent of such ignorance renders deliberative democracy a "pipe dream hardly worth the attention of a serious person" (ibid., 163). However, Posner pushes the argument further than Somin. In Posner's view, deliberative democracy's utopian nature renders it potentially dangerous. According to Posner (2003, 135, 166), the deliberativists' requirement that citizens engage each other on controversial political issues can only bring to the surface, and thus exacerbate, deep moral differences among them, thereby making for an increasingly antagonistic and volatile politics.

Although Somin and Posner differ in nuance, they pose roughly the same objection to deliberative democracy, which I will call the Public Ignorance Objection. Stated roughly, the argument runs as follows: 1. Deliberative democracy, in whatever form, expects citizens to be highly informed about basic political facts and emerging data relating to complex policy questions. 2. Citizens are in fact highly ignorant of even the most basic political facts. 3. Therefore, deliberative democracy is "both unrealistic and, as a result, potentially dangerous" (Somin 2004, 8).

The Public Ignorance Objection admittedly has an intuitive appeal. However, it is not clear that the argument's premises warrant the conclusion. Therefore, the fact of widespread public ignorance need not necessarily defeat deliberative democracy as a model for democratic politics.

Two Concepts of Ignorance

Despite its straightforward and confident air, the Public Ignorance Objection trades on an ambiguity regarding the term "ignorance." Suppose there is a policy question, *Q*, facing a given democratic population. Suppose further that a factual proposition, *p*, is true and bears so significantly upon *Q* that unless deliberators hold that *p*, they are unlikely to reach a rationally justifiable response to *Q*. Let us say that a typical citizen, Alfred, holds instead of *p* some instantiation of *not-p*. Now, what

are we to say about Alfred? Surely, Alfred has a false belief, and, *ex hypothesi*, he is unlikely to reach a justifiable position with regard to *Q*.

But is Alfred *ignorant*? In one sense of the term, he is. He holds the false belief that *not-p*, so he is ignorant of the fact that *p*.[3] Ignorance in this sense is equivalent to false belief; hence we shall call it *belief ignorance*.

However, imagine that Alfred's belief that *not-p* was generated by correct inferences from popularly held and socially reinforced—but false—premises. More specifically, let us suppose that *not-p* is the result of a justified inference from premises, *a* and *b*, that are false but nonetheless are promoted by sources of political information that are otherwise justifiably held to be reliable, such as, say, *The New York Times*, "All Things Considered,"or Fox News. In that case, Alfred is still guilty of belief ignorance; however, since his false belief follows from other premises he acquired from sources that he was justified in believing to be reliable, the belief is, in a sense, not his fault. In this case, we would be correct to say that Alfred is *misinformed*.

Contrast Alfred with Barbara. Like Alfred, Barbara believes that *not-p*; however, unlike Alfred, Barbara believes this despite the fact that she had regular exposure, from sources that are justifiably thought to be reliable, to the true premises that warrant belief that *p*. That is, Barbara's belief that *not-p* is the result either of an invalid inference or of some type of carelessness with respect to her premises. Like Alfred, Barbara is guilty of belief ignorance; but, unlike Alfred, since she had access to the true premises from which *p* follows, Barbara is *culpable* for her false belief. Thus, in addition to saying that Barbara is ignorant of the fact that *p*, we might say simply that Barbara is ignorant.

To claim that Barbara is ignorant is not only to accuse her of false believing; it is to charge her with a kind of cognitive failure; it is to say that her belief ignorance is her fault. In cases where the cognitive failure is particularly egregious, we might say that Barbara is incompetent. In any case, as it involves an evaluation of the believer in addition to an evaluation of the belief, we shall call ignorance in this sense *agent ignorance*.

With this distinction in place we are better able to evaluate the Public Ignorance Objection to deliberative democracy.

Is the Public-Ignorance Argument Valid?

The public-ignorance literature endorsed by Posner and Somin, among others, aptly demonstrates a disturbingly high degree of belief ignorance

among citizens of the United States (and elsewhere). However, if the Public Ignorance Objection is to succeed, what must be demonstrated is that there is a high degree of agent ignorance. Put otherwise, the public-ignorance literature reveals that the public is significantly misinformed about fundamental political facts, but the Public Ignorance Objection requires the premise that the public is not simply misinformed, but incompetent and hence *unable* to muster the cognitive resources necessary for deliberative democracy. Without such a premise, the argument is formally invalid: the conclusion does not follow from the premises.

To see why, consider that, unless it could be shown that agent ignorance is widespread, the deliberative democrat can respond that a high degree of belief ignorance indicates the extent to which fundamental democratic institutions, such as the media or the education system, are failing. The deliberative democrat could then say that the public-ignorance data show only that the public is in a state much like Alfred's, not Barbara's, and as such, that the proper response is to criticize and attempt to repair the civic institutions that are responsible for enabling deliberation, such as the sources of political information, analysis, and commentary.

In fact, many deliberative democrats make this kind of argument.[4] To take one example, Bruce Ackerman and James Fishkin (2004, 5) agree with Somin and Posner that "if six decades of modern public opinion research establish anything, it is that the general public's political ignorance is appalling by any standard." However, they lay the blame for such ignorance upon a failing civic system. They write,

> We have a public dialogue that is ever more efficiently segmented in its audiences and morselized in its sound bites. We have an ever more tabloid news agenda dulling the sensitivities of an increasingly inattentive citizenry. And we have mechanisms of feedback from the public, from viewer call-ins to self-selected internet polls, that emphasize intense constituencies, unrepresentative of the public at large. (Ibid., 8.)

Ackerman and Fishkin further contend that experiments with deliberative polling and citizen juries demonstrate that "when the public is given good reason to pay attention and focus on the issues, it is more than capable of living up to demanding democratic aspirations" (ibid., 7). Thus, the reform of existing civic institutions is central to the deliberativist program.

Ackerman and Fishkin accept the premises of the argument pre-

sented in the Public Ignorance Objection, but deny the conclusion. Accordingly, the Objection as it stands is invalid.

Of course, showing that the objection fails is not sufficient to vindicate deliberative democracy; it is merely to demonstrate that the Public Ignorance Objection is, by itself, insufficient to defeat the deliberativist program.

The Objection Revised: Uninterested Ignorant Citizens

Perhaps I have moved too quickly. One of the thoughts explicitly driving Posner's criticism of deliberative democracy is that citizens are *ignorant* of politics because they are inclined to *ignore* politics. According to Posner (2003, 164), the United States is a "tenaciously philistine society," and its citizens have "little appetite" for the kind of "abstractions" and arguments that deliberation involves; accordingly, they tend to disengage from politics to the greatest extent possible, preferring to pursue "other, more productive activities" (ibid., 172). Posner takes this tendency to be a good thing, and thus criticizes deliberative democracy on the grounds that it "hopelessly exaggerates" (2003, 144) the degree to which it is reasonable to expect citizens to care about politics. With characteristic frankness, then, Posner (2004, 41) presses the following objection against Ackerman and Fishkin's proposal for a paid holiday, Deliberation Day: "If spending a day talking about the issues were a worthwhile activity, you wouldn't have to pay voters to do it."[5]

We may revise the Public Ignorance Objection in light of this line of reasoning. It would seem now that the objection to deliberative democracy is that widespread belief ignorance indicates the extent to which citizens are *uninterested* in politics. If citizens generally do not care much about political issues, then any participatory theory of democracy, including deliberative democracy, must fail, regardless of the actions of civic institutions. Thus, although public ignorance does not itself constitute an objection to deliberative democracy, it provides evidence that citizens are unfit for deliberative democracy.

Are Citizens Uninterested?

But the claim that citizens are utterly uninterested in politics is difficult to square with the fact that political commentary is now a billion-dollar

business. The prevalence of political talk shows and call-in forums on television, radio, and the Internet, as well as the success of books offering popular political analysis, suggests that citizens are not uninterested in the way Posner suggests.

More importantly, these forums explicitly emphasize the need for rational deliberation and reasoned exchange. Thus, purveyors of political information claim to offer a "no spin zone" in which "fair and balanced" analysis promises to expose "bias," "treason," and "lying liars." Of course, this is for the most part merely an image. The rhetoric of rationality and intellectual fairness is surely part of a marketing strategy designed to maximize revenues for networks, book publishers, and newspapers. Yet given the pressures of the information marketplace, market strategies prevail only if they are effective. This suggests that citizens are not only interested in politics, but are also interested in the kind of engagement that the deliberativists advocate. Deliberative democrats, especially institutionally minded ones such as Ackerman and Fishkin, aim to promote or create forums in which this interest in public deliberation can be channeled into effective political action.

Posner and Somin have overestimated the force of their argument. The Public Ignorance Objection, even in its revised form, is insufficient to defeat deliberative democracy. This does not mean that deliberative democrats have won the day. There are many challenges that the deliberative democrat must confront, and perhaps further work on public ignorance will produce a decisive objection to it. I have suggested that a successful objection to deliberative democracy based in public-ignorance data would have to show that citizens are highly susceptible to agent ignorance. Such findings surely would constitute a serious challenge to deliberative democracy. However, it seems likely that such findings would prove devastating to *every* conception of democracy, not just deliberativist versions.

In any case, the question of deliberative democracy's practical potential remains open.

NOTES

1. Although I draw exclusively from Gutmann and Thompson in sketching the basic contours of deliberative democracy, I do not mean to imply that Gutmann and Thompson's view is representative or noncontroversial. I cannot review here the important philosophical differences among deliberative democrats. The main statements thereof can be found in Bohman and Rehg 1997

and Elster 1998. More recent work can be found in Macedo 1999 and Fishkin and Laslett 2003. To get a sense of the spectrum of the views in currency, see Fishkin 1991, Dryzek 2000, Misak 2000, Valadez 2001, Smith 2003, Goodin 2003, Leib 2004, James 2004, and Talisse 2005. Review essays by Samuel Freeman (2000) and James Bohman (1998) are also instructive.

2. Public deliberation arguably requires much more of citizens, including the readiness to listen respectfully to opposing views, the willingness to admit one's errors, and the public-spiritedness to set aside one's interests for the sake of a common good.
3. Here I am excluding the complicating possibilities of self-deception and other forms of irrational belief.
4. In addition to the work of Bruce Ackerman and James Fishkin that is discussed below, see Sunstein 2001 and 2003; Page 1996; the essays collected in Chambers and Costain 2000; and Shane 2004.
5. Ackerman and Fishkin (2003 and 2004) propose a new national holiday on which citizens would be paid a modest honorarium for voluntary participation in a day-long deliberative polling event they call "Deliberation Day."

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Richard A. Posner

LAW, PRAGMATISM, AND DEMOCRACY: REPLY TO SOMIN

ABSTRACT: *While pragmatism cannot resolve deep normative disagreements, it can, as a technique of judicial reasoning, at once resolve satisfactorily the majority of cases that do not involve such disagreements, while protecting democracy from overweening judicial assertiveness.*

I appreciate this opportunity to respond to Ilya Somin's interesting review of my recent book (Somin 2004 reviewing Posner 2003). It is a responsible review and it would be an impertinence on my part to criticize it—authors' efforts to defend themselves against their reviewers make a pathetic spectacle—except that the issues Professor Somin raises merit further discussion.

The book, as he explains, advocates what I call "everyday pragmatism" (to distinguish it from the philosophical pragmatism of Peirce, James, Dewey, Rorty, and other distinguished philosophers), and relates it to theories of democracy, on the one hand, and of judicial behavior, with special reference to "judicial review" (judicial determinations of constitutionality), on the other. Somin (2004, 2) argues that my "version of pragmatism is both too narrow and too broad." It is too narrow (I think he means too limited) because "the pragmatic soundness of an action cannot be assessed without first determining whether the results it accomplishes are to count as normatively desirable. . . . [It] requires some sort of normative theory of ends." It is too

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broad "because it is not clear which, if any, considerations can be excluded from its scope."

Elaborating on the first point, Somin (2004, 2) writes that everyday pragmatism "provides no way to decide which facts and consequences are desirable and which are not." For that, we need "theories of morality"; though such theories "may be utterly useless in persuading Hitler, Stalin, or Saddam Hussein to stop engaging in acts of mass murder," this "in no way reduces their usefulness in determining whether the removal of those dictators from power is morally justified." Indeed, "if there are no objective answers to disputed moral questions, why should we consider it wrong to base public policy on factual errors? And how can we judge the desirability of a policy or judicial decision on its 'consequences' if we have no way of telling which consequences are harmful and which are not?" (ibid., 5).

Somin's criticism of everyday pragmatism conflates two distinct points. The first, with which I agree, is that facts have no normative significance by themselves. "Ought" can't be derived from "is." There has to be something more (though it may not be quite obvious what). Even to say that public policy "should" not be based on factual errors requires a premise concerning what the purpose of public policy ought to be. To deem the consequences of mass murder "harmful," one has to think mass murder a bad thing.

But I don't agree that the existence of the is-ought gap requires "theories of morality" to bridge it. All that's needed is a morality, which need have no theoretical source or justification whatsoever.

I don't need a theory of human rights to condemn infanticide. That infanticide is evil happens to be one of the moral beliefs to which the members of my society subscribe; anyone in this society who rejects the belief is ostracized. Nothing more is necessary for me to label the consequences of infanticide "harmful." But I wouldn't like to argue the point with someone who believed that those consequences were not harmful, because we would be arguing from inconsistent premises, and such arguments are rationally unresolvable.

This means that everyday pragmatism is relative to the prevailing norms of particular societies. It provides local rather than universal guidance to action. And its local utility will depend on the degree to which the society is normatively homogeneous. The more homogeneous, and therefore the wider the agreement on what kind of consequences are good and what kind are bad, the greater guidance everyday pragmatism will provide.

To take a humble example, it is a normative fact that most people in America believe (with certain qualifications) that if a watch is broken, it should be fixed. This belief is not inevitable. There might be a society in which people believed that it was bad luck to repair a watch. But given that most Americans believe that a broken watch should be fixed, the fact that a watch is broken is a reason, on which almost everyone can agree, for fixing it. It is not a conclusive reason: the owner of the watch might be glad to be rid of it, or it may cost more to repair than to replace with an equally good watch, or it may not matter that it's broken (perhaps because it is not being used to keep time; maybe it is just valued as an antique). But given an agreed premise about the purpose of a watch, analysis of what to do when a watch breaks is thoroughly pragmatic.

I have the same view about the role of everyday pragmatism in law. In areas where there is consensus over the norms that should guide the courts, everyday pragmatism can improve judicial performance. For example, there is general agreement that economic efficiency is a good thing and that it is promoted by such legal institutions as private property; freedom (within limits) of contract; and liability, civil and sometimes criminal, for activities such as negligence and theft that impair the efficient operation of markets. Given this agreement, it is possible to analyze the economic efficiency of doctrines of property, contract, and tort law without having to worry a great deal about moral issues.

Moral issues arise only when moral norms are contested, as in the current controversy over gay marriage. To the extent that positions on these issues are entangled with empirical beliefs—such as that homosexuality is spread by recruitment, or that homosexuals make bad parents—pragmatic inquiry may alter some people's moral views. Yet even if full factual agreement were obtained, the moral views of many people on the issue of gay marriage would be unaffected.

Somin's second point against everyday pragmatism is that it is too inclusive. Applied to law, it rules out virtually no approach, even that of legal formalism (legal pragmatism's supposed antithesis). As I explain in my book, legal formalism can indeed be the pragmatic course—in societies that lack a sufficiently competent judiciary to be entrusted with discretionary, policy-oriented adjudication; and even in our society, in areas such as (to a considerable though not complete extent) contract law, where a formalist approach can reduce uncertainty in economic planning.

Somin is dissatisfied with a jurisprudence whose ultimate criterion is "reasonableness." He is certainly correct that since different people have different ideas of what is reasonable, a commitment to reasonableness will not dictate particular legal doctrines or case outcomes. But that is the point. There is no master concept that will generate correct answers to legal questions. This is why it is extremely important to have a judiciary that is diverse in outlook, background, experience, and temperament; it is why judges should be modest in asserting their will against those of legislatures and executive officials; and it is why judges should focus on consequences. In the areas of law—and there are many—in which there is normative homogeneity, knowledge of consequences will guide adjudication to a satisfactory outcome. And judicial diversity will make it less likely that information bearing on an assessment of consequences will be overlooked, because life experiences, temperament, and other individual characteristics are sources of information and insight.

Somin does not spell out his own legal philosophy in detail, but it seems that he would like the Supreme Court to interpret the Constitution as limiting government to some approximation of a classically liberal state, in the tradition of Mill, Hayek, Friedman, and Nozick. He thinks that I have altogether too sunny a view of modern American democracy.

This will surprise some readers of my book, who will regard my rejection of "deliberative democracy"—on the ground that it at once unattainable and undesirable—as being distinctly pessimistic. My argument, which builds on Joseph Schumpeter's theory of "elite" democracy, is that modern American democracy is not a debating society or a New England town meeting, but a system in which our rulers have to stand for periodic elections. I analogize it to the market system, in which sellers (corresponding to politicians in the political market) have to submit to the judgment of consumers "voting" with dollars. And I claim that just as consumers do not have to know a lot about products in order to be able to exercise their checking function over sellers, so the voting public doesn't have to know a lot about politics in order to exercise its checking function over the politicians.

Somin believes that I underestimate both the political ignorance of the voting public, which does indeed seem to be staggering (Somin 1999), and the role of interest groups in obtaining legislative and regulatory favors unrelated to the merits of the groups' claims. He quite properly emphasizes how these factors interact, and specifically how

the ignorance of the public about the consequences of alternative policies facilitates the extraction by interest groups of selfish benefits. But he exaggerates. For one thing, the results of public-opinion polls are not good evidence of what people really know, simply because most adults are not adept at taking tests; I'm sure I am not alone in tending to freeze when asked to reel off answers to questions that I haven't been thinking about recently. The knowledge that we have about politics or any other subject that is not our professional specialty is real knowledge, even if it is not at our fingertips. If one looks not at how people "test" on poll questions, but on how they rate candidates, a more rational picture emerges (Norpoth 1996, 776, 790).

For another thing, political apathy tends to be concentrated in groups that do not vote very much, and this reduces the effect of that apathy on policy (Bennett 1996, 219, 226; Delli Carpini and Keeter 1989, 227; Fiorina 1981; Key 1966). And if the interests of the apathetic are not sharply different from those of the well informed, the apathetic can, in effect, take a free ride on the actions of the well informed. We see this all the time in markets. Some people, like myself, are careless shoppers, who rarely look at the price tag and, if they did, would get nothing out of it, because they don't know anything about current market values. Yet these people are protected by the fact that a minority of shoppers is careful, and it is a large enough minority to determine price and quality. Sellers would, if they could, price discriminate against the careless shoppers, but this is difficult to do—although one of my children once said (not in my presence) that he thought that storekeepers probably raised their prices when they saw me coming into the store.

Somin is certainly correct in maintaining that interest-group politics and public ignorance of policy combine to produce many distortions, injustices, and inefficiencies in legislative regulation. But that is not enough to make the case for rampant judicial interventionism. The pragmatist concern I have with such a response to public ignorance is the finality of constitutional adjudication. Not that the amendment process is wholly unworkable, and not that the Supreme Court doesn't back down occasionally in the face of adverse public opinion; nevertheless, when the Court invalidates a practice, the usual effect is to kill it, and thus to deprive the country of the benefits of social experimentation.

Pragmatism, a form of empiricism, teaches that it is as vital to subject our social hypotheses as our scientific ones to the fires of empiri-

cal testing. We would never learn whether vouchers are the solution (or part of the solution) to the problem of the public schools if the Supreme Court had, as several of its Justices urged, held that voucher systems violate the Establishment Clause of the First Amendment. I doubt that Somin would have wanted the Court to do that. But the general tendency of an aggressive constitutional jurisprudence is to curtail the scope of social experimentation, except in the minority of cases—many involving efforts at censorship—in which a challenged statute itself tries to stifle experimentation.

Somin (2004, 15) argues that as a result of a deferential judiciary, "harmful policies will become institutionalized and impossible to reverse." Really? Think only of the profound effects of the deregulation movement, to which constitutional adjudication contributed nothing at all; and which succeeded despite the interest-group pressures, public ignorance, and apathy that had sustained regulation for decades.

I think it is premature to give up on the American people as hopeless ignoramuses and transfer key political authority from their elected representatives to a committee of nine lawyers. Somin might reply that he does not envisage the nine lawyers exercising discretion; they would merely apply the Constitution in accordance with its original meaning. But we should have learned by now that efforts to "fix" constitutional meaning are hopeless. Life-tenured judges do not bow to the tyranny of ancient texts. In effect, then, Somin wishes to shift political power from one group of officials (the politicians and civil servants) that are imperfectly controlled by their nominal principals—the public at large—to another group—the Justices of the Supreme Court—that is even less subject to the control of the public. This would only increase the oligarchic character of the American political system.

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Ilya Somin

PRAGMATISM, DEMOCRACY, AND JUDICIAL REVIEW: REJOINDER TO POSNER

ABSTRACT. *Posner's "pragmatic" defense of broad judicial deference to legislative power still reflects the shortcomings noted in my review of his* Law, Pragmatism, and Democracy. *His pragmatism still fails to provide meaningful criteria for decision making that do not collapse into an indeterminate relativism; and his argument that strict constraints on judicial power are required by respect for democracy underestimates the importance of two serious interconnected weaknesses of the modern state: widespread voter ignorance, and interest-group exploitation of that ignorance.*

I would like to thank Judge Posner for his courteous and insightful reply to my review of his book *Law, Pragmatism, and Democracy.* Judge Posner worries—groundlessly in his case—that an author's attempt to defend against a reviewer might seem petty. The danger is more serious in the case of a book reviewer replying to criticisms of his review by the book's author. Nonetheless, the issues raised in Posner's book and in his Reply are important enough to justify further discussion.

Posner's book contends that political and legal decision-makers should be guided by "everyday pragmatism" rather than worry about "abstract" moral considerations (Posner 2003, chs. 1–2). It also defends a limited conception of democracy as a "a competitive power strug-

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gle among members of a political elite . . . for the electoral support of the masses" (ibid., 130). Posner argues that judicial review should be based on a combination of pragmatism and adherence to his limited, Schumpeterian conception of democracy, rather than following to "formalist" theories of adjudication (chs. 6–10). In Posner's view, his pragmatism and his theory of democracy combine to justify only a strictly limited scope for judicial review.

In my critique of Posner's book, I put forward two major reservations regarding his argument (Somin 2004b). First, I suggested that his theory of pragmatism was inadequate because it collapses into a form of relativism that provides no determinate answers to contested questions, and because it does not provide much guidance as to what kinds of issues decision-makers might legitimately *exclude* from consideration. Second, in response to Posner's claim that his theory of democracy justifies very tight limitations on the power of judicial review, I argued that he underestimates the degree to which the democratic process is weakened by interest-group power and voter ignorance. Judge Posner has now replied to each of these points, and I would like to briefly assess his latest contribution to the debate.

Pragmatism without Purpose Revisited

In his Reply, Posner disputes my argument that pragmatism is defective because "it provides no way to decide which facts and consequences are desirable and which are not" (Somin, 2004b, 4). Posner appears to agree that his theory of pragmatism, to the extent that it relies on analysis of facts, does not provide determinate normative guidance as to what actions we should take on disputed issues. The "facts" on which pragmatic analysis is based "have no normative significance by themselves" (Posner 2004, 464).

But Posner (2004, 464) goes on to say that moral theory is not necessary to close the gap between empirical and normative analysis (the so-called "is-ought" gap) because "all that's needed is a morality, which need have no theoretical source or justification whatsoever." For example, Posner claims that we "don't need a theory of human rights to condemn infanticide. That infanticide is evil happens to be one of the moral beliefs to which the members of my society subscribe" (ibid.).

Obviously, Judge Posner and I can condemn infanticide or make

any other moral judgment on any basis we like, including the consensus opinion. The real issue, however, is whether or not we are right to do so. If a "morality" has "no theoretical source or justification whatsoever," how can we have any confidence that its conclusions are correct? I don't deny that "the prevailing norms of particular societies" can provide useful guidance. Not every moral decision we face requires a deep analysis going back to first principles. However, many of the most important issues faced by "particular societies" are matters about which members of those societies disagree. If there were no disagreement, there probably wouldn't be an issue in the first place.

As Posner (2004, 465) himself nicely puts it, "moral issues arise only when particular moral norms are contested." In these cases—the very ones about which we need guidance the most—appeals to prevailing norms are unhelpful because the point in dispute is precisely the question of which norm should prevail. Even on the seemingly open-and-shut question of infanticide, serious arguments have been advanced—by scholars who are certainly part of our "particular society"—claiming that our rejection of this practice should not be as sweeping as it is (e.g., Tooley 1983). While I don't agree with these arguments myself, they cannot be refuted simply by pointing out that "anyone in this society who rejects the belief [that infanticide should be prohibited] is ostracized" (Posner 2004, 464).

Moreover, even in cases where there is a consensus within our own society, we may still need theoretical analysis to help decide what to do in situations where members of other societies dispute that consensus. In the War on Terrorism, for example, our adversaries have serious disagreements with the American moral consensus, to put it mildly; and—another understatement—it would certainly be helpful to know whether we or they are right.

I don't dispute Posner's suggestion that empirical analysis is useful in situations where the major point at issue is how to achieve a purpose everyone agrees to be desirable, or in cases where moral disputes "are entangled with empirical beliefs—such as that homosexuality is spread by recruitment or that homosexuals make bad parents" (Posner 2004, 465). However, I don't see how everyday pragmatism helps us address such questions. The real work here would be done by analyzing evidence about the causes of homosexuality,[1] and whether or not homosexuals are worse parents than heterosexuals.

Posner also rejects my argument that his theory of pragmatism fails

to provide adequate guidance for judicial decision-making because it is insufficiently determinate, and can be interpreted to incorporate almost any consideration or viewpoint. He admits that his theory, based on a vague concept of "reasonableness," will not "dictate particular legal doctrines or case outcomes" because "different people have different ideas of what is reasonable" (Posner 2004, 466). But he urges us not to worry about this problem because it can be handled by a judiciary that is "diverse in outlook, background, experience, and temperament" (ibid.).

Certainly there are benefits to judicial diversity, including the possibility that it will "make it less likely that information bearing on an assessment of consequences will be overlooked, because life experiences, temperament, and other individual characteristics are sources of information and insight" (Posner 2004, 466). But I do not see how the assistance that diversity can render in determining which consequences will occur if judges make a given ruling can address the logically prior question of whether those consequences are *desirable* ones for judges to pursue. That is the central issue in any theory of jurisprudence, and Posnerian pragmatism cannot answer it.

Democracy and Judicial Review

A central argument of Posner's book is that the combination of his theory of pragmatism and his theory of democracy justify strict limitations on the scope of judicial power. He recognizes that this claim is heavily dependent on his relatively favorable evaluation the output of the political process (Posner 2003, 211–12). To the extent we take a dimmer view than Posner of the results produced by "our actual existing democracy" (ibid., 212), we should—other things equal—be more supportive of judicially imposed restraints on legislative and executive power.

My review essay argued that Posner's optimistic assessment of the modern democratic state underestimates the deleterious impact of two serious weaknesses: what Posner (2003, 191n84) himself calls the "staggering" ignorance of much of the public about politics and public policy, and the influence of organized interest groups that can often use the political process to serve their own ends at the expense of the general public.

There may be greater agreement between Posner and myself on

these issues than meets the eye. Perhaps more so than in his book, Judge Posner's Reply (2004, 467) recognizes that both political ignorance and interest-group power are serious problems that "produce many distortions, injustices, and inefficiencies," and he suggests that my review of the book "quite properly emphasize[s] how these factors interact, and specifically how the ignorance of the public about the consequences of alternative policies facilitates the extraction by interest groups of selfish benefits" (ibid., 466–67). Nonetheless, he believes that I "exaggerate" the importance of these problems (ibid., 467), and therefore overstate the case for using judicial review as a step toward correcting them.

My disagreement with Posner on these matters is therefore a matter of degree. And that degree is further narrowed because I do not, in fact, propose that judges "interpret the Constitution as limiting government to some approximation of a classically liberal state," as Posner (2004, 467) implies.[2] I certainly believe that the courts should impose much stricter limits on government power than they do at present—and therefore stricter limits than Judge Posner would support. But I also recognize that any judicial attempt to create a fully libertarian society would be both politically hopeless and legally dubious, insofar as the Constitution clearly gives the government greater power (e.g., the power to impose tariffs) than classical liberals would like.

Obviously, I cannot fully resolve my remaining differences with Judge Posner here. So I limit myself to a brief critique of his reasons for believing that my view of the political process is excessively pessimistic.

Addressing the problem of political ignorance, Posner (2004, 467) contends that "the results of public-opinion polls are not good evidence of what people really know, simply because most adults are not good at taking tests." Perhaps many people tend "to freeze when asked to reel off answers to questions that [they have] not been thinking about recently" (ibid.). This conjecture is plausible, but it flies in the face of a large body of evidence indicating that the ignorance reflected in public-opinion polls carries over into people's voting decisions, views about important issues, and other politically relevant matters.[3] These effects would not exist if the ignorance found in survey results were largely an artifact of respondents' test-taking anxieties. Furthermore, very extensive political ignorance is revealed in analyses (e.g., Somin 2004a) of the National Election Study, a major survey that is conducted around the time of each presidential elec-

tion, presumably when voters *have* been thinking about politics recently (as much as they ever do). Finally, Posner's conjecture ignores the fact that surveys can overestimate knowledge as well as underestimate it; for example, many survey questions have a multiple-choice format that is susceptible to guessing.[4]

Posner also points out that political ignorance is disproportionately concentrated among groups that are less likely than others to vote, mitigating the effect of their ignorance on electoral outcomes. Yet even the most knowledgeable 50–60 percent of the public (turnout is about 50 percent in presidential elections) that tends to vote more, and is relatively more knowledgeable, is shockingly ignorant about a great many issues (Somin 2004a; Somin 1998).

Moreover, as Posner (2004, 467) points out, relatively ignorant voters can "take a free ride on the actions of the well informed" only if "the interests of the apathetic are not sharply different from those of the well informed." Unfortunately, however, the relatively well informed differ from the population as a whole in a wide range of politically relevant ways: they are disproportionately, male, white, wealthy, aged, and ideologically extreme, to name just a few examples.[5]

The unrepresentative nature of relatively well-informed voters is only one of several ways in which Posner's analogy between political and economic markets is misleading. In economic markets for consumer goods, it is indeed often true that relatively ignorant consumers can piggyback on the efforts of "the minority of shoppers [that] is careful" (Posner 2004, 467). Unfortunately, this is far less likely in political markets. It is not just that political "shoppers" often have conflicting interests in ways that marketplace shoppers usually don't. Another problem is that in product markets, the most knowledgeable and careful shoppers are generally the ones who are likely to switch products if a rival firm introduces an improvement in quality or a reduction in price. By contrast, "swing voters"—those most likely to switch party allegiances in political markets—are, by a substantial margin, the most ignorant of voters.[6] Unlike economic success, political success often hinges on winning over the most ignorant "consumers" rather than the most knowledgeable ones. Finally, as I have argued elsewhere (Somin 1998 and 1999), the task of finding the right knowledgeable "opinion leader" to rely on as a substitute for being informed oneself is, for a variety of reasons, far more difficult in political markets than in economic ones.

Turning to the problem of interest-group power, Posner disagrees

with my contention that judicial review may often be necessary to prevent harmful interest-group policies from becoming entrenched. He points to the success of the deregulation movement of the 1970s and 1980s as an important example of how such policies can be reversed. Posner is too modest to mention that he himself played an important role in developing the ideas behind the deregulation movement,[7] but he is right to emphasize that inefficient policies can sometimes be undone without judicial intervention.

However, the fact that some such reversals are possible does not mean that this is always or often what happens. Although the metaphor is overused, difficult-to-reverse slippery slopes do exist.[8] Even in the case of the successful deregulation movement that he helped lead, Posner (2004, 468) notes, the harmful regulations it eliminated had persisted "for decades," in part as a result of "interest-group pressures, public ignorance, and apathy."[9] And many perverse regulations remained even after the deregulation movement ran its course.[10] Harmful regulatory policies had tremendous staying power, and the costs they imposed can never be recovered. It is at least plausible to argue that a more aggressive judicial effort to curb some of these policies would have paid major dividends.

Nonetheless, I agree with Posner (2004, 468) that we should be wary of concentrating too much power in the hands of "a committee of nine lawyers." Certainly, no one wants to be ruled by an "oligarchic" judiciary (ibid.). My argument, however, is not that we should transfer to the judiciary the kind of power enjoyed by legislatures, but rather that judicial power should be given greater leeway to block policies initiated by other branches of government. As a result, greater scope might be given to the private sector, and the dangers posed by political ignorance and interest-group power would be reduced, though certainly not eliminated.

Judicial power is not a panacea for all the ills that afflict our political system, and it is not without dangers of its own. It can, however, play a more constructive role than Posner gives it credit for.

NOTES

1. I set aside the question of whether or not the causes of homosexuality really are relevant to the question of what rights they should have. Although I doubt that the answer is yes, there are certainly many who believe otherwise.

2. This misunderstanding on Judge Posner's part is perfectly reasonable since, as he notes, I did not detail my own jurisprudential philosophy in my review of his book.
3. See, e.g., evidence compiled in Althaus 2003; Delli Carpini and Keeter 1996; Galston 2001; Holbrook and Garand 1996; Mutz 1993; Popkin and Dimock 1999; Somin 1998; and Somin 2004a.
4. For examples, see Somin 2004a.
5. For systematic evidence on these points, see e.g., Somin 2004a; Althaus 2003; Delli Carpini and Keeter 1996; and Converse 1964.
6. For example, data from the 2000 National Election Study show that respondents in the center of the political spectrum (self-described "independent independents") answered an average of only 9.5 of 31 political-knowledge questions correctly, compared with 18.7 correct answers for "strong Republicans" and 15.7 for "strong Democrats." The second-lowest scoring group, "independent Democrats," scored 13.3, well ahead of the independent independents. (Unpublished data from the 2000 NES are available from the author upon request.) These results are consistent with earlier studies going back to Converse 1964.
7. See, e.g., Posner 1974; Posner 1973; and Posner 1976.
8. For a rigorous analysis, see Volokh 2003.
9. For a detailed analysis of the politics of deregulation, see Derthick 1985.
10. Even leading scholars more sympathetic to the regulatory state than Posner and myself acknowledge this point. See, e.g., Breyer 1993 and Sunstein 2002.

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