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United States Supreme Court

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Point, Counterpoint: The Evolution of American Political Philosophy*

*William H. Rehnquist***

When one thinks that college courses and seminars covering entire academic years are devoted to the subject of American political philosophy, a lecture such as this on the subject necessarily risks the vice of superficiality, on the one hand, or of simply telling a twice-told tale on the other—or perhaps both. For the many members of the legal and political community, however, who are not particularly interested in American political philosophy, perhaps a “cram course,” such as this lecture purports to be, offers some hope of bridging the gap between those who have contributed to American political thought and those who have governed America. It is, as I shall hope to show, not only a rather considerable gap, but a recurring irritant to many of us. At the risk of “biting off more than I can chew,” I shall proceed.

I would suggest to you that during the more than two centuries that have elapsed since the American Revolution, American political philosophy has been notable principally for the contrapuntal themes that rise and fall as the nation matures. Numerous commentators have pointed out that certain ideals have long been

* Justice Rehnquist delivered this address at Vanderbilt Law School on November 18, 1980, as one of the continuing series of Cecil Sims Lectures. The late Cecil Sims graduated from Vanderbilt Law School in 1914 and was an eminent Nashville attorney and a lecturer at Vanderbilt Law School. Funds for the lecture series have been provided primarily by the Sims family. The copyright to this address is held both by Justice Rehnquist and by the *Vanderbilt Law Review*.

** Associate Justice, The Supreme Court of the United States. B.A. 1948, M.A. 1948, LL.B. 1952, Stanford University; M.A. 1950, Harvard University.

widely shared by Americans: individual autonomy, liberty, equality, and a belief in limited, decentralized government.¹ But no one would be so bold as to describe the present government of the United States as embodying those ideals. We have a strong national government that, with occasional lapses, impinges more and more on the activities of each individual citizen as time goes by. Yet most Americans are downright suspicious of, if not hostile to, governmental authority of any sort. This gap between our feelings about government in the abstract and the existing national, state, and local governments that we have in fact created in this country has made grist for the mill of those who would question the legitimacy of governmental authority—however much that authority may be completely consistent with the United States Constitution.

The American Revolution itself is the best example of this phenomenon. Most of the so-called American ideals, as well as skepticism about governmental authority, were espoused by those who began and fought to a successful conclusion the Revolutionary War. No one can doubt that the revolution was a reaction to concentrated and remote government—in the form of George III and the English Parliament—and was nourished by notions of individualism, liberty, and local autonomy. Bernard Bailyn, for example, in his *The Ideological Origins of the American Revolution*² concluded that although the revolutionaries had no blueprint for a new world:

[F]aith ran high that a better world than any that had ever been known could be built where authority was distrusted and held in constant scrutiny . . . and where the use of power over the lives of men was jealously guarded and severely restricted. It was only where there was this defiance, this refusal to truckle, this distrust of all authority, political or social, that institutions would express human aspirations, not crush them.³

Robert Nisbet, moreover, in his work *Twilight of Authority*⁴ said,

When the modern political community was being shaped at the end of the eighteenth century, it was thought by its founders that the consequences of republican or representative institutions in government would be the *reduction* of political power in individual lives. Nothing seems to have mattered more to such minds as Montesquieu, Turgot, and Burke in Europe and to Adams, Jefferson, and Franklin in this country than the expansion of freedom in the day-to-day existence of human beings, irrespective of class, occu-

1. See generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); W. CARPENTER, *THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT* (1968); P. CONKIN, *SELF EVIDENT TRUTHS* (1974).

2. B. BAILYN, *supra* note 1.

3. *Id.* at 319.

4. R. NISBET, *TWILIGHT OF AUTHORITY* (1975).

pation, or belief.⁵

I think more than one student of political science would hesitate to lump, as Nisbet does, Burke in Europe with Jefferson in the United States. Burke, after all, was a "conservative" in a very different sense from John Locke or Montesquieu, whose ideas played such a large part in the political philosophy dominant in this country both at the time of the Revolution and at the time of the adoption of the Constitution. But that is not to say that they were diametrically opposed in their outlooks on government. Locke and Montesquieu, to the extent that they ever left the realm of theory, wrote their principal tracts as if a new government were going to be made up out of "whole cloth." Burke, on the other hand, although a major supporter of the colonists at the time of the American Revolution, had very little good to say about the French Revolution. Burke tended simply to shift the burden of proof, if you will, as to the worth of existing institutions; to him, the burden of proof was on those who would change any institution that worked tolerably well. Since the American Revolution was premised largely on the theme that the relationship between the colonists and England had deteriorated to such an extent that it worked entirely to the disadvantage of the colonists, Burke, with his practical wisdom, tended to support them.

The success of the Revolution, as ratified by the Treaty of Paris in 1783, was quickly followed by the business of nation building. The Articles of Confederation, of course, were perfectly consistent with the ideals of the Revolution. They provided for a highly decentralized national government, by their terms addressing only the relationship of the central government to the states and giving the former no authority over the individuals within the states. Those, however, who attended the Annapolis Convention in 1786, which in turn authorized the Constitutional Convention at Philadelphia in 1787, recognized the weaknesses of such a decentralized government and sought to set up a limited central government that was to be empowered to act directly upon the individual. It had become apparent to the leaders of the "thirteen colonies" that unless the functions of government were centralized, the colonies would quarrel, as they had done even during the Revolution, and grow ever more fragmented and "balkanized" by each setting up trade and travel barriers to serve its own interests with little thought being given to the corresponding interests of the other

5. *Id.* at 194.

twelve. The fear was that as the colonies became more independent and isolated, the risk would increase that they would be picked off by one of the European powers. In short, the Articles were viewed as flawed because they failed to provide for the security of the people and made it difficult for the citizens to pursue private and, if you will, economic ends.

Over the opposition of most of the leaders of the Revolution, who supported the Articles of Confederation and favored their retention, the Framers of the Constitution did, of course, eventually establish a fairly strong centralized national government. James Madison in *The Federalist No. 39*⁶ put it this way:

The idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government. Among a people consolidated into one nation, this supremacy is completely vested in the national Legislature.⁷

George Washington, in his *Farewell Address*,⁸ had no illusions about the legitimacy of government exercising authority over individuals. He stated,

The basis of our political systems is the right of the people to make and to alter the constitutions of government. But the constitution, which at any time exists, until changed by explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and the right of the people to establish a government presupposes the duty of every individual to obey the established government.⁹

To be sure, this recognition of the need for a national government with authority over individual citizens was in many ways a reluctant one. No one can read Madison's *Notes of Debates in the Federal Convention of 1787*,¹⁰ or his *Federalist No. 51*¹¹ without concluding that the Framers were concerned not just with the lack of a central government for the thirteen former colonies, but also with the potential excesses of governmental authority. The path the Framers chose was the well known one of "checks and balances." Madison described the "separate and distinct exercise of the different powers of government, which to a certain extent, is

6. THE FEDERALIST NO. 39 (J. Madison) (Wesleyan Univ. Press 1961).

7. *Id.* at 256.

8. A TREASURY OF GREAT AMERICAN SPEECHES 44 (C. Hurd ed. 1959).

9. *Id.* at 46.

10. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. Press 1966).

11. THE FEDERALIST NO. 51 (J. Madison) (Wesleyan Univ. Press 1961). Some dispute exists about the authorship of *Federalist No. 51*. Although most authorities attribute it to Madison, some support exists for Hamilton as the author. *Id.* at xxvii.

admitted on all hands to be essential to the preservation of liberty," more fully in *Federalist No. 51*¹² than I propose to describe it here. He was by no means naive, as many of his successors in the realm of political theory have been, in thinking that the more powerful government the better, or that the people, if only given the chance, would make certain that wise and good leaders were chosen to head the government. Madison said,

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.¹³

Then, as if feeling he had perhaps lapsed too much into cynicism in the preceding passage, Madison concluded by saying,

It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.¹⁴

Thus, despite the wariness of the Framers toward centralized political authority, they concluded their deliberations in 1787 with a Constitution that provided for what was then thought to be a "limited" national government, so that the former thirteen colonies would indeed become "one nation." But as the debates over ratification of the Constitution in large states such as Virginia and New York reflect, all of those who thought about the matter were not of one mind on this subject, and some feared that the Philadelphia Convention had in fact unleashed, albeit unwittingly, a tiger. Even those who wrote and spoke for the adoption of the Constitution were by no means of one mind about how the nation should be governed or in their vision of what the nation would be like a century after the adoption of the Constitution.

The period immediately after the adoption of the Constitution was marked by a substantial emigration over the Appalachians into the Northwest Territory and the states, such as Tennessee,

12. *Id.* at 348.

13. *Id.* at 349.

14. *Id.*

that would comprise that part of our country known as the Mississippi Valley.¹⁵ This did not mean, however, that politics, political differences, or ambivalence between ideals and practical aspirations were at an end. Tension between our ideals and our institutions continued. The Jacksonian Era was dedicated in part to the proposition that in a democratic society there should be no office that could not be filled by an ordinary citizen¹⁶ and that there should be no concentration of economic power in any one part of the country.¹⁷ It represents one of the more significant attempts to reconcile theory with practice. This period in our nation's history was a time of great political debate, but that debate underscored yet a new ambivalence in American political thought. Andrew Jackson may have been a liberal in social and geographic terms, but he was in many ways a conservative in political and economic orientation. Jackson's veto of the Maysville Road Bill¹⁸ on the basis that the national government should not get into the business of assisting the states and local governments in the performance of their traditional functions such as road building is scarcely representative of the thinking of the members of his party a century and a half later. During his administration, the increased friction between Congress, the President, and, to some extent, the courts made real the checks and balances contemplated by the Framers in 1787; they, however, were made real only in the sense that no one branch of the national government would dominate the other two. The system of checks and balances did not really focus upon the relationship of the government to the individual citizen, and, to the extent that they did, the Democrats under Jackson proved to be more willing that the national government leave the individual to his own devices than were the Whigs who opposed Jackson.

Thus, despite the social egalitarianism of the era, no real centralization of political authority existed. The three branches of the national government maintained their independence from one another through the system of checks and balances established by the Framers, and the nation was simply too large and the national

15. D. PERKINS & G. VAN DEUSEN, *THE AMERICAN DEMOCRACY: ITS RISE TO POWER* 74 (1964).

16. *Id.* at 154-55.

17. *See generally id.* at 162.

18. *Id.* at 158. The Maysville Road Bill proposed that the federal government provide aid for the improvement of Maysville Road, an intrastate Kentucky road extending from Lexington to Maysville on the Ohio River. *Id.* *See also* W. MACDONALD, *JACKSONIAN DEMOCRACY: 1829-1837*, at 139-40 (1906).

government too small to centralize governmental authority in Washington. DeTocqueville wrote his *Democracy in America*¹⁹ at this time and captured this sense of American pluralism. He warned of the possible dangers of even a benevolent centralized government authority in words that are particularly relevant today:

Having thus taken each citizen in turn in its powerful grasp and shaped him to its will, government then extends its embrace to include the whole of society. It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break men's will, but softens, bends, and guides it . . . is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd.²⁰

Stability was once again interrupted by the Civil War. Whether one views secession as an example of pluralism breaking down or as the ultimate example of an interest group—those in favor of secession—insisting on getting its own way, secession remains an expression of autonomy and independence and is essentially an antimajoritarian act. Although New England made vague threats of such unilateral action at the Hartford Convention in 1815,²¹ it was only during the Civil War, when the eleven southern states²² unsuccessfully attempted to secede from the Union, that the majoritarian principle on which this country was based was fully tested. It seems to me that even if the southern states had come to the point of secession over a far more morally debatable issue than slavery or its extension, President Abraham Lincoln had the right answer in his First Inaugural Address when he said:

Plainly, the central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

. . . .
Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A

19. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (G. Lawrence trans. 1966).

20. *Id.* at 667.

21. A. LINK & S. COHEN, *THE DEMOCRATIC HERITAGE* 150 (1971).

22. D. PERKINS & G. VAN DEUSEN, *supra* note 15, at 269-73. The eleven states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 269.

husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them. Is it possible, then, to make that intercourse more advantageous or more satisfactory, *after* separation than *before*? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends? Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions, as to terms of intercourse, are again upon you.²³

Interestingly, it was not only Southerners who were dissatisfied with the national government during this period of time. In the North, there were numerous riots by the young in opposition to conscription. The protesters, like the Southerners, invoked American ideals of autonomy and independence in opposing this invasion upon their liberty.

Thus, those who have had to contend with the practicalities of governing—to exercise the power of government—generally have recognized the need for compromise and a certain amount of pragmatism and have realized that the opportunity to exercise power is itself one of the principal attractions of governmental office. They have also had to recognize that in their efforts to avoid anarchy, some of the ringing maxims of those political theorists whose writings are associated with the American Revolution must of necessity be tempered.

On the other hand, those who have been the “revolutionaries”—those who have espoused a philosophy that the government was headed in a totally wrong direction or was too powerful—have tended to phrase their criticisms in very general terms that offered little guidance once the transition of power that they advocated had been accomplished. Such a commonly quoted political metaphor is “that government is best which governs least.” That phrase was not coined during the recent presidential campaign by President-elect Reagan or by any spokesman of the so-called “New Right.” Its antecedents go back at least as far as to Henry David Thoreau, who, as the author of *Civil Disobedience*,²⁴ was one of the idols of the “New Left” of a decade ago. Another of Thoreau’s stories is similarly in vogue today. Thoreau wrote,

I went to the store the other day to buy a bolt for our front door, for, as I told the storekeeper, the Governor was coming here. “Aye”, said he, “and the Legislature too”. “Then I will take two bolts”, said I. He said that there had been

23. ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 585, 586 (R. Basler ed. 1946).

24. H. THOREAU, WALDEN AND CIVIL DISOBEDIENCE (O. Thomas ed. 1966).

a steady demand for bolts and locks of late, for our protectors were coming.²⁵

No one can doubt that Thoreau's attitude towards government occupies a prominent part in the warp and woof of American political attitudes today. Indeed, we read and hear of citizens wanting government off their back, of the emergence of the so-called New Right, of the growth of single interest groups, of the fragmentation of American society, and of a loss of faith in the notion of the melting pot and an increased emphasis on diversity that manifests itself in such demands as those for bilingual education. These developments have been hailed, on the one hand, as evidence of people becoming more independent and taking control over their own lives; they have also been condemned, on the other hand, as making it difficult for government to govern and to reach a consensus about important public issues of the day.

Similarly, even after the end of the Civil War, citizens of both the North and the South remained concerned about the increasing accumulation of power in the national government. Frequently their concern was more philosophical than practical, but it was voiced nonetheless. James Bryce, in his late nineteenth century work *The American Commonwealth*,²⁶ which is regarded by many as comparable to DeTocqueville's work *Democracy in America*, describes a triennial convention of the American Protestant Episcopal Church engaged in revising its liturgy—a phenomenon that is apparently an on-going process from century to century. In his words,

It was thought desirable to introduce among the short sentence prayers a prayer for the whole people; and an eminent New England divine proposed the words "O Lord, bless our nation." Accepted one afternoon on the spur of the moment, the sentence was brought up next day for reconsideration, when so many objections were raised by the laity to the word "nation," as importing too definite a recognition of national unity, that it was dropped, and instead there were adopted the words "O Lord, bless these United States."²⁷

Both the Granger Movement and the Populist Movement of the late nineteenth century and the progressive era, Woodrow Wilson's "New Freedom," and Franklin Roosevelt's "New Deal" in this century represent the notion that government can be harnessed as the servant of the majority to enable it to deal on equal terms with the rich and the powerful. Thus, despite periodic expressions of hostil-

25. Thoreau, *Journal* (Sept. 8, 1859), in GREAT TREASURY OF WESTERN THOUGHT (M. Adler & C. Van Duren eds. 1977).

26. J. BRYCE, *THE AMERICAN COMMONWEALTH* (3d ed. 1905).

27. *Id.* at 15.

ity toward concentration of governmental power, a trend toward centralization of authority in the national government has continued unabated to this day. As a result of the Interstate Commerce Act of 1887,²⁸ the Sherman Act of 1890,²⁹ and the various measures adopted during President Woodrow Wilson's "New Freedom,"³⁰ President Franklin Roosevelt's "New Deal,"³¹ and President Johnson's "Great Society,"³² what was in 1787 a reluctant centralization of limited authority in the national government in Washington has become quite transmuted. In the intervening period of nearly two centuries we have witnessed an ever-growing federal government in the nation's capitol, ever-growing governments in the nation's fifty states, and an increasing dependency and interrelationship of individuals and business enterprises with those governments.

28. Ch. 104, 24 Stat. 379 (codified at 49 U.S.C. §§ 1-23, 26-27, 301-327, 901-923, 1001-1022, 1231-1234 (1976)).

29. Sherman Anti-Trust Act of 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1976)).

30. Wilson's New Freedom was aimed at destroying monopolies and restoring free competition. It was embodied in the passage of the Clayton Act of 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (1976)), the enlargement of the size and authorities of the Interstate Commerce Commission, ch. 50, Pub. L. No. 65-38, 40 Stat. 270 (1917)(current version at 49 U.S.C. § 11 (1976)), and the passage of railroad securities bills in 1914. See A. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA 1910-1917*, at 66-70 (1954).

31. Measures passed and commissions created in Franklin Roosevelt's New Deal included the Banking Act of 1933, Pub. L. No. 73-66, ch. 89, 48 Stat. 162 (codified in scattered sections of chapters 3 and 6 of 12 U.S.C.), granting greater control to the Federal Reserve Board to insure bank reforms; the Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, ch. 30, 52 Stat. 31 (codified in scattered sections of 7, 16 U.S.C.), the Social Security Act, Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.); the National Industrial Recovery Act, Pub. L. No. 73-67, ch. 90, 48 Stat. 195 (1933) (no longer in force); the Civilian Conservation Corps Reforestation Act, Pub. L. No. 73-5, ch. 17, 48 Stat. 22 (1933); Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, ch. 32, 48 Stat. 58 (current version at 16 U.S.C. §§ 831-831dd); the Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (current version at 15 U.S.C. §§ 77a-78m). See D. PERKINS & G. VAN DEUSEN, *supra* note 15, at 518-42.

32. Following the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; scattered sections throughout chapters 20A and 21 of 42 U.S.C.), President Johnson embarked upon his Great Society reforms with the passage of the following federal programs: the Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified at 20 U.S.C. §§ 236-244 (1976)), authorizing 1.3 billion dollars in aid to public schools; the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified in scattered sections throughout chapter 28 of 28 U.S.C.), authorizing 650 million dollars in aid to colleges and universities; the Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified in scattered sections of 26, 42, 45 U.S.C.), an amendment to the Social Security Act establishing Medicare; the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified in scattered sections of 12, 15, 38, 42, 49 U.S.C.); and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976)). See A. LINK & S. COHEN, *supra* note 21, at 616-20.

The reason for these developments comes as no surprise. We all like the governmental carrot, but not the governmental stick. Despite our hostility towards authority, Americans are realists and recognize that a number of their public policy goals can only be accomplished through collective action. The best example of this, of course, is national defense, but also, when economic difficulties arise, Americans have grown accustomed to looking to the federal government first. The New Deal, like the framing of the Constitution itself, demonstrates that pragmatism often leads to centralization. Indeed, it was those that opposed the New Deal who invoked the American ideals of individualism, liberty, and autonomy. Moral indignation was directed *at* the New Dealers by their opponents, more often than vice versa.

Moreover, although governmental power has steadily grown more and more concentrated in Washington, D.C., belief in the ideals of individualism, liberty, and autonomy continues. In the late 1960s, for example, there was the New Left, and since the late 1970s there is the New Right. I suggest that their similarities are as marked as their differences. A strong ideological component of the New Left was an attack on the establishment, particularly the so-called "military industrial complex." The New Left also called for a return to nature, for smallness in government, and for individualism in the sense of "doing your own thing." The concerns of the New Right adherents are not dissimilar. They call for government to get off their backs so that individuals will have the freedom to make choices about their own lives. Further, like the populists and progressives, there is a moral and religious base to their attack on the evils of state power.

What I suggest is that most Americans are ambivalent about governmental authority and that this ambivalence is rooted in the gap between our political philosophy and our political institutions. We have invoked the familiar platitudes of individualism and liberty in the tradition of Locke and Jefferson, while at the same time increasing the authority of the national government—first at the time of the adoption of the Constitution, then after the Civil War, and more and more recently to accomplish various social and economic ends approved by Congress. I see little or no prospect that either our institutions or our announced political philosophy will change, and therefore the uneasy tension between our demands for less government and our desire for the benefits of certain government programs will continue.

I do think, however, that the gap cannot continue to grow

without producing ever-increasing stress between the individuals who compose the nation and those who govern it. The appetite for power, often for the most benevolently conceived purpose, is so strong in some of those who are in a position to regulate the lives of others that, although the authority of government may at some point be contained, I doubt that it will significantly contract. Yet those who govern—and I would include among these the executives, the legislators, and the judges—would do well to consider the bounds of effective law enforcement in a pluralist society such as ours. It is interesting to note that in a recent report on the state of the legal profession in England, a Royal Commission concluded that “[i]n a society where every relationship was controlled by law, we would not care to live.”

A troubling tendency exists in this country, however, to reduce all conduct to law. There is something noble and exalted, for example, about the lawyer who tells his opponent that he will take his client's case to the “highest court in the land” and something equally noble and exalted about the lawyer's opportunity to do so. But there is also something very professionally parochial about it. Unless lawyers are to be simply the “mouthpieces” for their clients, or unless they are to represent the interest of their clients, and incidentally their own pecuniary or philosophical interest, at whatever cost, the legal profession has a certain responsibility to make sure that its members act as good citizens as well as good advocates.

It is easy enough to conjure up John Adams' ringing defense of the British soldiers who killed an American,³³ or Andrew Hamilton's defense of Peter Zenger in his New York state trial for seditious libel.³⁴ When his client is haled into court against his will, the lawyer has strong professional obligations to fight for his client's cause. In a nation as geographically large and populous as ours, however, there is another side to the coin that is perhaps summarily, if not altogether accurately, expressed in the opening line of the familiar Protestant hymn “Blest Be The Tie That Binds.” The same thought is expressed in a more secular way, in a much different context by the admonition that the fictional Duke of Omnium gave to one of his sons in the nineteenth century novel *The Duke's*

33. 1 P. SMITH, JOHN ADAMS, 1735-1784, at 121-26 (1962).

34. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 65-100 (S. Katz ed. 1963); L. RUTHERFORD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL 69-125 (1941).

Children by Anthony Trollope:³⁵

Do you recognise no duty but that the laws impose upon you? Should you be disposed to eat and drink in bestial excess, because the laws would not hinder you? Should you lie and sleep all the day, the law would say nothing! Should you neglect every duty which your position imposes on you, the law could not interfere! To such a one as you the law can be no guide. You should so live as not to come near the law, — or to have the law to come near to you. From all evil against which the law bars you, you should be barred, at an infinite distance, by honour, by conscience, and nobility. Does the law require patriotism, philanthropy, self-abnegation, public service, purity of purpose, devotion to the needs of others who have been placed in the world below you? The law is a great thing,—because men are poor and weak and bad. And it is great, because where it exists in its strength no tyrant can be above it. But between you and me there should be no mention of law as the guide of conduct. Speak to me of honour, of duty, and of nobility; and tell me what they require of you.³⁶

While we do not and presumably would not wish to live in the nineteenth century English world of the nobility—at least if we were not ourselves of noble blood—the Duke's admonition to his son perhaps has some elements in common with complaints about the current state of our country. The Duke of Omnium was speaking of an England in which less than a quarter of the adult residents voted in elections to the House of Commons and in which the House of Lords was entirely hereditary, so it can be scarcely described as the epitome of a democratic society. He was also speaking of a country in which the reforms instituted by the Liberal government elected in 1906, part of which were in turn borrowed from Germany and part of which were later incorporated into President Franklin Roosevelt's New Deal, had yet to be enacted.

But, however different the context in which the Duke of Omnium spoke to his son from that in which we find ourselves more than a century later—with an entirely different governmental setting—his fictional remarks have not been denuded of the kernel of common sense that they represent.

Do we, as we enact more and more laws, albeit by the most democratic of processes, create a sort of "Gresham's Law"³⁷ of con-

35. A. TROLLOPE, *THE DUKE'S CHILDREN* (1912).

36. 1 *id.* at 72-73.

37. The maxim associated with Gresham's Law is that "had money drives out good money." For example, if the silver in coins is more valuable as metal the coins will be hoarded, and paper money will drive silver coins out of the money market. "Accurately stated, the Law is simply this: Cheap money will drive out dear money." I. FISHER, *THE PURCHASING POWER OF MONEY* 113 (1931) (emphasis deleted). See also C. WHITTLESEY, *PRINCIPLES AND PRACTICES OF MONEY AND BANKING* 187-88 (1948).

duct that says that if an individual's act is not forbidden by law, it should not be subject to criticism on other grounds? And when law becomes the only external authority that we recognize as capable of controlling our actions, do we not thereby lose an extraordinary amount of common ground between ourselves and our neighbors, either because we recognize that many laws simply cannot be enforced if defied by any large number of people or because we refuse the claims upon us of other pluralistic institutions within our culture—the church, the family, the neighborhood, and the like? It is probably Edmund Burke, who sided with the colonists during the Revolutionary War, whose thinking most epitomized the pluralistic nature and practical compromises necessary for actually governing a nation. Although Burke and Locke are both classified by many as “conservatives,” their conservatism is of quite a different nature. Locke stresses the rights of the individual as against the state. Burke stresses the necessity of considering the state as it exists and the caution that should be exercised in seeking to change it; his thinking is typified by the following passages from his *Reflections on the Revolution in France*:

The moment you abate anything from the full rights of men each to govern himself, and suffer any artificial, positive limitation upon those rights, from that moment the whole organization of government becomes a consideration of convenience. This it is which makes the constitution of a state, and the due distribution of its powers, a matter of the most delicate and complicated skill. . . .

The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*. Nor is it a short experience that can instruct us in that practical science. . . .

Society is, indeed, a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.³⁸

I was born and raised in a suburb of a midwestern city that, as I recall, during my childhood had an ordinance on its books prohibiting anyone appearing outdoors even upon his own property without being clad in at least shorts and an undershirt. No doubt

38. BURKE'S POLITICS 304, 318 (R. Hoffman & P. Levack eds. 1949).

today such an ordinance would be assailed on a variety of constitutional grounds, and I do not presume to tell you whether in my opinion such an attack would succeed or fail. The point I wish to make is that the suburb, while by no means totally homogeneous from a point of view of either income distribution, ethnic background, or the like, was generally satisfied with the ordinance. Those of us who during summer vacations had to mow lawns would, I know, like to have stripped down to our shorts, but we did not. We were told by our parents, or if not by them by our neighbors, that this just "wasn't done." There may have been vague references in these admonitions to an ordinance or law of some sort, but they were not the principal thrust of the admonition; its principal thrust was the attitude of the community. Those of us who were the "victims" of this ordinance's strictures in turn benefited from a feeling that we were doing, albeit reluctantly, the "right" thing.

We are dealing here not with colors of black and white, but with shades of gray. Those who speak of the country as being ungovernable, either because of its multitude of laws, its conflicting crosscurrents of interest, or any other reason, do not advocate despotism, or urge that the traditional English writ of habeas corpus be done away with, or that governmental authorities be allowed to knock on the door of a private home in the middle of the night and simply drag someone off as an "enemy of the people" without benefit of probable cause, warrant, or trial. But there is a substantial difference between such basic procedural protections of individual liberties and the ever-growing codes of state and federal laws that we have today.

Thus far, perhaps because of our ambivalence about the relationship between government and the individual, we have withstood the ebb and flow of two centuries of time with only one civil war. This does not mean, however, that our willingness to accept contrapuntal values and actions over the past two centuries will endure indefinitely. If we succumb too often to the temptation to *force* people by law to do what we would *like* to see them do voluntarily, we run the risk of another crisis in our society equivalent to that of the days of the New Deal or even of the Civil War. If we do not likewise contain the courts, in some way, from negating a law that, although unwise in the eyes of some, is nonetheless rendered unconstitutional only by a considerable stretch of judicial imagination, we risk a repetition of what one of my predecessors on the Supreme Court referred to as "Judicial Supremacy." In that case it

will be nonelected judges, rather than the elected representatives of the people, who have the final say about the extent to which policies enacted or administrated by representatives of the majority may infringe on the judicially declared liberties and rights of individuals.

So far, the genius of American institutions has been their ability to accommodate the demands of individuals for those freedoms that we hold dear with laws necessary to prohibit practices that the majority, through its representatives, thought wrong. But every new regulation of conduct and every new claim for some heretofore unrecognized individual right or liberty taxes the ability of these institutions to make the necessary accommodation between conflicting claims and demands. Surely we do not want to return to the Dark Ages, when in the absence of central government every traveler was at the mercy of roving bandits. Nor do we wish to endure another Civil War, when in the eyes of a significant part of the population secession was preferable to obedience to the commands of a federal government viewed as hostile to their interests. No one has been wise enough to devise a simple formula for avoiding these two extremes, and surely there must be a better reaction than the threat by disappointed voters, which I have heard after every presidential election since 1936, to move to either Canada or Australia. The tension between the ideal and the practical is constantly present; there are ideas whose times come and ideas whose times go. Perhaps I can best conclude this "cram course" in the ebb and flow of American political philosophy by suggesting that the best any of us can hope for in a country such as ours is an uneasy compromise between liberty and authority, and that such a compromise is surely preferable to despotism on the one hand or anarchy on the other.