

# THE REVITALIZATION OF DEMOCRACY IN THE NEW MILLENNIUM

STEVEN G. CALABRESI\*

We gather here today on a date that was originally of special importance to the Framers of our Federalist Constitution. Today, March 4th, is the day the Framers originally set aside for inaugurating new Presidents and for transferring executive power in our democracy. Thus, seventy-five years ago *today* the great Calvin Coolidge began the full four-year term of office to which he was elected by the American people in his own right in 1924; 135 years ago *today* one of our two greatest Presidents, Abraham Lincoln, delivered his powerful and famous Second Inaugural Address; and 175 years ago *today* Harvard graduate John Quincy Adams began the four year term as President to which he was elected by the House of Representatives after losing the popular vote!

The peaceful transfer of presidential power which has been the hallmark of many a March 4th is one of the great triumphs of American democracy. It is a triumph that dates back exactly 200 years to the election of 1800, when the first John Adams and his Federalists surrendered power to the Jeffersonians in obedience to the will of the voters. In the two centuries since, we Americans have fought a Civil War, two horrible World Wars, and then the Cold War to ensure that "government of the people, by the people, [and] for the people [would] not perish from the earth."<sup>1</sup> Indeed, the entire seventy-five year period between 1914 and 1989 could be described as a continuous global struggle to protect constitutional democracies from militants and totalitarians on both the right and the left.

---

\* George C. Dix Professor of Constitutional Law, Northwestern University. This essay is a revised version of remarks delivered at the Federalist Society Nineteenth Annual Student Symposium on "Law and the Political Process" at Harvard Law School, March 3-4, 2000. I would like to thank Gary Lawson and Eugene Meyer for their helpful suggestions and comments.

1. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 536 (Don E. Fehrenbacher ed., 1989).

Today, at the dawn of a new century, Americans have won the *military* struggle to establish democratic forms only to see new and more subtle threats arise to the institutions of self-government. Six threats, in particular, now endanger the all-too-recent global triumph of democratic forms.

First, world peace, democracy, and globalization itself have led to a major growth in power for international organizations like the European Union, NAFTA, the United Nations, and the World Trade Organization. Unfortunately, these powerful and very necessary international organizations all suffer from a democracy deficit, since no voters directly elect the powerful decision-makers who control them.<sup>2</sup>

Second, massive over-centralization in the United States and other democracies and expansion in the size of government during the seventy-five years of struggle between 1914 and 1989 have led to the growth of enormous unaccountable bureaucracies and administrative entities. Voters control these entities only very indirectly, and yet they make thousands of decisions that fundamentally affect our lives.

Third, in the United States and increasingly in Europe, more and more important decisions are being made by unelected, unaccountable judges who create new fundamental rights unrooted in text or history, or by judges, in this country, who adopt regulations of cigarettes and guns that the people's representatives have specifically chosen not to enact.

Fourth, office-holders in modern democracies have developed increasingly ingenious ways of entrenching themselves in office indefinitely, thanks to the high cost of media campaigning and overly restrictive campaign finance laws. The net effect has been legislative reelection rates approaching those of the U.S.S.R. under Leonid Brezhnev!

Fifth, in many parliamentary democracies, such as Austria, Japan, Israel, and, until recently, Italy, bad voting systems like proportional representation have given extremist fringe parties too much power over national political life and have prevented

---

2. See generally Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999). The lone exception among the organizations mentioned in the text is the EU, which does have a directly elected parliament. That parliament has few powers, however, and the EU bureaucracy and executive structures, which do have significant power, are not the product of direct election by European voters. See *id.* at 1580.

the peaceful and necessary alternation of power that a stable two party system can provide.<sup>3</sup> Voters are alienated as party elites pick colorless hacks to serve as Prime Ministers and voters are unable themselves to elect their own Chief Executive Officer.

In the United States, the amended Voting Rights Act,<sup>4</sup> together with new computerized redistricting techniques, is pushing us away from random geographic districts and toward an Austrian-European system of highly ideological districts for House races. The result has been that for two decades now, we have had a bitterly polarized House of Representatives. And, increasingly, our stable two-party system is breaking down even for presidential and gubernatorial elections.

Sixth, and lastly, in elite circles in the U.S. at least, the rise of public choice theory and of newly muscular elites in the universities, the press, and the bar have engendered a deep skepticism bordering on cynicism toward the very democratic institutions that we fought two World Wars and a Cold War to protect.

It thus seems timely that on the first March 4th of the new millennium, with the Super Tuesday primaries only three days away, we discuss how, and perhaps whether, our democracy is in need of revitalization. With us to discuss these issues is a phenomenally distinguished panel.

Our first speaker will be Professor Charles Fried, who is the Beneficial Professor of Law at Harvard Law School.<sup>5</sup> Professor Fried has served as Solicitor General of the United States under President Ronald Reagan and as an Associate Justice of the Massachusetts Supreme Judicial Court. He is the author of five significant books, and, most important of all, he is an alumnus of the very first Federalist Society Conference, held at Yale Law School in 1982, where he cautioned impetuous youth to

3. Israel recently responded to the evils of proportional representation by moving to direct popular election of the Prime Minister, a move which has changed Israel from a parliamentary to a presidential form of government. See AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 123-24 (1999). Italy has responded to the evils of proportional representation by reducing to only one quarter the fraction of parliamentary seats that are awarded by proportional representation. See Lisa Bannon, *Berlusconi Quits as Italy's Premier, Seeks Elections, Vows to Return*, WALL ST. J., Dec. 23, 1994, at A6.

4. 42 U.S.C. § 1971 (2000).

5. See Charles Fried, "Revitalizing Democracy": Some Caveats, 24 HARV. J.L. & PUB. POL'Y 155 (2000).

"Remember Santa Monica!"<sup>6</sup>

Our second speaker will be Professor William Eskridge, who is the John A. Garver Professor of Jurisprudence at Yale Law School. Professor Eskridge is the author of many books and casebooks and is one of the leading public choice theorists in American law schools today.

Next, we will hear from Professor Richard Epstein, who is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School.<sup>7</sup> Professor Epstein is the author of countless books and law review articles. He, too, has been involved in the Federalist Society from the very beginning, and he gave the very first outside lecture to the Yale Chapter in 1982, in which he called for the revival of *Lochner v. New York*.<sup>8</sup>

Our fourth speaker will be Professor Lino Graglia, who is the A. Dalton Cross Professor in Law at the University of Texas.<sup>9</sup> He, too, is an alumnus of our very first conference,<sup>10</sup> and he has frequently taken issue with Professor Epstein in our proceedings.

Fifth, we will hear from Professor Richard Parker, who is the Paul W. Williams Professor of Criminal Justice at Harvard Law School.<sup>11</sup> Professor Parker specializes in constitutional law and is an advocate of constitutional lawmaking by direct democracy.

And last but not least, we will hear from Professor Akhil Amar, who is the Southmayd Professor of Law at Yale Law School. He is the author of three books, most recently the spectacular *The Bill of Rights: Creation and Reconstruction*. Professor Amar has been involved in the Federalist Society since he was a law student, and he served as the official devil's advocate to the Yale Chapter during its formative years.

We will begin with Professor Fried.

---

6. Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 2 (1982).

7. See Richard A. Epstein, *The Necessity for Constrained Deliberation*, 24 HARV. J.L. & PUB. POL'Y 159 (2000).

8. 198 U.S. 45 (1905).

9. See Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165 (2000).

10. See Lino A. Graglia, *In Defense of "Federalism"*, 6 HARV. J.L. & PUB. POL'Y 23 (1982).

11. See Richard D. Parker, *Power to the Voters*, 24 HARV. J.L. & PUB. POL'Y 179 (2000).