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## Democracy's Paradox: Popular Rule as a Constitutional Limit on Foreign Policy Promoting Popular Rule

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# DEMOCRACY'S PARADOX: POPULAR RULE AS A CONSTITUTIONAL LIMIT ON FOREIGN POLICY PROMOTING POPULAR RULE

HARRY F. TEPKER\*

*So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.<sup>1</sup>*

With these words, the President of the United States embraced a view of America's purpose in the world that seems to reflect the same optimism articulated in Professor Noah Feldman's account of an "epochal event in the annals of the interaction between Islam and democracy."<sup>2</sup> Professor Feldman's argument is developed in two books advocating democracy as a policy for the reconstruction of Iraq.<sup>3</sup> The issues arising from the President's pronouncement follow not only the events of September 11, 2001 and the assault on Saddam Hussein's regime in Iraq, but also — in the world of ideas — an avalanche of literature predicting hope and expressing despair regarding the "clash of civilizations,"<sup>4</sup> an "end of history,"<sup>5</sup> the "future of freedom,"<sup>6</sup> and "the folly of

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1. President George W. Bush, Second Inaugural Address (Jan. 20, 2005), at <http://www.whitehouse.gov/inaugural/index.html#> [hereinafter Second Inaugural Address].

2. Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 7 (2005) [hereinafter Feldman, *Democratic Fatwa*].

3. See generally NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003) [hereinafter FELDMAN, *AFTER JIHAD*]; NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION-BUILDING* (2004) [hereinafter FELDMAN, *WHAT WE OWE IRAQ*].

4. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (arguing that the triumph of Western values is not inevitable and that the West should refrain from intervening in clashes between civilizations, in part because increasing threats of violence arise from differing cultures, religious faith, and dogma).

5. Compare FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (arguing that history is positive and directional and that all cultures will choose capitalism and liberal democracy), with NIALL FERGUSON, *COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE* 300 (2004) ("Contrary to the naïve triumphalism of the 'end of history,' these [outcomes of making the world safe for democracy and capitalism] are not naturally occurring,

empire.”<sup>7</sup> So much of this literature is political science, history, or grand futuristic speculation that it is beyond the ken of a professor of American constitutional law. Thus, this is the skeptical essay of a confused citizen, not an expert, bewildered by recent headlines and pronouncements that seem bold, even reckless and out of touch with humbler elements of American tradition, cautionary lessons of history, and our nation’s own constitutional politics.

Professor Feldman does not speak for current American policy, nor does he purport to.<sup>8</sup> Still, the meaning of his argument about Islam and democracy in Iraq cannot be severed from troubling questions about America’s newly forged commitment to “support the growth of democratic movements and institutions in every nation and culture.”<sup>9</sup> Professor Feldman seems to share the President’s faith in an active policy of promoting democracy in Islamic societies.

Of course, building Iraqi democracy was not the objective that the President initially articulated as a reason for attacking Saddam Hussein’s regime. As in most cases of American military action, the United States claimed that it went to war for its own security and that of its allies. The President explained that invasion was necessary because

[o]ur friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now, with our Army, Air Force, Navy, Coast Guard and Marines, so that we do not have to meet it later with armies of fire fighters and police and doctors on the streets of our cities.<sup>10</sup>

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but require strong institutional foundations of law and order.”).

6. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003) (drawing attention to the problem of illiberal democracy in the third world, including the Middle East).

7. *Compare* JOHN B. JUDIS, *THE FOLLY OF EMPIRE: WHAT GEORGE W. BUSH COULD LEARN FROM THEODORE ROOSEVELT AND WOODROW WILSON* (2004) (arguing that American leaders have forgotten lessons from interventions in Mexico, the Philippines, and Vietnam that unilateral American efforts to impose democracy result in futile, indecisive conflict, or worse, defeats), *with* FERGUSON, *supra* note 5, at 301 (“Unlike most European critics of the United States . . . I believe the world needs an effective liberal empire and that the United States is the best candidate for the job.”).

8. Robert Kagan, *Evil Rising with More*, N.Y. TIMES, Nov. 14, 2004, at 12 (reviewing FELDMAN, *WHAT WE OWE IRAQ*, *supra* note 3, and noting “there is no mistaking [Feldman’s] disappointment with some of the Bush administration’s failures in Iraq”).

9. Second Inaugural Address, *supra* note 1.

10. President George W. Bush, Address to the Nation (Mar. 19, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>.

The emphasis was on America's new understanding of its own vulnerability to terrorist attack and on allegations that Saddam was ready, willing, and able to supply terrorists with weapons of mass destruction.<sup>11</sup>

In the weeks between the reelection of President George W. Bush and his second inauguration, headlines seemed to validate the administration's critics. The administration stopped its futile search for weapons of mass destruction and surrendered to the apparent truth that its primary justification for attacking the regime of Saddam Hussein was false.<sup>12</sup> Worse, one apparent effect of American military efforts has been to transform Iraq into a "breeding ground" for terrorists, including allies of the murderers who attacked the World Trade Center in New York City and the capital city of the United States on September 11, 2001.<sup>13</sup> It seemed as if events were confirming the fears of dissenting elements within the executive branch that the Iraq venture was a step backward in the war against terror, not an effective strategic or tactical response to America's Islamic enemies.<sup>14</sup>

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11. BOB WOODWARD, *PLAN OF ATTACK* 92-93, 196-97, 189-90 (2004) (reporting that in President Bush's 2002 State of the Union message, "[t]he theme of promoting democracy, the rule of law, free speech, religious tolerance and women's rights in the Islamic world had been watered down in the final version of the speech," reporting that American intelligence agencies were uncertain whether to claim that Iraq "probably" had weapons of mass destruction, and reporting on the President's "unequivocal charge about [weapons of mass destruction] programs").

12. *U.S. Team Ends Iraq Arms Search*, N.Y. TIMES, Jan. 13, 2005, at 16 (reporting the American weapons inspector's "central conclusions that Iraq did not possess illicit weapons at the time of the American invasion"); see also Dafna Linzer, *Search for Banned Arms in Iraq Ended Last Month*, WASH. POST, Jan. 12, 2005, at A1 (reporting that the inspector's interim report would be the final report, and that it "contradicted nearly every prewar assertion about Iraq made by top Bush administration officials").

13. Dana Priest, *Iraq New Terror Breeding Ground: War Created Haven, CIA Advisers Report*, WASH. POST, Jan. 14, 2005, at A1. Professor Feldman acknowledges the fear that "weak or failing states are breeding grounds for nonstate violence." FELDMAN, *WHAT WE OWE IRAQ*, *supra* note 3, at 11. Also, "[t]he invasion and its aftermath . . . inaugurated a rich, new potential breeding environment for terror." *Id.* at 13. But support for autocratic "strong" states is not an answer. Instead, Professor Feldman defends

a strategy of nation building aimed at creating democratically legitimate states that would treat their citizens with dignity and respect, and in which political change could be brought about via party politics, not extralegal violence. States like these would be less likely to give rise to broadly supported terrorist movements that might end up harming us.

*Id.* at 17.

14. See, e.g., RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* (2004) (arguing that the Bush administration's unilateral policy, including the Iraqi War, will undermine American antiterrorism efforts and lead to more attacks on Americans and American interests around the world); MICHAEL SCHEUER ("ANONYMOUS"), *IMPERIAL*

Still, the President had won reelection, however narrowly, and days before his inauguration, he argued that “we had an accountability moment, and that’s called the 2004 elections.”<sup>15</sup> So, there was no reason, he said, to hold administration officials accountable for errors in planning for the war’s aftermath.<sup>16</sup> The President promised to renew his efforts to spread democracy around the globe.<sup>17</sup> It seemed that despite bad news and ongoing criticism, the transformation of American effort from a security mission to a crusade (with all that word connotes) for democracy was complete, permanent and, in the President’s view, not to be questioned further.

The bad news of December and January (as well as conflicting assessments and developments of the winter and spring) hopefully reflect temporary setbacks and problems. In the last days before the President’s inauguration, the administration was “lowering expectations” about the scheduled Iraqi constitutional assembly elections,<sup>18</sup> and many commentators worried that much of the country was not secure to permit safe voting.<sup>19</sup> Yet turnout was far better than expected, and terrorist attacks were less effective than feared.<sup>20</sup> At a minimum, the Iraqi people convincingly demonstrated that they desired the right to govern themselves. Recent events in Iraq neither prove nor disprove Professor Feldman’s thesis that Islam and democracy are compatible.<sup>21</sup> Even for those who agree America owes Iraq a chance to develop a viable democracy after removing Saddam by force,<sup>22</sup> it is difficult to “predict with confidence” that the Ayatollah and America will get their way in developing an enduring, reliable democratic practice in Iraq.

Apart from news reports, there are two sources for worry that America’s venture in Iraq may not result in a stable, responsible democracy. First, though one “accountability moment” may have passed, there are reasons — primarily

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HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR (2004) (arguing that practical policy differences between the Islamic world and the United States account for friction and hostilities).

15. Jim VandeHei & Michael A. Fletcher, *Bush Says Election Ratified Iraq Policy*, WASH. POST, Jan. 16, 2005, at A1.

16. *Id.*

17. *Id.*

18. Robin Wright & Jim VandeHei, *U.S. Lowers Expectations on Iraq Vote*, WASH. POST, Jan. 13, 2005, at A1.

19. Jackie Spinner, *Allawi Says Violence May Impede Voters*, WASH. POST, Jan. 12, 2005, at A16; see also Christine Hauser, *Under Fire, Election Workers in Iraq Are Scared but Resolute*, N.Y. TIMES, Jan. 13, 2005, at A1.

20. Anthony Shadid, *Iraqis Defy Threats as Millions Vote*, WASH. POST, Jan. 31, 2005, at A1.

21. See generally FELDMAN, *AFTER JIHAD*, *supra* note 3.

22. See generally FELDMAN, *WHAT WE OWE IRAQ*, *supra* note 3.

systemic and constitutional — to doubt and question the durability and reliability of America's commitment to Middle Eastern democratic nation-building. Second, the continuing use of the word "democracy" along with claims about its simplicity, universality, mobility, and flexibility<sup>23</sup> overlook the complexity, peculiarity, and uncertain exportability of the American republican experience.

## I

Despite promises from many American politicians who became presidents, this nation has frequently engaged in war. Military action abroad, however, usually has triggered deeply rooted doubts among the people about foreign involvement. The roots of American reluctance to undertake international roles trace back to George Washington:

The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little *political* connection as possible . . . . Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course . . . . Why forego the advantages of so peculiar a situation?<sup>24</sup>

President Washington focused on relations with "old Europe," and his words reflected a confidence in the security of America far out of reach of potential enemies. Pearl Harbor and September 11, as well as several generations of American life under the shadow of potential nuclear attack, have undermined the continuing relevance of Washington's views. But our constitutional structure reflects the early expectations and hopes of an America confident about "so peculiar a situation."<sup>25</sup> Washington's attitude and words resembled a "unilateralism" and nationalistic "isolationism" that has, more often than not, characterized American foreign policy.<sup>26</sup> When Japan attacked Pearl Harbor,

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23. See generally FELDMAN, *AFTER JIHAD*, *supra* note 3; see also *id.* at 31-37.

24. President George Washington, *Farewell Address*, in DOCUMENTS OF AMERICAN HISTORY 174 (Henry Steele Commager ed., 1968).

25. See *id.*

26. Compare JOHN LEWIS GADDIS, *SURPRISE, SECURITY AND THE AMERICAN EXPERIENCE* (2004) (arguing that Bush administration policy after the September 11 attacks is consistent with a nineteenth-century foreign policy of "preemption, unilateralism, and hegemony")

more Americans than ever before were shocked into rethinking their relationship with the world. The disaster “settled” a debate between interventionists, led by a visionary Franklin D. Roosevelt who saw America and the world as interdependent, versus isolationists who thought America was secure between the Atlantic and Pacific Oceans.<sup>27</sup> However, if Pearl Harbor “vindicat[ed] internationalism, it did not vanquish isolationism.”<sup>28</sup> Blunders such as Vietnam restored some of the traditional American feeling for remaining unentangled, or at least pretending to. Interventions abroad once again became politically risky, particularly if lives of American soldiers were at risk.

“America first” thinking is reinforced by our constitutional structure, by the doctrine of the separation of powers, and by our democratic character. The framers chose to divide responsibility for war between the president and Congress. The original draft of the document had assigned to Congress the power to make war, but even when the Convention amended the language to give Congress power to “declare” war, and spoke of the need to allow a president to respond to military attack, they “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>29</sup>

Divided presidential-congressional authority for military action reflects the twin Madisonian ideas of a separation of powers and a system of checks and balances.<sup>30</sup> The strategy was to limit the president — the chief executive and the commander-in-chief — whose power might threaten autocracy. On this point, the framers were explicit. As Alexander Hamilton promised, writing in the guise of “Publius,” the president’s role “would amount to nothing more than the supreme command and direction of the military and naval forces . . . while that of the British king extends to the *declaring* of war . . . which, by the Constitution under consideration would appertain to the legislature.”<sup>31</sup>

Realities have intruded on the confidence of the framers that no one man could initiate a war. The Constitution was written to provide a national

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expanded from the Western Hemisphere to the entire globe), with ARTHUR M. SCHLESINGER, JR., *WAR AND THE AMERICAN PRESIDENCY* 3, 21 (2004) (arguing that “unilateralism” is “the oldest doctrine in American foreign policy,” but the Bush transformations “repudiated the strategy that won the Cold War — the combination of containment and deterrence”).

27. SCHLESINGER, *supra* note 26, at 10.

28. *Id.*

29. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787* 418-19 (1987); see, e.g., Charles A. Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 701 (1972) (arguing that the framers and ratifiers intended the president would possess latitude for defense against imminent invasion, while the Congress would share a coordinate and perhaps dominant responsibility for “initiating all but the most obviously defensive wars, whether declared or not”).

30. Lofgren, *supra* note 29, at 701.

31. *THE FEDERALIST* No. 69 (Alexander Hamilton).

government with competent powers for the execution of sovereign functions. And the vulnerability of American territory to foreign attack with little time to prepare is the overriding security concern of the modern age. Defenders of a separate and independent presidential duty can trace their argument to understandings and hopes that the American president would not be “feeble.” They explained their choice for a single executive as a desire for “energy,” “unity,” “competent powers,” a “due dependence on the people,” “a due responsibility,” as well as virtues more frequently associated with national security functions — “[d]ecision, activity, secrecy and dispatch.”<sup>32</sup> Presidents have consolidated their authority over foreign policy with claims to superior expertise, greater competence, and better information. Of these ideas, a critical factor is democracy and popular accountability. War requires a broad institutional and popular consensus. In *The Federalist*, Alexander Hamilton defends the unity of the executive not only on grounds of efficient government, but also as a means of fostering political accountability: when the president speaks and acts, there can be no doubt as to responsibility for the course of policy, and no obstacle to the imposition of censure or punishment for failures.<sup>33</sup>

But democracy and accountability also create problems. If consensus is required for action, efficiency may be sacrificed to the slow process of public education. Also, if the consensus is fragile, perhaps because the president has not spoken clearly or accurately, the American president may find a deterioration in political support. Compare two observations years apart. First, in 1835, Alexis de Tocqueville said:

I do not hesitate to say that it is especially in the conduct of their foreign relations that democracies appear to me decidedly inferior to other governments. Experience, instruction, and habit almost always succeed in creating in a democracy a homely species of practical wisdom and that science of the petty occurrences of life which is called good sense. Good sense may suffice to direct the ordinary course of society; and among a people whose education is completed, the advantages of democratic liberty in the internal affairs of the country may more than compensate for the evils inherent in a democratic government. But it is not always so in the relations with foreign nations.

Foreign politics demand scarcely any of those qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient. Democracy is favorable to the increase of the internal resources of a state; it

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32. THE FEDERALIST No. 70 (Alexander Hamilton).

33. *Id.*

diffuses wealth and comfort, promotes public spirit, and fortifies the respect for law . . . . But a democracy can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience.<sup>34</sup>

As is often true, the prophetic insights of Tocqueville speak clearly to the dilemmas of the present. In the early years of the twenty-first century, another foreign observer, British historian Niall Ferguson, reached similar conclusions: “[America’s] attention deficit . . . seems to be inherent in the American political system and . . . already threatens to call a premature halt to reconstruction in both Iraq and Afghanistan. . . . The problem is systemic; it is the way the political process militates against farsighted leadership.”<sup>35</sup>

In this context, a separation of powers and a democratic dependence on the people for the power to govern often lead to compromise, indecision, and faltering leadership. The people must be led: they must be taught to support what needs to be done. Perhaps it is too early to conclude that the Iraq experience is a bad moment for those who believe that presidents of the United States can lead a “liberal empire” to develop a wise, enduring foreign policy in defense of democratic values. But we have many examples from history to justify skepticism. The role of constitutional structure, however, can be overestimated; perhaps the reasons are tied closer to the nature of human beings and the tendency of democracies to seek to make the people content. Walter Lippmann argued so:

Now the momentous equations of war and peace, of solvency, of security and of order, always have a harder or a softer, a pleasanter

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34. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 234-35 (Phillips Bradley trans. 1994) (1831).

35. FERGUSON, *supra* note 5, at 293. In Ferguson’s view, the problem is not just that America is democratic; the problem is that America disclaims its status as an empire, though a different kind of empire, a “liberal empire,” with ongoing responsibilities to defend capitalism and democracy. *Id.* at 293-95. Ferguson stated:

The trouble with an empire in denial is that it tends to make two mistakes when it chooses to intervene in the affairs of lesser states. The first may be to allocate insufficient resources to the nonmilitary aspects of the project. The second, and the more serious, is to attempt economic and political transformation in an unrealistically short time frame . . . . By insisting — and apparently intending — that they will remain in Iraq only until a democratic government can be established and “not a day longer,” American spokespeople have unintentionally created a further disincentive for local people to cooperate with them.

*Id.*

or a more painful, a popular or an unpopular option. It is easier to obtain votes for appropriations than it is for taxes, to facilitate consumption than to stimulate production, to protect a market than to open it, to inflate than to deflate, to borrow than to save, to demand than to compromise, to be intransigent than to negotiate, to threaten war than to prepare for it.

Faced with these choices between the hard and the soft, the normal propensity of democratic governments is to please the largest number of voters. The pressure of the electorate is normally for the soft side of the equations. That is why governments are unable to cope with reality when elected assemblies and mass opinions become decisive in the state, when there are no statesmen to resist the inclination of the voters and there are only politicians to excite and to exploit them.

There is then a general tendency to be drawn downward, as by the force of gravity, towards insolvency, towards the insecurity of factionalism, towards the erosion of liberty, and towards hyperbolic wars.<sup>36</sup>

One pattern from American history underscores Lippmann's assessment. How can any president promise that the United States will have the will, the determination, and the endurance to make sure that peoples "in every nation and culture" will someday enjoy the right to vote, speak, and worship according to their own conscience, if we have shown utterly no capacity to make sure that they will enjoy the right to live? America has done little to stop genocide. Indeed, "[i]t is in the realm of domestic politics that the battle to stop genocide is lost."<sup>37</sup> Worse,

[i]t is daunting to acknowledge, but this country's consistent policy of nonintervention in the face of genocide offers sad testimony not to a broken American political system but to one that is ruthlessly effective. The system, as it stands now, *is working*. No U.S. president has ever made genocide prevention a priority, and no U.S. president has ever suffered politically for his indifference to its occurrence.<sup>38</sup>

Like a fight for world democracy, a fight against genocide requires constancy, but America has shown little or no capacity to continue to fight a painful,

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36. WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 45-46 (1955).

37. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* xviii (2002).

38. *Id.* at xxi (internal citation omitted).

difficult “twilight struggle”<sup>39</sup> when its own interests were not at risk.<sup>40</sup> When the issue was genocide,

American leaders did not act because they did not want to. They believed that genocide was wrong, but they were not prepared to invest the military, financial, diplomatic, or domestic political capital needed to stop it. The U.S. policies . . . were not the accidental products of neglect. They were concrete choices made by this country’s most influential decisionmakers after unspoken *and* explicit weighing of costs and benefits.<sup>41</sup>

Put another way, America will choose to be a “liberal empire” only when presidents convince voters that their security interests justify it. What are the chances that past patterns of isolationist thought and domestic preoccupation will be broken? Bold rhetoric will not be enough. National will cannot be based on uncertain explanations of motive or confusing claims about security

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39. President Bush is not the first chief executive to offer sweeping and beautiful language designed to inspire, but less certain as a basis for policy. John F. Kennedy spoke of a “long twilight struggle, year in and year out, ‘rejoicing in hope, patient in tribulation’ — a struggle against the common enemies of man: tyranny, poverty, disease, and war itself.” John F. Kennedy, Inaugural Address (Jan. 20, 1961). He also said: “Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty.” *Id.* Whatever message Kennedy intended, his words never sounded the same after Vietnam.

40. A single scholar’s interpretation of a single moment in history hardly proves a historical pattern, but a biographer of Theodore Roosevelt draws a lesson similar to Tocqueville’s assessment. H.W. Brands described President Roosevelt’s “change of heart” regarding America’s mission to bring democracy to the Philippines after the Spanish-American War of 1898:

Roosevelt recognized that he had misjudged the Filipinos, but, more to the point, he recognized that he had misjudged the American people. He had thought Americans would become as enamored of their country’s civilizing mission as he was; only when he realized that they hadn’t, and wouldn’t, did he throw in the towel on American imperialism. And this is the crucial lesson of history for the present. George W. Bush can be as resolute as he wants regarding Iraq, vowing to finish the job the United States started there. But the fundamental constraint on policy is, and always has been, the resolve of the American people. Americans followed the lead of the imperialists in 1898 only to turn back when they discovered that empire was more expensive and less rewarding than the imperialists had told them it would be. Iraq isn’t the Philippines, but the American people are the American people, and there is little reason to think they’ll bear the cost of empire more patiently now than they did then. The clock is ticking for Bush; his “heel of Achilles” moment awaits.

H.W. Brands, *Don’t Know Much About History*, WASH. POST, Aug. 8, 2004, at T5 (reviewing JUDIS, *supra* note 7).

41. POWER, *supra* note 37, at 508.

threats, ambiguous talk of guilt for terrorist attacks, or a blunt, dramatic new “national security strategy” of “preemptive” or “preventive” war. Neither the debate before the Iraqi war nor the debate during the 2004 presidential election focused on the profound implications of a new commitment to world democracy. Democracy has yet to forge a reliable foundation for a new foreign policy to make the world over for democracy.

In an essay on the significance and lessons of World War II, George F. Kennan challenged the “deeper failure of understanding, a failure to appreciate the limitations of war in general — any war — as a vehicle for the achievement of the objectives of the democratic state.”<sup>42</sup> In terms that seem tragically absent from current debate about war, Kennan argued: “It is essential to recognize that the maiming and killing of men and the destruction of human shelters and other installations, however necessary it may be for other reasons, cannot in itself make a positive contribution to any democratic purpose.”<sup>43</sup> Kennan, of course, was no pacifist and he recognized that violence might be necessary before progress can be made.

But, basically, the democratic purpose does not prosper when a man dies or a building collapses or an enemy force retreats. It may be hard for it to prosper *unless* these things happen . . . . But the actual prospering occurs only when something happens in a man’s mind that increases his enlightenment and the consciousness of his real relation to other people — something that makes him aware that, whenever the dignity of another man is offended, his own dignity, as a man among men, is thereby reduced. And this is why the destructive process of war must always be accompanied by, or made subsidiary to, a different sort of undertaking aimed at widening the horizons and changing the motives of men and should never thought of in itself as a proper vehicle for hopes and enthusiasms and dreams of world improvement.<sup>44</sup>

Kennan’s analysis illuminates why, in Iraq, our nation faces resistance. Our forces confront a nationalist insurgency that may ultimately choose a democratic tradition on its own, but is entirely unwilling to see it imposed by foreigners and infidels. “Whether justified by promises of liberation or not, coercion and conquest foster fear, resentment, and a desire for revenge much more reliably than they promote understanding and respect in the conquered for the values of the conqueror.”<sup>45</sup>

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42. GEORGE F. KENNAN, *AMERICAN DIPLOMACY: 1900-1950* 88 (1951).

43. *Id.* at 89.

44. *Id.*

45. FRED ANDERSON & ANDREW CLAYTON: *THE DOMINION OF WAR: EMPIRE AND LIBERTY*

## II

In his second inaugural address, President Bush sounded a trumpet of idealistic determination that resembles Professor Feldman's hopeful assessment about the future of democracy in Iraq and the rest of the Islamic world. Without focus on any particular part of the world, Bush proclaimed: "Democratic reformers facing repression, prison, or exile can know: America sees you for who you are: the future leaders of your free country."<sup>46</sup> One can only imagine what a Nelson Mandela or a student protester from the 1989 Tianamen Square clash between Red China's military and "reformers" must have thought upon hearing reports of the President's words, or the quick efforts of administration officials to explain that his soaring rhetoric "represents no significant shift in U.S. foreign policy."<sup>47</sup> Perhaps not, but the rhetoric sounds like the President clings to a "conviction . . . that the unique position of the United States as the planet's supreme military, economic, and cultural power creates an unprecedented opportunity for America to impose its values on other countries and thereby save them from themselves."<sup>48</sup>

A reality check requires awareness of the complexity of the values we cherish. The finest words of America's constitutional tradition — democracy, freedom, justice, and so many others — stir emotion, but they are not the simple, elegant concepts that Professor Feldman champions as universal, "mobile ideas."<sup>49</sup> True, they speak to the ideals of many throughout the world and reflect noble aspirations. And true, "scholarly complications need not cloud the basic message of a mobile idea, which will maintain its simplicity despite the best efforts of scholars to multiply complications."<sup>50</sup> At risk of my showing an academic's tendency to see intricacy instead of simplicity, "clouds" on message are not the point. The true challenge facing America and all advocates of democracy in "every nation or culture" is in the details of implementation. Our celebrations of democracy as the certain end of human progress are speculative estimates and an uncertain focus for a pragmatic diplomacy. "A majority of the world's inhabitants may be living under democracy, but

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IN NORTH AMERICA 1500-2000 424 (2005).

46. Second Inaugural Address, *supra* note 1.

47. Dan Balz & Jim VandeHei, *Bush Speech Not a Sign of Policy Shift, Officials Say*, WASH. POST, Jan. 22, 2005, at A1. Indeed, administration officials specified:

Nor . . . will [the address] lead to any quick shift in strategy for dealing with countries such as Russia, China, Egypt and Pakistan, allies in the fight against terrorism whose records on human rights and democracy fall well short of the values Bush said would become the basis of relations with all countries.

*Id.*

48. SCHLESINGER, *supra* note 26, at 25.

49. FELDMAN, *AFTER JIHAD*, *supra* note 3, at 31-33, 75-78.

50. *Id.* at 33.

democratic hegemony is a mere flash in the long, sad annals of recorded history.”<sup>51</sup>

America’s republican experiment is not simple or elegant or even “pure democratic theory.”<sup>52</sup> And in the short run — which may be all an America with attention deficit may have — the American elements are not easily or even feasibly exportable, particularly by means of bombs, bullets, and bayonets. Complexities are apparent even if one simply focuses on the American tradition — without regard to the factionalism<sup>53</sup> and zeal of elements of Iraqi culture.

If one tries to “sum up the basic version of [a mobile] idea in a sentence or two that almost everyone can understand,”<sup>54</sup> one has not taken a serious step toward implementation of that idea. Professor Feldman argues: “Democracy . . . may be summed up in brief. Although emphases vary, nearly everyone would agree that democracy involves . . . choosing leaders and making political decisions on the basis of competition for the people’s votes.”<sup>55</sup> This statement may have the virtue of “simple elegance,” but it falls far short of an adequate description of a governing idea in America. Even a brief statement of the American republican tradition hints at complexities and controversies. To begin, “democracy” is not the same as “voting” or “elections.” It involves not only popular accountability, but also a genuine sharing of power to direct the course of a community.

How does a popular election and majority rule account for minority rights? Jefferson’s famous definition of this “sacred principle” was that “though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.”<sup>56</sup> America’s commitment to democracy is a belief that the system of government is the best means to promote “unalienable rights.” Even after seeing a potential compatibility between Islamic traditions and democratic traditions, it is difficult to “predict with confidence” a triumph of *liberal* democracy *in a reasonably near future*. It is difficult to detect examples of any Islamic society embracing a theory of individual rights with any passing resemblance to the concepts of equality of rights in the Declaration of Independence,<sup>57</sup> though they have had much more

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51. SCHLESINGER, *supra* note 26, at 108.

52. Feldman, *Democratic Fatwa*, *supra* note 2, at 6.

53. Erik Eckholm, *Factional Unrest Is Dividing the Shiites of Southern Iraq*, N.Y. TIMES, Jan. 15, 2005, at A6.

54. FELDMAN, *AFTER JIHAD*, *supra* note 3, at 33.

55. *Id.*

56. President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).

57. Compare ZAKARIA, *supra* note 6, at 120 (“The Arab rulers of the Middle East are autocratic, corrupt, and heavy-handed. But they are still more liberal, tolerant and pluralistic than what would likely replace them.”), with FELDMAN, *WHAT WE OWE IRAQ*, *supra* note 3,

time to evolve toward an “end of history.”

How does majority rule, even qualified with equal minority rights, account for stability, order, and “a more perfect union”? James Madison’s careful, clear-headed, practical thinking is hard to summarize in a brief idea, but a separation of powers between executive, legislative, and judicial branches along with federalism, divided sovereignty, and other checks and balances seems essential to explaining the republican ideal in America’s past and present.<sup>58</sup> “Pure democratic theory” does not.

The issue of religion is an example of the paradox: democracy depends on constitutional limits on majority will. When Madison reflected on the dangers of factionalism to America’s republican experiment, he worried about the effects of religious passion and zeal:

The latent causes of faction are . . . sown in the nature of man. . . . A zeal for different opinions concerning religion . . . and many other points . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.<sup>59</sup>

Americans debate the substance of his thinking, and even conservative originalists have begun to distance themselves from Madisonian solutions to the issues of religious freedom.<sup>60</sup> Still, it is essential to recall several accepted elements of Madison’s careful thinking.

First, “religion [and government] will both exist in greater purity, the less they are mixed together.”<sup>61</sup> Second, government has a duty to respect the privacy and sanctity of the individual relationship between a human being and

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at 106-07 (noting Zakaria’s “classic, Madisonian concern about the tyrannical majority’s denying liberal rights and oppressing minorities” and stating that “[w]ithout guarantees of basic rights, a society will have no claim to be just, and it is also likely to be ill run. Illiberal democracy . . . should not be a desired end-state of nation building.”); *see also* SCHLESINGER, *supra* note 26, at 109.

58. THE FEDERALIST No. 51 (James Madison).

59. THE FEDERALIST No. 10 (James Madison).

60. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 2333 (2004) (Thomas, J., concurring) (suggesting while “more extreme notions of the separation of church and state [might] be attribut[able] to Madison, many of them clearly stem from arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society” (quoting ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 22 (1982))).

61. Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON, WRITINGS 786, 789 (1999) [hereinafter WRITINGS]; *see also* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* WRITINGS, *supra*, at 29, 32.

his God. As a believer, Madison wrote that a person's duty to God is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."<sup>62</sup> And so, he reasoned, "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only as he believes to be acceptable to him."<sup>63</sup> Third, the benefits of an intellectual and spiritual autonomy to be enjoyed by the individual were also to be enjoyed by nonbelievers.<sup>64</sup> If America was to enjoy the undeniable and inestimable benefits of religion and its teachings for individual virtue and morality, as well as justice, religion was to remain private — not secret — exerting its influence through the community by persuasion and by example. America has difficulty enough maintaining these principles against the passions of majorities and the plotting of vote-seeking politicians.<sup>65</sup>

Professor Feldman argues — with far more authority, experience, and learning than I — that similar fusions of democracy and liberty are possible in Islamic society because of Islamic law.<sup>66</sup> Yet others see a more ominous outlook. "The Arab world today is trapped between autocratic states and illiberal societies, neither of them fertile ground for liberal democracy. The dangerous dynamic between these two forces has produced a political climate filled with religious extremism and violence."<sup>67</sup> The point is not that America ought to run and hide from these challenges. Rather, an assumption about potential and theoretical compatibility is not a wise basis for a foreign policy plan, which ought to avoid risk and gambles.

Of course, Professor Feldman understands this and much, much more, as his lecture, article, and two books demonstrate. In many respects, the elements of skepticism expressed in this essay are suggested and even endorsed elsewhere in Professor Feldman's writing. But the optimistic elements of his assessment of the "democratic fatwa" do not emphasize these complexities which, in my view, go to the heart of successful constitution-drafting and nation-building. As Professor Feldman states, America's solutions to the problems of democracy, equality, liberty, and stability are not the only solutions or even the best solutions for the Islamic world. So my confusion focuses on the thinking and the mysteries of recent presidential remarks, with special worry about the

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62. *Id.* at 30.

63. *Id.*

64. *Id.* at 31 (arguing for an "equal freedom to those whose minds have not yet yielded to the evidence which has convinced us").

65. *Id.* at 418, 420-21.

66. FELDMAN, *AFTER JIHAD*, *supra* note 3, at 12-13.

67. ZAKARIA, *supra* note 6, at 121.

refrains of democracy and freedom as an explanation of a rational, realistic, trustworthy foreign policy.

If democracy is a natural right of human beings, it is not America's gift. It is something that Iraq must choose, embrace, and adapt for itself.<sup>68</sup> And so, this confused citizen is torn between two thoughts. First, even if we have blundered in Iraq, we have no choice except to keep our promises and obligations, and that requires an enormous price in human life, national treasure, and patience. "Having thrust Iraqis into this situation, we have an obligation to enable them to climb out of it."<sup>69</sup> But second, our nation cannot rely on the doubtful notion that democracy is a simple and elegant idea. Democracy is complicated and messy. The ideal provides uncertain focus and guidance for the pragmatic and realistic policies that must always characterize American foreign policy.

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68. FELDMAN, WHAT WE OWE IRAQ, *supra* note 3, at 131 ("Ultimately . . . because the nation builder is not a parent, and the nation that has been built not a child, the bond of ethical obligation does break when full sovereignty has been achieved. . . . What we ultimately owe Iraq is to let the Iraqis grasp nationhood and sovereignty for themselves — and to keep it, if they can.").

69. *Id.* at 129.