Philosophy & Public Policy Quarterly

The Institute for Philosophy and Public Policy
School of Public Policy • University of Maryland

Rethinking the American Constitution

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Introduction

It is legitimate to ask whether the federal government works any more.

In my own field of research, the management of federally owned lands, by the early 1990s expert groups were warning of dangerous buildups of wood accumulating on western national forests managed by the US Forest Service. In 1998, the General Accounting Office cautioned that, without corrective action, "catastrophic wildfires" were almost certain. Only after the West in 2000 experienced one of its worst outbreaks of forest fire in decades, however, did federal officials finally act, and with limited effectiveness.

The national security arena exhibits even larger failures in the federal government—evidenced by such events as September 11, 2001 and the decision to go to war in Iraq based on poor intelligence—leading the *Washington Post* to assert that "the US intelligence agencies failed catastrophically not once but twice in this decade." And while the Bush administration brought in a new director for the CIA and created a national intelligence director, these actions have not significantly improved US intelligence capacity—on which more than $30 billion is spent annually. The newly-created (in 2003) Department of Homeland Security offers another example of government failure: its ineffective response to Hurricane Katrina led to doubts about the Department's efficacy in dealing with the much more complex task for which it was constituted—combating terrorism and the potential consequences of an attack.

Hurricane Katrina also brought to wider public attention the dismal administrative record of yet another federal agency, the US Army Corps of Engineers, responsible for levee failures in New Orleans. As one expert report found, the levees "were built in a disjointed fashion using outdated data;" yet another report described the entire Army Corps organization as "dysfunctional and unreliable." The chief of the Army Corps, Lt. Gen. Carl Strock, acknowledged "catastrophic failure" of his agency.

One might think that these many failures of government are instances of simple bad luck—or perhaps the failings of the Bush administration. While those might have been contributing factors, and while agencies such as the Forest Service, FBI, CIA, Army Corps of Engineers, and Department of Homeland Security receive much public visibility when administrative failures have catastrophic consequences, many other federal agencies routinely fail in smaller, more conventional ways, thereby never coming under intense public scrutiny.

Destroying the Army Corps

How have things come to this state of affairs? In 2000, the problems of the Army Corps of Engineers were documented in a comprehensive exposé published in the *Washington Post* by reporter Michael Grunwald. His analysis was readily available to all of official Washington; at the time, as additional installments appeared, congressional leaders demanded reform of the Army Corps. Yet, little happened and the same dysfunctional Army Corps was allowed to fail in its core

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responsibilities, leading Grunwald to conclude post-Katrina that in New Orleans "a useless Corps shipping canal intensified Katrina's surge, . . . poorly designed Corps floodwalls collapsed just a few feet from an unnecessary $750 million Corps navigation project. . . ." Yet, rather than penalize the agency for its misdeeds, Congress in 2006 was still determined to advance a "new multibillion-dollar potpourri of Corps projects."

In his earlier 2000 series in the *Post*, Grunwald had also explored the wider institutional factors in Washington and the federal system responsible for such unfortunate results for the nation. The leading culprit, as he found, was the US Congress. When Grunwald had investigated the role of the Army Corps of Engineers in Mississippi, he found that the

Army Corps did "generally, whatever Senate Majority Leader Trent Lott and Senate Agriculture Committee Chairman Thad Cochran want it to do." This was no exception. In theory, the Army Corps subjected its projects to rigorous technical analysis but, as Sen. George Voinovich (R-Ohio), chairman of a subcommittee overseeing the Army Corps, confessed, "We don't care what the Corps cost-benefit is" because "we're going to build it anyhow because Congress says it's going to be built. Somebody's in charge of some appropriations committee, or another committee, and jams it through."

Although various Presidents, including Jimmy Carter, Ronald Reagan, and Bill Clinton, attempted to rein in the Army Corps, none has succeeded. As Grunwald learned, the agency was filled with qualified professionals who at the same time understood that their own survival depended on pleasing Congress, whose motive in turn was to send money and projects to favored parties at home. Since it is federal money being spent—considered "free" to constituents—Congress typically pressed for as much as it could get.

Political scientists for decades had been writing about "the iron triangle" of Washington politics. Grunwald's portrayal, however, exhaustively detailed the failures of the Army Corps, which were now fully revealed to the general public. Nonetheless, business as usual continued.

Systemic Failure

Some skeptics might suggest that the Army Corps is merely Washington at its worst, and that its dismal record and full congressional complicity are exceptions. In 2003, however, the National Commission on the Public Service, chaired by former Federal Reserve Board chair, Paul Volcker, offered this harsh and sweeping indictment: "Those who enter public service often find themselves at sea in an archipelago of agencies and departments that have grown without logical structure, deterring intelligent policymaking. The organization and operations of the federal government are a mixture of the outdated, the outmoded, and the outworn." The Volcker Report summarized its findings as follows:

> In this technological age, the government's widening span of interests inevitably leads to complications as organizations need to coordinate policy implementation. But as things stand, it takes too long to get even the clearest policies implemented. There are too many decisionmakers, too much central clearance, too many bases to touch, and too many overseers with conflicting agendas. Leadership responsibilities often fall into the awkward gap between inexperienced political appointees and unsupported career managers. Accountability is hard to discern and harder still to enforce. Policy change has become so difficult that federal employees themselves often come to share the cynicism about government that afflicts many of our citizens.

Even though this prominent commission urgently called for remedial actions, no one heeded the Volcker Report or the similar diagnoses of other groups, such as the Government Accountability Office. The Congress did little or nothing. Compared with the coverage given to lobbying scandals and other political gossip, the response of the national media was minimal. The executive branch was largely indifferent—in fact, no one in Washington showed much concern. The administrative capacity of the federal government might be in a state of crisis but the response was a collective yawn. This recalled the story of the Army Corps of Engineers, as Grunwald had related it. A basic failure of national leadership, extending across official and unofficial policymaking bodies, was increasingly the norm for Washington.

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Indeed, it now seemed to be the case that the central purpose of the federal government—the actual "mission" behind all the high school civics shibboleths trotted out for speeches and other public occasions—might no longer be to deliver services to the citizens of the nation. Rather, based on the accumulating evidence, the federal system increasingly worked to serve the direct participants—to create jobs for government employees, reelect Congressmen (another form of job), and pay off voters and political contributors as necessary to sustain these arrangements. Perhaps most distressing, and given the internal dynamics of this system, one could see no way of altering the results within any form of American politics as usual.

Rethinking the Constitution

One option that many are reluctant to consider is a change in the American Constitution. This reluctance is in some ways surprising, since the Constitution was written over 200 years ago in much different circumstances and when the federal government was far

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smaller and with few responsibilities. Revision in the Constitution has occurred, occasionally by formal amendment, more often by Supreme Court reinterpretation, but the basic political structure and in particular the constitutional role and operation of Congress, have remained unchanged. Perhaps it is time to take Thomas Jefferson's advice that each new generation should revisit the Constitution.

The recent prominent failures of the federal system may be the visible symptoms of deeper and more fundamental structural problems that have attracted the attention of leading scholars. Writing in the *Columbia Law Review* in 1998, two Columbia law school professors, Michael Dorf and Charles Sabel, have proposed a framework of a brand new American "constitution of democratic experimentalism." According to them, "the defining and revolutionary features of American constitutionalism—separation of powers, federalism, and the very idea of a written Constitution that constraints government—are losing their vitality as organizing principles of our democracy. None functions as originally intended; it is debatable whether any functions at all."

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The Constitution had never been designed for the large and complex task of administering the American government of the late twentieth century. The separation of powers, including three independent branches, was inevitably cumbersome. Progressive-era political theorists had jury rigged an outmoded Constitution with new political institutions such as the Federal Trade Commission, the Interstate Commerce Commission, and other expert "independent commissions" that had the effect of combining legislative and executive functions. At the time, the Supreme Court effectively ignored the traditional constitutional requirement for a separation of powers. With the exception of the Federal Reserve System, however, no one believes any longer in the model of the independent commission.

We are left, however, with the original problem. According to Dorf and Sabel, the affairs of the modern administrative state "are too complex, diverse, and volatile to be governed by lapidary expressions of the public will—laws of Congress, administrative rules, judicial judgments—that [attempt to] indicate precisely how to dispose of most of the cases to which they will eventually be applied." In many areas, Congress merely pretends to write laws that have any real content in controlling the administrative actions of the government; the reality is a grant of wide administrative discretion. In the Clean Air Act, for example, Congress directed the Environmental Protection Agency (EPA) to require American industries to install "best available control technology," involving diverse applications to potentially tens of thousands of individual businesses across the US. This congressional language amounted in practice to a directive to EPA to both write and administer a main part of the clean air law of the US. Given the complexities of air quality, to be sure, Congress could not have done otherwise—a reality that the formal constitutional framework of the US today simply ignores.

To the extent that checks on EPA exist, they come in the form of two extra-constitutional inventions of the twentieth century. The American judiciary has assumed the role of an executive-branch ombudsman, effectively empowered to overrule EPA and other executive decisions in cases of serious mistakes. Individual Congressmen and members of their staffs also frequently second guess agency decisions and often have the clout to compel agencies to comply with their wishes. In some cases, such as the Army Corps of Engineers, congressional micromanagement has become so widespread as to supplant the formal administrative structure, substituting congressional control in place of the traditional executive role.

Democracy versus Good Government

Dorf and Sabel find that, when Congress employs general language in its legislation, the vague laws that result "open the way to divergent, often self-interested, interpretations" in practice. In fact, "whatever government does, including efforts to correct defects of preceding enactments or police its own boundaries, contributes to its undoing." In the current constitutional confusion, one option might be to move towards a libertarian outcome—to drastically reduce the scope of the federal government, limiting its functions to those things that can be administered effectively within the constitutional rules established in 1787 (such as defense of the nation, maintenance of internal law and order, printing of the US currency, and so forth).

Alternatively, if the goal is to save the administrative state, then Dorf and Sabel suggest that "much less" democratic control of the details of governance is necessary. Tight new curbs on congressional interventions in executive affairs might have to be imposed, limiting the legitimate legislative role to broad determinations of national values and policy. Some judicial checks would remain, but the judicial role of final arbiter for the executive decisions of federal agencies would be eliminated.

There is yet a third alternative. Under a better constitutional design, it might be possible to achieve a

more successful balancing of the requirements for democratic decision making and the imperatives of administrative efficiency. I agree with Dorf and Sabel on the need to "rethink American constitutionalism and the design of our representative democracy in the light of those urgent doubts about the possibilities of democratic government in an age of complexity, and with the attention to the principles of constitutional design that inform our democratic traditions." I suggest that a rethinking of the American Constitution should begin with the source of much of our current governing malaise—the workings of the US Congress. The nation needs a legislative body that would not lead the Army Corps of Engineers to one day allow the destruction of New Orleans.

A Constitutional Alternative

At the very least, writing and adopting a new American Constitution is a daunting task and there is little possibility of this happening any time soon. But practical feasibility is not my concern here. I suggest below some specific provisions of a possible new American Constitution. I recognize full well that many of them would represent radical changes in American governance. However, while some are complementary and would need to be adopted jointly, others could be adopted as single constitutional changes. I offer them here not as a final prescription but to invite debate and in hopes of stimulating greater public discussion of a much wider range of constitutional options in the future. Given the urgency of the federal government's problems at present, our thinking has been much too constricted by familiarity and the habits of the past.

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The National Legislature

As the most democratic branch of government, the national legislature decides basic questions of national values and sets broad policy directions. But with 100 members of the Senate, and 435 members of the House of Representatives, the US Congress is poorly suited to executing policy details. Further, Congress frequently fails to set overall national policies—the war making power, the most critical policy decision a nation can make, has been largely delegated to the President. At the same time, Congress intervenes routinely in details of administrative decision making, for instance routinely blocking cancellation of wasteful and outmoded military technology.

Congress at the same time has become less democratic. Gerrymandering of districts, along with other barriers to "political entry," have severely limited the number of competitive seats in the House of Representatives. Omnibus budget bills are worked out by the congressional leadership and rammed through at the end of a session; many provisions are unknown to most Congressmen and their staffs. Negotiations between the House and Senate that seem intended to resolve differences in legislation often become the occasion for determining the final contents of the legislation, leaving most legislators out of the picture. In the Senate, the filibuster rule has effectively substituted a 60 percent voting requirement for passage of many important pieces of legislation—a basic constitutional change that, assuming it is desirable, should be adopted instead by explicit constitutional amendment.

On the whole, the US Congress—the part of government supposed to be closest to the people—is no longer working. A new constitutional arrangement that clarifies and simplifies the governing role of the national legislature could be achieved with these amendments:

Amendment 1—Abolish the Senate. The state of Delaware in 1790 had the smallest population, with 59,000 people; the largest state was Virginia, with 748,000—a factor of 13. Today, this gap is much greater. Wyoming is the smallest state, with 509,000 people, and California is the largest, with 36 million—a factor of 71. Until 1913 senators were chosen by state legislatures, giving senators the distinctive role of "ambassadors" for their states. But today senators from smaller states take advantage of their disproportionate political leverage to win pork barrel projects and capture other large "political rents" for their home states. Yet with the current ease of national transportation and communications, wide internal migration among the states, and the rise of federal governing responsibility, the states now play a smaller role in the life of the nation. The Senate is no longer needed.

Amendment 2—Vote by electronic means. Current voting is antiquated. In the internet age, if it is possible to transfer bank funds securely from one person to another by personal computer, it is also possible to develop a secure and reliable system of individual electronic voting (with "hard system" backups for people lacking or unable to use internet access). Electronic voting will greatly reduce the cost of voting and allow for new constitutional options.

Amendment 3—The House of Representatives will be the one national legislative body; in effect, a new "national parliament" of the US. Establishing a single national legislative body is a key step in overcoming

the excessive management and policy fragmentation resulting from the extreme separation of powers under the current US constitutional system. A single body would clarify legislative responsibility and establish greater accountability. The House of Representatives is the most nationally representative body and could readily be adapted to become a new "national parliament."

Amendment 4—The population size of House districts will be determined by the number of people living in the smallest state. Every state should have at least one representative, and other states should then have proportionally more. Hence, the size of election districts would be determined by the smallest state in population—as noted above, at present Wyoming with 509,000. Wyoming and those other states with up to 1.5 times the population of Wyoming would each have one member of the new House of Representatives. Other states would have proportionately more representatives—California, with 36 million people, would have 71 House representatives. Reapportionment would occur, as at present, every 10 years.

Amendment 5—Members of the new House of Representatives will serve for five years, limited to one term. Two years is not enough time to learn about the leading policy issues facing the nation. Although they need more time, the members of the House of Representatives should not become professional national politicians. They should not devote large parts of their time and effort raising campaign funds and otherwise working for reelection. Members of the House should be citizen legislators who serve a single five-year term.

Amendment 6—Members of the House will be subject to recall after three years by 60 percent vote of their district. In the case of a recall, a replacement for the remaining two years of the term will be selected by popular majority vote within two months. Given the longer term of five years, it is possible that shifting trends of national opinion will leave the House radically out of touch with prevailing public views, or that some individual members will prove particularly unfit. In order not to be burdened with seriously flawed representatives for all of five years, voters in a House district can recall their representative. In order to avoid recalls for less serious reasons, a vote of 60 percent should be required. Excessive cost would be avoided by conducting all recall votes at one time and via electronic voting

Amendment 7—Voting for the House of Representatives will be by a system of transferable votes, and the winner must receive more than 50 percent of the total votes. The current system of plurality voting (under which the winner is simply the candidate receiving the largest total number of votes) discourages minority candidates and limits the diversity of views expressed in the electoral process and in the national legislature. It has been strongly criticized by many political scientists and other experts in voting methods. A system of transferable voting would be more accurate and offer a superior way of revealing true voter preferences. Under a system of transferable votes, each voter lists more than one candidate on his or her ballot, ranked in order of preference. In the initial round, the candidate with the fewest votes is eliminated. Votes for the losing candidate are then transferred to the second choices indicated on the ballot. This process continues through additional rounds until one candidate has received more than 50 percent of the total votes (including transfers). Transferable voting has been employed successfully in Australia for many years and in several other nations. Under such a system, for example, voters for Ralph Nader in the 2000 presidential election would not have been "sacrificing" their vote in Florida (and other states); instead, once Nader had been eliminated from contention, his votes would have been transferred to an indicated second choice—in most cases probably Al Gore, and if that had happened, Gore would have won Florida.

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Amendment 8—No law (including spending bills and tax provisions) enacted by the House of Representatives will specify individual projects or otherwise include individual provisions that create identifiable spending items or benefits limited to one individual, one business firm, one House district, or one state. Individual projects in legislation—often now described as "earmarks"—undermine public confidence in the legislature and encourage political corruption in both official and unofficial forms. Constituents and other participants in the current American political system in effect "pay for" individual projects and other narrowly targeted legislative provisions with votes and campaign contributions. The Congress shows no inclination to impose discipline on its own behavior. Hence, the new House of Representatives should be constitutionally prohibited from enacting earmarks and other narrowly targeted spending provisions.

Amendment 9—All spending commitments must be fully funded at the time of their enactment by the House of Representatives, either by current taxes in the case of current government spending, or by the issuance of bonds or other financial instruments to

meet capital and other long-run government obligations—except as may be approved by a two-thirds vote of the House for purposes of fiscal stimulus in times of economic recession. Given the limited tenure of many politicians in office, the politically expedient course is often to approve public benefits for the future, leaving other politicians then to pay the bill. Deficit funding of current expenditures (by issuing government bonds) and generous public pensions are common methods to transfer current spending burdens to future generations. Since political representatives are not inhibited by normative sanctions against such irresponsible behavior, new constitutional rules to limit "unsustainable" levels of public spending are therefore desirable.

Current spending should be funded by current taxes; long-run spending for capital projects (or other future commitments such as Social Security) should be funding by issuing financial instruments to raise the necessary funds to meet the future spending obligations. The issuance of a bond or other financial instrument by one part of the federal government that is purchased by another part of the federal government—as is the case under the current Social Security "trust fund"—will not count for the purposes of satisfying this requirement. (The Social Security trust fund is the public-sector equivalent of my issuing an IOU to pay myself in the long run.)

The Executive Branch

Too much responsibility is today constitutionally invested in one individual. The President is overburdened with the tasks of both serving as symbolic head of the nation as well as chief administrator of the federal government. The selection process for choosing the president, moreover, is broken. Given the arduous path to the presidency, many of the most qualified individuals in the US are not willing to pursue the office. In recent decades, the use of primary elections by the political parties creates confusion and at times yields weak candidates. The current presidential lottery is a luxury the nation can no longer afford.

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The problems of the executive branch are compounded by the pervasive intervention of the judicial and legislative branches in executive decision making. The resulting fragmentation of administrative authority leaves no one truly accountable for executive branch results. Because of the numerous legislative and judicial interventions and constraints, the executive branch frequently is blocked from taking actions required for effective and efficient government. In the current circumstances, even the most capable president cannot govern effectively. To repair the breakdown in the separation of powers, in short, I propose:

Amendment 10—The President will serve as the symbolic head of the nation. He or she will have the power to veto acts of the national legislature (subject to a two-thirds override), to submit treaties with foreign governments to the legislature, to submit nominations to the national judiciary, to submit nominations for the Federal Reserve System, and to propose declarations of war. Other executive functions of the national government will be the responsibility of a new Office of the Chief Administrator, as selected by the President. The President should be removed from routine partisan politics and administration; instead, his or her role should be limited to fundamental choices with longer run consequences for the nation. The daily administration of the government should be undertaken by a separate person, chosen by the President, and with suitable administrative experience and other qualifications for this task. Historically, too many American presidents have been unprepared—and perhaps also unsuited by temperament—for the demands of administration of an organization as large and as complex as the current federal government.

Amendment 11—A national presidential primary will be held 90 days prior to the presidential election, and the winners will be the top five candidates, as selected by a system of transferable voting. Involving many individual state primaries, the current primary system cannot identify the best qualified presidential candidates. The two major political parties give only two candidates any real chance of winning. Instead, there should be a single national presidential primary in which any American citizen could be listed on the ballot if he or she receives 100,000 petition signatures of registered voters anywhere in the US. Voting will be by transferable vote, and each voter can list up to five candidates, shown on the ballot in rank order of the voter's preference. After all votes of losing candidates have been transferred to preferred candidates, the winners of the national presidential primary—held 90 days prior to the final presidential election—would be the five candidates receiving the highest total number of votes.

Amendment 12—The President will be selected from among the five national primary winners, as determined by a system of transferable voting in the final presidential election. The current Electoral College for selecting the president will be abolished. Instead, the

final selection of the president will be by nationwide voting also based on a system of transferable votes. After votes have been cast for the five presidential candidates who have emerged from the primary, the candidate with the fewest votes will be eliminated first, and his or her votes will then be transferred to the remaining candidates, as shown by indicated voter preferences for a second choice. Vote counting will proceed in this manner until one candidate has received more than 50 percent of the total votes, resulting in a new president of the US.

Amendment 13—The President will serve for five years, limited to one term. I propose that the term of the President coincide with the five-year terms of members of the new unicameral House of Representatives, allowing the President full attention to the responsibilities of the office without distraction by concerns of reelection. Both members of the House and the President will be limited to one five-year term and subject to recall after the third year by 60 percent vote (for any reason considered relevant by voters) and a new president would be elected within two months and serve for the remaining two years.

Amendment 14—The Chief Administrator of the executive branch will be appointed by and serve at the discretion of the President. If 60 percent of the House votes to remove the Chief Administrator, the current holder of this position will be removed and the President will appoint a new Chief Administrator. The Chief Administrator of the federal government will be chosen by the President, based on long administrative experience, political awareness, and other talents and skills needed in overseeing the daily administration of the executive

branch. If a Chief Administrator performs poorly, and the President refuses to remove him or her, the Chief Administrator could be removed by a 60 percent vote of disapproval in the House.

Amendment 15—Four federal departments—State, Defense, Treasury and Judiciary—will be designated as permanent. Consolidation, abolition or other large-scale changes in the organization and operation of these four departments will require the approval by majority vote of the House of Representatives. The organization and operation of other federal departments will be the responsibility of the Chief Administrator. These departments will be subject to reorganization, abolition, consolidation or other changes at the discretion of the Chief Administrator. The heads of these departments will be appointed by and serve at the discretion of the Chief Administrator. The US Congress at present exercises tight control over many details of federal administration—it "micromanages" the manner of organization and much else in the executive branch. Legislators are poorly equipped to organize the executive functions of government and even less equipped to make detailed executive decisions themselves. The Chief Administrator thus should bear responsibility for federal departments and be insulated from legislative micro-management. There would still be democratic accountability because, in circumstances of inadequate performance by the Chief Administrator, either the President or the House (by 60 percent vote) could dismiss him or her.

Amendment 16—The Chief Administrator will submit a proposed federal budget to the House of Representatives. The House will then determine upper spending limits for executive agencies by majority vote. The Chief Administrator will be prohibited from spending more (but may choose to spend less) than these amounts at his or her discretion. The House, however, could require the full expenditure of approved agency funds by a vote of 60 percent. Given the necessity of passing a budget for each agency for each year, a simple majority vote of approval for this budget will be sufficient. The logrolling and other political practices common to legislative decision making, however, often result in the funding of poorly conceived projects. The Chief Administrator, therefore, will have the authority not to spend funds approved by the legislature—a budgetary form of "line-item veto." To protect against arbitrary actions by the Chief Administrator, the House will have the authority to require spending of funds by a vote of 60 percent.

Amendment 17—The Chief Administrator will have the authority to submit a "Proposed Federal Law" involving non-budgetary matters to the House of Representatives. If the Chief Administrator so requests, the House will be required to act on this proposed legislation without any changes to it within 90 days. Approval will require a vote of 55 percent. If the legislature fails to vote on the request, the legislation will be approved. In many areas, legislators no longer have the knowledge and skills required to write laws adequate to the size and complexity of the modern national government. Current laws are frequently hundreds of pages long and filled with technical requirements, which few legislators actually read—and in many cases can understand even if they do read them. In practice, much of the detailed language of proposed legislation is now written by interest groups. Although legislation could originate in other ways, in many cases the writing of legislation should be the responsibility of the Office of the Chief Administrator, with the legislature approving or disapproving the proposed legislation. The requirement for passage of such bills should be by 55 percent majority.

The Judicial Branch

The role of the American judicial branch is unique in the world. In other nations, the judiciary is responsible for overseeing conventional matters of law—enforcing and interpreting contracts, conducting criminal trials, protecting citizens against arbitrary exercises of state power, for instance. In the United States, however, the Supreme Court is also a key participant in writing and implementing legislation and in setting national democratic priorities. The fierce current warfare over the process of judicial selection and confirmation reflects the recognition that the judiciary has increasingly become the most important branch of government in the resolution of national management and policy questions. The judiciary has become the final management and policy backstop, when other main elements of the American constitutional design are not working.

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In some cases—such as campaign finance law in recent years—the Supreme Court strikes down important parts of enacted legislation, thus significantly altering the final contents of the law. More often, Congress enacts vague legislation without substantive content until interpreted by the judicial branch. In the process of interpretation, the courts then in effect write

much of the law. Another important current judicial role is the review of executive branch actions. Just as the separation of powers has broken down between the executive branch and the legislature, it has also broken down between the executive branch and the judiciary. Courts commonly review the details of agency rules and regulations, often requiring their modification, as well as frequently overturning specific administrative decisions. At times, this judicial role is explicitly acknowledged such as when a court determines that an executive action lacks any rational basis or is otherwise arbitrary and capricious; in many other cases, the judicial role is less explicit and yet substantively determines the administrative outcome. Under the guise of enforcing procedural rules—such as the requirement to follow the administrative procedures

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act, prepare an environmental impact statement, or develop a formal public plan as a guide to action—the judiciary becomes an active participant in crafting substantive federal rules and administrative decisions.

By long tradition, appointees to the judiciary are drawn exclusively from the legal profession. Given the unique role of the American judiciary in matters of national governance, however, this limitation is no longer necessary or desirable. Judges often are ill-equipped by training or experience to resolve substantive regulatory and administrative questions in technical areas. Moreover, the current judicial process can involve long appeals, and the initiative to bring legislative or administrative issues before the courts must be taken by outside parties. In general, judicial resolution of many of the most important substantive policy and administrative issues facing the federal government is a cumbersome arrangement, and I therefore propose a new constitutional design for the national judicial branch.

Amendment 18—The current responsibilities of the American judiciary will be reassigned among three independent review and appeal bodies. The existing Supreme Court, whose members will be limited to fixed terms of 15 years, along with members of the lower courts, will continue to address themselves the matters of "conventional law." A new "House of National Legislative Review" will consider actions of the national legislature, and an "Office of National Administrative Appeal," will review the rules and regulations and the administrative decisions of the executive branch. Many areas of law are well suited to the current qualifications of judges and to the methods of operation of the existing Supreme Court and lower courts. This "conventional law" includes such legal issues as the application of past legal precedent and interpretation to current cases, and the protection of individual rights of Americans. I propose that members of the Supreme Court and the lower courts will be nominated by the President and confirmed by a vote of 60 percent by the House. Membership in the legal profession will be required for nomination to the Supreme Court or lower courts. In order to introduce new blood to the Supreme Court on a more frequent basis, the terms of Supreme Court justices should be limited to 15 years—in contrast to the 25 years or more of service, extending to the age of 80 or more, that has become increasingly common among the current members of the Court.

Amendment 19—A "House of National Legislative Review" will be established to consider the constitutional legitimacy and public benefit of the legislative actions of the House of Representatives. The House of National Legislative Review may strike down—with a required vote of two–thirds—a law enacted by the House of Representatives or may strike down selected portions of such a law. The House of National Legislative Review will have 27 members, who serve terms of ten years, as appointed by the President and confirmed by a vote of 60 percent by the House of Representatives. The members of the House of National Legislative Review will be American citizens of great demonstrated accomplishment and expertise and need not be members of the legal profession. With the abolition of the US Senate, it would then become desirable to have another national body that can serve as a check on the House of Representatives and prevent actions harmful to the nation. The US Supreme Court at present performs such a role but it is limited by its constitutional status and the public expectation that it merely "interpret the law." A group of distinguished Americans—perhaps seen in some respects as a parallel to the House of Lords in the English system, but without any aristocratic pedigree of its members—should perform this review function. The President will select the members from all parts of American society, subject to a 60-percent vote of approval by the House of Representatives, based on their reputations for integrity, knowledge, and sound judgment. The House of National Legislative Review will have the authority to overturn all or part of actions of the House of Representatives, based on a criterion of the public good or the national interest. In order to ensure that this review authority is not exercised to excess, a vote of two-thirds will be required to alter an action of the House of Representatives—unlike the simple majority decision making of the current Supreme Court, under which a mere five justices in recent years, even when

strongly opposed by four others, have often decided the most fundamental of national questions. The House of Representatives could overturn an "upper House veto" by a two-thirds vote.

Amendment 20—An Office of National Administrative Appeal will be created to review actions of the executive branch. This Office will be empowered to overturn or modify by a vote of two-thirds actions of the executive branch. The members of the Office, who will serve for ten years, will be 15 distinguished individuals nominated by the President and confirmed by a 60 percent vote in the House of Representatives. The members of the Office of National Administrative Appeal will be American citizens of widely recognized integrity and accomplishment with significant experience in administrative matters and not necessarily members of the legal profession. A third basic task of the current Supreme Court and lower courts is to review the rules and regulations and other actions of the executive branch. The many other responsibilities of the Supreme Court prevent its review of many important administrative matters in a timely fashion. Often the Court's members lack extensive knowledge and experience of a matter at hand. The current courts are at least formally limited to determining legality rather than the more appropriate questions of whether executive branch actions have a solid factual basis, are soundly reasoned, and otherwise serve the national interest. The Office of National Administrative Appeal would have the authority and funding to commission scientific and other expert studies and otherwise obtain the assistance of appropriate outside parties in forming its decisions. The materials presented in the deliberations of the Office would address administrative issues relating to national impacts and consequences. Again, in order to limit the use of this authority to cases of clear administrative problems, a vote of two-thirds of the members of the Office of National Administrative Appeal would be required to take any action.

Reverence for the established constitutional order . . . should not result in denial of the dysfunctional character of . . . the federal system in recent decades, which demands consideration of radical change.

Conclusion

The American constitutional status quo has the great merit of historical familiarity and public legitimacy. Reverence for the established constitutional order, however, should not result in denial of the dysfunctional character of many outcomes of the federal system in recent decades, which demands consideration of radical change. The twenty amendments to the US Constitution proposed above would very significantly modify longstanding American governance arrangements at the federal level. Changes of such a magnitude would have to be the product of a full and no doubt lengthy public debate. Many other constitutional alternatives exist and would deserve consideration as well as part of this public discussion.

The point is to begin such a process. Veneration of a national governing regime established more than 200 years ago is no longer justified. The current federal system is failing. It is time to think more innovatively and bravely about the constitutional future of the United States.

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Sources: Robert H. Nelson, *A Burning Issue: A Case for Abolishing the US Forest Service* (Lanham, MD: Rowman & Littlefield, 2000); *Urgent Business for America: Revitalizing the Federal Government for the 21st Century,* Report of the National Commission on the Public Service (January 2003). In 2005, the US General Accountability Office (GAO) offered a broad survey of *21st Century Challenges: Reexamining the Base of the Federal Government.* GAO found that "the fiscal policies in place today will—absent unprecedented changers in tax and/or spending policies—result in large, escalating and persistent deficits that are economically unsustainable over the long term." If there were not sharp changes in the policy directions of recent years, a continuation of business as usual will "gradually erode, if not suddenly damage, our economy, our standard of living, and ultimately our national security." The redirection of national policy, GAO argued, would require meeting a "major transformational challenge" in American governance at the federal level. Yet, the GAO was able to offer little beyond the issuance of further such warnings and exhortations to reform—which had had little effect in the past—to explain how any major changes in the political practices of Washington could be expected. Michael C. Dorf and Charles F. Sabel, "A Constitution of Democratic Experimentalism," *Columbia Law Review* (March 1998).

Science, Religion, and Morality: A Reply to Herman E. Daly

Stephen J. Sullivan

Introduction

In 1963 the brilliant physicist and atheist Richard P. Feynman raised the following question about the relationship between science and religion: how is it possible to preserve "the real value of religion as a source of strength and courage to most men while at the same time not requiring an absolute faith in the metaphysical (i.e., theistic) system" that partially constitutes religion and that "sooner or later" will turn out to be scientifically mistaken? According to Herman E. Daly (writing in the previous issue of *Philosophy & Public Policy Quarterly,* vol. 26, no. 1/2 (Winter/Spring 2006)), Feynman's question remains unanswered, especially when understood as the problem of "how to maintain inspiration to provide the strength to do good in the face, not of a slight doubt as to the existence of God, but . . . of aggressive assertions by the high intelligentsia that the very idea of God is an infantile suggestion." The intellectuals he has in mind include Carl Sagan, Stephen Jay Gould, Edward O. Wilson, Richard Dawkins, and Daniel Dennett.

Daly's central claim is that from a "scientific materialist" or "neodarwinist" perspective, human life is meaningless, human action is pointless, free will and morality (especially objective morality) are illusory, and reason cannot be trusted. He asserts that theoretical abstractions are never well-supported enough to overturn beliefs in the objects of concrete, "direct experience," and that in fact we have such experience of free will, efficacious human purpose, and good and evil. Holding that "Feynman's question . . . underlies the culture war over the issue of intelligent design versus neodarwinism," he sides with or inclines toward (theistic) intelligent-design accounts of evolution, the origin of life, and the anthropic principle.

Daly's essay is interesting, complex, and provocative—and, it seems to me, chock full of dubious assertions and shaky reasoning. In what follows I will highlight some of these difficulties. I will begin by questioning Daly's understanding of Feynman's question, continue by challenging his account of the implications of scientific atheism, add some doubts about his appeal to direct experience, and close with some remarks about the intelligent-design debate.

What Feynman Says

Contrary to what Daly seems to suppose, Feynman does not say that without religious inspiration ethical knowledge "is powerless to produce action," nor that morality requires a theistic foundation. Feynman recognizes that religious skeptics are non-religiously motivated to act morally; indeed he himself is such a skeptic given his active support for freedom of thought and expression, and for some of the values of Pope John XXXIII's *Pacem in Terris.* And while denying that science by itself can answer ethical questions, he never asserts that only religion can do so. His considered view seems to be that for most people religion is "*a* source of moral code [*sic*] as well as inspiration to follow that code" (emphasis added).

A Blurring of Distinctions

Daly's discussion of the implications of scientific atheism blurs many important distinctions. In this respect he is at least in good company: some of the intellectuals who arouse his ire—Edward O. Wilson first and foremost—are pretty confused themselves. Let me call attention to four problems.

First, Daly repeatedly conflates two different ways in which human life might be said to be meaningful or meaningless. On the one hand, human lives might possess or lack a cosmic (transcendent, superhuman) purpose—one provided, for example, by a divine plan. On the other hand, human lives might or might not be worth living—they might include or lack goals and purposes worth pursuing. From absence of meaning in the former sense Daly somehow infers absence of meaning in the latter sense. But to non-suicidal skeptics about cosmic purposes (other than Arthur Schopenhauer), this will appear to be a non-sequitur: despite their awareness of human mortality, they find

life worth living for familiar reasons involving love, work, personal achievement and commitments, and so on. At the very least Daly owes us an account of where they supposedly go wrong. I highly recommend Iowa State University philosopher E.D. Klemke's anthology *The Meaning of Life* (second edition), which includes contributions both from Schopenhauer, Leo Tolstoy, and William Lane Craig (two psychologically troubled thinkers and one fundamentalist Christian philosopher who make the same inference Daly does) and from skeptics such as Albert Camus, Kurt Baier, Paul Edwards, and Antony Flew (who reject it altogether).

What would it mean for neo-Darwinist atheism to reduce moral value to the random, and why does Daly suppose that it does so?

Second, Daly seems to conflate metaphysical and epistemological issues while engaging in a very confusing discussion of the metaethical implications of scientific atheism. He reasons that if scientific atheism is true then so is moral nihilism: no actions have any moral value, merely survival value. He defends this contentious metaphysical inference not by appealing to the controversial (and in the present context probably question-begging) divine-command theory of morality, but apparently by maintaining that an evolutionary account of moral experience and belief is unacceptable. This statement in turn depends on the partly metaphysical claim that if moral value were "reducible to the random" then we would have no reason to act morally.

Third, this last claim is muddled even if we put aside the metaphysical/epistemological conflation. What would it mean for neo-Darwinist atheism to reduce moral value to the random, and why does Daly suppose that it does so? Presumably his point is something like this: (a) from this atheist perspective moral value can only be survival value, (b) survival value is central to natural selection, and (c) natural selection is based on random mutations and random changes in the environment. But (a) is at best problematic. The difficulty is not merely that it conflicts with Daly's claim that neo-Darwinist atheism leaves no room for moral value.

More important, (a) is highly implausible on its face: neo-Darwinian evolutionary theory itself takes no stand on the nature of moral value, and supporters of neo-Darwinism can and do adopt any of a variety of skeptical and non-skeptical positions on it. Furthermore, surely we would have obvious reasons of self-interest to act morally even if moral value were nothing but survival value.

Even if irreducibly random processes at the quantum level govern our actions, it does not follow . . . that in virtue of this randomness we lack free will; those processes may still conform to probabilistic laws that strongly limit the randomness.

Fourth, whether scientific atheism excludes free will depends on what free will is and whether, for example, it is compatible with determinism and with indeterminism. Daly assumes without argument that free will and determinism are incompatible; but a great many philosophers disagree, including "high intelligentsia" member Daniel Dennett. Moreover, even if irreducibly random processes at the quantum level govern our actions, it does not follow—at least without further argument—that in virtue of this randomness we lack free will; those processes may still conform to probabilistic laws that strongly limit the randomness.

Mistaken Experiential Beliefs?

I have some sympathy for the appeal that Daly makes—influenced by the logician and philosopher Alfred North Whitehead—to the primacy of direct experience. But in Daly's hands this appeal seems dogmatic and infallibilist: he dismisses even the bare possibility that core experiential beliefs could be mistaken. And he seems unaware that his position would nullify much well-established scientific belief, especially in theoretical physics since the advent of relativity theory, quantum mechanics, and string theory. Indeed, the Flat Earth Society would surely have many more members if most people adopted Daly's position!

The Intelligent Design Controversy

Finally, Daly's discussion of the intelligent-design controversy is marred by major and minor flaws. Here are two of the more serious ones.

First, in contrast to most biologists, Daly treats neo-Darwinian evolutionary theory as merely a "reasonable conjecture" or "good working hypothesis"—apparently because macroevolution is not directly observable. By this logic, every scientific theory that posits unobservables—for example, the theory of gravity—is conjectural, no matter how well supported it is. This is a hugely restrictive account of scientific knowledge that cries out for defense; Daly offers none.

Second, Daly claims that defenders of neo-Darwinian evolutionary theory have failed to respond adequately or even forthrightly to scientific objections from intelligent-design theorists concerning irreducible complexity and facts about the fossil record. But in fact there is a substantial and growing literature going back several decades that does contain serious replies—for example, by Philip Kitcher, Kenneth R. Miller, Niles Eldridge, and Robert Pennock—to these (and other) creationist and neo-creationist objections.

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Sources: Herman E. Daly, "Feynman's Unanswered Question," *Philosophy and Public Policy Quarterly* vol. 26, no. 1/2 (Winter/Spring 2006); Richard P. Feynman, *The Meaning of It All: Thoughts of a Citizen Scientist* (Perseus Books, 1998); *The Meaning of Life*, 2nd edition, edited by E.D. Klemke (New York: Oxford University Press, 2000); Daniel C. Dennett, *Freedom Evolves* (New York: Viking Penguin, 2003); Philip Kitcher, *Abusing Science: The Case Against Creationism* (Cambridge, Mass.: M.I.T. Press, 1982); Kenneth R. Miller, *Finding Darwin's God: A Scientist's Search for Common Ground Between God and Evolution* (New York: Harper Collins, 1999); Robert T. Pennock, *Tower of Babel: The Evidence Against the New Creationism* (Cambridge, Mass.: M.I.T. Press, 1999); and Niles Eldridge, *The Triumph of Evolution* (New York: W.H. Freeman, 2000).

Rejoinder to Stephen J. Sullivan

Herman E. Daly

Introduction

Stephen J. Sullivan's comments are thoughtful and deserve a reply. He understands me well enough, but simply disagrees. Members of the group that he tellingly labels "nonsuicidal skeptics" are likely to be both numerous and sympathetic to his complaints. But that insightful label raises the question of why other skeptics might be suicidal, and why do we drop them so quickly from consideration? Because the cosmic meaninglessness that follows from the skeptic's materialism is very bad news for the individual who seeks meaning, purpose, and value in his personal life, as well as for a society that tries to enact policy for the common good. A moral individual in an amoral cosmos is like a compass needle in a world without magnetic north. It doesn't matter which way it points. This is not at all a complicated or dubious inference. Furthermore, individuals are part of the cosmos, and if we have value and meaning then so does the cosmos, at least to that extent. If the cosmos has no value or purpose then neither do we who are part of it.

A moral individual in an amoral cosmos is like a compass needle in a world without magnetic north. It doesn't matter which way it points.

The Modern Skeptic

If scientific naturalism (neodarwinism) is a true metaphysical worldview, as the modern skeptic believes, then he must come to terms personally with the very bad news it entails. If the skeptic is logically consistent then depression, apathy, a lack of interest in policy, and perhaps suicide are the likely consequences, even if it is suicide by "entertaining ourselves to death." To remain nonsuicidal it helps if the skeptic is willing to fudge a bit on logical consistency. Many skeptics admirably serve values that they absorbed with their mother's milk, never questioning where these values came from or how long they will survive once their spiritual roots have been thoroughly extirpated from the culture. Darwinian selection naturally favors the nonsuicidal, which is perhaps why logical inconsistency is so common among surviving skeptics! Of course faith in reason does not come easily to a skeptic who is led by logic to suspect, as Darwin himself did on occasion, that his own convictions may merely be the random long-term product of a "monkey's mind." This is not just a quip, but a real problem that neodarwinists have not faced up to.

As an example of Sullivan's tolerance for inconsistency I cite his willingness to believe, on the authority of "a great many philosophers," (Dennett is specifically mentioned) that free will and determinism are compatible. I defined free will, consonant with most dictionaries, as the view that "there is room for purpose as an independent cause in the real world." Determinism is the view that purpose or will is not independently causative, and that it is an illusion to believe that it is. These two views are opposites, and I would be justified in assuming their incompatibility "without argument." But for good measure there is an argument contained in the quote from Wendell Berry and the related discussion.

Sullivan also provides an example of what I, following John Haught, called "metaphysical impatience." My characterization of macroevolution as a "reasonable conjecture" and a "good working hypothesis" is not reverent enough for Sullivan. He calls it a "hugely restrictive account of scientific knowledge." First, I was talking specifically about macroevolution, not "scientific knowledge" in general. To suddenly put macroevolution in the same category as the Second Law of Thermodynamics rather begs the question at issue. Second, as Karl Popper has argued, "conjecture and refutation" are the very soul of science. I was calling attention to the fact that microevolution is a conjec-

ture that has survived many attempts at directly observable refutation. Macroevolution is a far grander conjecture for which it is much more difficult to design empirical attempts at refutation—we simply don't live long enough, and just-so stories, plausible though some may be, are not refutable hypotheses. Sullivan conflates micro- and macroevolution, calling them both "neodarwinist evolutionary theory" and implicitly attributes to macroevolution the higher level of scientific confidence that one is justified in attributing only to microevolution. Sullivan is impatient to take a short cut to the truth by promoting a reasonable extrapolation to the status of a "theory," a tested conjecture that has survived many attempted empirical refutations.

It is reassuring that Sullivan has "some sympathy" for the primacy of direct experience. I do not "dismiss even the bare possibility that core experiential beliefs could be mistaken," but I do require stronger evidence and arguments than does Sullivan for going against Whitehead's radical empiricism. And if one concludes that core existential beliefs are mistaken, then one really must live with the crippling logical consequences. Further, it is quite a stretch to claim that my position (Whitehead's) would nullify theoretical physics! Of course science makes use of highly abstract and nonobservable concepts, but at some point they must yield a prediction or conjecture that could be empirically refuted. And it is arbitrary to rule out direct experience as admissible empirical evidence.

Neodarwinism is the major home of modern determinists and nihilists. Far from recognizing their logical obligation to remain silent on matters of public policy, many neodarwinists are loud and opinionated on the subject.

Nor do I claim that an "evolutionary account of moral experience and belief is unacceptable"—only that a materialistic and deterministic account is unacceptable. To be sure, the *neodarwinist* evolutionary account is materialistic and deterministic and for that reason unacceptable. But the concept of evolution *per se* is not the problem—the problem is the accompanying metaphysics of materialism.

The Interesting Question

As for Feynman's atheism, I believe he said he was an atheist because he thought atheists ask the more interesting questions. Well, in this instance Feynman has indeed asked the interesting question. I think it derived from his honesty more than from his atheism, but be that as it may, my intention was to reconsider the question itself. Nevertheless, Sullivan's point is interesting—that Feynman's considered view was that "for most people" religion is a source of morality and inspiration. Does Feynman mean here to distance himself from most people, to suggest that most people are deluded and he is not, that he possesses a better source of morality and inspiration? Perhaps, but he made no attempt to instruct or correct the mistakes of most people in this regard, something he was usually not reluctant to do in other areas. Furthermore, he said he did not know the answer to the question he was raising. At least he was a metaphysically patient atheist!

Philosophy and Public *Policy*

Finally, a word about my more proximate motivation for writing this essay may help, even though it is not a response to any specific point that Sullivan raised. I teach economics in a School of Public Policy. This journal is dedicated to "Philosophy and Public Policy." If one is to be seriously interested in policy as a student, teacher, or policymaker, one must make two presuppositions. First, one must believe that there is more than one possible future (nondeterminism). If the future is completely determined then policy is nonsense. Second, even if there is more than one possible future, policy would still make no sense unless there were a criterion for choosing one future as better than another (nonnihilism). Determinists and nihilists have a right to exist (to be nonsuicidal), but they also have a logical debt to the rest of us to remain silent on matters of public policy. Neodarwinism is the major home of modern determinists and nihilists. Far from recognizing their logical obligation to remain silent on matters of public policy, many neodarwinists are loud and opinionated on the subject. One hopes that they will eventually abandon their skepticism instead of their logic. In the meantime putting up with their inconsistencies may seem not too high a price for the rest of us to pay to help them avoid suicide. However, a society unable to enact and enforce serious policies because it is lured by the lurking fecklessness of neodarwinism, runs its own larger risk of suicide. The survival value of neodarwinism is likely negative for the society that adopts it as its worldview.

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Sources: Leon Wieseltier, "The God Genome," *New York Times,* February, 2006; Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge,* 1963; Herman E. Daly, "Policy, Possibility, and Purpose," *Worldviews,* September, 2002.

Philanthropy and its Uneasy Relation to Equality

Rob Reich

Introduction

There's a standard story about philanthropy and its relation to liberty and equality. The story is this. Philanthropy is tightly connected to liberty for two reasons. First, philanthropy is voluntary. Whereas the state can mandate and coerce behavior, activity within the philanthropic sector is not compelled. Indeed, philanthropic or charitable actions that are coerced are often thought not to be instances of philanthropy or charity at all. Second, the exercise of liberty includes freedom to associate, which, famously in the American context, has resulted in a strong inclination for people to join together to address and solve social problems. Philanthropy is not only an activity of free persons, but when the state protects the freedoms of individuals, it becomes a group activity.

Philanthropy is also tightly connected to equality because the quintessentially philanthropic act—and the virtue in the philanthropic act—is generally thought to consist in providing for the poor or disadvantaged, or attacking the root causes of poverty or disadvantage.

This story, linking philanthropy to both liberty and equality, is an attractive one and it contains some truth. My aim in this essay, however, is to complicate this rosy story. Philanthropy is not always a friend of equality, can be indifferent to equality and sometimes even a cause of *in*equality. When philanthropy causes or worsens inequality, it can be harmful and at odds with social justice. This is no decisive objection to the existence of a nonprofit and philanthropic sector in society in general, for there are a variety of justifications for philanthropic endeavors, some of which depend not at all on philanthropy being redistributive or eleemosynary. But when philanthropic activity actually worsens inequality, any justification for the state's provision of special tax treatment to philanthropic organizations is considerably weakened, and perhaps entirely eroded.

Though philanthropy may be as old as humanity itself, its setting in modern society embeds it firmly with the political institutions of the state.

Though philanthropy may be as old as humanity itself, its setting in modern society embeds it firmly with the political institutions of the state. Laws govern the creation of foundations and nonprofit organizations, and they spell out the rules under which these organizations may operate. Laws set up special tax treatment for philanthropic and nonprofit organizations, and they permit tax concessions for individual and corporate donations of cash and property to qualifying nonprofits. In this sense, philanthropy is not exactly an invention of the state but can be viewed as an artifact of the state; we can be certain that philanthropy would not have the form it currently does in the absence of the various laws that structure it and tax incentives that encourage it.

The goods and harms of philanthropy can be products of, or at least can be promoted or diminished by, the policies of the state that are designed to encourage or reward philanthropic behavior. The basic argument I shall advance is that public policy does not do enough, I believe, to encourage philanthropic behavior that aims at greater equality. Worse, public policy currently rewards some philanthropic behavior—in the form of tax concessions—that worsens social inequalities and causes harm. The state is therefore complicit in these philanthropic harms, and unjustifiably so.

I proceed as follows. The first section offers a short consideration of the potential harms of philanthropy, distinguishing between individual and institutional harms. A brief treatment of the complex interplay between philanthropy and the tax code follows. I then turn to the variety of institutional harms that public policies governing philanthropy can inflict, focusing special attention on the ways in which philanthropy is indifferent to equality. I then provide an illustration of how philanthropy can be causally implicated in the worsening of inequality: the case of private donations

to public schools. I conclude with a few gestures at policy recommendations aimed at making the outcome of philanthropic endeavors more egalitarian.

One terminological note merits a comment. Though many people seek to distinguish philanthropy from charity, usually on the ground that philanthropy seeks to attack the root causes of social problems and charity is the provision of direct assistance, or on the ground that philanthropy refers to foundation activity and charity refers to individual donations, I shall use the two here relatively interchangeably. The reason for doing so is not because I think the putative distinctions between the two are faulty. The reason is that, however distinguished, both philanthropy and charity are activities regulated and governed by a common institutional framework of laws and public policies.

Philanthropic Harms

The notion that philanthropy can cause harm is perhaps at odds with popular conceptions about what philanthropy is and does, but even philanthropic practitioners recognize the potential for harm. Writing about the array of private philanthropic foundations in the United States, for instance, former foundation executive and current Duke University scholar Joel Fleishman opines, "I believe deeply that foundations do far more good than harm, and that such harm as they do can be attributed mostly to operating inefficiencies and the consequent waste of assets, assets which they are morally obligated to steward wisely."

What are better rather than worse public policies for philanthropy, policies that will encourage goods rather than harms?

Fleishman's statement is not incorrect but it is pollyanna-ish. Philanthropic acts can cause harms in a number of ways that go far beyond the failure to steward assets wisely. We can divide these harms into two broad categories: individual harms and institutional harms. Individual harms are the product of the actions, motives, and behavior of individual philanthropists; philanthropic endeavors sometimes harm the people they were meant to benefit. Institutional harms are the product of public policies and incentives that set the framework within which philanthropy takes place; public policy can cause and exacerbate harms itself, apart from the motives or actions of individuals. Obviously individuals and institutions interact with and effect one another, so the two categories cannot be completely walled off from one another. Nevertheless, the division between individual and institutional harms is a helpful way to demarcate the kinds of harms worth worrying about.

My concern is with the institutional harms of philanthropy, how the public policies that guide philanthropy or the very structure of philanthropy itself can be harmful. In some respect, this is an old criticism. Left-wing critics have long suggested that philanthropy is but another self-interested means of the powerful to continue their dominion over the poor and to entrench the ideological interests of the wealthy in all of society. To the extent that the state is involved in supporting philanthropy, the state would merely be abetting the philanthropic actions of the powerful and reinforcing their already dominant position. But one needn't be a foe of capitalism to see how philanthropy can be harmful. Contemporary political philosopher Will Kymlicka argues, for instance, that justice supercedes charity in importance, and that our obligations as citizens to fulfill and realize social justice through political institutions effectively subsume any reasons we might have to perform acts of charity. Kymlicka's argument raises the basic question of why the state should be involved in any way whatsoever in subsidizing, through tax incentives, philanthropic activity. Philanthropy existed long before the state decided to become involved, so it is surely not true that philanthropy would disappear absent the state's involvement. These are important critiques that cut to the heart of the very legitimacy in a democratic society of philanthropic and charitable activities and organizations. But for purposes of this essay I shall sidestep the important issue of justifying the "intervention" of the state in legitimizing, regulating, and providing incentives for philanthropy. The relevant question to ask, since the state will be involved, is: What are better rather than worse public policies for philanthropy, policies that will encourage goods rather than harms? To answer this question we first need a better understanding of the particular manner in which modern philanthropy is not the sum total of individual philanthropic decisions but must be seen as resting in a web of public policies, mainly in the tax code.

Philanthropy and Tax Policy

Nonprofit organizations and philanthropic foundations enjoy an array of substantial tax benefits at the federal level. The details and levels of these benefits have changed from time to time, either when Congress passed legislation directly affecting nonprofits and foundations or when Congress passed legislation making changes in the rates of taxation for individuals, estates, and corporations. The rules are often very complicated, but the underlying mechanisms that supply the tax advantage are simple and have always been the same. First, nonprofit organizations, including philanthropic foundations, which are a specific kind of

nonprofit organization, are tax-exempt entities. Second, for a specific and large class of nonprofit organizations (those called 501(c)(3)'s after the section of the tax code that defines them), contributions of cash or property to the nonprofit organization are tax-deductible for the individual or corporation making the contribution. This latter provision is perhaps the most well-known institutional incentive for charitable activity, and some version of this incentive has existed since the creation by the US Congress in 1917 of a federal income tax. In addition to these two basic mechanisms, nonprofit organizations are exempt from tax on investment income; private foundations pay a small 2% excise tax on net investment income, generally coming from endowments. Finally, nonprofit organizations of all kinds are generally exempt from property taxation at the state and local level.

Expressed in the abstract language of the tax code, it is hard to appreciate just how significant an intervention into charitable and philanthropic behavior these tax laws are. To get a better picture, consider what the tax laws mean in concrete terms for a would-be donor. The mechanism of a tax deduction for a donation creates a subsidy by the government at the rate at which the donor is taxed. So a person who occupies the top tax bracket—currently 35%—would find that a $1,000 donation actually "cost" her only $650. The government effectively pays $350 of her donation, subtracting this amount from her tax burden. Similar incentives exist for the creation of private and family foundations, and for contributions to community foundations, where donations and bequests to a foundation are deducted from estate and gift taxation.

In permitting these tax incentives, federal and state treasuries forego tax revenue. Had there been no tax deduction on the $1,000 contribution, the state would have collected $350 in tax revenue. Or to put it differently, tax incentives for philanthropy constitute a kind of spending program or "tax expenditure," affecting the national budget. Seen in this light, tax incentives for philanthropy amount to massive federal and state subsidies, or tax expenditures, for the operation of philanthropic and charitable organizations and to the individuals and corporations who make charitable donations. These tax policies have been described as "the world's most generous tax concessions." One economist observes that "no other nation grants subsidies at such a high level or across so many types of activities."

Just how large are these subsidies? It is surprisingly difficult to put a precise dollar figure on the total. Evelyn Brody estimates that the charitable contribution deduction in the federal income tax code alone cost the US Treasury nearly $26 billion in 2000, and the charitable contribution deduction in the estate and gift tax code more than $6 billion. These already large figures omit tax concessions on income earned by nonprofit organizations and property taxes that would be paid by nonprofits and foundations, so they considerably understate the total subsidy. But focus just on the charitable contributions deduction in the income tax code. According to the fiscal year 2005 US Federal Budget, estimated tax expenditures in 2005 on charitable contributions total more than $36 billion, a sharp rise (38%) from Brody's calculation in 2000. Measured against other tax expenditures given to individuals in the federal tax code, the charitable contributions deduction is the fourth largest of more than 130 such tax expenditures, ranking only behind the mortgage interest deduction, exclusions of pension contributions to 401(k) plans, and deductibility of state and local taxes.

Public Policy and Institutional Harm

Let us note first that the charitable contributions deduction is available only to those individuals who itemize their deductions, people who opt not to take the so-called "standard deduction" on their income tax. This effectively penalizes, or fails to reward and provide an incentive for, all people who do not itemize their deductions, a group that constitutes roughly 70% of all taxpayers. One might think that it is predominantly high-income earners, and therefore itemizers, who make charitable contributions, but this is false. A remarkable 89% of American households made a charitable contribution in 2000. A great many people are capriciously excluded from enjoying the tax deduction simply because they do not itemize deductions on their return.

Second, the tax subsidy given to those who do receive the deduction possesses what is known as an "upside-down effect." The deduction functions as an increasingly greater subsidy and incentive with every higher step in the income tax bracket. Those at the highest tax bracket (35% in 2005) receive the largest deduction, those in the lowest tax bracket (10% in 2005) receive the lowest deduction. Table 1 (see next page) illustrates how the progressivity of the tax code translates, perversely, into a regressive system of tax deductions: the wealthiest garner the largest tax advantages. In 1999, 50% of all tax deductions were claimed by the wealthiest decile of earners. Compounding this oddity is a variant of the objection offered above. Identical donations to identical recipients are treated differently by the state depending on the donor's income; a $500 donation by the person in the 35% bracket costs the person less than the same donation by the person in the 10% bracket. Since the same social good is ostensibly produced in both cases, the differential treatment appears totally arbitrary. If anything, lower-income earners would seem to warrant the larger subsidy and incentive.

Both of these features of the tax code arbitrarily and unfairly benefit the well-off. In the process, the structure of the tax code's treatment of philanthropy, it could be argued, harms low-income earners, who are either excluded from the benefit of a deduction or who receive a smaller subsidy for the same charitable contribution. Happily, it would be quite simple to remedy this unfairness and remove the harm. Congress could allow non-itemizers to deduct their charitable contributions from their income. Better, since this solution would still leave the upside-down effect in place, Congress could allow all donors a tax credit, rather than a tax deduction, for donations, capped at a certain level. This fix would be of the greatest marginal value to lower income individuals but would still be an equivalent subsidy for all persons. Congress has at times debated versions of both remedies, but neither has ever become law.

Even if Congress were to pass legislation that eliminated these unfair and harmful aspects of the tax code, important questions about the structure of tax policy would remain. The focus would turn to whether the incentive of a state subsidy works in a way to encourage the good that we wish philanthropy to accomplish and deter the harms that we wish to avoid. In providing tax concessions to philanthropy, the state is not merely permitting and setting guidelines within which philanthropy takes place. If the state is actually funding, through a tax expenditure, some philanthropic harm, it makes the state complicit in the harmful action of the philanthropist. It is no exaggeration to say that, as philanthropy is currently structured, when philanthropists do harm so too does the state.

In keeping with the initial question of this work, I shall focus on whether and how public policies strengthen or weaken the connection between philanthropy and equality. On the one hand, public policies in the nonprofit and philanthropic world appear to take account of the likely distributional flow of dollars. Most significantly, in order to qualify for 501(c)(3) status as a nonprofit—the status that permits organizations to receive tax-deductible donations—an organization must serve religious, charitable, scientific, testing for public safety, literary, or educational purposes. This large group of 501(c)(3) organizations is usually referred to as the "public charities," distinguishing them from other nonprofit organizations that are primarily mutual benefit societies (e.g., unions, private membership clubs, veterans organizations, etc.) For certain nonprofit organizations that compete with for-profit organizations in the marketplace for business, such as day care centers and hospitals, there are additional rules that the nonprofit organization serve poor or disadvantaged communities. On the other hand, public policy seems remarkably indifferent to

The structure of the tax code's treatment of philanthropy . . . harms low-income earners, who are either excluded from the benefit of a deduction or who receive a smaller subsidy for the same charitable contribution.

Table 1

Cost per Dollar of a Charitable Contribution for Married Taxpayers Filing Jointly, 2005

Taxable Income	Itemization Status	Tax Bracket	Net Cost of a Dollar Donation
$ 14,300	non-itemizer	10%	$ 1.00
$ 50,000	non-itemizer	15%	$ 1.00
$ 60,000	non-itemizer	25%	$ 1.00
$ 60,000	itemizer	25%	$ 0.75
$ 125,000	itemizer	28%	$ 0.72
$ 200,000	itemizer	33%	$ 0.67
$ 319,500	itemizer	35%	$ 0.65

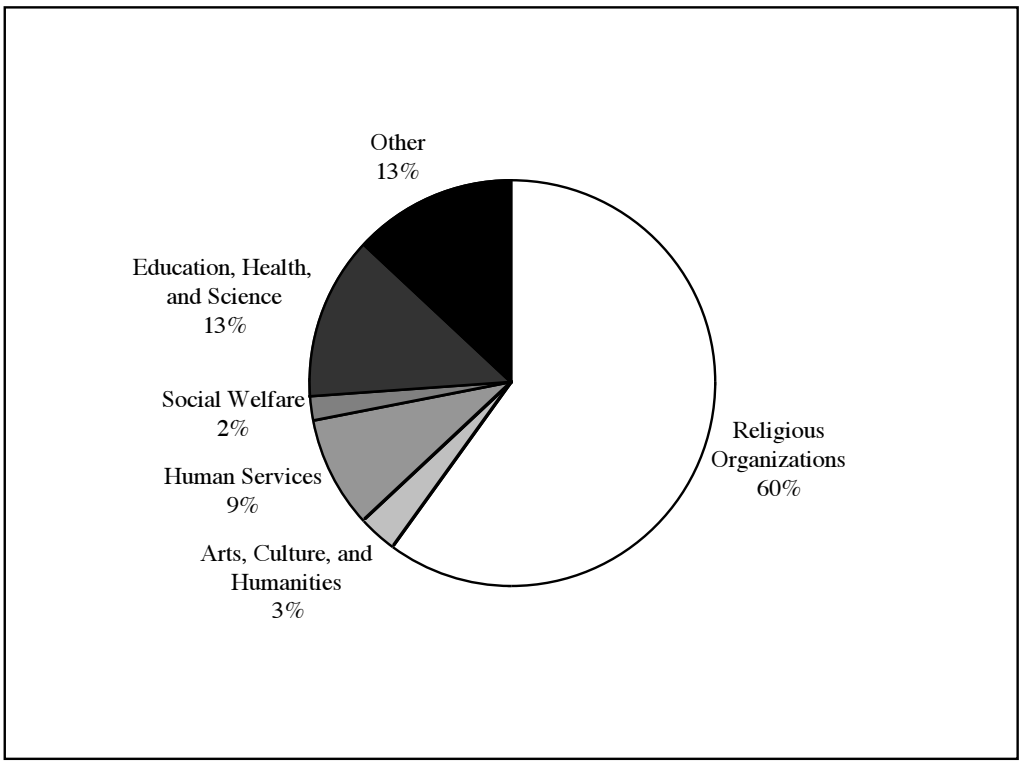
Adapted and updated from Clotfelter 1988/1989.

equality and redistributive outcomes. One of the oldest objections to the provision of tax-deductible donations to qualifying nonprofits is that the policy fails to differentiate between the social benefits produced by various nonprofits. Thus, from the perspective of the state, assuming we are in the same tax bracket, the $1,000 donation that you make to a contemporary arts museum to underwrite a video installation is worth exactly the same as the $1,000 that I give to tsunami relief. Are these of equal social value? That social policy should be indifferent between these two kinds of goods and provide equivalent subsidies to their respective donors seems quite odd. Yet so long as the recipient organization is a qualifying 501(c)(3), the state grants a tax deduction.

More damningly, if we move away from the treatment of individual contributions and consider the total distribution of charitable dollars, we find a pattern of giving that appears hard to reconcile with redistributive outcomes. The unexpected elephant in the room, the subject so often overlooked in discussions of philanthropy, is the dominant presence of religious groups as recipients of charitable dollars (see Figure 1). Is giving to a religious group a redistributive or eleemosynary enterprise? It might be thought so, if contributions to religious organizations included gifts to religious schools and faith-based social services. But gifts to these religious enterprises have been sectioned off and assigned to their appropriate categories of education and human services, respectively. Gifts to religious organizations can only be understood as predominantly for the operation and sustenance of the religious group, and in this sense, religious groups look more like mutual benefit societies than public

Figure 1

Distribution of Charitable Dollars, by Type of Charity, 1998



Religious Organizations do not include giving to religious schools or faith-based social services; these dollars are tallied in education and human services, respectively.

The Other category includes giving to international aid and development, private and community foundations, recreation, and still other charities.

Source: Independent Sector, *The New Nonprofit Almanac and Desk Reference, 2002*

charities. It appears very difficult, then, to construe giving to religion as redistributive. Even if we ignore the elephant in the room and focus instead on the other recipients, we find that social welfare groups receive only 2% of charitable dollars and human services only 9%. A larger amount goes to education, health, and science (13%), which is potentially redistributive but not obviously so.

Duke University economics and law professor Charles Clotfelter examines the distributive benefits of nonprofits and concludes, "that relatively few nonprofit institutions serve the poor as a primary clientele." Of the possible redistributive and eleemosynary aims of public charities, political philosophers Liam Murphy and Thomas Nagel conclude:

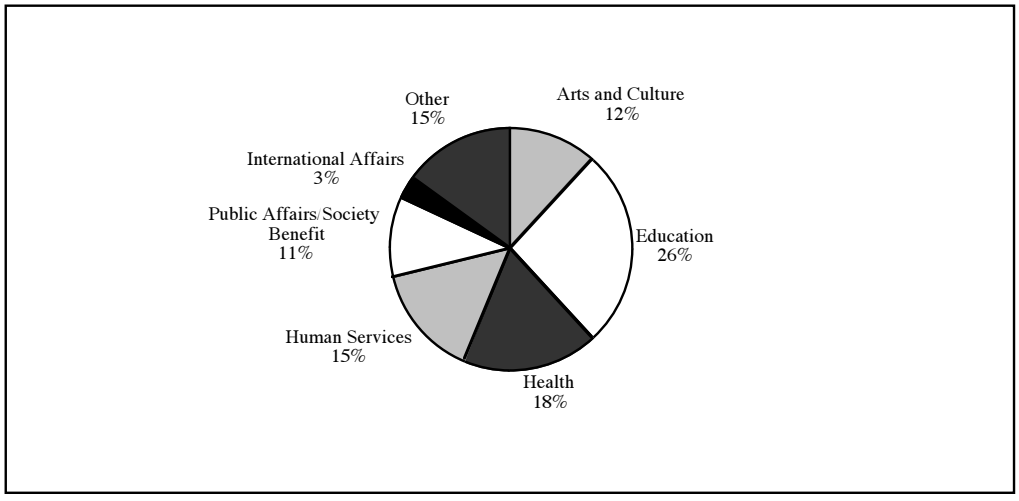
> The word charity suggests that this deduction is a means of decentralizing the process by which a community discharges its collective responsibility to alleviate the worst aspects of life at the bottom of the socioeconomic ladder. . . . [But] many currently deductible 'charitable' contributions go to cultural and educational institutions that have nothing to do with the poor, the sick, or the handicapped. State funding of such institutions may or may not be desirable, but the argument would be very different, and 'charity' is hardly the right word.

Does the picture change if we limit ourselves to the world of philanthropic foundations? Though these constitute a relatively small part of the charitable universe (gifts from individuals and their bequests accounted for roughly 85% of all private giving in 1998, the remaining 15% comes from foundations and corporations) foundations might be more straightforwardly redistributive for three reasons. First, the funds that create them almost always come from the very, very wealthy; it would be difficult for the money to flow upward to the even wealthier. Second, whereas the charitable giving of individuals is directed very heavily toward religion (60% of all charitable contributions), foundations direct only 2.7% of their grant dollars to religion. Third, at a conceptual level, to the extent that our focus should be on philanthropy as an activity separate and distinct from charity, we would have good reason to believe that philanthropic endeavors, conceived as large scale interventions with an aim toward social melioration, would be more likely to be redistributive in outcome than the aggregation of charitable contributions to all nonprofit organizations described above. The eye-popping growth of foundations in the past fifteen years also warrants special attention. According to figures produced by the Foundation Center, almost half of the largest foundations in the United States were created after 1989. An even more explosive growth pattern can be seen in the subsector of community and family foundations. Can foundations lay a greater claim than nonprofits more generally to embrace equality?

Figure 2 (below) displays the distribution of foundation dollars in 2002. The grant dollars are certainly dis-

Figure 2

Distribution of Foundation Dollars, by Subject Category of Recipient, circa 2002



The Other category includes giving to the environment and animal, to science and technology, to social sciences, and to religion.

Source: Foundation Giving Trends 2004 (The Foundation Center)

tributed more evenly than is the case with the charitable contributions of individuals. But the grant categories tell us relatively little about whether the grant dollars are redistributive or not. Take the education category, for instance. Almost half of foundation dollars to education go toward higher education. But we have no way of knowing if these dollars are funding boutique centers for research, the endowment of a professorial chair, or scholarships for disadvantaged and poor students. Princeton University professor Julian Wolpert's extensive analysis of the redistributional effects of foundations notes a host of other complex issues, including how to account for the time horizon of foundation activities, which are often directed at long-term rather than short-term change, and the scope of foundation activities, some of which are very local (community foundations) and others of which are global in reach (e.g., Gates Foundation).

Julian Wolpert concludes that foundations are at best "modestly redistributive" as can be determined with available data. Let us assume that he is correct; yet we must still account for the tax concessions to philanthropy and the counterfactual scenario in which the money flowing into philanthropic foundations would have been taxed and become public revenue. The relevant question is not merely, "Are philanthropic foundations redistributive?" but rather, "Do foundation dollars flow more sharply downward than government spending does?" In order for the return, so to speak, on the public's investment in philanthropy to be worthwhile, philanthropy must do better than the state would do had it taxed the philanthropic assets.

Answering this counterfactual question is even more difficult than determining whether philanthropic foundations are redistributive. We are forced to speculate about how the state might spend the tax revenue it could have collected if it hadn't extended the tax concessions to philanthropists for their gifts to foundations. I will not make any such speculation here. Instead, I simply note that anyone who seeks to ground the special tax treatment of philanthropy on the sector's redistributive outcomes must confront at least three reasons to be suspicious that any such redistribution actually occurs. There is the first and obvious difficulty that a motley assortment of nonprofit groups all qualify for 501(c)(3) status, puppet theaters and

soup kitchens alike. There is the second difficulty that religious groups dominate the beneficiaries of individual charitable dollars. And there is the third difficulty that the burden on the sector's advocate is to show not merely that philanthropy is redistributive but that it is more redistributive in its actions than would be the government. In short, we have some good *prima facie* reasons to doubt that philanthropy is redistributive in effect or eleemosynary in aim. Philanthropy's supposed tight connection to equality looks more and more dubious.

One might still find reasons to justify the existence of nonprofits and philanthropies, resting the justification on the importance of decentralizing authority, creating a set of mediating institutions in civil society, desiring the production of public goods to be sensitive to local demand, reflecting and generating the pluralism of a diverse democratic society. But the public policy framework that gives preferential tax treatment to donors will be more difficult justify. Though pursuing greater equality is not the only aim of social policy, it is certainly one of the central aspirations of social justice. If the massive tax subsidies given to philanthropy do not serve to enhance equality, the justification will have to lie elsewhere.

Though pursuing greater equality is not the only aim of social policy, it is certainly one of the central aspirations of social justice. If the massive tax subsidies given to philanthropy do not serve to enhance equality, the justification will have to lie elsewhere.

Generating Inequality: Private Funding for Public Schools

Private funding for public schools is a very old practice. Think of bake sales, car washes, and spaghetti dinners. What's new is the scale and professional organization of the effort and the total dollars being raised. Where once it was parent-teacher associations (PTAs), with their wide-ranging activities, that were the organizational hub of fund-raising, today many schools and school districts have created independent entities known as local education foundations (LEFs) whose main or sole purpose is to raise private money to supplement public funds. In some places, the local foundations resemble university fund-raising offices more than volunteer-driven PTAs. New York City famously hired Caroline Kennedy, the daughter of former President John F. Kennedy, to lead its education foundation, the New York City Fund for Public Schools. LEFs are almost always 501(c)(3) organizations. Individuals and corporations make tax-deductible contributions to the LEF, which in turn funnels and disburses the money to the school or district.

School and district policies determine whether private funds can be collected at the school or at the district level (or at both), and whether there are limits on how private funds can be spent (on core academic activities or only on extracurricular activities). Very frequently these donations are earmarked for particular activities such as extracurricular events or materials, additional schools supplies, and field trips. While parents cannot suggest to the district that a special aide be hired, with their privately donated funds, to shadow their own child around, there are many circumstances that would permit parents collectively to get the district to hire art and music teachers, additional teacher aides, sophisticated technological equipment, and so on, that would be targeted to benefit their own children.

With ever-tightening state budgets and a general reluctance in many states to boost education funding, LEFs have grown exponentially in recent years. They exist in almost every large urban district, but they are also increasingly common in smaller and comparatively well-off suburban districts. For most LEFs, but especially those located in suburban districts, the potential donors are parents of the children in the school district or citizens of the town or city in which the district is located.

The distributional consequences of private funding for public schools are not hard to intuit.

It is difficult to fault the motives of parents and townspeople who respond to efforts to fund-raise for public schools. Parents seek to do the best by their own children. Townspeople support their local public institutions. Everyone can lay claim to a public spiritedness in contributing to public education. Yet the distributional consequences of private funding for public schools are not hard to intuit. Wealthy schools and school districts can raise substantially more money than can schools which have high concentrations of poor students, and they do it with the active support of the state in the familiar form of tax subsidies for charitable contributions.

For many, the function of public schools and the very reason why society invests so much money in them and compels children to attend them is to try to *remedy* some of the inequalities that children bring with them into the first day of Kindergarten. Yet the institutional structure subsidizes the charitable giving of those who, in seeking to support their own children's or their own town's schools, worsen the inequalities between

schools. Rather than rewarding virtue, public policy rewards what from the perspective of the public must be considered a vice. The state is complicit in the creation of harms that it is ostensibly charged to eliminate.

To see the problem more vividly, consider the analogous, hypothetical case—call it the police department case. The block on which you live has been victimized in recent months by a crime wave. You and your neighbors attribute the crime wave to budget cuts to the police department, and you pool together money and offer to make a $100,000 donation to a local police foundation that is set up to provide additional financial support to the local police department. You offer the donation only on the condition, however, that the money be used to hire a new officer whose only patrol will be your block. You fully expect to take a tax deduction for your donation.

Rather than rewarding virtue, public policy rewards what from the perspective of the public must be considered a vice. The state is complicit in the creation of harms that it is ostensibly charged to eliminate.

Note that in both the school and the police cases there is an exit option. Parents could choose to send their children to private school, but they would not receive any tax deduction for their tuition payment. Similarly, you and your neighbors could hire a private security officer, but this would not qualify for any deduction either.

Should you be permitted to make the donation to the police department? For most people, I believe that their intuition runs firmly against any such donation. And public policy tracks our intuitions here. Not only does public policy forbid anyone from taking a tax deduction for donations to police departments, it strictly forbids the donation in the first place. Of the many lessons to be drawn, the police case illustrates the liberty of individuals as constrained in the interest of equality. Private individuals are not permitted to make charitable contributions to a public institution in which all citizens are thought to have an equal stake. Note that nothing less than the United States Constitution enshrines a version of this principle. Only Congress can appropriate funding for federal branches of the government. Beyond making a donation to the US Treasury, individuals are not permitted to direct funds to a particular federal agency or organization. This is not a denial of a tax benefit; it is a blanket prohibition on giving.

Conclusion

Making a blanket prohibition on private giving to public schools is not necessarily the most justifiable public policy with respect to philanthropy and public education. The aim should be to make good on the promise of the old story about philanthropy with which I began—that philanthropy is tightly connected to both liberty and equality.

It is at this point that an examination of philanthropy becomes an exercise in political philosophy. There will be no final and definitive answer in any such exercise, but it is important nevertheless to recognize the potential injustices —*the potential harms*—of current public policy. The public policies designed to create a favorable environment for nonprofits and foundations and to offer incentives for people to make charitable donations represent a wide-scale governmental intervention within the charitable and philanthropic sector. As things currently stand, these policies do not do much, if anything, to enhance equality. At worst, public policy is not merely indifferent to whether philanthropy is equality enhancing but actively creates or exacerbates inequalities. As the private funding for public schools phenomenon shows, public policy is sometimes causally implicated in the creation of greater inequalities. This is something we should worry about.

The rocky relationship between philanthropy and equality and the data I have presented does not shake the very legitimacy of philanthropy, charity, nonprofits, and foundations. But it should shake any conviction or belief we might have that their legitimacy, and the public policies that give incentives for their activities, might rest on their connection to equality. In the end, when assessed as an institutionally-sanctioned, encouraged, and rewarded activity, philanthropy is much more tightly connected to, or systematically favors, liberty than equality.

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A version of this article appears in *Taking Philanthropy Seriously: Beyond Noble Intentions to Responsible Giving,* edited by William Damon and Susan Verducci (Indiana University Press), forthcoming.

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The Diversity Rationale: The Intellectual Roots of an Ideal

Michele S. Moses

Introduction

The ideal of diversity retains its salience, even outside of civil rights circles. President George W. Bush has said that he "strongly support[s] diversity of all kinds, including racial diversity in higher education." *How,* and even *whether,* diversity in higher education is to be implemented has been contentious. In the groundbreaking 1978 case, *Regents of the University of California v. Bakke,* the Supreme Court held that, while race could be one the factors considered in choosing a diverse student body in university admissions decisions, the use of quotas was impermissible. When the Supreme Court declined to review the 1996 lower court case, *Hopwood v. Texas,* in which race was not to be used as a factor in deciding which applicants to admit to the University of Texas School of Law in order to achieve a diverse student body, some were convinced that diversity would no longer be valued. Spurred by *Hopwood,* researchers produced credible evidence that supported and explained the educational benefits that flow from a diverse student body to universities, students, and the public. In the far-reaching 2003 Supreme Court ruling, *Grutter v. Bollinger,* the Court cited the research that found educational benefit in diversity and affirmed the constitutionality of affirmative action—what is called the "diversity rationale"—for race-conscious education policies. Heard in conjunction with *Grutter v. Bollinger,* was *Gratz v. Bollinger,* also involving the University of Michigan, and in which the Court struck down the school's point-based undergraduate admission policy, considered essentially a quota system.

As is often the case with divisive public policy issues, the diversity rationale and its foundation, the ideal of diversity itself, have been critiqued with renewed fervor. Following the Michigan cases especially, critics of the diversity rationale proceeded to disparage the democratic ideal of diversity as an invented, empty intellectual concept. The current effort in Michigan to abolish affirmative action, spearheaded by the Michigan Civil Rights Initiative (MCRI), rests on these critiques, among others. MCRI is the first ballot initiative since *Gratz* and *Grutter* to be put on a state ballot by affirmative action opponents such as Ward Connerly and the American Civil Rights Institute. Slated for popular vote in November 2006, if approved, it will serve to eliminate affirmative action in higher education admissions in Michigan as well as in state-supported programs. In a sense, the concept of diversity is being put to a public test; what the voting public ultimately decides will either underscore or repudiate critics of the ideal diversity.

The Ideal of Diversity Challenged

Even critics of the ideal of diversity acknowledge that diversity has become a very visible cultural ideal in the United States, one that holds "a special, almost sacrosanct place in our public discourse." And recent empirical research has found that racial diversity among college students stimulates them to think in more complex ways than they would in the absence of that diversity. Some critics support the ideal of diversity, but object to using it to justify affirmative action in higher education admissions. These critics are concerned that an emphasis on diversity excludes or negates other, more compelling reasons to support affirmative action, such as remedying the present effects of past discrimination or fostering racial integration and social justice. Such issues deserve consideration; but first it is important to examine the notion of diversity and address critics who question its existence or relevance.

The Supreme Court's recognition of the educational value of diversity has prompted skeptics to call for a justification of how the diversity fostered by affirmative action and related policies benefits white students in particular. One skeptic, anthropologist Peter Wood, objects to such formal mechanisms as affirmative action that attempt to ensure enough student diversity to broaden student horizons. Questioning whether institutions of higher learning are the best place for this broadening, Wood argues that persons can expand their horizons informally, just as may happen in everyday life. One might respond that institutions of higher learn-

ing prepare students for democratic and global citizenship, furthering the goals of equality of educational opportunity, liberty, and self-determination, as well as of the public good. Yet Wood's argument uncovers a weakness in explanations of the diversity rationale. When the ideal of diversity is invoked in a simplistic, ahistorical way, one cannot fully appreciate its educational and democratic benefits.

Certainly, the term "diversity" itself is contested; it can have various meanings and is quite controversial in that those on both sides of the affirmative action debate may support "diversity." At the most basic level, diversity means variety or heterogeneity. In discussions centering on affirmative action, people tend to think of race/ethnicity first. In this context, diversity is characterized by a variety of races, ethnicities, colors, cultures, ages, religions, socioeconomic backgrounds, sexual orientations, sexes and gender identities, abilities, languages, etc. These are qualities persons hold that cannot easily be changed. In the context of educational benefits, diversity also includes things that can be changed, such as values, beliefs, moral ideals, intellectual understandings, political ideologies, etc. Critics such as Wood make two serious charges.

When the ideal of diversity is invoked in a simplistic, ahistorical way, one cannot fully appreciate its educational and democratic benefits.

Diversity as Invented and Rootless. Wood is concerned that the diversity championed and sought on college campuses is imagined—conjured, even. He sees diversity as a concept that has ascended in importance to match the concepts of equality and liberty, even though it has no intellectual justification. Wood especially lauds the ideal of liberty and is concerned that the ideal of diversity not overshadow liberty or individual equality.

A particular worry for Wood is that diversity in the United States has been "a source of difficulty and *in*security" since colonial times. However, misunderstanding what proponents of contemporary diversity believe to be real equality, he wrongly asserts that

> [real] equality, according to diversicrats, consists of parity among groups, and to achieve it, social goods must be measured out in ethnic quotas, purveyed by group preferences, or otherwise filtered according to the will of social factions.

In actuality, egalitarian proponents of the ideal of diversity—historically and now—understand real equality to be characterized by treatment of people as equals. Although some commentators may support quotas, quotas are not part of the diversity rationale as promoted by the Supreme Court.

Diversity as Damaging to Unity. The fear that diversity and difference will damage social unity can be found as long ago as in Plato's times. According to Wood, the ideas that bolster the diversity rationale have trumped what he calls old diversity, which emphasized unity forged from multiple identities and assimilation. By contrast, the contemporary diversity rationale stresses particularity for its own sake, highlighting the group at the expense of the whole. Wood is concerned that the diversity rationale is founded on the untenable "*belief* that the portion of our individual identity that derives from our ancestry is the most important part, and a *feeling* that group identity is somehow more substantial and powerful than either our individuality or our common humanity." To critics such as Wood, the central criticism of the diversity ideal is that racial and ethnic groups then receive special—largely unearned—privileges.

To begin to repel such charges as that the diversity ideal is an empty, rootless concept that, further, hinders or destroys social unity—one must take the time to dig deeper to find that the ideal of diversity *has* followed a decisive intellectual trajectory. Understanding the philosophical underpinnings of diversity as an educational and democratic idea allows one to see that unity and common humanity can actually be fostered by diversity. It need not be assimilationist; indeed individual and group diversity that is sustained over time can contribute to greater mutual human understanding and respect. Too often the unity for which Wood and similar critics are nostalgic served to suppress the very diversity from which it came.

Philosophical Origins of the Ideal of Diversity

One can trace the evolution of the concept of diversity itself and of diversity as a democratic ideal as far back as the ancient Greeks, to the nineteenth century Utilitarian thinker John Stuart Mill, to the early twentieth century sociologist and writer W.E.B. DuBois, to the contemporary philosopher and legal theorist Martha Nussbaum. These theorists provide foundational historical-philosophical evidence for the diversity rationale in use today.

It is John Stuart Mill's work, in particular, that shows that the ideal of diversity has a long intellectual and historical tradition. For instance, Mill begins *On Liberty* with the following quote by William von Humboldt: "The grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity."

Mill's Marketplace of Ideas. Mill believed in the importance of diverse perspectives. As an early proponent of diversity, broadly defined, he provided perhaps the clearest and strongest foundation for the contemporary ideal of diversity. Mill's concept of the

"marketplace of ideas," primarily used to justify free speech, served also to underscore one of the key points he made in *On Liberty:* in social and political affairs, it is crucial to think through issues carefully and discuss all opposing ideas. He had in mind religious and even class differences of opinion and perspective, rather than racial and ethnic differences, but his point supports the use of the diversity rationale:

> There are many truths of which the full meaning *cannot* be realized until personal experience has brought it home. But much more of the meaning even of these would have been understood, and what was understood would have been far more deeply impressed on the mind, if the man had been accustomed to hear it argued *pro* and *con* by people who did understand it.

This is, at bottom, a strong argument for the value of diversity in classrooms, campuses, political deliberation, and public life, for persons cannot understand opposing viewpoints fully if they are never exposed to those who hold different views.

Mill emphasized human development of important capacities (e.g., intellectual, moral) and individual autonomy as characteristics central to a worthwhile human life. Because it stimulated the development of such capacities, Mill valued diversity, particularly diversity of character, lifestyle, and preference. According to Mill, "unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good." He specifically was interested in the complexity and diversity within human nature, arguing that there were different, tenable ways to live the good life and that each could learn from the other.

Mill's individualism was prescient in many ways. He worried that the strong emphasis on social uniformity and assimilation prevalent during the nineteenth century would actually serve to threaten individualism. Consequently, Mill warned of "the tyranny of the majority" in politics, a problem the contemporary diversity rationale aims to mitigate.

The diversity of ideas that Mill championed can be linked strongly with diversity of race and culture. Contemporary critics who question the value of diversity contend that diverse races and cultures provide no guarantee of diverse ideas and opinions. That is certainly true. However, several studies have found that increasing racial diversity on college and university campuses provides a better chance of both diversity of perspective and cross-cultural understandings than does racial homogeneity. As Mill said: "the interests of truth require a diversity of opinions."

W.E.B. DuBois. Like Mill, W.E.B. DuBois's ideas related to diversity are complicated. His work never dealt explicitly with the ideal of diversity, but it has interesting implications for the ideal and the use of the diversity rationale for race-conscious education policy. In particular, DuBois saw race as crucial to identity, as "a source of individual and group definition." Here, as in the ideas underlying the diversity rationale, the assumption is not that people of different races and ethnicities *always* have different views, but that they do have different experiences of the world that they then bring to bear in educational settings, which was Justice Powell's primary emphasis when he invoked the diversity rationale in *Bakke.* As a result, because of the way DuBois understood race as an important conduit of individual and group identity, he likely would have agreed that racial diversity brings invaluable resources to educational endeavors. As his chief biographer, David Levering Lewis, pointed out, for DuBois, "the ideal American society was one that would draw strength from the interaction and interdependence of its heterogeneous groups."

In an oft-quoted passage from *The Souls of Black Folk,* DuBois discussed his idea of "double-consciousness" or "second sight," which he said black persons acquire by living in a racist society:

> This sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness, an American, a Negro, two thoughts, two unreconciled strivings; two warring ideals in one dark body.

Through the idea of double-consciousness, DuBois advanced the notion that multicultural knowledge broadens perspective. He also lamented that such double-consciousness can cause a fragmented identity, but commented that the formation of a coherent social whole requires the strengths of both black and white people. For example, he championed "the ideal of fostering and developing the traits and talents of the Negro, . . . in order that some day on American soil two world-races may give each to each those characteristics both so sadly lack."

As such, DuBois criticized the Booker T. Washington-influenced accommodationist school of thought regarding the education of black people. He argued that education served not only as preparation for employment, but also as preparation for citizenship and should therefore be much broader and deeper than a vocational education would allow. According to Burks, DuBois advocated for full equality for black people (as well as other marginalized groups), but not to the detriment of American unity. This was part of his disagreement with Washington, who accepted the idea of separate facilities for African Americans. DuBois felt that continued segregation and separation of black people from other groups would diminish democracy.

As with the other scholars examined here, DuBois's ideas on racial issues were complex and fluid. In fact, later in his life, discouraged by the lack of progress in racial integration and social conditions, DuBois reconsidered his ideas, coming to support black unity and

black self-sufficiency. These ideas need to be understood in addition to DuBois's earlier calls for increased interaction between different racial groups. He never denied that integration was the ultimate goal: "Doubtless, and in the long run, the greatest human development is going to take place under the widest individual contact."

Returning to DuBois's early thinking, he observed, "despite much physical contact and daily intermingling, there is almost no community or intellectual life or point of transference where the thoughts and feelings of one race can come into direct contact and sympathy with the thoughts and feelings of the other." He saw education as a hopeful institution, where, indeed, the thoughts and feelings of one race could come into direct contact and sympathy with the other. This exemplifies DuBois's view on how racial diversity can serve to enhance educational experiences, learning, and, ultimately, social relations and understanding between the races, which is an idea importantly invoked by the contemporary diversity rationale.

Nussbaum's Humanity. In a contemporary context and with a broader notion of cultural diversity, Martha Nussbaum argued that diversity is crucial for the proper education of global citizens. As she explained:

> Many of our most pressing problems require for their intelligent, cooperative solution a dialogue that brings together people from many different national and cultural and religious backgrounds . . . A graduate of a US university or college ought to be the sort of citizen who can become an intelligent participant in debates involving these differences, whether professionally or simply as a voter, a juror, a friend.

Drawing on the ideas of Socrates and the Stoics, Nussbaum defended the ideal of diversity most prominently in *Cultivating Humanity.* She used the classics and philosophy to make connections between higher education and preparing democratic citizens. Her emphasis was on the development of critical thinking; critical examination of oneself and one's own history, culture, background and beliefs; and critical understanding of non-Western cultures, American people of color, sex, and sexuality. Students, Nussbaum argued, need to be able to reflect on themselves, their culture, community, and nation—critically—in order to achieve an education for democracy and world citizenship.

As such, Nussbaum articulated three primary values of a liberal education: (1) the ability to conduct critical self-examination; (2) the ability to participate as a citizen of the world; and (3) the ability to develop narrative imagination. She focused on how university curricula can foster these core abilities among students, calling for a re-envisioning of the central aims of higher education and its content as well. Peter Wood, critic of the diversity ideal, has argued that "as valuable as it is to get to know people of many different backgrounds, doing so is ultimately of less importance than such things as learning how to write well, how to speak and read a foreign language, and how to use calculus." I contend that Nussbaum would disagree, positing instead that the "new emphasis on 'diversity' in college and university curricula is above all a way of grappling with the altered requirements of citizenship, an attempt to produce adults who can function as citizens of a complex interlocking world." This is arguably just as important as learning to write and use calculus, perhaps more so. Nussbaum's notion of cultural diversity is closest to the notion invoked in the contemporary diversity rationale: "We do not fully respect the humanity of our fellow citizens—or cultivate our own—if we do not wish to learn about them, to understand their history, to appreciate the differences between their lives and ours." What Nussbaum called the "new" emphasis on the ideal of diversity has its roots in a long and distinguished tradition of philosophical thought.

Concluding Thoughts

This brief examination of Mill, DuBois, and Nussbaum's ideas related to the ideal of diversity shows that—though there exist tensions and complexities in their thinking and each viewed the ideal of diversity differently and assigned it a different social priority—for all three the ideal of diversity played an important part in a democratic society. Taken together, they argued that the ideal of diversity is worth wanting because it enriches a democratic society and cultivates adults who can function more effectively as citizens of a complex, connected world. Even Justice O'Connor, in her majority opinion in *Grutter,* noted that widening access to higher education through affirmative action is justified in part by a commitment to democracy. In this sense, the diversity rationale is rooted to a philosophical foundation in the virtues of diversity.

Although this is important, the diversity rationale remains an incomplete justification for affirmative action and related policies. Other important rationales include remedying the present effects of past discrimination, fostering an expanded social context of choice and individual self-determination, and promoting social justice. The diversity rationale is one particularly viable justification for policy, but is also an insufficient justificatory concept. At its best it is a strategic and reasonable political compromise, founded on the ideal of diversity; at its worst it allows people to ignore rationales for race-conscious policies based on equality and social justice. As such, scholars would do well to integrate analyses of diversity with considerations of social justice. An integrated rationale would provide a more appropriate framing of issues to inform the public about race-conscious education policies, which is especially important in this era of initiatives such as the

Michigan Civil Rights Initiative, seeking voter approval.

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I gratefully acknowledge that this paper was supported by funding from a National Academy of Education/Spencer Foundation Postdoctoral Fellowship. I thank Mitch Chang, Peter French, and Lauren Saenz for their generous feedback and editing.

Sources: George W. Bush, *President Bush Discusses Affirmative Action Case,* (January 15, 2003) Retrieved January 16, 2003, from *http://www.whitehouse.gov/news/releases/2003/01/;* Justice Sandra Day O'Connor cited research in writing for the majority in *Grutter;* see, e.g., Anthony Antonio, "The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding," *Research on Higher Education 42,* no. 5 (2001): 593–617; Mitchell J. Chang et al., eds., *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (Stanford: Stanford University Press, 2003); Patricia Gurin et al., "Diversity and Higher Education: Theory and Impact on Educational Outcomes," *Harvard Educational Review 72,* no. 3 (2002): 330–366; Gary Orfield with Michal Kurlaender, eds., *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Cambridge: The Harvard Civil Rights Project, 2001); On the renewed fervor of critques of diversity, see, e.g., Derrick Bell, "Diversity's Distractions," *Columbia Law Review, 103,* (2003): 1622; Brian Fitzpatrick, "The Diversity Lie," *27 Harvard Journal of Law and Public Policy* (2003): 385–397; Charles Lawrence, "Two Views of the River: A Critique of the Liberal Defense of Affirmative Action," *101 Columbia Law Review* (2001): 928–965; Peter Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Cambridge: Belknap, 2003); and Peter Wood, *Diversity: The Invention of a Concept* (San Francisco: Encounter, 2003); Ward Connerly is a Regent of the University of California system. He spearheaded successful anti-affirmative action ballot initiatives in California (Proposition 209) and Washington (Initiative 200); The "special place" of the diversity ideal in the US is found in Peter Schuck, "Affirmative Action Is Poor Public Policy," *The Chronicle of Higher Education,* 2 May 2003, B10; diversity leading to more complex thinking occurs in Anthony Antonio et al., "Effects of Racial Diversity on Complex Thinking in College Students," *Psychological Science 15,* no. 8 (2004): 507–510; Michele S. Moses, *Embracing Race: Why We Need Race-Conscious Education Policy* (NY: Teachers College Press, 2002); Michele S. Moses, "Affirmative Action and the Creation of More Favorable Contexts of Choice," *American Educational Research Journal 38,* no. 1 (2001). By invoking these scholars' ideas on diversity, I am not trying to mitigate the problematic nature of how they handled real racial issues. Here I am most concerned with their intellectual ideas related to diversity as a democratic ideal. Very different versions of the sections on Mill and Nussbaum appear in, "Toward a Deeper Understanding of the Diversity Rationale," with Mitchell Chang, forthcoming in *Educational Researcher.* John Stuart Mill, *On Liberty.* (London: Penguin Books, 1974/1859); Bikhu Parekh *Rethinking Multiculturalism* (Cambridge: Harvard University Press, 2000); Mitchell J. Chang, "The Positive Educational Effects of Racial Diversity on Campus," in *Diversity Challenged,* 175–186; Patricia Gurin, "Selections from the Compelling Need for Diversity in Higher Education: Expert Report of Patricia Gurin," *Equity & Excellence in Education 32,* no. 2 (1999); Richard King, *Race, Culture, and the Intellectuals, 1940–1970,* (Baltimore: Johns Hopkins University Press, 2004); David Levering Lewis, *W.E.B. DuBois: The Fight for Equality and the American Century, 1919–1963,* (NY: Henry Holt, 2001); W.E.B. DuBois, *The Souls of Black Folk,* (NY: Gramercy, 1994/1903); Benjamin Burks, "Unity and Diversity through Education: A Comparison of the Thought of W.E.B. Dubois and John Dewey," *Journal of Thought,* 32, no. 1 (1997); DuBois' shortcomings include failing to include women in his vision of talented Black people (see chapter 6 of *Souls,* "On the Training of Black Men") and what some call the elitism of his notion of the "Talented Tenth"; Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education,* (Cambridge: Harvard University Press. 1997); the idea of whether something is "worth wanting" is borrowed from Kenneth Howe, *Understanding Equal Educational Opportunity: Social Justice, Democracy, and Schooling* (NY: Teachers College Press, 1997); Walter Feinberg, *On Higher Ground: Education and the Case for Affirmative Action* (NY: Teachers College Press, 1998).

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