

PRINCIPLES OF THE AMERICAN REPUBLIC

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I. THE ENDS AND MEANS OF AMERICAN DEMOCRACY: BALANCING LIBERTY AND EQUALITY BY DIVIDING POLITICAL AUTHORITY

In eloquently stating the ends of their new government, the country's early leaders stumbled on the challenge that would be theirs for the next 225 years. Acknowledging *that all men are created equal*," the Declaration of Independence proclaims, "*that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*" At Gettysburg, Abraham Lincoln repeats the conundrum but weighs in on the other side, "*a nation conceived in liberty and dedicated to the proposition that all men are created equal.*"

The Ends of Democratic Government

In a democracy, citizens ask their elected officials to provide political, economic and social benefits that the majority wants, but in a way that legally protects the choices of those who don't. The American republic was founded on the novel belief that ordinary men and women can make those decisions under a set of Constitutional principles (both explicit and implicit) implemented through free elections and protected by the Courts.

But, it was never that simple. The Constitution guaranteed liberty. Though the Convention delegates never believed that "all men were created totally equal," the country's abundant land and resources reinforced the social and economic equality that the Constitution sought to establish. The colonists' fight for political liberty would have been wasted if the yeoman farmer didn't have enough to eat or had to house his family in a trailer on the Commons. In the words of America's first sociologist, Alexis de Tocqueville, "equality of condition is the fundamental fact from which all others seem to be derived."

Washington and his fellow delegates certainly understood the tension between liberty and equality as well as the relation between economic prosperity and a successful democracy. Except for black slaves, poverty was virtually unknown in the 1790s. Land was available for those who wanted it, and penury more a reminder of the lands from which the delegates had come than an issue in the new nation.

Freedom is, indeed, the hallmark of American society. It comes in the form of legal protections grounded in the Bill of Rights and the judicial system; economically, through open markets and fair competition; and, socially, through pluralism and separation of church and state.

The principle of an equalitarian society is also fundamental to the Republic's structure. "Our greatest goal is to give the average family the opportunity to earn an income, to own a home, to educate their children, and to have some security in their later years." Former Speaker of the House, Tip O'Neil went on to say, "I believe it is wrong for the people who made it up the ladder to pull the ladder up behind them. This is an alien philosophy. We Americans believe in hard work, in getting ahead, but we also believe in looking out for the other guy."

"Equality" suggests that "people who are alike should be treated alike." This definition, however, is deceptively simple and leaves unanswered the degree to which people should be made equal and in what respects. Equality's meaning has undergone a transformation over the Republic's history. Over the past two and a quarter centuries, however, forces in American life have worked to expand the meaning of equality and to promote egalitarianism and social justice.

Today, an equalitarian society encompasses much more than what it meant to the Framers. The principle applies to a much larger, diverse, and heterogeneous society. An equalitarian society presupposes equality of opportunity, and equality of opportunity leads to expecting a certain minimum equality of result.

The Means

Achieving this balance was and remains the underlying challenge of American or (any democratically elected) government. The Constitution reflects the political theory of its day, a social contract that holds "governments derive their just powers from the consent of the governed."

In designing this compact between citizens and their elected officials, the authors of the Constitution had choices to make but few examples to follow: England offered Parliament, but the Palace was just down the street. They had their own experience with colonial assemblies; and, of course, the largely dysfunctional Continental Congress.

They considered these precedents and designed a new system, "a fabric without model." Equally concerned about the abuse and concentration of power as well as the government's ability to achieve its objectives, they parceled out the single source of authority from the electorate among multiple branches and levels. They erected an electoral sieve that insulated the government from direct representation by class and sectional interests, while hoping the process would promote experienced and virtuous leaders to public office. The delegates anticipated a political equilibrium that would balance and mold these diverse interests into coherent policy and effective government. Separation of powers operated through a series of checks and balances among different branches internally; and, vertically, through a federal structure. Federalism also offered the advantage of allocating authority to those levels of government in the best position to make the best decisions.

Government Today

The Constitution married the colonist's basic aspirations for a democratic and free society and their experience with representative government over the previous 150 years. The results were practical if not always happy compromises to marry the two together.

For the past 220 years, Americans have struggled to make that union work. The past 50 years however, have seen the people and their elected officials grow apart in a way that has never happened before, ironically, after arguably America's greatest achievement, victory in World War II.

The forces driving this separation are many and merit their own discussion. Among them: at home, the social upheaval that transformed American society through the civil rights movement, empowerment of women, and the exponential increase in and concentration of wealth. Overseas, the rise of Asia and liberation of Eastern Europe have exposed a nation previously content to live and work within continental boundaries to resources and competition that were previously exploited or ignored.

The result has been a government increasingly estranged from the vast majority of the electorate and internally incapable of responding to a broadly diverse set of social and economic forces with which the elected, well-educated and socially privileged are no longer connected.

If the best of what America has accomplished, unprecedented political liberty and economic opportunity is worth preserving, then it is a union in need of repair. The path to revitalizing this relationship lies in understanding the principles framing the contract between the government and the American people, what has changed, and reconciling those changes with the world we live in today.

We start then with these basic principles.

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PRINCIPLES OF THE AMERICAN REPUBLIC

United by their recent victory for independence and desire to “create a more perfect union,” the Country’s early leaders shared beliefs inspired by the era’s foremost thinkers and shaped by their own experience. They cast these ideals into a unified set of principles underlying their ultimate achievement, the American Constitution. Though modified by vast changes, these principles have provided a novel yet enduring guide to formulating policy over the past 220 years.

Inherently a political document, the Constitution’s foundations rest equally on economic, social and legal principles. The Convention delegates spent most of their time discussing what the new government could and could not do and sorted out tasks between its different branches and the former colonies. They searched for a basis on which sectional interests could participate equally in government. And, of course, they worried about the qualifications of those who would occupy elected office.

Washington and his peers also recognized that economic prosperity was a precondition to political stability, and, in turn, that political stability was essential to economic progress. Responding to a postwar recession that bottomed in 1786, the Constitutional Convention envisioned a commercial system founded on free markets and a level playing field. “You made a mistake? So what? Try again!” soon defined a society that afforded infinite second chances and unprecedented wealth to those willing to stay late and take risks.

The Framers drew upon their English common law heritage and adopted an adversary system of justice, the legal equivalent of the “everyman-for-himself” model of open markets and free trade.

The Constitution also reflected equally important social values. “Our greatest goal is to give the average family the opportunity to earn an income, to own a home, to educate their children, and to have some security in their later years.” Former Speaker of the House, Tip O’Neil went on to say, “I believe it is wrong for the people who made it up the ladder to pull the ladder up behind them. This is an alien philosophy. We Americans believe in hard work, in getting ahead, but we also believe in looking out for the other guy.” Winning wasn’t everything or even the only thing—it was how you played the game that mattered most.

“Out of many one” and the separation of church and state further reinforced the foundations of a fair, open, and democratic society.

But, no matter how carefully they balanced competing interests within the Constitutional framework, the Convention realized that their ultimate success depended upon the individuals chosen to lead the new republic. “Governments like clocks, go from the motion men give them,” wrote William Penn. No less true in today’s digital world, public virtue remains the ultimate bedrock of American society and government.

POLITICAL PRINCIPLES

Political principles address the underlying legitimacy of government, its purpose, role, and structure.

SOCIAL CONTRACT.

The principle that democratic government derives its legitimacy from the consent of the governed was implicit in the very act of creating a written constitution. It addresses both the source and scope of government power. This principle rests on the belief that elected officials govern with the permission and participation of the governed. The growth, size, and complexity of modern government have obscured but not replaced this integral component of representative democracy.

The relevance of social contract is reflected in the debates over redistricting and gerrymandering; the explosion in the number and influence of professional lobbyists; and the accountability of appointed officials to elected representatives.

NATURAL RIGHTS

The social contract is premised on a second principle, natural rights. In return for surrendering authority to their elected leaders, government guarantees that certain “fundamental rights” will not be violated. “I demand my Constitutional rights” is more than a Hollywood chorus line: it is every American citizen’s shield against the state’s overwhelming power to deny basic legal protections.

The idea of "freedom" is central to the democratic tradition. Historically, "freedom" applied only to the limits on physical confinement. Over time, the idea has grown into a general concern for the individual and his right to "life, liberty" and material well-being.

"Equality" sets boundaries on "liberty." Liberty secures individual autonomy and freedom from government interference, while equality, at the very least, demands similar opportunities for all and elevates the common good over individual demands.

As a political doctrine, natural rights traces its origins to English institutions such as the *Magna Carta* and eighteenth century philosophers including Locke and Rousseau. The Declaration of Independence enshrined "life, liberty, and the pursuit of happiness." The Bill of Rights added freedom of the press, speech, and religion, and the rights to assembly, to counsel, to protection from unreasonable search and seizure, to the state's burden to prove criminal behavior, and to a jury trial.

The Civil War amendments further expanded these rights, guaranteeing "equal protection of the law" to all inhabitants. Through liberal construction of Fourteenth Amendment "due process" and "equal protection," the Courts have greatly expanded the number of "fundamental rights" to invalidate statutory distinctions based on race, national origin, and sex.

The courts have also widened the definitions of "core" fundamental rights of "life, liberty, and property" to include public education, public employment, welfare benefits—and privacy. Expansion of the meaning of "life" and "liberty" underlie the greater procedural protection granted to criminal defendants.

Whether these other rights are or have ever been lurking in the Constitutional "penumbra" is beside the point. Many relate to social issues that are better resolved within a political forum. Relying on judges responsible for adjudicating opposing legal arguments has forced the courts into far-reaching policy decisions and undertaking broad social reform, which they are structurally-ill equipped to handle. Ultimately, these are decisions that a reluctant but empowered legislature should be undertaking.

FEDERALISM.

Federalism is one of the Republic's core political principles. It recognizes that effective self-government rests on a partnership between the national government and one which is "close to home."

Federalism is commonly used to describe the relationship between Washington and the states. Madison and others at the Convention, however, conceived of federalism more broadly as the dynamic relation between a "General Government" and "subordinate Governments [who] retain their due authority and activity."*

The successful transformation of a largely agrarian and rural society into an industrial metropolis; and its evolution from a collection of local communities to a unified national

society—set within a global community—reflects the wisdom of Madison’s original vision. But, the states' importance in 1787 undermined what the delegates really had in mind: allocating political authority to that level of government best suited to take on specific responsibilities and whose independence served as yet another check on the abuse of power. "It also permitted the constituent units of government to be laboratories for social experimentation, thereby creating the possibility of a greater diversity in governmental styles and political responses than could be achieved if all authority were centralized in the national government."*

Rethinking the contours of federalism have frequently run aground on concepts of “state sovereignty” or “states rights.” The Framers addressed the issue of accommodating two levels of government through the 16th century concept of "sovereignty." Back then, "sovereignty" meant "the absolute power to make the laws without the consent of the governed."*

The delegates agreed that the "people" had ultimate authority. Most realized that the legitimacy of a democratic regime lodged not in governments but in the people’s willingness to support that government. Regarding the people as "sovereign," however, meant denying "sovereignty" to both the state and federal governments. In 1787, however, the states were not only very real but the only political game in town.

The delegates never articulated a theory which would have justified the states' role in the Republic nor resolved whether the federal union resulted from the states surrendering part of their authority or from the will of the people who split political authority between local and national governments. Political structures which rested on doctrines of "separation of powers" and "federalism" were incompatible with any concept of “absolute supreme, and uncontrollable power.” .

The difference between the two kinds of government, the one general, the other local, lay in the tasks assigned to each. By creating a federal republic that shared both the characteristics of a confederation and unitary government and by dividing authority into so many pieces and levels, they destroyed any lingering possibility of "supreme authority." The delegates constructed a practical solution on a spare theoretical base. The Constitution, itself, never mentions the word "sovereignty."*

More than they realized, the Framers created a government whose aims and structures corresponded to the conditions of equality and dispersed centers of authority that characterized an agrarian and largely homogeneous society, whose political landscape was dominated by the former. As such, the federal structure ignores the move to an industrial and urban society; the population's accelerating diversity; the rise of special interest groups, the enormous power concentrated in Washington—against an increasingly global political and economic landscape. Modern transportation, communications, and computer processing power have facilitated administration which was impossible in the Republic's early days.

RESTRAINTS ON A SINGLE SOURCE OF AUTHORITY

Most agreed that the state's authority flowed from the electorate. The principle of restraints on a single source of authority operated through a complex system of checks and balances. First, the delegates created a series of partitions within the government, which also established the government's internal structures: separation of powers, comingled powers, and enumerated powers. Dividing government power among three horizontal and interlocking branches completed the vertical distribution of government functions. The delegates' major innovation, it was the product of untested political theory and pragmatic concerns for the abuse of power. The Constitution also combines separation of powers with a different mechanism—balance. Without the power to withstand encroachments by another branch, a department might find its authority greatly impaired.

Enumerated powers engages the principle of federalism within the machinery of national government and sets the parameters for separation of powers. The Convention debated the powers of the different branches and levels of government at length. What emerged was generally a compromise between those who favored granting the Federal government extensive powers and those who sought to limit them.

The delegates went onto engineer restraints external to the formal government machinery. These included indirect election of senior officials and excluding social and economic groups from direct representation in the government. The Framers created a durable yet delicate mechanism whose operation depended upon capable and honest officials and whose equilibrium was insulated from external pressures. Representation, indirectly electing the President and Senate, and excluding social, economic, and religious leaders from directly participating in the political hierarchy were the means chosen to implement their model.

Mechanisms whose primary purpose lay elsewhere also doubled as governors on the Constitutional drive. Federalism served the practical role of organizing and managing an extended republic, while acting as a counterweight to the national government's abuse of authority. Judicial review both separated the judicial function from the legislative and executive and interposed the Judiciary between the Constitution, the people and the legislature. Finally, representation served to implement the social contract and to qualify those occupying national office through a process of education, character and experience.

The end result has been a dynamic political system, searching for equilibrium yet rarely achieving it. All democratically elected governments have faced the same issue: how to create a responsible government while deterring individuals using institutional means to usurp their legitimate authority.

PUBLIC VIRTUE

Subordinating individual interests to the greater good of the whole formed the essence of public virtue as well as one of the American Revolution's ideals. Early American thinkers reasoned that while virtue is necessary to every state in which the people participate in government, it is fundamental to a state founded on the belief in the people's combined wisdom*

In the absence of forced compliance to the state's demands, this voluntary self-sacrifice for the community's good enabled the state to remain united and functional. In an extended republic and a diverse society, individuals from the highest officials to ordinary citizens would make the difference through exemplary behavior that extended well beyond self-interest.

Structurally, the Framers resolved their ambivalence between the delegates' belief in "the people's innate goodness" and their fears about the "every man for himself" model by creating a system of checks and balances within government and an electoral pyramid that only the "wise and virtuous" would ascend to public office. The mechanical structure sought to place as many barriers as possible against political corruption without totally incapacitating the government.

Instead of licensing self-interested behavior on the grounds that somebody else's equally self-interested acts would cancel them out, the Framers wanted to create a republic in which an informed citizenry would elect wise and public spirited individuals to office. The latter, in turn, would use their position to promote the general welfare and to protect individual liberties. The Framers sought to encourage a "national aristocracy" by providing elected officials with the required experience to run the country's affairs.

The model provided successive stages of government responsibility to test those who would eventually run the federal government. The Framers optimistically believed that the "base men" at the bottom would somehow be enlightened as they moved upward through the political apparatus. Most members of the Revolutionary generation thought that public virtue—as defined by "a concern for and willingness to subordinate individual and local interests to the common welfare—necessary to the functioning of any republican political society."* But they never reconciled this belief with their ideal that a common good would arise from each individual selfishly pursuing his own interest.

The Framers took the existence of public virtue in national leaders for granted. They never explained how selfish individuals became more virtuous than "men of indigence, ignorance, and baseness"* as they climbed the political ladder. While frequently referring to an individual's inherent selfishness, they provided no proof of why anyone should act more altruistically when elected to public office.

LEGAL PRINCIPLES

Although the Constitution primarily addresses political issues, it remains a legal document. The Convention largely focused on the scope and composition of the judiciary, and little was explicitly said about the new Republic's legal order.

JUDICIAL REVIEW

Borrowing language from the *Magna Carta*, the Framers made the Constitution "the supreme Law of the Land." By elevating the Constitution over the ordinary acts of the

legislature, they departed from the English tradition where Parliament had the final say on the country's affairs. The Framers explicitly removed the Federal courts from the legislative process, but used the principle of judicial review to insure that the laws passed by both the Federal and state legislatures conformed to Constitutional standards. But they ostensibly drew a bright line underscoring the Constitutional branch responsible for making fundamental policy decisions—Congress.

Assessing the Court's primary responsibilities raises at least, two key questions: First, what forces have caused the courts to broaden their primary role beyond simply deciding legal disputes? Second, how can society set parameters on judicial activity consistent with what was intended to be their proper function: to determine the facts in the case before them, to apply relevant legal principles, and to resolve controversy by applying those principles in a manner consistent with prior decisions and the ends of justice?

Though furthest removed from the check of the polling booth, courts are frequently closest to the citizenry when seeking to preserve the Republic's most fundamental values.* As guardians of the social contract, courts frequently serve as the last resort of citizens who have been treated unfairly.

Anthony Lewis, for example, observed that "judicial intervention on fundamental issues is most clearly justified when there is no other remedy for a situation that threatens the national fabric—when the path of political change is blocked." Another legal scholar sees "judicial imposition of constitutional values as a last resort -- when one or another branch fails to give effect to the aspirations of the peoples of the United States."* Where political will has failed, the judiciary's excursions into non-justiciable areas is really the courts performing their historic function of "doing what they have to do" under the circumstances.

Mechanically, the courts function as one of the national government's three branches in the dynamic political system created by the Framers. This position has forced the courts to deal with the legislature's failure to serve as the primary arena for making policy decisions.* Clearly, the legislative branch has failed to tackle important problems, but by itself, Congressional failure does not explain "judicial activism." The courts could simply force Congress to take the necessary steps by refusing to adjudicate. Is society better served, then, by accepting the court's piecemeal approach to social policy or by calling on the legislature to make the necessary decisions?

Finally, fashioning remedial law shouldn't be confused with making substantive decisions. In many of the controversial court decisions in the 1960s (busing, for example), the courts simply fashioned a remedy to implement the civil rights laws passed by Congress.*

COMMON LAW

The application of law to societal problems through principled decision-making forms the basis of Western civilization and is fundamental to the American republic. Dating from

Anglo-Saxon times, the common law developed into the foundation of individual rights that the colonists brought with them from England and incorporated in the Constitution.

"Common law" refers to the general system of law which was originated, developed and formulated in England and which prevails in most of her former colonies. Common law can be distinguished from civil or Roman law which is based on a code; from ecclesiastical law, which is separately administered by the Church; and from statutory law, which arises from the specific acts of the legislature.

The Framers incorporated such basic common law features in the Constitution as trial by jury, which is guaranteed in all criminal prosecutions (and under the Seventh Amendment in most civil cases). The Bill of Rights guaranteed other procedures unique to the common law: among them, protection against self-incrimination, the requirement of a Grand Jury indictment for serious offenses, and the right to cross examine witnesses.

The delegates were at home with the common law inherited from England, reflected in the Constitution's Article II "case or controversy" language. "A court may not hear a legal claim unless it arises from a genuine dispute. A complaint requires a plaintiff with a personal stake in the outcome sufficient to assure an adversarial presentation of the case."*

Hence, a plaintiff must demonstrate suffering an actual or threatened injury caused by the defendant's conduct. The "cases or controversy" language evidenced the Convention's desire to continue a legal system in which the parties argued their cases before a court which would then render a decision by applying prior case law precedent to the facts before them.

Prior to the Twentieth Century, common law was primarily concerned with deciding the specific rights and liabilities of actual parties before the court. The litigants were those who had sustained an injury or asserting rights in property that had been taken away from them personally. The courts decided questions of law and fact only as to the dispute and parties before them and were bound by prior case law precedent.

ADVERSARY SYSTEM OF CRIMINAL JUSTICE

The third legal principle, an adversary system of criminal justice was predicated on the "every man for himself" philosophy, which held that the "truth" would emerge from the clashing of individuals pursuing their own interests. This model implies that justice is best served when two opposing sides argue their strongest case in front of an impartial decision-maker by presenting the pertinent facts and points of law most favorable to its position. It assumed, incorrectly, that the pursuit of truth and justice necessarily coincides with the pursuit of self interest.*

Every legal system has lawyers, but the Framers made the right to counsel fundamental to the Constitutional system. As the Supreme Court noted in 1932, "the right to be heard,

would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

Relying solely on adversary justice has detracted from the much larger issue of dealing with the causes of tortous or criminal behavior. The courts have narrowly focused on procedural safeguards to ensure that criminal defendants get a fair trial while the ultimate objective of preventing criminal conduct has been largely ignored. Police, lawyers, and judges, the adversary systems' protagonists, only appear in the final stages of a sad story that has begun years before in a broken home, a failed educational system, or communal neglect.

Criminal justice system

The underlying network supporting an effective criminal justice system has been weakened by the disappearance of strong family, church, and cultural restraints, which deter criminal conduct. They have been replaced by structural changes in society which, to the contrary, foster the growth and spread of anti-social behavior: the transformation of a local and closely-knit rural society into a depersonalized and anonymous urban society; an increasing gap between wealth and poverty; a cult of violence reinforced by the media; and changing cultural values that place greater emphasis on material accumulation than on humanistic or social achievements.

An overburdened court system enters too late in the process to effectively cope with the problem, and must then deal "fairly" with the criminal who has arrived at its doorstep. Moreover, the means at the court's disposal are generally inadequate to the task: the judge has the option of putting the criminal back on the street or sending him to a prison where he is further brutalized and educated in criminal behavior.

A more comprehensive approach to criminal justice would recognize that an adversary system frequently forces legal officials into counterproductive behavior from society's standpoint. It attempts to deal with a multifaceted issue by controlling only a small and advanced stage of the problem, diverting attention from affecting an overall solution.

The focus should be on the criminal justice system as a whole. That begins with integrating the various components of the legal, economic, and social orders to first deter criminal conduct; and then as a last resort, to apprehend, punish and rehabilitate those who break the law.

ECONOMIC PRINCIPLES

Economic principles relate to earning a living, supporting a family, and contributing to the community: creating jobs, apportioning taxes, and meeting basic needs for food, clothing and shelter. Though the Framers were involved first and foremost in a political act, pressure for the convention largely arose from economic concerns. James Madison wrote to Thomas Jefferson in March 1786, "most of our political evils may be traced to our commercial ones, as most of our moral to our political."*

Impatient with British trade restrictions and deteriorating commercial relationships between the states, national leaders called a meeting in Annapolis to deal with conflicting state commercial laws in 1786. When representatives from only five states came, those present realized that resolving these problems were more than they could handle. They, therefore, announced another convention the following spring in Philadelphia.

The postwar depression that hit the colonies in 1783 bottomed in the summer of 1786. Because the national government had no authority to tax, the Continental Congress had massed ever larger foreign and domestic debts. In addition to these debts, a uniform and stable currency didn't exist. Increasingly worthless paper money flooded the states. The farmer and small debtor were especially hurt because they lacked hard currency to pay off their obligations.*

During the winter of 1786-87, two thousand farmers in the economically depressed Western part of Massachusetts rose in armed rebellion under Daniel Shays, a Revolutionary War veteran. The local militia easily put down Shay's rebellion, but other states had poor areas and unhappy debtors as well. News of the uprising evoked fears that the country might be on the brink of anarchy and hastened the decision by all of the states except Rhode Island to send delegates to Philadelphia. The weak condition of the government balance sheet and the unsettled state of domestic and foreign trade added further urgency to calling the Constitutional Convention.*

Achieving political stability was prerequisite to economic growth. The settlement of political issues and the establishment of political arrangements, thus, took precedent over the shaping of the economy. Economic concerns were primarily discussed in the context of the power granted to the Federal legislature, the delegates' opinions on socioeconomic class, and the broad debate over slavery. Serious consideration of the main economic issues involving trade, taxes, and the government's role in the economy didn't occur at the Convention until August 1787. Moreover, these debates really reflected the fight over the division of political power and the effort to insure that one part of the country did not take advantage of another.

One of the first scholars to examine economics at the Convention, Charles Beard, argued that the Constitution was largely the work of an economic elite who sought to advance their own class and financial interests. Later research has largely disproved Beard's contentions. As a group, the Framers were not particularly involved in bondholding or speculative operations, and they were equally drawn from agrarian, commercial, and legal interests as from any moneyed elite.

Beard, though, was correct in his argument that the Framers were, of necessity, commercially astute: they couldn't rely on trust funds or PAC committees for material support. The economics embedded in the Constitution, however, largely reflected the delegates' personal business experience. Any theoretical overtones represented an extension of their political thoughts and objectives.

If the Constitution's authors thought about economic theory, they did so in the context of Adam Smith's ideas in *The Wealth of Nations*. The Framers admired Adam Smith for more than simply his economic precepts, which supported their notion of free trade. His moral philosophy was congruent with their political views of human conduct and the perceived need to restrain man's selfishness through a self-correcting system of checks and balances. Indeed, one historian has argued that the crucial elements of Madison's system are representation, "which makes possible a large republic, and a modern commercial system along the lines suggested by the writings of Adam Smith."*

An overall economic construct was, thus, never developed. The men who assembled in Philadelphia developed a plan and theory of government that married the era's latest political ideas to the economic exigencies of the new Republic. They outlined certain economic tasks for the government to perform and decided to omit others. Aware of sectional rivalries, they erected an economic infrastructure that encouraged business without favoring any particular region's economy. At the same time, they realized that the national government's activities were crucial to the health of the young Republic's economy. Some favored more government involvement than others, but all agreed that the Federal government would play a direct if limited role in facilitating interstate commerce, promoting foreign trade, and overseeing the nation's economic health.

LIMITED BUT DIRECT GOVERNMENT ROLE IN THE ECONOMY

The debate over the government's proper role in the economy reflected a deep division that existed among the delegates who favored a strong central government and those who didn't. The men who wrote the Constitution were firmly committed to the ideas of free trade and natural rights, but they also expected government to play an active role in assuring a fair and open economy. Madison, himself, noted that the question was not regulation of commerce "among the several states" but the "degree of that regulation."

Interwoven with both the nature of the marketplace and the government's role were the issues of capitalism and democracy. The delegates well understood the importance of economic prosperity to the growth of democratic institutions, and that economic stability was a precondition to political equality.

The Framers sought to strike a balance. They thought it desirable and even necessary that the government involve itself in the economy, but limited its participation to umpiring the free flow of commerce and providing an economic infrastructure including currency, roads, post offices and courts.

Aside from undertaking financing or other activities necessary to its own operations, government interjects itself into the economy in three general ways: as a referee, a regulator, and an active participant. In a free market system, government is in its strongest position when simply acting as an umpire between private parties.

The delegates were so determined to restrict the sphere of government power that they never addressed the challenge of integrating the public and private economies. As a result, instead of working toward common goals, government and business leaders are frequently at odds with one another or embroiled in conflicts of interest when their activities do overlap, e.g., when former government officials use political contacts to promote special interests or corporate officials defraud public investors. Public infrastructure projects that could dramatically increase economic productivity languish while private enterprise frequently abuses the government's reluctance to meddle in their business by awarding contracts or regulatory relief to the favored few.

FREE TRADE

The Constitution reflects the Framers' simplified notion of "free trade," a precursor to the modern "free markets" concept. The delegates defined "freedom of trade" as the "unrestrained liberty of the subject to hold or dispose of his property as he pleases."* Given the varied economic interests represented at the Convention, "free trade" embodied mutual recognition of each other's right to pursue his own commercial activity with as little outside interference as possible.

"Free trade" then meant very much the same as it does now but is very different from the more complex "free markets" concept whose theoretical pilings extend well beyond the limited economic structure built by the Framers. "Free trade" generally refers to international trade and the absence of tariffs or other trade barriers between nations.

"Free market" theory looks at the way markets function, the relationships between them, and describes the actual forces that shape market dynamics and firm behavior in the modern industrial state.

The economic concepts underlying the Constitution were built to sustain a largely agrarian society moving into the early stages of the industrial revolution. The economic theory on which the Constitution was premised preceded the development of international capital markets, which have developed a life of their own apart from primary markets for goods and services. Smith couldn't predict the revolution in transportation and telecommunications that have made the world's economies highly interdependent. The large multinational corporation owned by private investors didn't exist. The evolution from an agricultural to an industrial and labor intensive economy, and then to a service and information-driven system were two centuries away. The imperative of time-based competition was measured in years not months—an economically flat world inconceivable.

Smith acknowledged labor and capital's different objectives, but didn't take into account the separation of management and ownership in the modern corporation. The producer funded his operations through retained profits and personally-arranged loans, but today's multinational corporations are financed through massive and anonymous sales of public debt and equity.

The principle of free trade that guided the Convention provided the new nation with a common starting line for the many sectional, class, and occupational interests that existed rather than a multifaceted economic paradigm. Based on early economic theory, they created structures and relationships that were not intended to be all-inclusive even in their own time and lacked the complexity and sophistication to drive a democratic government in today's global economy.

SOCIAL PRINCIPLES

Although officially silent on social issues, the Constitution is very much a blueprint for American society. Governments are ultimately framed to create or to preserve a certain social order. The Constitution rests on values that were expressed and were appropriate to a special combination of social conditions that prevailed in early America. Among the values that political society was expected to promote were equality of opportunity, individual and political liberty; and physical security.*

Though the delegates frequently discussed social class and the manner in which different social strata would be represented in government, the social principles reflected in the Constitution addressed a much broader concern with competing social and cultural forces in a diverse and open society.

PLURALISM

The principle of pluralism was fundamental to a nation that encompassed a wide range of different peoples and interests. Pluralism holds that the state is less an association of individuals than an association of co-equal and cooperating groups. These include churches, professional associations, trade unions, employers, and local community groups.

Madison's elaborate theory supporting the idea of "an extended republic" had its political basis in federalism and its social basis in the principle of pluralism. To simply divide the country geographically, Madison argued, was insufficient. "It was politic as well as just that the interests & rights of every class should be duly represented & understood in the public councils."*

The delegates didn't spend a lot of time on social theory in their debates. Their sociological framework was very basic; and, their study of group behavior largely reflected Madison's observation that "the three principal classes into which our citizens were divisible were the landed, the commercial, & the manufacturing."* That they understood the importance of group dynamics, however, was clear. The theory of "factions and associations" which Madison and his two Federalist colleagues advanced to sell the wisdom of the Constitutional model implicitly rested on pluralism and formed the cultural foundation of the Convention's political model.

Democracy assumes the existence of a multitude of different groups and interest groups. Madison criticized the destabilizing effect of these different factions, but their existence

also added a means of social control to the national government's carefully circumscribed political authority. In a state where authority was widely diffused and which relied heavily on the voluntary cooperation of its members to maintain order, these factions and associations served many important functions of social control and social action. Indeed, the Republic's political mechanisms are specifically designed to balance if not harmonize internal conflict between competing factions.

America's first sociologist, Alexis de Tocqueville, wrote, "in no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects, than in America. There is no end which the human will despairs of attaining through the combined power of individuals united into a society."* The group serves as a conduit of organized social power. Groups and associations focus individual action on productive ends.

The Family

Charged with preparing an individual to function in society, the family has historically served as the Republic's most important agency of socialization. The modern family and its role in American society has changed from the late 1700s. The breakdown and shifting nature of the family unit has caused very real problems that cut across the fabric of society. The erosion of the nuclear family's role in enforcing societal values has forced the state to divert its efforts from other objectives to assume many of the tasks that relatives once performed.

Socioeconomic Classes

The existence of social classes in a state that theoretically did away with European class divisions isn't easy for Americans to admit. Wealth, family background, and ethnic origin, however, have played an equal role with ability and character in determining an individual's opportunities in society. As one sociologist has observed, access to a better education and family surroundings has meant that "today's rich don't exploit the poor; they just out compete them."

No state has been able to or probably can prevent the stratification of society. In a state with a free market economy such as America, these divisions are likely to take place along economic lines. The state suffers when this stratification limits opportunities to others. As long as class lines are kept open and opportunities to advance exist, this danger will be minimized.

Racial and Ethnic Minorities

The delegates looked out over a relatively homogeneous country. Of the estimated 5 million Americans at the time of the first census, most were white, Protestant and of English or Northern European origins. If divisions existed, they fell more along sectional boundaries rather than reflecting any great ethnic or racial differences.

Homogeneity gave way to diversity beginning in the mid-1880s. Pluralism now encompassed a multitude of ethnic, national, and racial groups. At the same time, a change occurred in the American attitude toward immigration. Prior to 1880,

immigration was virtually unrestricted but through a series of laws and regulations, the country continues to struggle with how to keep “the golden door” open to those who seek to enter.

Historically, the issues surrounding immigration have centered on balancing forces seeking to preserve traditional values against those working toward assimilation. But the recent influx of illegal immigrants has added a new dimension to the national debate. Public discourse increasingly encompasses elements such as more border patrols, guest worker programs, homeland security, the drain on taxpayer-funded social services, and American jobs. But the basic facts are incontrovertible: the economies of Mexico, India, China, and other nations cannot fully support their populations; and the US—and other Western nations—have jobs that their nationals don’t want or are increasingly ill-prepared to handle. These range from harvesting grapes, to sweeping the shop floor, to developing high-end software.

So given that these immigrants will come, and that America needs them to come, the real policy issues are broad-based: how do we integrate these new arrivals into a society dedicated to preserving fundamental equality among its inhabitants while protecting the individual liberties and rights of its citizens? America is a land of immigrants and its strength lies as much in its democratic ideals as in its cultural diversity: the flow of recent arrivals constantly replenishes those ideals and gives them new meaning.

National Character

The Framers' legal remedy for managing the tensions of a pluralistic society required balancing competing interests by partitioning political authority. Pluralism also ultimately demanded the fusion of different cultural traits in the concept of national character and nationhood. The elusive concept of "national character" serves as a social counterweight to the diversity that characterizes the Republic.

To help the war effort in 1942, the anthropologist, Margaret Mead described her vision of the "American character": "The essence of the Puritan character, the character which has reached its most complete development in America, is the mixture of practicality and faith in the power of God—or moral purpose. Trust in God, my boys, and keep your powder dry."*

Other scholars have also contributed to defining the national character. Frederic Jackson Turner was one of the first to look at what made Americans tick by isolating the importance of “the frontier” and the consequences of what he termed its "closing" on the national psyche. Another sociologist, Louis Hartz, argued that the absence of a feudal past has been at the center of the American intellectual tradition.* David Potter suggested that abundance has been the key to the American character. For Potter, the quest for material wealth underlies the mobility and status of the American people, the role of the frontier, the growth of democracy, and America’s “manifest destiny.”*

All of these factors have shaped the American character. The population's sheer size and diversity have necessitated underlying tolerance and acceptance of new ideas; its

geographic isolation has protected the country from invasion and enabled it to experiment with democracy and survive mistakes.

Though the existence of a national character among a population as diverse as that of the United States is increasingly tenuous, other forces have bonded the nation closer together: modern transportation and telecommunications, the Internet, and popular culture. Americans are just different than we were 50 years ago. The challenge is to understand and articulate how different and its impact on the way we see ourselves and lead our lives.

The Nation

Closely identified with the concept of national character is that of nationhood. If "the government" is a political unit, and "the state" is a legal entity, then "the nation" represents a social and cultural ideal. A nation can be identified through common interests including language, territory, political independence, race and religion.

The growth of an American nation conceived in historical and cultural terms has centered around and largely defined itself by the values and ideals expressed in the Declaration of Independence and the Constitution. Even today, the American nation presents a symbol for other nations, signifying freedom, opportunity and hope, a synthesis of different social, ethnic, and national backgrounds.

The emergence of a distinctly American culture has also shaped our image at home and abroad. While American literature and art are well known, American cinema (Hollywood), Twentieth Century music (rock n' roll), what we eat ("fast food"), and technological achievement ('Silicon Valley') have defined the nation's culture around the world.

The Farm/Rural America

De Tocqueville adopted the Jeffersonian view that rural America formed the agrarian roots of democracy. Circumstances have not changed much in 200 years. "At the heart of America's concern for the small farm is an abiding Jeffersonian belief in the nobility of farmers and farm life, a belief closely tied to the public's willingness to spend more to help farmers."*

The fact that politicians repeatedly invoke the "small farmer" to justify the government's subsidies, low cost loans, and related programs highlights the farm lobby's social as well as economic roots. Failure to acknowledge these social forces has been costly. The many farm subsidy bills are enormously expensive, mostly benefit large agribusinesses and absentee owners, and hamstring America's foreign policy towards its trading partners and developing nations.

EQUALITARIAN SOCIETY

The Constitution's basic social principle is that of an equalitarian society, which is fundamental to the Republic's structure. The Declaration of Independence proclaimed

that "all men are created equal." The Constitution and the first eight amendments explicitly spelled out the legal and political equality that these words implied.

The Framers never believed that "all men were created totally equal," but the prevailing economic and social equality in America reinforced the political and legal equality, which the Constitution sought to establish, prompting de Tocqueville's observation that "equality of condition is the fundamental fact from which all others seem to be derived."

"Equality" suggests that "people who are alike should be treated alike." This definition, however, is deceptively simple and leaves unanswered the degree to which people should be made equal and in what respects. Equality's meaning has undergone a transformation over the Republic's history. Over the past two and a quarter centuries, however, forces in American life have worked to expand the meaning of equality and to promote egalitarianism.

Today, an equalitarian society encompasses much more than what it meant to the Framers, and the principle applies to a much larger, diverse, and heterogeneous society. As important, equality has taken on economic and social as well as legal and political dimensions. An equalitarian society presupposes equality of opportunity, and equality of opportunity leads to expecting a certain minimum equality of result.

Forces in American life have worked to expand the meaning of equality and to promote egalitarianism: a larger percentage of the population achieving a middle class standard of living; organized labor's role in the political process; minority groups' social mobility; "the Establishment's" decline; and, the emphasis colleges have placed on recruiting minorities and disadvantaged students, elevating educated men and women of diverse social and ethnic backgrounds into business and the professions.*

Slavery

In creating an "equalitarian society," the Framers focused on legal (and to a lesser extent) political equality. All citizens were entitled to vote and enjoyed the same legal rights. Moreover, that "all men are created equal" embodied the contemporary view that women were not equal to men. Nor did all men literally mean 'all' men, as "slaves and their descendants" were excluded.*

The prevalence of relative equality made it easy to ignore inequality for blacks. The adamancy with which the Southern states viewed slaves as property, however, handcuffed the delegates' debate on slavery and paved the principal avenue for establishing economic inequality in American society.

Many delegates were opposed to and fought slavery throughout the Convention including the South's leading statesmen—Washington, Jefferson, and Madison. The Framers were forced to make a principled decision, and at some juncture, they opted for union over abolition. The delegates believed that a majority of Americans saw the evils of slavery, and that it would soon be abolished. These men might have well agreed that their lack of

success in resolving the issue of slavery was the Convention's most egregious failure without in any way admitting that the Convention itself was a failure.*

The Meanings of Equality

While asserting that America has remained a society "dedicated to the proposition that all men are created equal" is easy, the meaning of "equal" and who is included in "all men" have proved more difficult to define over the Republic's history. The principle of equality was explicitly and implicitly central to the Constitutional model, but the nature and meaning of this "equality" have changed over the nation's history.

Development of the principle of equality has been twofold: not only have the ways in which people should be treated alike been expanded, but the groups of persons in the category of "citizens" who are entitled to be treated alike has grown.*

Equality before the Law. When the delegates spoke of equality, they most likely meant every citizen's right to receive a fair trial. Legal equality has two major strands. "Equal protection" encompasses the substantive aspects and means the absence of governmental classifications of individuals on "an irrational basis"; and that the laws themselves should be equal laws.

Equality, however, deals as much with access and procedure as with substance. "Due process" concerns itself with the methods of government action and has evolved around the requirements of a defendant's right to "notice" and an "opportunity to be heard." "Substantive due process" springs from "the fundamentals of "ordered liberty" and is more closely related to the natural rights principle than that of an equalitarian society. Equality of rights, however, comes close to what Jefferson referred to in the Declaration of Independence. He didn't totally believe that people were endowed with equal attributes or equal abilities, but he did believe in equality of legal rights.*

Political Equality. Political equality has come to mean more than equal voting rights and includes the absence of property, sex or racial discrimination at the polling booth. Political equality has been defined in basic terms as "one person, one vote in equal districts." Over the past fifty years, the United States has made great strides in assuring political equality. The Twenty-Third Amendment removed the poll tax. Voter registration drives and the Supreme Court's "one man, one vote" ruling have further strengthened political equality. The 2005 Special Elections in California and Ohio, and the 2004 Texas redistricting, however, evidence the unabashed gerrymandering that have severely undermined this progress.

Economic Equality. Equality of economic opportunity that assures equal access to jobs and housing is now considered a fundamental right. In turn, equality of opportunity has led to equality of result, guaranteeing certain minimum standards of material comfort for all Americans.

The Constitution implicitly sets the stage for a free market economy but doesn't address how accumulated wealth is distributed. It accommodates a society where differentiation of wealth and talent exist without characterizing it as a non-egalitarian society.

Equality of Opportunity. The historic *Brown* decision in 1954 emphasized the importance of equality of opportunity. "Education is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."*

Equality of opportunity often boils down to economics. When the Constitution was written, someone else's economic opportunity didn't have to be reduced to provide equal economic opportunity for all. Unlimited resources, however, is simply not an accurate reflection of the world in which we now live. Moreover, equality of opportunity has become a popular goal in the past 35 years but wasn't 200 years ago.

Equality of Result. The government's responsibility to look after the people's general welfare and assure a minimum standard of living goes beyond the question of equal opportunity. If promoting a "floor for a decent life"* becomes a desirable societal goal, who sets the standards and by what criteria? Equality of result should be defined in terms of housing, social services, education, and job opportunities rather than just a blanket statement.

Social Equality. The Constitution's authors believed that one of the state's principal tasks was the regulation of the "various and interfering interests" in society. These "factions" had their source in societal divisions based on the "various and unequal distribution of property."*

The delegates rejected the class basis of human superiority, but they "meant only to change the origins of social and political preeminence, not to do away with such preeminence altogether."* Although they frequently admitted that the average man was sufficiently good and reasonable to be trusted with freedom, they created a government of law by which selfish behavior would be checked and a natural aristocracy would rise to positions of leadership.

Consistent with the Framers' view, American society has never been an egalitarian society. But mobility between socio-economic groups has generally been high. As Margaret Mead wrote, "the American system is really a classification based on a ladder, up which people are expected to move, rather than an orderly stratification or classification of society within the pigeon-holes of which people are born."*

Promoting social equality has been accepted as a legitimate end of the state. Discrimination due to race, color, creed or national origin in public (and some private) places has been outlawed. In the 1960s and 1970s, fair housing and affirmative action programs replaced "blockbusting" and ethnic quotas for top universities.

An Equalitarian Society Today

The forces shaping social equality in the 21st century, however, are considerably more subtle. Enormous capital markets, global competition, and sheer demographics have exponentially lifted the fortunes of the wealthy, sliced into the middle class, and further tightened access to a quality education—adding a modern twist to Chief Justice Warren’s words written 50 years ago. Joe Mainstreet leads a comfortable existence, but the opportunities for improving his or his children’s lot in life appear considerably less than they’ve ever been.

The Constitution guaranteed liberty but never promised anyone equality. The principle of fostering an equalitarian society underpins many of today’s government social programs including national healthcare; care for the elderly, programs aimed at the poor, and, of course, social security. Access to a good education looms equally large.

Valuing an equalitarian society is easy, but questions of how much it costs, who pays for it, and what liberties must be surrendered to achieve it lead straight to the Republic’s philosophical core. The question of cost is significant. The budget is a social checklist that reflects America’s goals and priorities, allocating funds among competing ends. Providing for the common defense is crucial, but can the country continue to underwrite costly and poorly conceived weapons systems and foreign wars at the expense of assuring a minimum level of equal opportunity and living standards? A government whose checkbook covers a Federal budget over \$2.7 trillion and supports a gross national product in excess of \$12 trillion has the capacity to be more responsive to the health, educational, career and housing needs of its citizens.

SEPARATION OF CHURCH AND STATE

The separation of church and state ranks among the Republic’s fundamental principles. The Framers were deeply religious men and recognized religion’s importance to an orderly society, but they never confused the state’s interest in public morality with an individual’s right to worship as he or she pleases.

Of the many different forces that might destroy the fabric of American society, the Framers were most concerned about those created by religious strife. They hoped to contain political confrontations through an extended republic and internal checks on government power; created the courts to settle legal matters; and relied on competitive markets to determine economic success.

The Framers saw the suffering and carnage which protracted religious wars had caused in the past: "In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured and killed."* More importantly, in a democratic society, individual conscience not state sponsorship should define religious practice. Although they did it by amendment rather than at the Convention itself, the Framers cast

a rigid separation between church and state in order to create an unbreachable wall between religious coercion by the state and individual freedom of conscience.

In his *Memorial and Remonstrance Against Religious Assessments* (1785), Madison wrote, "torrents of blood have been spilt in the old world by vain attempts of the secular arm to extinguish religious discord by proscribing all difference in religious opinions." He continued, "the preservation of a free government requires that [government] not overleap the great barrier which defends the . . . equal right of every citizen to the free exercise of his Religion according to the dictates of conscience."*

When the colonies were founded, circumstances differed from those today. The Church was not only a more powerful and established force than the state, but "most of the early settlers had brought with them traditional assumptions concerning the state's responsibilities for supervising and enforcing orthodox religious institutions."* Many early communities had sought to duplicate established state churches, but impediments had existed from the beginning.

The Revolutionary War hastened the disestablishment of organized religion, but the establishment issue remained alive, however, through the eve of the Convention. In 1784, establishment forces in Virginia sought to enact a bill "which would require all persons to pay an annual contribution for the support of the Christian religion or of some Christian church or denomination which the taxpayer might designate." Proponents argued that "since organized religion was beneficial to the general welfare, all citizens should be required to participate in supporting it."* The legislators rejected this proposal. Madison's *Memorial* and Jefferson's *Bill for Religious Freedom* (Virginia *Bill for Religious Liberty*) were passed in its place in 1786.

On the eve of the Convention, the Framers viewed the separation of church and state "not merely as an adjunct to religious freedom, but as an independent prerequisite to a free society."* The delegates never discussed the separation of church and state except when the broader bill of rights was introduced. That separation of organized religion from government was not an issue shows the extent to which it had already been agreed by the time the delegates met in Philadelphia. Implicit in the Constitution itself, the First Amendment formally incorporated this principle into the Framers' model.

The First Amendment's establishment of religion clause was enacted, in Jefferson's words, to erect "a wall of separation between church and state." A Supreme Court justice elaborated, "the Amendment's purpose was not to strike merely at the official establishment of a single sect, crowd or religion, outlawing only a formal reaction such as had prevailed in England and some of the colonies. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."*

Modern Interpretation: Separation and Accommodation

The principle of separation of church and state rests on both legal and social foundations. The Supreme Court, though, has never developed a fixed, "per se" rule, and Congress has avoided the issue.

Deviating from rigid separation, "the Supreme Court has consistently recognized that the establishment clause embraces the conflicting principles of separation and accommodation and that the outcome in establishment clause cases turns on the balance struck between these principles." The Court has permitted accommodation only in instances in which a secular rationale has diluted the religious meaning or content of the practice in question.*

Former Chief Justice Warren Burger's observation that "there is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789"* strikes closer to the divide. The delegates probably did mean to erect a wall between church and state, but they assumed that religious institutions on the other side would retain their central role in society.

Religion's Role in Society

Non-involvement didn't translate to indifference. The Framers intended that religious values play an important role in American society. Whether they could have foreseen or imagined society's secularization or organized religion's decline is doubtful. That the courts have taken the separation doctrine from Madison's absolute prohibition to one of relative prohibition follows the evolution of American society and its greater tolerance for religious differences.

Religion's role has varied from simply infusing a materialistic culture with certain moral and ethical values to providing a focal point for community life. Religious institutions have long provided a meeting place for young people while introducing values and beliefs that transcend those of the workplace.

Religion's influence on national life is both a cause and effect of the importance of moral principles in America. Injecting religious issues into political and economic debate, evangelism, and church membership are basic American themes. Puritan America was a theocracy; and even through church and state have since been separated, the clergy have been leaders in the social order as well as influencing political and economic events.

The challenge lies in resolving whether churches and synagogues can overcome the past excesses caused by state aid to religion in a way that enables them to fulfill needed societal functions without compromising the Republic's absolute commitment to an environment where individuals can worship as they choose. Ultimately, that answer should lie in the cultural and societal realms rather than the courtroom.

* *Third party attribution.*