

Book Notes

Is the Constitution “Godless” or Just Nondenominational?

The Godless Constitution. By Isaac Kramnick* & R. Laurence Moore.** New York and London: W.W. Norton & Co., 1996. Pp. 191. \$22.00.

In an infamous address at the 1992 Republican National Convention in Houston, Pat Buchanan declared that “[t]here is a religious war going on . . . for the soul of America.”¹ Maintaining that the United States is “a nation that we still call God’s,” he exhorted supporters to “take back our culture, and take back our country.”² Buchanan’s speech, with its clarion call for a religious restoration, tacitly cast American history in terms of a story of the fall: The nation’s origins, his rhetoric implied, lay in an Edenic Christianity from which God-fearing Americans have been rudely expelled due to the sins of secular infidels who would deny the nation’s fundamentally Christian identity. Buchanan’s words garnered immense publicity because they were nationally televised during prime time;³ the “fall” story underlying his address, however, is one commonly told by the Religious Right.⁴

In *The Godless Constitution*, Isaac Kramnick and R. Laurence Moore set out to explode the legitimacy of what they call “religious correctness”—the claim that “the United States was established as a Christian nation by Christian people, with the Christian religion assigned a central place in guiding the nation’s destiny” (p. 13). To correct the purveyors of religious correctness, the authors pursue a twofold thesis. First, they argue that as a matter of history,

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1. Judi Hasson, *Religion Shares Convention Stage*, USA TODAY, Aug. 18, 1992, at 4A.

2. *Buchanan Speech Highlights*, GANNETT NEWS SERV., Aug. 17, 1992, available in LEXIS, News Library, Arcnws File.

3. See Chris Black, *Buchanan Beckons Conservatives to Come ‘Home’*, BOSTON GLOBE, Aug. 18, 1992, at 12.

4. See, e.g., THE COLLECTED WORKS OF PAT ROBERTSON 51, 66 (1994) (arguing that “[t]he American Revolution produced a constitution and a government based on biblical principles of Christianity” but that present day secularists “have tried to throw out the last remnants of Christianity in America”).

the nation's Founders (as well as their philosophical progenitors in England and their immediate political descendants in America) believed that government should be a secular enterprise uninfluenced by, and indifferent to, religious concerns; this belief, according to the authors, is inscribed in the Constitution. Second, they posit that as a normative matter, the Founders' faith in a secular state should be heeded by the modern American polity, and that failure to ward off religious influences on American politics (particularly those of the Religious Right) will simultaneously betray constitutional values and exacerbate the nation's moral decline.

Kramnick and Moore deserve plaudits for seriously engaging the historical and constitutional rhetoric of the Religious Right and systematically demolishing its intellectual credibility. No one can finish their book and still make a reasonable case that the Constitution was conceived as a blueprint for a uniformly "Christian nation" (p. 13). The authors also deliver a valuable remonstrance against those who peddle intolerance while wrapped in the mantles of the Bible and the Constitution. Unfortunately, however, Kramnick and Moore's advocacy of "godless Constitution[alism]" (p. 12) occasionally veers beyond rebuttal of the Christian nation theory and toward a defense of an affirmatively secular state that largely excludes religion from the public sphere. At such junctures, the authors render their historical and prescriptive arguments vulnerable to some of the very criticisms they level at the acolytes of "religious correctness" (p. 13).

Kramnick and Moore present their historical evidence through a series of vignettes.⁵ They begin, for instance, with a lively chapter on the Constitution's framing and ratification, in which they argue that the text's drafters deliberately designed it to be "an instrument with which to structure the secular politics of individual interest and happiness" (p. 27). As proof, they point to the absence of any express mention of "God" or "Christianity" in the Constitution itself and to the inclusion of the No Religious Test Clause in Article VI.⁶ Concluding that "[t]he advocates of a secular state won" at the Founding (p. 28), Kramnick and Moore proceed to examine two other key historical episodes: the Sunday Mail Controversy of 1820 to 1830 (pp. 132-43) and the "Christian amendment" movement of the post-Civil War era (pp.

5. The scope of Kramnick and Moore's historical inquiry should be singled out for credit. Unlike many constitutional scholars, the authors do not rest their historical case solely on excavation of "original intent." Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 9 (1982) (defining historical argument, as modality of constitutional interpretation, in terms of search for "the original understanding of the constitutional provision to be construed").

6. "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI. Other scholars, however, have argued that Founding-era citizens understood the Clause not as a statement of the Constitution's secularism but as a guardian of religious pluralism. See, e.g., Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

144–48).⁷ In both instances, religious zealots sought to transform the nation into “a Christian commonwealth where the state and spiritual ideals commingled” (p. 132). The failure of both crusades, the authors contend, demonstrates that the secular victory of the Founding has been an enduring one.

Kramnick and Moore take particular care to identify a distinguished American tradition of religious opposition to theocracy. Though the authors mention many adherents of that tradition in the course of their book, they focus on two: Roger Williams and the American Baptists. Both Williams (banished from Massachusetts Bay in 1636 for nonconformism) and the American Baptists (oppressed by New England’s Puritan establishment throughout the pre-Independence era) suffered intense persecution at the hands of the State. Both, in turn, came to view the juxtaposition of religious and political spheres with great suspicion. For Kramnick and Moore, these examples refute any “notion that the idea of the godless Constitution is the invention of militant secularists” (p. 111). The authors do not, however, neglect the historical importance of secular resistance to theocracy. In analytic expositions of English Enlightenment philosophers such as John Locke, Joseph Priestley, and James Burgh, Kramnick and Moore trace the liberal, laissez-faire pedigree of the “godless Constitution” and its survival in the thought of Jefferson, Madison, and their contemporaries (pp. 67–109).

In the final chapter of the book, titled “Religious Politics and America’s Moral Dilemmas,” the authors’ argument becomes more explicitly normative. Kramnick and Moore emphasize the Founders’ conviction that “democratic government was not created to produce moral citizens. It was the other way around: moral citizens constructed and preserved democracy” (p. 151). The authors decry the imperilment of this ideal, excoriating Pat Robertson, Ralph Reed, and Pat Buchanan for cloaking themselves in the rhetoric of religion and morality while promoting a virulent and obdurate symbolic politics that threatens the nation’s democratic tradition (pp. 153–64).

The first problem with *The Godless Constitution*—and the genesis of several others—lies in the authors’ failure to define exactly what they mean by the title phrase, and especially by the term “godless.” What exactly does “godless Constitutionalism” connote? Kramnick and Moore’s account differs at different junctures. At some points, the authors’ claims are virtually incontrovertible, as when they argue that the Constitution bars establishment of a theocratic (e.g., “Christian”) state at the federal level (p. 143) and formal religious tests for public office (p. 168). At others, their contentions are more dubious: The authors also suggest, for instance, that the Constitution proscribes local establishments just as clearly as federal ones (p. 104); prohibits

7. For further exposition of these controversies, see MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 58–74, 103–07 (1984).

governmental support for religious institutions in any way that privileges their work over that of secular entities (p. 152); rules out religion-based advocacy of legislation (p. 130); and frowns on statements by elected officials that they are following or fulfilling divine imperatives in making public policy (p. 130). These latter claims, which intermingle with Kramnick and Moore's more modest contentions as the book unfolds, confuse readers seeking to assess the authors' overall argument; worse still, they present an unbalanced (and at times unreliable) account of the historical record.

Take, for example, the authors' contention that the Establishment Clause was drafted to preclude both federal *and state or local* establishments of religion (p. 104). Kramnick and Moore posit that though "[t]he Christian right offers a narrow reading in which the . . . clause refers only to the prohibition of a national church, . . . [w]hat is perfectly clear, despite today's debate, is that Madison, the father of the Bill of Rights, shared [the] broader reading" (p. 104). Madison's agreement with the authors' expansive reading, however, is far from "perfectly clear."⁸ And the "narrow reading" of the Establishment Clause can hardly be described as a product of the Christian right: A long line of constitutional scholarship has recognized that the Clause was widely understood to allow state establishments until radically reinterpreted by the *Everson* Court in 1947.⁹

The authors likewise tread on unfirm ground when they assert historical support for the proposition that government has "an obligation not to encourage [religion] . . . in a way that privilege[s] it over the work of nongovernmental secular agencies" (p. 152). This claim is troubling even if one ignores its insensitivity to principles of federalism (e.g., even if one overlooks that as of 1789, no fewer than six states featured government-supported churches, and all thirteen promoted religion in some manner).¹⁰ If

8. The Madison of *Federalist No. 10*, for instance, cites religious pluralism as the best defense against the threat of sectarian conflagration, a position wholly consistent with state and local establishments. See THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961). Additionally, while participating in the congressional debate over the Bill of Rights in 1789, Madison sponsored an amendment that would have limited state governments' power to curtail their citizens' freedom of speech, press, and conscience, but would have *permitted* state establishment of religion—an amendment Madison proudly spoke of as "the most valuable . . . in the whole list" he presented to Congress. 1 ANNALS OF CONG. 784 (Joseph Gales ed., 1789) (Aug. 17, 1789); see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159 (1991) (discussing Madison's proposed amendment and its implications for modern interpretation of Establishment Clause). Madison, of course, also penned the *Memorial and Remonstrance Against Religious Assessments*, which the modern Supreme Court has cast as the paradigmatic expression of strict separation in the era of the Founding. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 11–12, 63 app. (1947). For a cogent summary of Madison's vacillations over the course of his career, see GERALD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 86–87 (1987).

9. See, e.g., EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 104 & n.5 (reprint 1979) (1959); Amar, *supra* note 8, at 1157–58; Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 84–85, 127–30 (1962); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 371–73; see also *Everson*, 330 U.S. 1.

10. See BRADLEY, *supra* note 8, at 13.

the Founding generation understood the First Amendment to bar federal promotion of religion, for instance, why did the first Congress pass a statutory extension of the Northwest Ordinance that encouraged formation of religious schools by emphasizing the necessity of “religion, morality, and knowledge . . . to good government and the happiness of mankind”?¹¹ Moreover, why did the Senate ratify a treaty with the Kaskaskia Indians in 1803 that appropriated \$100 annually for priestly ministrations and \$300 for the erection of a church?¹² These examples—and the myriad other instances of federal aid to religious entities in the late eighteenth and the nineteenth centuries—do not, of course, dictate how present generations should interpret the Constitution’s Religion Clauses. But they do debunk assertions that history has bequeathed us a strongly and unequivocally “godless” Constitution.

Consider finally the authors’ claims that religion-based advocacy of legislation and appeals to the divine in making public policy “offend . . . the religious rules of this country set up to protect the free exercise of religion” (p. 130). Here too Kramnick and Moore’s arguments are not supported by the historical record. Surely the authors would not maintain that the passage of the Thirteenth and Nineteenth Amendments violated constitutional principles of free exercise—yet supporters of both actively invoked religious principles in fighting for ratification.¹³ Surely the authors would not argue that Presidents Washington, Madison, and Lincoln trespassed on First Amendment values—yet each of these constitutional giants publicly appealed to personal and collective religious faith at critical junctures in his presidency.¹⁴

The deeper problem with Kramnick and Moore’s book, however, lies neither in its shifting claims regarding the nature of the Constitution’s “godlessness,” nor in the historical inaccuracies of the authors’ more strident contentions. It lies rather in Kramnick and Moore’s attitude toward religion and religious adherents. In *The Culture of Disbelief*, Stephen Carter decries those who “trivializ[e]” religion by unthinkingly denying respect to people who “take . . . religion seriously.”¹⁵ Though the authors profess sympathy with Carter’s position (pp. 14, 175), their treatment of religion often lapses into a

11. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52 n.(a) (1789) (adapting original Northwest Ordinance to newly ratified Constitution).

12. See A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, Dec. 23, 1803, art. III, 7 Stat. 78, 79.

13. See, e.g., AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890–1920*, at 64–75 (1965) (examining complex but critical role of religion in women’s suffrage movement); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525–26 (1974) (detailing key role of religion in American antislavery movement).

14. See, e.g., Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in 1 GREAT ISSUES IN AMERICAN HISTORY 389, 396 (Richard Hofstadter ed., 1958); James Madison, Thanksgiving Proclamation of July 9, 1812, reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 513 (James D. Richardson ed., n.p., U.S. Cong. 1898); George Washington, First Inaugural Address (Apr. 30, 1789), in 1 ANNALS OF CONG. 27 (Joseph Gales ed., 1789).

15. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 15 (1993).

textbook illustration of the phenomenon he describes. Kramnick and Moore see only two sides in the debate over the role of religion in American politics: the “party of the godless Constitution” (advocating religion’s relegation to the private sphere) and “the party of religious correctness” (seeking formal establishment of a Christian state) (pp. 12–13). Other positions—held by moderate, rational, religious citizens who believe that American politics should be neither hermetically secular nor fanatically theocratic—are never contemplated. The authors’ affinity for such facile dichotomies not only produces an oversimplified, monochromatic view of the religion debate; it also, at times, leads them to trivialize the convictions of religious adherents. Kramnick and Moore blithely characterize all proponents of prayer in schools, for instance, as purveyors of “symbolic politics” who seek to install “vapid prayers as a way of saying ‘in your face’ to some evil group of secular humanists” (p. 165)—never considering that some might seek to pray in schools out of actual devotion, or that others might promote school prayer as a modest way to ameliorate problems of nihilism, materialism, and violence among American youth.

In the end, the authors’ polarizing impulses also prevent them from addressing the fascinating questions at the center of America’s struggle with the role of religion in politics. The modern Supreme Court has recognized that the Constitution bars theocratic government;¹⁶ it has also recognized, however, that the Constitution bars efforts to excommunicate religious adherents and institutions from the public sphere.¹⁷ The interesting problems lie between these poles, in cases such as *Lee v. Weisman*¹⁸ and *Rosenberger v. Rector and Visitors of the University of Virginia*,¹⁹ which challenge us to determine neither whether the Constitution is “godless,” nor whether it sanctions a “Christian nation,” but rather what constitutes religious freedom and what religious coercion.²⁰

—Erez Kalir

16. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1946) (declaring that “[n]either a state nor the Federal Government can set up a church”).

17. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 628–29 (1978) (holding that state may not limit political participation to those who eschew religious practice).

18. 505 U.S. 577 (1992) (holding that nondenominational benediction ceremony at public school violates Establishment Clause).

19. 115 S. Ct. 2510 (1995) (holding that denial of university funds to religious student magazine violates First Amendment principles and expressly rejecting applicability of Establishment Clause strictures).

20. Important exemplars of the animated scholarly debate about the Constitution’s Religion Clauses include JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* (1995), Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992), Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986), and Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

“From Opportunity to Entitlement” and Back Again—Or Beyond

From Opportunity to Entitlement: The Transformation and Decline of Great Society Liberalism. By Gareth Davies. Lawrence: University Press of Kansas, 1996. Pp. xii, 320. \$35.00.

Is liberalism in America poised to regain a workable popular consensus? Recent political commentary suggests that it is,¹ and Democrats have been struggling within their ranks to define and control the identity of this revived liberalism.² In *From Opportunity to Entitlement: The Transformation and Decline of Great Society Liberalism*, Gareth Davies enters the fray with a historical account of why the New Deal liberal consensus was once lost. Davies's thesis is that in the period 1964–1972, liberal leaders came to embrace an “entitlement” ideology that repudiated the values of work and self-sufficiency central to Progressive, New Deal, and Great Society “opportunity” liberalism (pp. 2–3, 12). The book gives a balanced history of the ideological underpinnings of opportunity liberalism and its politically damaging transformation, and offers insight on which strands of liberalism bear reviving.

I

Davies argues that America's dominant social philosophy is individualism, defined “within the specific context of national attitudes toward dependency and work” and associated with “a persistent tendency to denigrate dependency and elevate self-help” (p. 8). He traces the individualist ethic in the rhetoric of opportunity liberalism through successive liberal movements, seeking to establish it as a “traditional and authentically liberal” position (pp. 2–3). By his account, Progressive-era reformers built a liberal political consensus by rejecting laissez-faire conservative doctrines while insisting on individual self-

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1. See, e.g., E.J. DIONNE, JR., *THEY ONLY LOOK DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA* (1996); GORDON MACINNES, *WRONG FOR ALL THE RIGHT REASONS HOW WHITE LIBERALS HAVE BEEN UNDONE BY RACE* (1996); JACOB WEISBERG, *IN DEFENSE OF GOVERNMENT: THE FALL AND RISE OF PUBLIC TRUST* (1996).

2. The “New Democrats” associated with the Democratic Leadership Council argue that the Democratic Party's “extreme” left wing is out of touch with middle-class values. For a good overview of the New Democrat debate, see Jeff Faux, *The Myth of the New Democrat*, *AM. PROSPECT*, Fall 1993, at 20, and Will Marshall, *Friend or Faux?*, *AM. PROSPECT*, Winter 1994, at 10.

help.³ New Deal liberalism continued this tradition of government activism that nevertheless disparaged dependency, creating social insurance and public works programs that linked income to employment. Great Society liberalism also upheld the ideal of individual self-sufficiency, adding rehabilitative job assistance services and work conditions for welfare recipients.

The “one major exception to this tradition of opportunity-centered liberalism,” however, arose in the late 1960s and early 1970s. It consisted of “radical notions of income by right . . . [with which] American liberalism remains associated in the public mind” (p. 3). The “entitlement” liberals successfully attacked work requirements and other conditions placed on welfare recipients. They favored reforms to guarantee an unconditional minimum income. But the entitlement approach, in Davies’s opinion, was doomed to “inevitable defeat” (p. 233). Moreover, it led liberals to the politically disastrous “denunciation of societal values . . . [and the] abandonment of the search for consensus” (p. 184). Davies’s pointed implication is that liberals can recapture a national consensus only by reclaiming individualism and work-oriented ideals as their own.

Reclaiming opportunity ideology does not necessarily force liberals down a single path, however. The book reveals that a variety of strategies, including a full employment policy, public works projects, social insurance programs, and rehabilitative job training and placement efforts, are consistent with liberal work and self-sufficiency ideals. All these strategies reject *laissez-faire* in favor of government action to create income security, but each ties income security to work requirements in a significantly different way.

The possibility of alternative ways of linking work and self-sufficiency raises two challenges to Davies’s thesis. First, are middle-class Americans really estranged from entitlement ideology, as Davies claims, or do they just object to treating income support as an “entitlement” for the poor? Middle America seems to favor an entitlement-like “no strings attached” approach in government programs for its own benefit. Second, is Davies right to locate the welfare policies of Franklin Delano Roosevelt, Lyndon Johnson, and today’s New Democrats under the single banner of opportunity liberalism? The distinctiveness of a rehabilitative approach to welfare policy might best be seen by its inability to fit into either the old contractual analogy of New Deal social insurance and public works programs, or the 1960s New Property analogy of entitlement to an unconditional minimum income. The new approach suggests instead a new private law analogy, beyond both contract and property.

3. Davies argues that “[t]he distinctive quality of progressive individualism was the claim that *laissez-faire* capitalism *impeded* self-advancement. The dependent poor were victims of unregulated combination . . .” (p. 12). See RICHARD HOFSTADTER, *THE AGE OF REFORM* 143 (1955) (describing Progressives’ liberation from “doctrinaire commitment to *laissez faire*” and “revival of enthusiasm for popular government”).

II

Charles Reich's influential 1964 article on the "New Property"⁴ highlighted the connection between the emergent entitlement ideology and the liberal concern with individual autonomy. Reich denounced the way the government used Americans' common and increasing dependence on valuable interests created and controlled by the state to intrude into individuals' private lives.⁵ He argued that government benefits should be deemed "property rights" rather than privileges, because property would "perform[] the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner."⁶

Entitlement liberals similarly sought to remove seemingly improper governmental constraints on the private lives of welfare recipients. Loosening the ties between income and work—ties that had been demanded by the opportunity ethic—was the price of securing a "zone" of autonomy for everyone. Moreover, the "autonomy" foundation of entitlement liberalism, rooted in the protection of individual liberty against state control, had liberal credentials strong enough to match even the opportunity ideology.

Reich's New Property concept had the potential to unify Americans from different economic classes behind this alternative liberal commitment to autonomy. However, an apparent class bias has prevented this unification of interests. Americans have never subjected Social Security and unemployment insurance beneficiaries to moral and behavioral conditions as intrusive as those placed on welfare recipients, such as the "no man in the house" rule,⁷ mandatory cooperation in the state's paternity suits,⁸ or sanctions when children are truant from school.⁹ This disparate treatment cannot be explained away by claiming that people in poverty need special guidance from the government, or that redistributive programs in themselves justify government controls over the recipients' use of the benefits. For not only are government benefit programs such as Social Security and unemployment insurance redistributive, they are also precisely what keep many "middle class" recipients from becoming poor.¹⁰

4. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

5. *See id.* at 746–51, 756–64.

6. *Id.* at 771.

7. *See id.* at 761–62 (describing intrusiveness of this rule); *see also* King v. Smith, 392 U.S. 309 (1968) (striking down this rule).

8. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 408(a)(2), 110 Stat. 2105, 2135 (reducing or eliminating government assistance for noncooperation in establishing paternity).

9. *See id.* § 404(i) (providing sanctions for welfare recipients who fail to ensure that their minor children attend school).

10. *See, e.g.*, William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 462, 466 (1996) (documenting that "[w]ithout Social Security, most seniors would fall below the poverty level today"). On the contribution of unemployment benefits to keeping unemployed workers' families

The real difference is that, unlike these other government benefits, welfare benefits cannot be understood contractually as “earned” from prior “contributions.”¹¹ Welfare benefits do not fit into the contractual model because they are not tied to any previous effort or responsibility and cannot be conceptualized as the fruits of a prior, fixed agreement with the government.¹² Social insurance, by contrast, embodies contractual principles of prospectivity (the agreement is fixed in advance) and neutrality (the benefits received are those bargained for and are not related to the recipient’s individual, contextual need).¹³

The contract model’s symbolic division between welfare benefits and other government benefits enables middle America to justify government control over the lives of welfare recipients. Yet rejection of entitlement liberalism here coexists with endorsement of one of its core values—autonomy—in income support programs for the middle class. Aspects of entitlement ideology retain a place in American social philosophy with which Davies has not reckoned.

III

If opportunity ideology continues to dominate our national philosophy with respect to poverty policy, then the welfare reform legislation of 1996 might hold the seeds of the revived liberal consensus that Davies’s book anticipates. Federalism and devolution issues to one side, the new law most notably transforms welfare into a temporary assistance program¹⁴ focused on providing services to help recipients into employment.¹⁵ Thus, it links income support once again to work and disavows the unconditional right of poor families to government support.¹⁶ The opportunity-to-entitlement shift that Davies describes appears to have come full circle, bringing welfare back into the fold of the New Deal liberal consensus that fell apart in the late 1960s.

above the poverty line, see U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/HRD-93-107, UNEMPLOYMENT INSURANCE: PROGRAM’S ABILITY TO MEET OBJECTIVES JEOPARDIZED 42 (1993).

11. See William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1438 (1986); see also ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 363 (1974) (providing example of how even make-work projects in New Deal enabled participants to feel that they were earning their benefits).

12. Welfare benefits can be seen as directly analogous to public works programs, with “rearing children” seen as work that has an important public component. On this view, it is the devaluation of child rearing that leads to the breakdown in the contractual analogy. See Simon, *supra* note 11, at 1483.

13. See *id.* at 1442.

14. See § 402(a)(1)(A)(ii), 110 Stat. at 2113 (requiring recipient to engage in work once determined to be work-ready or after she has received assistance for 24 months, whichever is earlier); *id.* § 408(a)(7) (barring assistance beyond five calendar years from date of first receiving benefits).

15. See *id.* § 402(a)(1)(A)(i) (requiring states to “[c]onduct a program . . . [that] provides parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient”).

16. See *id.* § 401(b) (“This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”).

Although the 1996 welfare reforms decidedly represent a movement away from entitlement liberalism and the property analogy for public benefits, they do not really recapture the original philosophy of the New Deal social insurance programs or the contract analogy. Even now, welfare does not fit comfortably into the contractual model. The poverty of a family with children is still the criterion for receiving welfare benefits. No prior contribution is required, nor are the income transfers or job training services regarded as earned even if welfare recipients find work afterward. Moreover, the new focus on recipients' individual needs to become employable¹⁷ flies in the face of contractual neutrality.

If not property and not contract, is there a better private law analogy for our new welfare policy? Perhaps we should consider an analogy to tort. At the core of tort theory is the understanding that there are some contingencies for which the parties involved could not efficiently bargain *ex ante*, before the harm occurs.¹⁸ Most welfare recipients are poor precisely because they have not formed sufficient attachments to the work force *ex ante* to be covered under one of the "contractual" social insurance programs.¹⁹ The welfare program's focus on need is the analog of tort's focus on harm. Whereas contract protects the expected benefit of the bargain, and property protects the ability to control what one has and to exclude others from using it, tort is oriented toward repairing harm itself.²⁰ Tort's compensation notion parallels the rehabilitation orientation of contemporary welfare policy: The welfare recipient is "whole" when she becomes an "employable" member of society. Thus tort, like welfare, rejects contractual principles of prospectivity and neutrality, and instead adopts a highly individualistic and reactive approach.

17. See *id.* § 408(b) (describing "Individual Responsibility Plans" setting forth personal rehabilitative and employment goals).

18. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 37 (1983) (using classic tort example of automobile accidents involving pedestrians to illustrate point that "bargaining obviously cannot lead to the efficient outcome since neither drivers nor pedestrians know in advance with whom to bargain").

19. See Stephen Bingham, *Replace Welfare for Contingent Workers with Unemployment Compensation*, 22 FORDHAM URB. L.J. 937, 943 (1995); Deborah Maranville, *Changing Economy, Changing Lives. Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 331-32 (1995). Unemployment insurance protects less than half of the workforce: "The excluded workers include those in the less skilled marginal occupations; those seeking their first job; or those reentering the labor force. All states require a certain period of work prior to eligibility in order to eliminate the casual or intermittent worker." Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 484-85 (1987-88).

20. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6 (5th ed. 1984) ("There remains a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests This is the law of torts."); Stephen R. Perry, *Tort Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 57, 57 (Dennis Patterson ed., 1996) ("Damages is a backward-looking remedy that is intended to *compensate* the plaintiff for the harm suffered."). Of course, the duty to mitigate damages, which imposes responsibilities on the injured party analogous to the obligation imposed on welfare recipients to seek employment, is common to both tort and contract theory.

Two other elements of tort, causation and liability,²¹ might have a welfare analog within the liberal understanding of why government action to alleviate poverty is justified—indeed compelled—in the first place. Progressive and New Deal liberals originally rejected laissez-faire in favor of active government out of some belief in society's collective obligation to attend to the distributive effects of its economic structures.²² Just as welfare alleviates the poverty inevitable in a free market economy, tort alleviates the unavoidable individual harms arising from the activities of modern society.²³ On a tort model of welfare, therefore, society can be conceptualized as a strictly liable tortfeasor with an obligation to compensate those who are made poor by its economic structures. Likewise, welfare recipients are contributorily negligent and hence cut off from further assistance if, having (in theory) received education and job training, they fail to find and keep paying jobs.

A tort analogy might reconcile the American individualist tradition with need-based redistribution to a greater extent than either the contract or property model allows. Ultimately, we need a new analogy for our new welfare policy because its rehabilitative welfare-to-work approach diverges from the values underlying the social insurance and public works programs that forged the true legacy of New Deal liberalism. By lumping both social insurance and rehabilitative strategies together under the single rubric of "opportunity liberalism," Davies has obscured important differences in their respective links between income and employment. The rehabilitative approach to poverty policy may still be faithful to another common law analogy, but it has yet to demonstrate its ability to construct and maintain a national liberal consensus.

—Allison Moore

21. See Perry, *supra* note 20, at 57 ("The heart of tort law, then, is a legal obligation to pay compensation for harm caused, where the obligation is owed by the person who caused the harm directly to the person who suffered it.")

22. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 33–34, 166 (1992); see also *supra* note 3.

23. See KEETON ET AL., *supra* note 20, at 6 ("Arising out of the various and ever-increasing clashes of the activities of persons living in a common society . . . there must of necessity be losses . . . sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses . . .") (internal quotation marks omitted) (citation omitted).

The System Worked: Our Schizophrenic Stance on Welfare

Whose Welfare? AFDC and Elite Politics. By Steven M. Teles.* *Lawrence: University Press of Kansas, 1996. Pp. x, 226. \$29.95.*

The republic has welfare reform on its mind. On August 22, 1996, President Clinton, faced with an impending election and the daunting prospect of explaining a three-time veto in light of his past promises to remake welfare,¹ signed into law a bill that, among other things, devolves greater flexibility to the states and imposes sharp restrictions on the availability of AFDC.² Even the staunchest advocates of reform acknowledge that we have entered an era of uncertainty.³ In such a climate, Steven Teles's study, *Whose Welfare? AFDC and Elite Politics*, enhances our collective understanding of AFDC's history and continues the national conversation about society's obligations to the poor.

Whose Welfare vividly describes the genesis of AFDC, the changes in the composition of the program and its recipients, and the various attempts at reform beginning in the 1960s. Eschewing the approach taken by consensus-based scholarship,⁴ Teles insists that welfare politics represents a breakdown of the democratic decisionmaking process. He claims that welfare policy has not legitimately reflected popular sentiment over the last thirty years, and argues that this state of affairs is best explained by a theory of "elite

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1. See F. Christopher Arterton, *Campaign '92: Strategies and Tactics of the Candidates*, in *THE ELECTION OF 1992*, at 74, 99 (Gerald M. Pomper ed., 1993) (discussing Clinton/Gore ad that announced, "Welfare Can Be a Second Chance, Not a Way of Life" and called for "an end to welfare as we know it").

2. See 42 U.S.C.A. § 601 (West, WESTLAW through Pub. L. No. 104-94). For most mothers, AFDC is a transitional program. See MARY JO BANE & DAVID T. ELLWOOD, *WELFARE REALITIES* 28 (1994). Less than 15% of current beneficiaries will be on welfare for two years or less in a lifetime; 48% will return to AFDC for periodic spells adding up to ten years or more. See *id.*

3. See, e.g., *All Things Considered* (NPR radio broadcast, Aug. 1, 1996), transcript available in LEXIS, News Library, Curnws File (quoting Sen. Slade Gorton, who admitted that he was "not at all certain of what the consequences of the passage of this bill will be"); Alison Mitchell, *Two Clinton Aides Resign to Protest New Welfare Law*, N.Y. TIMES, Sept. 12, 1996, at A1 (reporting resignations of DHHS Assistant Secretaries Peter Edelman and Mary Jo Bane over "deep concerns" about new law).

4. See, e.g., JOEL HANDLER & ELLEN HOLLINGSWORTH, *THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION* (1971); MICHAEL KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986); FRANCES FOX PIVEN & RICHARD CLOWARD, *REGULATING THE POOR* (1971).

dissensus.”⁵ Unfortunately, the study falls short in two respects. First, contrary to the author’s claim, the political system has “worked”⁶ by producing policy in tune with popular views. Notwithstanding the dramatic recent round of devolution of authority, it is the public as a whole, and not merely the elites, that remains deeply conflicted over welfare goals. Second, even if there were a disjunction between public sentiment and policy, this is best understood as characteristic of a healthy deliberative democracy.

Whose Welfare analyzes the actions of the cast of intellectuals who have been charged, whether by electoral process or by chance, with the responsibility of defining the contours of welfare policy. Teles’s explanation is top-down by nature: Politicians, activists, and judges have prevented AFDC from evolving to reflect the prevailing views of the populace. As a first step, he argues that whereas AFDC’s precursor, Aid to Dependent Children, originally was established in 1935 to supplement state programs designed to keep destitute widows out of the labor force, today eighty-five percent of the public supports requiring women with preschool children to work in order to receive public assistance (p. 55). As Teles asserts, “[t]he set of beliefs that formed the moral foundation for the mother’s aid and Aid to Dependent Children programs has utterly collapsed” (p. 57).

Having explained that requiring work is a critical element of any legitimate form of welfare, Teles goes on to argue that reform has been frustrated by “elite dissensus,” a system malfunction marked by a failure on the part of the political elite to “give form and structure to [the public’s] preferences” (p. 165). He notes that, compared with the public at large, professional elites possess “well-constrained ideological structures” (p. 62). The more actively elites involve themselves in the social issues of the day, the more likely it is that extreme bipolar debate will occur (p. 74). Teles finds that welfare is particularly vulnerable to dissensus dynamics because the issue implicates “regime level consequences”⁷ (p. 164), and because the poor have no direct representation in the political process but are spoken for by competing organizations (pp. 15, 16, 164). He avers that elite “disjunction” has characterized welfare politics since the 1960s. His portrait is of an America

5. As Teles explains, dissensus is characterized by “large or intellectually powerful elites at the extremes of the ideological spectrum who possess roughly equal power” and a resulting “insufficiency of the political center” (pp. 76–77). Consensus politics, by contrast, is recognizable by an alignment of public opinion and elite opinion that is “sufficiently strong, persistent, and mature to act as a counterweight against interest-group agreements” (p. 11).

6. See LESLIE H. GELB & RICHARD K. BETTS, *THE IRONY OF VIETNAM: THE SYSTEM WORKED* (1979) (arguing that political system “worked” with respect to American involvement in Vietnam in that even when public opinion swung decisively against conflict, most Americans actually favored escalating efforts to win war over outright withdrawal).

7. By “regime level” issues, Teles means those “basic issues of citizenship and social system maintenance . . . [that] concern[] not merely who gets what, when, where, and how, but why a particular community exists and for what ends it is organized” (pp. 16–17).

where “welfare dependency continued to rise” (p. 80), even as attempts to tie public assistance meaningfully to work requirements were foiled.

The author lays much of the blame squarely at the door of self-styled advocates of the poor, such as the National Welfare Rights Organization (NWRO).⁸ Rather than lobbying for legislative reform or assisting the poor to get off the rolls, the welfare movement sought to secure a guaranteed annual income. NWRO was instrumental in the derailment of Nixon’s Family Assistance Plan (FAP), a proposal supported by politicians on both sides of the aisle. Subsequent plans either failed or produced only cosmetic effects.⁹ Political leaders, for their part, opted for the expedient practice of credit-claiming and risk-avoidance instead of seeking national reform: Successive administrations granted waivers for states to implement innovations (pp. 124–38). Finally, Teles argues that the Supreme Court’s rulings, as well as the intellectual ideas embodied in them,¹⁰ exacerbated the climate of gridlock.

While Teles accurately points out that support of AFDC expenditures has declined and values of work have changed over time, he is wrong to conclude that the electorate no longer supports the program. That AFDC occasionally has been amended suggests that the program has been susceptible to the ebb and flow of public pressures. Indeed, the new law demonstrates that strict limits can be enacted when national will is brought to bear on existing policy. In other words, welfare policy has reflected, and continues to exemplify, the *rational* contradictions of popular goals. The answer is that Americans feel that a safety net is necessary, but have come to dislike the costliness¹¹ of the program and the effects that such a safety net may have on those who rely on it.¹² The author is surely correct that support for “welfare” spending has

8. The contributions of the welfare rights movement should not be wholly overlooked, however, since lawyers were instrumental in the creation of “fair processes for eligibility determination and . . . ensur[ing] horizontal equity.” See BANE & ELLWOOD, *supra* note 2, at 12–14.

9. The Work Incentive Program (WIN) passed in 1967, requiring states to establish work programs with sanctions for noncompliance and creating a financial incentive to work, but WIN was never fully implemented (p. 95). President Carter’s Program for Better Jobs and Income was defeated in 1976. The Family Assistance Plan passed in 1988, but the work provisions were widely seen as paper requirements (pp. 94–95). See *also id.* at 20–21.

10. See, e.g., Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich suggested that welfare might be more accurately understood as a property right rather than as merely a privilege, and this idea was adopted in the Court’s analysis in *Goldberg v. Kelly*, 397 U.S. 254 (1970). See *infra* text accompanying notes 16–21.

11. Actually, although AFDC expenditures have increased over time and in 1993 reached \$13 billion (4.7 million families assisted), they comprise less than one percent of the annual federal budget. See BANE & ELLWOOD, *supra* note 2, at x.

12. Teles indulges the widespread misperception that fuels at least some of the public antipathy toward AFDC: that welfare encourages individuals to have out-of-wedlock children (p. 173). In fact, as studies repeatedly confirm, there are other dynamics in play: there are complex, real costs to raising children, and AFDC’s support is quite small relative to these costs. See, e.g., GREGORY ACS, URBAN INSTITUTE, *THE IMPACT OF AFDC ON YOUNG WOMEN’S CHILDBEARING DECISIONS* at i (1994) (observing that AFDC generosity had “very modest” effect on first births and “virtually no effect on subsequent births”); BANE & ELLWOOD, *supra* note 2, at 111 (“There is little observed impact of welfare on births out of wedlock.”); JANET CURRIE, *WELFARE AND THE WELL-BEING OF CHILDREN* 71–73 (1995) (reporting that studies have concluded that “AFDC benefits have little effect on the probability of birth”).

consistently declined, yet he fails to mention that when the query is rephrased as "assistance to the poor," sixty-four percent of those polled advocate more spending, while only eleven percent favor decreased spending.¹³ While Americans see lack of effort, poor schools, and loose morals as causes of poverty, a significant number also understand that there are not enough jobs available (pp. 51–52). The overwhelming majority of Americans believes that welfare alleviates hunger and helps people overcome hard times, but fears that welfare encourages out-of-wedlock births and creates a disincentive to work (pp. 49–50). These numbers, taken as a whole, indicate that the people are profoundly divided over the goals of AFDC: Is it primarily intended to help eligible mothers achieve self-sufficiency, or is it meant to provide a minimal standard of living for poor children? Teles's analysis assumes that current policy is out of step with public opinion based on a conception of AFDC as furthering the former goal, while almost entirely ignoring the complicating purpose of the latter.¹⁴ The populace seems to want to "have it both ways" (p. 53)—it would like mothers to work but insists on maintaining an appropriate standard of care for poor children. In short, any actual dissensus exists with the public at large, and is not attributable solely to elites.

Even assuming that welfare policy has been out of step with the views of the populace, however, Teles does not offer a compelling explanation as to why this is so. The primary weakness of Teles's thesis is its failure to distinguish between dissensus and consensus politics, and perhaps normal politics, on conceptual and historical levels. Although the author provides clues as to why the issue of welfare may be particularly divisive, he does not demonstrate why the actions of elite actors here differ dramatically from the vigorous political mobilizing and legal strategizing of daily politics. One problem lies in his vague definition of dissensus. On the one hand, because of the characteristics of elites, polarizing dynamics appear to be the norm when they participate in robust public debate. This suggests that on most contentious social issues, dissensus will occur. On the other hand, the author implies that dissensus is an unusual phenomenon, producing "aberrant policy" (p. 8).

A further difficulty emerges in Teles's failure to provide detailed examinations of welfare politics vis-à-vis other historical examples.¹⁵ Without

13. See CURRIE, *supra* note 12, at 1.

14. Today, one in five children is defined as poor; the proportion of poor children rose from 15% to 20% between 1974 and 1989. See IRWIN GARFINKEL, *ASSURING CHILD SUPPORT 1* (1992). See generally OLIVIA GOLDEN, *POOR CHILDREN AND WELFARE REFORM* (1992) (analyzing benefits of program); BOBBIE G. TURNER, *FEDERAL/STATE AID TO DEPENDENT CHILDREN PROGRAM AND ITS BENEFIT TO BLACK CHILDREN IN AMERICA 1935–1985* (1993) (discussing importance of AFDC for black children). Some studies suggest that, compared with in-kind aid, AFDC produces no quantifiable direct benefits for children. See CURRIE, *supra* note 12, at 92–117. Nonetheless, a case can be made for cash assistance based on the argument that in-kind aid does not permit individuals sufficient autonomy to order their lives and those of dependent children.

15. Teles mentions only the airline deregulation of the 1970s and the tax reform of the 1980s as examples of consensus politics (p. 11). No historical examples of dissensus politics are explored.

such analogies, it is unclear why elite behavior and the political dynamic in the welfare context should be deemed dysfunctional. Teles's more specific arguments demonstrate this point. One critical thread of his theory is that elites within the legal profession are partly responsible for dissensus—that “[s]tarting with *King v. Smith* and running through *Goldberg v. Kelly*, the ordinary legislative process was circumvented” (p. 144) (emphasis added). Yet while the welfare cases were dramatic decisions in their own right, it is debatable whether the Supreme Court departed from the norm in applying the law. The author rather overstates the actual scope of these decisions and misunderstands the nature of the judicial-political process.¹⁶ Contrary to Teles's claim (p. 116), the welfare cases do not resemble the abortion cases, in which, according to some jurists and scholars, illegitimate judicial activism arrested and polarized political deliberation.¹⁷ Whereas the Court has pronounced with unmistakable clarity a woman's fundamental right to terminate her pregnancy within the first trimester,¹⁸ it has never “ratified” a right to welfare.¹⁹ In *Goldberg v. Kelly*,²⁰ the Court held that due process required only that recipients be granted an evidentiary hearing before termination of their benefits, but stopped far short of finding an unconditional right to the statutory distribution of wealth.²¹ Teles does not clearly explain how judges should have avoided contributing to dissensus while fairly deciding the critical legal claims at stake; it is not sufficient to simply say that courts must avoid the language of “entitlement.” Nor is it apparent that lawyer/activists circumvented the normal political process. Elites, as well as lay persons, have long sought to vindicate their rights in the legal system. Litigation, moreover, often comprises an integral component of normal political strategy.

16. More plausible is Teles's claim that the Court's decisions helped spur stricter welfare rules (pp. 115–16), as it is undisputed that the costs of maintaining welfare rose as a result of these rulings.

17. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part, dissenting in part) (“Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.”); cf. Stephen L. Carter, *Rush to a Lethal Judgment*, N.Y. TIMES, July 21, 1996, § 6 (Magazine), at 28–29 (arguing that recent decisions by Ninth and Second Circuits threaten to short-circuit deliberative process over divisive notion of assisted suicide).

18. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that woman has “fundamental” privacy right to terminate her pregnancy in first trimester).

19. In *King v. Smith*, 392 U.S. 309 (1968), the Court struck down an Alabama regulation that denied AFDC benefits to families in which a male cohabited with the mother of eligible children. See *id.* But as Teles acknowledges (p. 108), the case was decided on statutory grounds and did not create a new substantive constitutional right. See *id.* at 329–34. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court struck down Connecticut's one-year residency requirement for AFDC eligibility. Yet rather than finding a constitutional right to public assistance, the Court grounded its decision in the right to travel freely and equal protection of the laws. See *id.* at 629–33.

20. 397 U.S. 254 (1970).

21. Subsequent decisions further affirmed the notion that no fundamental right to welfare exists. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587 (1987) (upholding federal law requiring that children living in same home be considered as part of same household); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973) (upholding state work incentive law); *Dandridge v. Williams*, 397 U.S. 471 (1970) (rejecting “substantive” challenges to state's monthly AFDC cap).

If one remains convinced that AFDC has long been out of step with public opinion, it is still possible to understand disjunction as illustrative of a properly functioning system. As the historian Gordon Wood aptly noted, our peculiar "balanced constitutional" political order was designed to "check the imprudence of democracy."²² The American political-legal structure does not reflect every shift in popular approval; rather, it may, at times, prolong debate or frustrate transient majorities in the interest of protecting not only deeply entrenched values,²³ such as due process and perhaps the modern principle of an activist national government,²⁴ but also policies across generations. Just as the system "controlled the effects" of the welfare rights movement's "passions,"²⁵ so it checked the efforts of those who sought transformation of either the policy of cash assistance or the underlying principle of *limited* social welfare spending. However unpopular AFDC has been, it does not follow that intense public scrutiny of the issue has occurred until recently, or that, borrowing Bruce Ackerman's language, "broad and deep"²⁶ support for fundamental reform has ever existed during the last three decades. Hence, the cycle of devolution represents an institutional slowdown that permits ad hoc tinkering until informed deliberation takes place and a new consensus emerges in favor of comprehensive reform.

Upon reflection, it is apparent that the new welfare structure, in its nascent form, falls far short of Teles's vision of a national solution.²⁷ Although it puts teeth into existing work requirements, the law follows the pattern of devolution of which Teles is sharply critical (pp. 119–46), and it remains to be seen whether adequate training programs will emerge, or whether private institutions will fill in the void on behalf of children whose mothers no longer qualify for AFDC. In the end, although *Whose Welfare* posits an intriguing theory, its parts do not coalesce as a persuasive whole. To be sure, the author makes a number of incisive observations and provides often arresting accounts of the welfare rights movement. Still, at a time when sober reflection on the past and thoughtful solutions for the present are sorely needed, *Whose Welfare* speaks in a softer voice than one would have hoped.

—Robert L. Tsai

22. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 554 (1969).

23. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 10 (1991) (advocating dualist theory of judicial review in which courts serve democracy by protecting erosion of "hard-won principles" by "political elites who have failed to gain broad and deep popular support for their innovations").

24. Public opinion is but the beginning of a process of refinement to "best discern the true interest" of the citizens, to promote "justice," and to ensure that these considerations are not "sacrifice[d] to temporary or partial considerations." *THE FEDERALIST* NO. 10, at 59 (James Madison) (Modern Library ed., 1937).

25. See *id.* at 56–59; see also WOOD, *supra* note 22, at 575 ("To regulate and not to eradicate [the passions] . . . is the province of policy." (quoting John Adams)).

26. See ACKERMAN, *supra* note 23, at 10.

27. The author believes that support for a national solution exists. Accordingly, he advocates uprooting AFDC and planting a national "insurance-like system of income security" (p. 170). His approach would establish a "general civic entitlement," thereby "guaranteeing work to everyone" (p. 172).