

**John F. Kennedy School of Government  
Harvard University  
Faculty Research Working Papers Series**

**Moral Competence in the Practice of  
Democratic Governance**

**Kenneth Winston**

**November 2002**

**RWP02-048**

**The views expressed in the KSG Faculty Research Working Paper Series are those of the author(s) and do not necessarily reflect those of the John F. Kennedy School of Government or Harvard University. All works posted here are owned and copyrighted by the author(s). Papers may be downloaded for personal use only.**

**For the People: Can We Fix Public Service?**  
edited by John D. Donahue & Joseph S. Nye Jr.  
[forthcoming from Brookings]

## **Moral Competence in the Practice of Democratic Governance**

**Kenneth Winston**

Schools of government shape their curriculum around three types of inquiry: policy analysis and design; strategic management; and a more encompassing focus on the political environment, including electoral activity, advocacy, and public leadership. The mission is not just to educate professionals, serially, in these three areas but enable them to integrate the three in depth and move across them in the course of their careers. What does the person look like who can do that? Are there generic skills and capacities that this person would possess?

The aim of this chapter is to address these questions in part, as a prerequisite to addressing the question we now want to add to the above: Must the list of skills and capacities be revised as governance responsibilities migrate away from the central state to other locations? My focus is on one dimension of professional skill, which I shall refer to as *moral competence*, understood as the set of individual attributes and dispositions (latent moral resources) that make for good governance. These are traits that governing institutions should either select for in recruiting or, more likely, cultivate on the job through an appropriate ethos and well-designed structural supports—which then constitute the moral competence of the institutions themselves. To give content to the idea of good governance, my working assumption is that the duties of practitioners and the nature of the polity are inextricably

I am indebted to Mark Moore and Philip Selznick for discussion of the issues addressed in this chapter. For their generous comments and sage advice on an earlier draft, I am grateful to Mary Jo Bane, Michael Blake, Brent Coffin, Cary Coglianese, Archon Fung, Fred Schauer, and participants in the Visions of Governance Project. Thanks also to Chambers Boyd Moore for her skillful research and editorial assistance.

linked. What a practitioner should be depends crucially on what the practitioner is legitimately expected to do, and that depends on the polity. The central question, then, is what constitutes moral competence for a practitioner of democratic governance?

I begin, accordingly, by identifying some important aspects of democratic governance (without offering a full-blown theory). Then I sketch five generic virtues that I regard as constituent components of the moral competence of “the good practitioner.”

### **Features of democratic governance**

In this section, I offer simple assertions, not an argument, to suggest that democracy is a moral order of a certain sort, based on a commitment citizens make to one another. Only a people with such a mutual commitment attempts to answer the main question of politics: *How should we live together?* A democratic polity, I want to say, has moral foundations, moral ends, and moral structures.<sup>1</sup>

*Moral foundations.* It is a sociological commonplace that the legitimacy of political institutions depends on general societal acceptance, not coercive threats. This acceptance, in turn, is sustained over time only if supported by citizens’ appreciation of official efforts to achieve orderly, fair, and decent governance. Political institutions are the work of their everyday participants, a continuous effort to construct and maintain a common framework to meet the exigencies of a shared existence, to resolve recurrent conflicts fairly, and in general to realize the aspiration of just and workable relations among citizens. Good institutions are ones that enable citizens to lead what they regard as decent lives *with others*. Democratic order, then, is emergent rather than imposed and receives its validation from the people whose

lives it organizes. It relies on historical understandings and customary expectations in particular social contexts. As a result, democratic legitimacy is variable, fluid, and often problematic: something constantly to be achieved, not taken for granted.

One implication is that citizens are owed respect and have a standing claim to forbearance, even when their views are ill-founded or confused. We need not believe they are always right to recognize that practices and social norms based on shared experience, reflecting shared sentiments, have a presumptive validity. The presumption is rebuttable, of course, but the official who acts toward citizens from an Archimedean point outside the existing culture is likely to experience moral isolation and self-doubt—a precarious circumstance for even the most foresighted among us. Joseph Ellis’ compelling portrait of Thomas Jefferson, who had such difficulty sustaining his early commitment to racial equality against opposing social pressures in his beloved Virginia, is a telling, if troubling, case study.<sup>2</sup>

Since democracy is a collective project, the affinities between official rules and procedures, on the one hand, and social expectations or norms, on the other, must be close. Not that each rule or decision has to be regarded as morally compelling: a citizen may well follow a rule out of calculated self-interest or to avoid coercive threats. But such an attitude cannot be at the core of citizens’ relation to government; it must lie at the periphery or operate only with regard to certain limited obligations. Instead, egoism must be harnessed and bounded by attachment, if we expect to see the trust and cooperation necessary for a life together. Needless to say, if we are too demanding on individual motives, the polity is bound to fail. So, it is vital, as John Rawls observes, to rest the commitment to democracy on a reasonable moral psychology. Citizens have the capacity to follow principles and act for the sake of ideals. When they believe that social practices are fair, they are prepared to do their

part, provided they have assurance that others will also do their part. The more they believe others are doing their part *for the right reasons*, the more they will develop trust and confidence in others.<sup>3</sup> Instrumentalism to personal ends is a possible attitude to have toward social and political institutions, and characteristic of those who think the principal function of government is to protect private spheres of activity. But instrumentalism by itself impoverishes political life. In contrast, democratic citizens value civic goods, including the goods of association and collective self-rule. The state itself is an association, whose members are citizens, and has a practical preeminence in compelling them to think about a common good beyond the goods of special groups.<sup>4</sup>

*Moral ends.* I follow Amartya Sen in thinking that, for moral purposes, our conception of democratic citizens has a double aspect. We view citizens in terms of well-being and in terms of agency. The first has to do with how well off citizens are: whether they enjoy favorable life circumstances, security, prosperity, and so on. Regarding citizens as agents means respecting their ability to set goals, develop commitments, pursue values—and succeed in realizing them.<sup>5</sup> In the context of a democratic polity, valuing agency is at the core of self-government. Strictly, what is fundamental is not so much the realization of what (let alone everything) one values, but recognition of the moral space within which one can exercise deliberate choice, typically in conjunction with others. Liberty is not a presocial attribute of individuals that government (or society) inevitably restricts; it is the exercise of self-determination that the polity makes possible. A fundamental aim of public policy, therefore, is to empower citizens and foster the conditions for engaging in meaningful activities together. This goal is one criterion for selecting among policy options.

From the importance of agency flows the principle of citizen participation in decision making. Not “maximum feasible participation,” but participation that is appropriately structured and relevant to the activity in question. (I say more about specific structures below. The forms of participation that come most readily to mind are elections and political advocacy, but every decision mechanism needs to be viewed along this dimension.) Further, to value agency does not mean we should preclude exacting scrutiny of how it is exercised. People are known to enter voluntarily into relationships—of employment, family, politics—even when they are ill-informed and the relationships are demeaning. We need to retain a critical perspective on such choices. Thus, at least for decisions with public implications, it is a benefit to the polity if institutional mechanisms operate to transform initial preferences into thoughtful judgments, the way litigants in constitutional disputes are required to formulate their complaints in terms of authoritative readings of our collective compact, or juries are required to reach unanimous agreement and thereby strive for impartiality. In general, well designed institutions do not leave citizens just as they are but transform them through participation, making possible the reconciliation of partial and general perspectives, which (as I observe below) it is the special task of good practitioners to bring about.<sup>6</sup>

Since the exercise of agency requires enabling social conditions, valuing agency entails a collective commitment to capacity building, that is, providing citizens with basic resources and opportunities for realizing the kind of life they wish to live, individually and collectively. Background conditions include public policies that diminish the threat of famines, epidemics, or terrorist attacks. For individuals, basic capacity development typically requires education, adequate health care, and employment opportunity. We should also note the importance of opening channels of communication—especially today, by exploiting the

potential of new information technologies—and easing barriers to mobilizing coalitions and forming associations. Beyond these are formal structures of decision making, to which I now turn.

*Moral structures.* A crucial ingredient of citizens' capacity to exercise choice together is the availability of mechanisms of collective decision making. To act effectively as a member of a democratic polity requires structures that bring each citizen's actions into meaningful relation with the actions of others. This is the civic dimension of freedom—the capacity to engage with others in self-rule.

Traditional decision mechanisms can be sorted into certain basic types, such as election, contract, adjudication, legislation, mediation, administrative regulation, and choosing by lot. Each comes in many variations. For example, voting can take the form of simple majoritarianism or of proportional representation; it can be single (one person, one vote) or cumulative (one person, the same number of votes), and so on. These alternatives are obviously incompatible. Without some method of counting, a collective decision cannot occur, but each method has its own implications for the polity that adopts it. Each is qualitatively different and makes of the polity something that, morally, it would not otherwise be.

The moral quality is highlighted by observing these structures from both sides of the relationships they establish, that of practitioners and of citizens. From the side of practitioners, we can see that certain duties to citizens flow from the purpose of the decision mechanism itself, quite apart from substantive outcomes. For example, if the point of a legislature is to promulgate general rules and give meaningful direction to citizen conduct,

then legislators have a duty to make statutes clear and consistent and capable of execution. A carelessly drafted law fails to respect citizens in their capacity as responsible agents.

Similarly, a retroactive statute (imposing an obligation today on conduct undertaken yesterday) is inherently problematic and requires special justification for the limited cases in which it might be employed. In general, agencies of governance not only have tasks to perform; they have relationships to sustain. The commitment to these relationships determines, to some extent, the kinds of tasks they are able to take on and how the tasks are accomplished.

From the side of citizens, fundamental to the structures of decision are the methods by which participation occurs. Self-rule, whether individual or collective, must be appropriate as well as effective. In adjudication, for example, litigants present evidence and reasoned arguments in support of their claims. Respect for litigants is optimized when the judge's decision is based, as far as possible, on those arguments, even though this entails a reduced role for the judge as policy maker. In that way, the fate of litigants is made to rest on their own efforts and their own understanding of their situation. Similarly, the important feature of a market, in this view, is that it brings human choices, and the cost of realizing them, into a common calculation. Thus, efficiency is not the driving consideration; it is participation, as an equal, in the allocation of social resources. (Closer is the idea that the market is a sensitive mechanism for coordinating a myriad of activities, without requiring agreement on values.) In sum, each structure recognizes a mode of participation, and hence of self-rule, that fits its purpose and mode of functioning.

Institutional forms are not fungible or infinitely malleable. Distinct principles and values regulate different spheres of activity—and appropriately so—for example, marriage



and divorce, commercial relations, religious associations. Thus, each form, we could say, has a comparative advantage in addressing certain issues and not others. Democratic governance entails due regard for the integrity of institutional forms and respect for the distinctiveness of each sphere. Thus, extending an institutional form (such as the market) beyond certain bounds may mean subjecting some spheres of activity to an inappropriate set of values. At the same time, institutional forms should be viewed dynamically—not as static and determinate structures of rules or procedures but as purposive mechanisms designed to foster self-government. To accomplish specific aims, participants must follow set forms. But since forms may become dysfunctional in relation to aims, the commitment to form is always open to reassessment. This brings out the moral as well as purposive aspect of decision mechanisms, and is especially important to keep in mind as we search for new forms of social architecture in a world of migrating responsibilities. Since people reflect on what they are doing, they construct mental models of possible structures, which then guide the emergence of specific practices and provide patterns for evaluating their success. Such reflection requires evaluative judgments about the interplay of means and ends. The models are focal points of human striving; they embody moral aspirations and define moral relationships. At the same time, the ideals we are interested in are not just fantasies of the imagination; they must take concrete form and prove themselves workable in practice. The contextual factors that enhance, or impair, the effectiveness of particular structures determine *whether or not* an existing social problem can be managed democratically—and *how*.

## **The moral competence of the practitioner of democratic governance**

In broad terms, “social capital” refers to the fund of human resources (traits of character, moral conventions, social networks) that a society has available to accomplish its collective goals and sustain itself over time. I am concerned with just those resources (dispositions, orientations, training) that constitute moral competence for practitioners of democratic governance. The features of a democratic polity sketched above have powerful implications for how the description of these resources should go and challenge the profession’s current understanding of its work. In particular, I focus on five generic attributes that I regard as defining features of *the good practitioner*—and variable attributes of actual persons. They are not character traits in the ordinary sense but qualities of officials, acting in their official capacities, as required by the duties of office. (Thus, we would not expect individuals necessarily to exhibit these traits in other aspects of their lives.) The five are: fidelity to the public good, the duty of civility, respect for citizens as responsible agents, proficiency in social architecture, and prudence.<sup>7</sup>

*Fidelity to the public good.* Since the democratic polity is based on a mutual commitment to living together, the good practitioner is crucially preoccupied with determining the content and scope of the public good. This may seem platitudinous, but the challenge is formidable.

The aspect I want to stress is the inescapable *dual responsibility* of officials in democratic polities. Almost every official gets into office via a process that incurs legitimate obligations to specific individuals or limited constituencies. At the same time, officials have a duty to enlarge their vision beyond these connections, to encompass considerations of the public good. A key requirement of the good practitioner, then, is the ability to reconcile

partial with general perspectives. Members of Congress, for example, are elected from particular districts and have duties to their *electoral constituents*. But they are also lawmakers for the whole country and thus have responsibilities to every citizen—their *constitutional constituents*, as I would call them. Similarly, top-level administrators owe allegiance to their appointing officer and the officer's political agenda, but are also bound to the statutorily created mandate of their office, which may or may not coincide with the boss's wishes. Policy analysts face this dual responsibility derivatively when they take on public officials as clients. Only judges appointed for life—and the occasional special prosecutor—escape the need to grapple with it.

The task of reconciling partial and general perspectives is a standing test of the integrity of the good practitioner, and its execution often demands considerable imagination and creative leadership. It may require, for example, open disagreement with (and attempts at educating) one's constituents, or re-examining prior personal commitments in light of a new understanding of one's responsibilities. The challenge is compounded for practitioners who attempt to adopt a global perspective. If I may refer briefly to an illustrative case: Beginning in 1990, Senator Patrick Leahy made repeated attempts (all unsuccessful) to enact legislation restricting the export of pesticides whose sale is forbidden in the US. He offered two principal reasons for this measure. First, he feared the pesticides' return to the U.S. in the form of poisonous residues on imported food. Second, he was concerned for the health of farm workers, most of them in developing countries, who use these toxic chemicals under conditions that too often produce illness, sterility, and death.

The first reason is not controversial. Surely, members of Congress have a legitimate regard for the health and safety of their constituents, both electoral and constitutional; if there

are questions about Leahy's efforts, they have to do with the best means for achieving these ends. The second reason is less clear-cut. Why are farm workers in developing countries Leahy's business? Can a legislator have responsibility for a constituency—let's call them Leahy's *moral constituents*—to whom he or she is not directly accountable? If the category of moral constituent is not empty, how should one weigh duties to constituents to whom one is directly answerable (including the U.S. chemical industry) against duties to constituents where no accountability mechanism exists? How does one configure the public good in these cases? I sympathize with Leahy's felt sense of responsibility to workers harmed by U.S. products in developing countries, but these questions, I believe, are not easily answered.<sup>8</sup>

*The duty of civility.* It is often said that, if one heeds one's conscience and does what one sincerely believes to be right, one needn't fear the consequences. The moral life, however, is more complicated than that. If by "conscience" we refer to the personal moral convictions by which one guides one's life, it matters little—except to the person whose conscience it is—what those convictions are and whether they are shared by anyone else. But in the public realm, we no longer have the luxury of idiosyncratic moral conviction. Principles that are important, even foundational, to oneself do not necessarily have any claim on anybody else. Thus, sincerity of conviction is not an acceptable basis of public action. Since public decisions affect others, often profoundly, including those who have conflicting convictions, good practitioners are obligated to reach out beyond what is personal to what can be shared and agreed to by others. Personal beliefs, of course, generate felt imperatives and may legitimately function as starting points of public discussion. But reaching common ground is indispensable for collective endeavors. Accordingly, one of the moral capacities necessary

for responsible public decision making is the ability to regard one's own opinion as only one among others and not decisive simply because one holds it, even passionately. (It is in this light that I take Nietzsche's observation: "A very popular error: having the courage of one's convictions. Rather it is a matter of having the courage for an attack on one's convictions.")

The good practitioner, we could say, has a duty to act in accordance with a *public conscience*. The conscientious democratic official is one whose grounds of decision are beliefs and principles that citizens generally are committed to—or *could be* after deliberation and reflection. The hypothetical is crucial. Assent by others need not be immediate; for that would compel consideration of every prejudice, no matter how vicious, and every opinion, no matter how ill-considered. On the other hand, we must have a sense that assent is available, that the principles invoked are current at some level, even if only emergent and inchoate. Consider the example of Abraham Lincoln on slavery. If the goal of emancipating the slaves had been based on a personal (or idiosyncratic) conviction that slavery was wrong, there would have been no moral ground for calling upon the nation to endure the great sacrifices in prosecuting the war against the South. Lincoln appealed, rather, to the ideal of equality expressed in the Declaration of Independence, the nation's defining statement of moral principle. Even though he saw implications in that document that not everyone saw, the logic of his appeal was public, not personal.

Or, consider the case of human rights advocacy by NGOs. These groups champion essential conditions of human agency and well-being, yet the principles they espouse are not everywhere recognized. Actual acknowledgement of their principles by others cannot be a precondition of their appeal, as Michael Ignatieff emphasizes.<sup>9</sup> But it is also true that NGOs act illegitimately if they have no reasonable basis for supporting their claims on grounds

everyone could accept. And that is where questions arise. Do human rights advocates have the correct understanding? Do they have defensible grounds, for example, for giving priority to civil and political rights over social and economic rights, in all societies? There is reasonable disagreement on these matters.

The duty to act only on the basis of principles that citizens could reasonably accept is what Rawls refers to as the duty of civility.<sup>10</sup> This duty requires the good practitioner to strive always to attain a vantage point for assessing and revising particularistic claims and partial viewpoints. It helps the practitioner move in reasoning from the individual to the communal, and where appropriate from the communal to the universal.

*Respect for citizens as responsible agents.* Regard for human agency, I have noted, is at the core of the value of self-government. Accordingly, good practitioners do not attend to well-being alone. In teaching strategic management, for example, we focus on managers as entrepreneurs for public value. But if public value has to do only with citizens' well-being, not their agency, it omits a critical aspect of what good practitioners have a responsibility to care about. Recognition of this point allows us to distinguish two opposing conceptions of the democratic practitioner and of the proper exercise of political power. (The contrast is no doubt a bit overdrawn, but it should help us define the terms of debate.) The first sets forth the image of rule by an elite cadre of experts, who are needed because modern democratic society has become so complex that it has outgrown the capacities of even an active, informed citizenry. In this scenario, the role of citizens is to choose among competing elites who define policy alternatives. Here, political power consists in the capacity to achieve citizen compliance with goals set by practitioners. Let's call this the *directive style* of governance.

Every government, of course, uses coercion to secure compliance with some of its rules and decisions. That is unavoidable. Yet, in a democracy, coercive threats are always disfavored—a necessary means only if alternative methods have failed or are unworkable. The search for alternatives is therefore a constant imperative. In contrast to the directive style, the opposing conception starts from the premise that democratic self-government is too important to abandon to elites; the modern polity simply poses new challenges to engaging citizens actively in decision making. To require that practitioners be expertly trained and informed is not to cede all control to them. To be sure, they have an active role to play, especially in ensuring that goal-setting is informed and deliberative. But respect for citizens as responsible agents goes further, by giving weight to the goals that citizens have adopted for themselves and enabling them to be realized, within the constraints set by the reconciliation of partial and general perspectives. Thus, the orientation is different: while the practitioner's input is critical, the process is interactive. Power, then, consists in the practitioner's capacity to facilitate citizens' capacity for self-direction. The good practitioner is disposed, wherever feasible, toward a *facilitative* rather than directive style of governance, one that enhances citizens' exercise of effective agency.

In conformity with the first image of the democratic practitioner, we have command-and-control government, issuing prescriptive rules and backing them with the threat of sanctions. One step removed is official manipulation of incentives to achieve citizen compliance, which still exemplifies the directive style—governance as social engineering. Incentives are designed to provide motivation or encouragement to individuals to act in ways conducive to fixed objectives. The implicit assumption is that manipulation is needed because citizens would not otherwise act as desired. Incentives, however, change people's

calculations, not necessarily their minds. They respond to external stimuli, unmediated by appreciation of their warrant, engaging in acts of expedience rather than conviction. Even worse, material incentives to do socially desirable things sometimes crowd out, rather than supplement, civic motives to do them, with the result that citizens are less inclined to act in socially beneficial ways. For these reasons, the manipulation of incentives appears to be an inherently unstable strategy of governance.

For example, in environmental policy, tradable permits and pollution fees take firms' economic motives for granted, attempting to make it "in their interest" to meet official goals. Which is fine as far as it goes. But regarding these techniques as an improvement over prescriptive rules makes sense precisely because they acknowledge citizen purposes and use local information in decision making. Once this step is taken, it is possible to imagine further moves that give citizens greater opportunities for meaningful engagement. With deliberative environmental regulation,<sup>11</sup> local parties have a significant say in policy implementation and sometimes in goal-setting itself. Instead of attempting to achieve specific outcomes by top-down directives, backed by threats, or by micromanaging citizen activity, practitioners identify broad measures of success (e.g., preserving endangered species) and let affected parties work out the details. With problem-centered regulation,<sup>12</sup> practitioners demonstrate their respect for socially valued private activity by adopting its viewpoint, in a cooperative effort to understand the needs of the enterprise and achieve shared goals. With so-called management-based regulation,<sup>13</sup> at least in my generous interpretation of it, citizens are asked to undergo a consciousness-raising planning process, but how—and whether—to meet targeted outcomes is left for them to decide. (This process could also educate practitioners,



since private parties might develop solutions to problems too complex for government officials to figure out on their own.)

This sketch of regulatory options is crude and meant only to be suggestive. The common thread is increased citizen participation, which enhances governance values without losing central oversight. The chief concern for the good practitioner, as noted, is to reconcile partial and general perspectives, which (among other things) requires serious attention to the principle of subsidiarity. Simply stated, the principle of subsidiarity is: Don't assign to a higher level of governance what can be done effectively at a lower level. The criteria of allocation are typically economic (maximizing efficiency) and epistemic (aligning tasks with the location of relevant knowledge). For the good practitioner, a different criterion is democratic—favoring units of moral commitment, loci of self-determination where mechanisms of citizen engagement can be protected and enhanced. With this concern, higher units will attempt, if possible, to exercise less exacting forms of authority over lower units, employing non-directive modes of governance that may take the form of expressions of value, guidelines based on “best practice,” expert reports, or various “reputational” mechanisms such as performance scorecards—rather than prescriptive rules and regulatory directives. (These non-directive modes comprise what recent European writers call *soft law*.<sup>14</sup>)

The point is that, in governance, relationships matter as well as goals. Citizens are objects of concern as whole persons.<sup>15</sup> Therefore, the criteria of success in policy making are incomplete if they fail to take into account how policy options are likely to engage citizens. Not because citizen participation necessarily makes desired outcomes more likely; rather, since citizens are moral agents, the good practitioner aims to release human energies and create structures of opportunity, no less than constraint.

*Proficiency in social architecture.* I have not yet found an apt term for this virtue; perhaps I need to invent one. My aim is to capture an attribute of competence, distinct from technical skill, which involves deliberative judgment about ends and means. Lawyers who value this trait refer to it as *craft* and regard it as essential to law as a professional vocation. Lon Fuller identified the key features when he spoke of lawyers as *architects of social structure*, fashioning legal instruments for effective collaboration among citizens and establishing frameworks for the future dealings of affected parties. In elaborating this idea, Fuller stressed the continuity between private and public architecture. The orientation and qualities of mind involved in drafting a contract for two parties, for example, represent in miniature what is needed in drafting statutes for the polity, because every legal instrument is a kind of constitution establishing a framework for future interaction. When the client is the public as a whole, the lawyer “could, without any question of propriety, regard himself, in Brandeis’ words, as ‘attorney for the situation.’”<sup>16</sup>

For this reason, legal education, Fuller thought, should include the teaching of social architecture. Whatever the merits of that view, I believe the virtue of institutional craftsmanship is an attribute of the good practitioner. (Lawyers are not thereby excluded; they may constitute a subset of the class.) As I observed above, institutional forms establish or affirm certain moral relationships, or fail to do so, which is why it is important to get them right. The good practitioner has the skill to identify the appropriate form for a given type of problem, guided by the types of relationship that would obtain among citizens if the form were realized. Institutional design is moral legislation. Any specific decision structure leads us to conduct our lives one way rather than another. It provides access to some citizens and

excludes others; it facilitates certain problem definitions, makes certain types of information available, and not others. So, good practitioners have a responsibility to ensure that the ends of governance are served, as well as substantive social ends. Governance values are always at risk, subject to displacement, attenuation, and corruption. A major task of the good practitioner is “to preserve inherently precarious values against ruinous competition from the cheap, the easy, the cost-effective, and the urgent.”<sup>17</sup>

It is worth emphasizing that the architect of social structure is not just a technician. The responsibility of setting up and monitoring frameworks of interaction and collaboration cannot be carried out without a simultaneous focus on ends and means—not just because both are important, but because ends and means invariably interact and involve each other.<sup>18</sup> This point is especially important in thinking about the implications of moving governance responsibilities to private firms or NGOs. The critique should indeed be familiar. For example, it is commonly assumed that practitioners can use the market as a means for pursuing the ends of governance, without thereby changing the ends of governance. The interaction of means and ends suggests otherwise. Two things may happen: (1) practitioners focus on only some ends of governance, especially narrowly managerial ones, and (2) they fail to grasp how new ends intrude through market mechanisms. A mechanism such as “contracting out” does not, typically, improve citizen participation, let alone transparency or responsiveness. “Demand side financing” (e.g., education vouchers) may improve accountability but impair collective self-government. In general, markets are not value-sensitive unless they are made deliberately so. This is the rationale for building “social markets,” in which specific political values—such as racial and gender equality, workers’ rights, habitat preservation—are incorporated into market calculations.<sup>19</sup> Thus, applauding

new management forms, as the “new public management” is wont to do, without thinking about their implications for governance is like creating new life forms without thinking about ethics. No doubt experiments in social architecture will proceed willy-nilly, as the lure of technological innovation pushes ahead of thoughtful deliberation, but good practitioners surely should reflect on their ramifications before leaping to embrace them, asking in particular whether they are opening up or closing down opportunities for democratic governance.

*Prudence.* In the classical sense, prudence is the cardinal political virtue: the exercise of practical wisdom in governance. Since governance is about sustaining valued relationships, ruling requires more than technical expertise. But can we suppose that those who rule in a democratic polity are endowed with superior wisdom? Does their expertise disclose to them a better range of beliefs, which gives them authority to control our conduct and alter our lives? Democrats are cautious about such implications.

In a more specific sense, prudence is practical wisdom in deciding how to act in specific cases—not expediency, focusing on the assessment of means to specified ends, nor opportunism, taking advantage of institutional dysfunction to achieve predetermined outcomes—but making sound moral judgments in concrete situations. Prudence is thus the capacity and willingness to engage in ethical inquiry when the occasion requires. Beyond the traits described above, this includes skill in managing competing claims and the ability to tolerate moral ambiguity. The commitment to core values is balanced by an appreciation of recurrent perplexities and tensions. In this endeavor, the prudent official learns more from cumulative experience than from philosophical reason.

Max Weber addressed this matter when he asked: “In which area of ethics, so to speak, is [politics] at home?”<sup>20</sup> His response was that the animating passions of politics (the pursuit of “ultimate ends”) must be tempered by an “ethic of responsibility.” This ethic requires an attitude of detachment toward events and people, the ability to contemplate things as they are with inner calm and composure. So, while politics is born from passion and nourished by it, it becomes a mature human activity when disciplined by the exercise of judgment. The ethic of responsibility constrains the commitment to grand principle by a sensitivity to consequences for specific persons. Responsible politicians have a feel for the particularity, as well as the complexity, of political action. They appreciate the fallibility of human planning and the inevitability of unintended consequences.

If I may revert to Lincoln on slavery: Although he proclaimed his opposition to slavery from early on—“if slavery is not wrong, nothing is wrong”—he refused to align himself with the abolitionists. Up to (and into) the Civil War, his effort was to prevent the extension of slavery into new territories, not to abolish it where it already existed. Accordingly, in setting out the position of the Republican Party in 1858, he declared: “if there be a man amongst us who does not think that the institution of slavery is wrong ... he is misplaced, and ought not to be with us.” However: “if there be a man amongst us who is so impatient of it as a wrong as to disregard its actual presence among us and the difficulty of getting rid of it suddenly in a satisfactory way ... that man is misplaced if he is on our platform.” Lincoln realized that unwavering commitment to principle, although indispensable, is not the only determinant of action; he had also to take account of “hard facts” and constitutional strictures. This was not abandonment of principle but prudence, no less moral than the abolitionists and perhaps more so.<sup>21</sup>

Lincoln's case illustrates prudence on a large scale, but it is worth emphasizing that prudence is required in everyday decision making, in the application of rules to cases—whether the rules be statutes, administrative regulations, or general directives. As Fred Schauer reminds us,<sup>22</sup> rules reflect the limits of human language and are always imperfect or incomplete in relation to their animating purposes. (They may require more than the purpose warrants, or less.) Consequently, faithful rule-following depends on second-order competencies, such as the ability to discern the purpose of a rule and the integrity and self-restraint necessary to pursue it. The prudent official tries to avoid what Fuller referred to as the problem of absentee intellectual management: using today's general language to decide tomorrow's unknown cases. The good practitioner has the ability to discern when rule-departure more effectively meets official responsibilities than rule-following: for example, selective enforcement by police and prosecutors despite a contrary statutory obligation, or a jury's non-reviewable decision to "nullify" a law and acquit a defendant as an act of moral protest, in plain violation of judicial instructions. Flexibility, openness to further inquiry (including fact-finding), postponing matters if possible until they are ripe for decision—these are qualities of the prudent official.

**Conclusion: The good practitioner in a world of migrating responsibilities**

Let's recall that the question motivating this inquiry is: Will the moral competence of the practitioner of democratic governance have to change as governance responsibilities migrate away from the central state to other locations? My effort has been to identify which qualities might need to change. But whether they would in fact have to change is a question I would prefer to pose for discussion than attempt to decide.

Today, social and economic forces seem to impel us inexorably toward alternative architectures of governance. We live in a time of institution-creation, not unlike the post-revolutionary period of the American republic. I take it as a basic assumption, however, that the current order of states is not destined to disappear in the near future. Nor is it outdated—because the state is still the most favorable location for democratic governance. Hence the special worry that, if international economic integration is not done with care, it will accentuate domestic inequalities and undermine the mutual commitment among citizens that makes democratic life possible.<sup>23</sup> I wouldn't claim that workable democratic self-government has a natural or optimal size, but I do think it is reasonable to believe that mutual commitment to effective participation in appropriate forms of decision making requires shared sentiments and attachment, and perhaps a common vocabulary of understanding with ongoing and inclusive deliberation—all of which place limits on territorial possibilities. At the same time, these “hard facts” should not serve as an excuse for skepticism or resistance to the new developments. Rather, they define the challenge faced by the good practitioner. As responsibilities migrate to new locations, the special challenge is to stay focused on the moral dimensions of governance.

## Notes

<sup>1</sup> In elaborating these ideas, I am employing the framework I have developed for interpreting the work of Lon Fuller. This essay focuses on the democratic underpinnings of Fuller's jurisprudence. See "Introduction to the Revised Edition," *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed, Kenneth Winston (Oxford: Hart Publishing, 2001).

<sup>2</sup> Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (A. A. Knopf, 1997).

<sup>3</sup> John Rawls, *Political Liberalism* (Columbia University Press, 1993), p. 86, and *The Law of Peoples* (Harvard University Press, 1999), pp. 149ff. James Madison wrote: "Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea." Quoted from the documentary history of the ratification of the constitution by Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Cornell University Press, 1995), p. 247.

<sup>4</sup> For a critique of instrumentalism, see Kenneth Winston, "Why Are Libertarians Afraid of Democracy?," *The Good Society* vol. 8, no. 2 (1998), pp. 48-52.

<sup>5</sup> Amartya Sen, "Well-Being, Agency and Freedom" [the Dewey lectures], *Journal of Philosophy* vol. 82, no. 4 (1985), pp. 185-187, 203-208.

<sup>6</sup> I am not arguing that thoughtful citizens wouldn't sometimes rationally prefer to delegate decision making authority to others. But in policy analysis, it is too easy to assume that the act of delegation has already occurred and need not be revisited. I believe, rather, that we should think about delegation not as a one-time transfer of authority but as a condition that needs sustaining through continuing communication. And we need to be more imaginative about involving citizens in decisions, where that is feasible. For reflections on the economy (or diseconomy) of participation in decision making, see Robert Dahl, *After the Revolution: Authority in a Good Society* (Yale University Press, 1970) and Jane J. Mansbridge, *Beyond Adversary Democracy* (Basic Books, 1980).

<sup>7</sup> For a more expansive account of "what constitutes virtue" for officials in democratic societies, see Mark H. Moore and Malcolm K. Sparrow, *Ethics in Government: The Moral Challenge of Public Leadership* (Prentice Hall, 1990).

<sup>8</sup> The story of Leahy's efforts is told by Esther Scott, "Breaking the 'Circle of Poison': Senator Patrick Leahy and Pesticide Export Controls" (KSG case C14-00-1583.0). The relevant moral arguments are canvassed in the "Teaching Note" for the case (C14-00-1583.2). I should add that Leahy achieved a limited victory when he inserted a provision in an overseas spending measure enacted in January, 2002, requiring coca-eradication herbicides used by the U.S. in Colombia to meet U.S. health and safety standards. See *The New York Times*, July 11, 2002, p. A10.

<sup>9</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* [the Tanner lectures] (Princeton University Press, 2001), p. 10.

<sup>10</sup> Rawls, *The Law of Peoples*, p. 56.

<sup>11</sup> Charles Sabel, Archon Fung, and Bradley Karkkainen, *Beyond Backyard Environmentalism* (Boston: Beacon Press, 2000). See also Archon Fung and Erik Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance," *Politics and Society* vol. 29, no. 1 (2001).

<sup>12</sup> Eugene Bardach and Robert Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982).



<sup>13</sup> Cary Coglianese and David Lazer, "Management-Based Regulatory Strategies," in *Market-Based Governance: Supply Side, Demand Side, Upside, and Downside*, eds, John D. Donahue and Joseph S. Nye Jr. (Brookings, 2002), pp. 201-224.

<sup>14</sup> For recent examples of soft law in the EU, see Adrienne Heritier, "New Modes of Governance in Europe: Policy-Making without Legislating?," *Common Goods: Reinventing European and International Governance*, ed. A. Heritier (forthcoming). See also W. J. Witteveen and B. M. J. van Klink, "Why is Soft Law really Law?," *RegelMaat: Journal for Legislative Studies* 1999, no. 3. Perhaps the EU is fertile territory for soft law because of its peculiar nature as a "postmodern polity," in which the EU is more of a supplement to, than a replacement for, national governments. (See Joseph S. Nye Jr., *The Paradox of American Power* (Oxford University Press, 2002), p. 32, quoting Andrew Moravcsik.) But a long-standing U.S. example is the work of the American Law Institute in periodically producing non-binding but exemplary "restatements of law," which are then available for legislatures to enact (or not) as they choose.

<sup>15</sup> Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992), pp. 289ff. Aaron Wildavsky suggests the same view when he says: "The highest form of analysis is using intellect to aid interaction between people. Policy analysis, then, is about relationships between people." *Speaking Truth to Power: The Art and Craft of Policy Analysis* (Little, Brown, & Co., 1979), p. 17.

<sup>16</sup> Lon L. Fuller, "What the Law Schools Can Contribute to the Making of Lawyers," in *Education for Professional Responsibility* (Carnegie, 1948), p. 34. For the difference between an "architect of social structure" and a "transaction cost engineer," see David Luban, "Rediscovering Fuller's Legal Ethics," *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, eds, Willem J. Witteveen and Wibren van der Burg (Amsterdam University Press, 1999), pp. 208-213.

<sup>17</sup> Selznick, p. 245. Since practitioners are often not just drafters of the rules but also players in the game, many ethical conflicts arise simply from the simultaneous occupation of multiple roles. (I call this *the problem of many hats*.) The debate on campaign finance reform provides an obvious example for U.S. legislators, since they are both drafters of the rules and its potential beneficiaries.

<sup>18</sup> John Dewey, *Theory of Valuation* (University of Chicago Press, 1939).

<sup>19</sup> Dani Rodrik, *Has Globalization Gone Too Far?* (Washington: Institute for International Economics, 1997). Much of the literature on market-based governance focuses on the good of efficiency, forgetting that efficiency is a secondary and parasitic value. Whether efficiency is good depends on what one is being efficient at; efficiency at mass murder, for example, is not good. Historically, the design of the U.S. federal government has been praised for its inefficiency. This is perfectly intelligible from a political perspective. The counterargument must also be political.

<sup>20</sup> Max Weber, "Politics as a Vocation," *Weber: Selections*, ed W. G. Runciman (Cambridge University Press, 1978).

<sup>21</sup> Bernard Crick, *In Defense of Politics*, 5<sup>th</sup> edition (Continuum, 2000), pp. 154f. Crick's argument is anticipated by Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986 [original 1962]), pp. 65-72.

<sup>22</sup> Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford University Press, 1991).

<sup>23</sup> Merilee Grindle voices the concern that asymmetrical relations between states can force the less powerful to adopt a studied indifference to their own people's needs and wishes. "Ready or Not: The Developing World and Globalization," *Governance in a Globalizing World*, eds, Joseph S. Nye Jr. and John D. Donahue (Brookings, 2000), pp. 178-207.