American Constitutional Fantasies:
Escape from Difference Through Escape from Government

David C. Williams
John S. Hastings Professor of Law
Director, Burma Center for Law and Democracy
Indiana University School of Law–Bloomington

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I begin with a reflection on the title of this conference, “Back to Government? The Pluralist Deficit in Decision-making Processes and before the Courts.” As the designated bearer of the American perspective on legislative process, I find this notion of going Back to Government particularly interesting, because it highlights a difference between the European and American experiences. To talk about going back to government implies that we were once there and are now returning, perhaps returning home or to an old friend or at least to familiar territory. But for Americans the title might better be “Still Getting To Government,” because we never really got there in the first place. We are not going “Back”; we are still going “To.” Many, perhaps most, Americans tend to imagine government as an artificial creation with shallow roots and doubtful legitimacy, so they want to keep their common life out of its reach. In fact, we can imagine that a fairly typical American, when asked to think about going Back to Government, might observe: “Back to Government? We were never there! And thank God!”

I begin with this observation because I think that it helps us see something importantly different in the way that Americans and Europeans might perceive the subject of this conference. I will first offer my thesis in a condensed form, and then I will unpack it. Here’s the short version: in America, power in the private sphere—i.e., power outside of government—has never been broadly distributed. In other words, it has never been accountable or pluralist, in the sense of diffusing power over a variety of different groups or individuals. In response, American government has often extended its reach so as to change the power inequalities of the private sphere. In reality, therefore, the road to government has always offered the best promise of real pluralist power-sharing. That’s in reality. Yet in theory, Americans have always been reluctant to move down that road to
government, because they fear it. Instead, they like to imagine that there is a social realm before or outside of government in which we are all the same, at least in the ways that matter—a kind of Rousseau-ian state of nature in which unity and harmony reign. In this sphere, because we share an identity of interest, we do not need to worry about pluralist power-sharing; in fact, we don’t need to worry about the messiness of pluralist politics at all. Few Americans want to eliminate government, but they do want to escape it to the extent possible, into this realm beyond government, which they imagine as more natural. In getting off the road to government, in other words, we have escaped difference, so that we don’t need government after all.

Many in Europe find this attitude somewhat perplexing, so let me explore it by recapitulating the thesis on which this conference is based, as I understand it. First, many in Europe are unhappy with the European Union because they think that it is insufficiently pluralist; it under-represents the interests of certain groups. And so, for that matter, do the national governments of Europe. So Europe is suffering from a broad pluralist deficit in government. As a result, some citizens have developed new mechanisms to protect and advance their interests. In the language of the conference description, these devices do not “imitate” the “traditional forms of participation.” Instead, they have looked outside the formal legal framework for “alternative or additional channels shaped according to a different rationale, namely privileging the functional rather than political representation of their interests.” Some of these devices involve finding ways to influence government decision-making outside the formal process—such as lobbying and the like. Other mechanisms involve attempts to bypass the legislative process altogether, such as privatization, “soft” law and the like. The goal of these devices is to remedy the pluralistic deficit in government by finding routes outside government’s formal structure. The problem with these devices, however,
is that they are unaccountable, so we must wonder whether it is time to go Back to Government. Perhaps there is a way of taking what is best about these devices—their ability to raise voices that have been under-consulted—but incorporating them into a structure of government that will be broadly accountable to all. The organizers of this event hope that the American experience might shed some light on this possibility for two reasons. First, American constitutionalism has pluralism built into its very physiognomy. Second, the US Supreme Court is notably willing to give the constitution a flexible and evolutionary interpretation, so that the justices might find a way to take these new devices and incorporate them into the structure of governance—taking them Back to Government.

My intent is to offer two claims in response to this thesis: first, American governance does have a degree of pluralism built into its physiognomy, but second, the recent drive to go outside government grows out of a desire to deny this pluralism, not to remedy a pluralist deficit. As a result, these extra-governmental devices offer little to remedy the pluralist deficit in government.

I begin with the first claim: American constitutionalism and American government in general have offered Americans the possibility of real pluralism. In fact, it could be powerfully argued that constitutional government has offered Americans their primary prospect for real pluralism. From the beginning, our constitution has sought to give formal representation to a plurality of different groups, considered as groups. For example, we have federalism because many thought that the different states had different collective interests. Each state therefore retains some control over its own affairs, immune from federal control. In the federal government itself, each state, regardless of population, elects two senators, so that the smaller states have as much protection for their interests as the larger do for theirs. Originally, the state legislatures elected US senators, so it was very clear
that senators were supposed to represent states as states, not as collections of diverse individuals. Even now that senators are directly elected, most still imagine their jobs as representing the collective interests of a state citizenry.

So in this view, the Senate should protect states as such. Some offered a slightly different rationale for the Senate: the Senate and the House of Representatives would represent different social orders. In particular, because Senators are elected from large areas for long terms, many thought that the Senate would be dominated by men of wealth, education, and prominence. The house, by contrast, would be full of ordinary people, the demos, the hoi polloi. With this division in mind, the Constitution gives Senators, with their presumed sagacity, the power to ratify treaties and presidential nominations to the courts; and the House, with its concern for the people’s pocketbooks, has the power to initiate appropriations bills. So we have two theories for the existence of the Senate—it was supposed to represent states as states, and it was supposed to represent the elite as the elite—but what they have in common is that in both, the Constitution formally allocates power to groups that otherwise might have less voice.

More recently, people have worried less about protecting small states or men of property; instead, legal reformers have been more concerned about allocating political power to racial, ethnic, religious, and gender groups. This concern animates a great deal of recent constitutional politics, and I cannot fully summarize these developments in our limited time this morning. Instead, let me offer one example that will illustrate the more general phenomenon, besides being important in itself. In the United States, for a long time, many states limited the right to vote in such a way as to disenfranchise most of the African-American population. Before the Civil War, these limits were overtly racial: only whites were allowed to vote. After the war, the limits on the right to vote were
overtly neutral--devices such as literacy tests, good character requirements and the like--but they were administered in such a way as to disenfranchise the great bulk of the black population. Eventually, the Supreme Court and the Voting Rights Act of 1965 eliminated most of those restrictions, and black voting rates soared. As a result, many confidently anticipated that African-Americans would receive their fair share of electoral power.

But it didn’t happen, because of the structure of our electoral system. Remember that American elections occur in single member districts, where the winner takes all. In the great majority of districts, racial minorities are a minority, so they cannot control the election of their representative. Because these are winner take all affairs, the losers send no-one to the legislature; they simply lose. Now if racial minorities cannot control the election in their district, and if they believe that they have systematically different interests from the majority, then they may feel effectively disenfranchised by this system. Suppose for a moment that a racial group is 20% of the population of a state but forms a majority in only 2% of the districts--a not uncommon situation. These groups therefore comprise 20% of the voters, but they control only 2% of the legislature. Even if all these voters are formally registered and even if they actually turn out on election day, they may feel that government has failed to give them their appropriate share of power.

What I have described is not a hypothetical situation. All across America for a very long time, Black and Hispanic voters controlled a much smaller fraction of the legislature than their numbers would appear to warrant. In the language of the conference, we might call this a pluralist deficit in government. But minority voters did not turn away from government. Instead, they asked government to reform itself by establishing what are called majority minority districts: these are winner-take-all single member districts which are deliberately drawn so that minorities make up a
majority of the voters. If you create enough of these districts, even within our electoral system, minorities might eventually command something like their proportional share of the legislature.

Minority voters first asked for such districts before the US Supreme Court, and for a while, the Court seemed to hold that under some circumstances, the Constitution guaranteed these voters a right to majority minority districts. We call such claims constitutional vote dilution claims: the idea is that for your right to vote to mean something, you must be grouped with like-minded voters, at least up to your proportional share. But then the Court backed away: it held instead that you have no right to be grouped with people like yourself. Instead, legislatures were required only to draw district boundaries without a deliberate intent to hurt racial minorities. But suppose that legislatures have no such intent, and that they draw districts in which, by happenstance, a racial minority of 20% controls only 2% of the districts. This racial minority still feels powerless, but according to the Supreme Court, there is no constitutional violation, because the legislature has not intended to discriminate against them.

So in the early 1980s this problem fell into the lap of that most political branch–the United States Congress. And astoundingly, Congress decided to reform itself by amending the Voting Rights Act to require the states sometimes to draw majority minority districts. The law on this subject is now very complicated, and I will outline it in a moment, but it is worth pausing to contemplate this wonder: politicians in Congress passed a statute that would inevitably diminish their own chances of re-election. The VRA amendments required redistricting, which would alter the constituencies that put the incumbents in office, which would in turn imperil the future of these incumbents. And yet these self-same incumbents overwhelmingly voted for it. Surely God would make the world stop spinning so that he could contemplate this miracle awhile. And we now have
evidence that the new statute did indeed change the membership of Congress in significant ways. So the legislature saw a pluralist deficit in itself, and then the legislators did something to remedy it, even at the cost of undermining their own power!

The Court’s current interpretation of the statute is roughly as follows: to secure a majority minority district, a group of minority voters must show (1) they have traditionally voted as a bloc, suggesting that they perceive their electoral interests in racial terms; (2) the majority voters in their area have traditionally voted in a racially polarized way, meaning at least that they have voted for candidates other than those favored by the minority voters; (3) residually, the minority voters are settled closely enough together that the legislature could draw a compact, contiguous district in which they would form a majority; and (4) the minority voters in a given state have less than proportional representation, meaning that the fraction of districts that they control is lower than the fraction of the electorate that they represent. It is difficult to satisfy these requirements, and so there are not very many majority minority districts. Today, racial minorities control fewer districts than their share of the electorate. In that sense, they are still under-represented.

And now the action returns to the Supreme Court. When last we left the Court, you will remember that they had held that the Constitution does not require majority minority districts. Now that Congress has statutorily required some such districts, the Court has decided that the Constitution actually forbids them, at least when race is, in the Court’s words, the “predominant factor” in their creation. For a while, it even looked as though the Court might outlaw intentional majority minority districts altogether, but the latest cases indicate that they will be allowed in limited circumstances.

Here is the upshot of this tale: the American legislature is clearly suffering from a pluralist
deficit on the issue of race, along with a number of others. Racial minorities have repeatedly asked for more effective representation, but they have been given relatively little. And yet despite this history, America’s racial minorities are convinced that government is the answer, not the problem: they remain committed to reforming government, not going outside it. The reason for this enduring faith is that government has offered the only real possibility of power-sharing for them. The private sphere–the realm of extra-governmental devices–has always seemed far more threatening. African-Americans keenly recall that the Ku Klux Klan grew up in the private realm, not the public, and Black enfranchisement came from formal governmental change, not informal channels.

If American Blacks remain committed to government, however, many others have become thoroughly disgusted with it. These people believe that government has become excessively solicitous toward “special interests,” a term that refers to women, racial, linguistic, ethnic, and religious minorities, gays, lesbians, and bisexuals, the disabled, and many others. In this view, government has become too pluralistic, the instrument of powerful factions that ruthlessly seek to advance their own agenda, and politics has become an ugly game of rent-seeking. In this indictment of government, one of the primary bits of evidence is the existence of the majority minority districts themselves, which in this view, aim not at fairness but at maximizing minority power, whatever the cost. They involve a kind of reverse gerrymandering to shore up Black power. As a result, they encourage racial divisiveness by encouraging both majority and minorities to conceive their interests in racial terms. And so government has become hostage to the Politically Correct doctrine of structural pluralism. Ergo, those who want simple fairness have no option but to develop mechanisms outside government that will allow them more functionally to pursue their interests.

We have now come now to my second claim: to a substantial extent, the turn away from
government in America grows out of a desire for less pluralism, not more. At this point, because I am trying to survey a large development, my argument will necessarily become more sketchy and suggestive. I will inevitably over-generalize: after all, Americans have developed a whole variety of extra-governmental devices, for a whole variety of reasons. Many of those devices do not fit the description that I am about to offer. Nonetheless, amidst all this variety, we should not miss the forest for the trees: to a significant extent, the American desire to seek representation outside the formal governmental structure has its roots in a traditional set of anti-government attitudes. These attitudes are not quite an orthodoxy, but they do provide much of the inspiration for the current dissatisfaction with the way that government conducts its business.

As in Europe, many Americans think that government fails adequately to represent their interests, and so they have had to look elsewhere. To this extent, the European movement and the American one are similar. But the thinking that underlies the movement away from government may be different. As described in the statement of the conference, the European devices are basically instrumental. Their creators perceive a limited problem in government—a pluralist deficit—and in response they develop limited mechanisms to find a greater pluralism outside government. In America, by contrast, the devices grow out of a broad ideology that casts the entire legitimacy of government into doubt. Their goal is not merely to supplement government, but in some sense to escape it. Their creators hope to transcend the bickering pluralism of American politics into a metaphysically better condition, a harmony achieved without governmental meddling. Most commonly, these devices aim not at influencing government decisions but at limiting the reach of government altogether.

To understand this phenomenon, let me describe a basic mindset that underlies much of
American constitutional law and almost all American politics. In this view, government is neither natural nor ancient. Instead, it is a relatively recent and artificial creation, designed by individuals simply to protect their personal rights. In this vein, many conceive the United States constitution as a social contract that created America; before that, we were a loose assembly of states or communities or even individuals. We have decided to give government a chance, to see how it will turn out. But we always remember that once we made do without it; that if government fails to live up to its charge, we can still jettison it; that even now, government must live under severe restrictions designed to protect the private sphere; and that the private sphere is not the product of government or even of civil society, but rather is the vestige of a better, freer, more harmonious, aboriginal state of being. When many American contemplate going outside government, therefore, they are not merely looking for devices to correct a structural problem in government; they are seeking to keep alive a pre-lapsarian world of the time before we accepted the messy necessity of government.

It is important to understand that in this thinking the social contract is an historical event, not just a metaphor or an heuristic that allows us to examine the relationship of governors and governed. The Founders agreed to certain terms in the contract, and those particular terms, the actual words of the Constitution (and not some philosophical abstraction) give the government its sole authority. But because this contract is only an historical fact, it is also only an historical trial, because the signatories–i.e., the citizens of America–can always renounce it in whole or in part. In fact, many rather wish that it would be undone, to the extent possible, so as to preserve our primordial freedom.

The dangers in this sort of thinking are obvious. I have suggested that government has offered America’s best prospect for pluralist power-sharing. Even Locke acknowledged that a world
without government was not only unthinkable but highly undesirable. How can these Americans then yearn for a world without government? Don’t they realize that without government, there is no accountable structure to allow different groups to live together, no rules of the game to keep us from each other’s throats? Don’t they realize that the strong will dominate the weak? It is tempting to suggest that some anti-government Americans do realize all those things; in fact, they want to restrict government because they believe that less government will directly benefit themselves. They realize that without government, the strong will dominate the weak, but they imagine themselves as the strong. In fact, many of those seeking to escape government have more money and more guns than the norm, so it may be rational to imagine that less government means more power for them.

But Americans are seldom so cynical, or at least so open about the brute fact of power. Even when we are really seeking our own gain, we try to describe it in terms of a universal good. And so when anti-government Americans talk about a world without (or with less) government, they do not suggest that some—those with guns or money—will dominate others. Instead, they imagine that our differences will vanish. We will suddenly see that pluralism was only a phantom, foisted on us by manipulative politicians. Really, we are all the same underneath, but we will come fully to that realization only when we escape government. And that is why I have entitled this talk American Constitutional Fantasies: Escape From Difference Through Escape From Government.

There are a number such fantasies current in America, but let me describe two to give a flavor. We might call these the Populist Fantasy and the Libertarian Fantasy. The Populist Fantasy imagines that America was born in a moment of great unity, when a single people sat down and wrote out a social contract appropriate to itself. This People acts as a single organic entity, and
it should be capitalized, as befits a proper noun. In the decades since the Founding, however, the American People has lost this unity: they have fallen into pluralist squabbling as interest groups, ethnic communities, political parties, and so forth.

This story of decline and fall helps these fantasists to recognize the present fact of pluralism without letting it threaten their claim that Americans form a constitutionally organic entity. Remember that fantasists of this stripe imagine that at all important moments, the American people has acted with astounding unity. America was born from a social contract to which individuals, families, and communities all spontaneously agreed. Even before it sat down to write this contract, the American people had to rise up against the British Empire in a spontaneous revolutionary movement, unified but outside the structure of government. Today, if America’s revolutionary heritage is to remain alive, America must be led by a group of people who still stand for the Framer’s values—a saving remnant that still represents the American People in its original organic unity. This group, the Real American People, retains the right to depose government, take power back into its own hands, and institute a new government founded on the consent of the governed. In all of these cases, the fantasists imagine the American people acting in great unity, but without a governmental frame to help them resolve their differences. It rises up, it writes a contract, it makes a government, and then it unmakes a government. How is this possible? Certainly, modern Americans in their plurality and diversity could not accomplish such magical coherence. But here is where the fantasy comes riding to the rescue: perhaps Americans are not now so unified, but most of these modern Americans are fallen and sinful. Once upon a time, the American People acted as one body—the “Body of the People”—and to this day, some Americans can still claim descent from the founding entity. Those real Americans must stay vigilant, scrutinize the government, and be ready
to overthrow it for the good of the People.

This story of decline offers a great psychic benefit to its authors. If you really imagine that government is temporary, contingent, and dispensable, then you must imagine an alternative. But at first glance, it seems plain that removing government from America would reduce us to a bloody war of all against all, in which life is nasty, brutish, and short. This fantasy, however, promises us that it need not be so: historically, in this view, the American People was once united, and it can be so again. It can therefore threaten government not with suicidal civil war, but with a united uprising. The possibility of escaping difference by escaping government into a mystically unified campaign of violence is still alive, well, and the birthright of every American child. In short: we need not reconcile ourselves to the inevitability of government and pluralism.

One version of this populist fantasy is savagely ethno-nationalist, and it shares much with European fascism. In this view, the real American people has always included only those of a certain racial, religious, ethnic, cultural, or political background. At its most malignant, this version insists that only white male conservative heterosexual anti-communist gun-owning Protestants can really be members of the American volk; people of this sort—Real Americans—made America the greatest nation on earth, only to see it taken over by immigrants and traitors. But these Americans are still united in the spirit of the volk, and soon they will have to take back their country from the villains in Washington. At its most extreme, this rhetoric is limited to the truly radical right, which does not have a lot of power. But in less extreme ways, this mindset clearly underlies the thinking of more mainstream figures like Charlton Heston, the president of the National Rifle Association, and presidential candidate Pat Buchanan, who famously urged his fellow Americans to take back their cities, and take back their culture, and take back their country from people like inner city rioters.
Still, not too many Americans would openly endorse this ethno-nationalist fantasy of escape from difference. But the Populist Fantasy sometimes shades over into a libertarian fantasy that is much more widely shared. Let us return to this puzzle of the social contract: without benefit of government, the people somehow cohered as individuals to make a government. Without any real political structure, plunged into the state of nature by the War for Independence, they somehow magically agreed on a single set of contractual terms, a single plan for making a government and a country. But how likely is this occurrence, how plausible this story? The populists insist that spontaneous agreement was possible because of the ethno-nationalist unity of the American people: they are really one. The libertarians, by contrast, insist that it was possible because every individual signatory to the contract regarded herself purely as an abstract individual, without distinguishing social identity. At root, everyone is basically the same: not men or women, Black or white, Moslem or Christian, rich or poor, but just individuals. These abstractions possess only two characteristics, will and reason. Ergo, they define themselves by their choices, and the government’s only role is to defend their autonomy. And so we arrive at a libertarian theory of government.

Let us now re-imagine the moment that the American people created the social contract. The populists insist that at this instant, the American volk came together and found itself united by a single spirit. By contrast, libertarians maintain that American individuals assembled and realized that they were all the same, precisely in that they were not a volk but merely generic individuals. They were all essentially alike in being disconnected atoms, with a desire to be treated as such. Though individuals, they all want the freedom to individuate their lives, to pursue their own view of the good. And so, most fundamentally, they are not really different individuals at all; they are really the same metaphysical person, with the same rights, faculties, and basic desires, endlessly iterated in
different bodies. And because they are really generic individuals, they could agree on a generic set of contractual terms.

Centrally, the libertarian contract will require government to treat people as abstract and autonomous choosers, with the right to pursue their own separate goals. Libertarians commonly argue that the constitution should be interpreted through a libertarian lense: if the social contractors wanted to be regarded as abstract individuals, then it stands to reason that they mostly wanted to protect their right to do as they liked until they invaded someone else’s liberty. This constitution celebrates individualism, but it is distinctly uneasy with the real world differences—in culture, language, race, and so forth—that pluralism celebrates. In fact, this libertarian constitution insists that government may never legitimately recognize these differences; instead, government must always treat everyone as abstract individuals, devoid of particular identity.

In this view, therefore, affirmative action is not really an effort to remedy injustice; instead, it is rent-seeking by racial minorities. Tax relief for the poor is not really an effort at economic equity; instead, it is class warfare. (But tax relief for the rich is not class warfare, as it just allows individuals to retain the benefits of their own economic choices). Multi-cultural education is not a good faith attempt to present the many ways of living in the world and to teach respect for others; instead, it is special pleading for the government’s coddled pets. Majority minority electoral districts are not a device aimed to correct the traditional under-representation of certain groups; instead, they are American apartheid. Federal protection for Native American tribal governments is not an attempt to promote the self-determination of peoples; instead, it is a denial of the American dream of limitless individual mobility. Ronald Reagan once said revealingly to an audience in Russia that forcible assimilation might have been better than reservation life for Native Americans:
“Maybe we should not have humored them in that, wanting to stay in that primitive lifestyle. Maybe we should have said, no, come join us; be citizens along with the rest of us.” Here we have the libertarian tension in a nutshell: government must treat people as abstract individuals, even when what they really want is the messiness of pluralist identity. Somehow they are really the same, even when they seem fond of their differences.

We are left then with this paradox: Americans are great individualists; they resent any intrusion on their power to direct their individual lives; they come in an enormous variety of types, sizes, and styles, so that some have described the United States as the “first global nation.” And yet the cost of this individualism is a discomfort with real difference as seen in the real world. The premise of our individualism is that because we are not really different, we should all receive the same formal collection of rights. This kind of individualism promises individuation but not pluralism; it promises happy harmony between generic selves, not simmering unease among entrenched identities. It promises, in short, escape from difference through escape from government: as long as government leaves us alone, secure in our rights as abstract individuals, then we can happily co-exist, united by mutual recognition of our essential moral equivalence. But woe betide America if the government should start to draw lines between people as a result of pluralist politics.

In other words, when libertarians ask courts to interpret the Constitution through a libertarian lense, they are in effect asking government to provide an escape from government into a domain where we can all be alike, as individuals. This view has old roots, especially in the economic realm. Let me offer just two examples. The first is Federalist Ten, widely regarded as the single most significant exposition of the Constitution, written contemporaneously by its principal architect James Madison. Arguing for adoption of the new constitution, Madison claims that transferring power to
the central government will protect liberty because, unlike the states, the federal government will find it hard to do anything. It will be so riven with faction that majorities will be unable to form, so that we will be left with an inert government; it will have the bulk of constitutional power, but it will be unable to act. The upshot is that our liberties will be safe from government control.

To this point, Madison has been writing in universal terms: limited government will be good for everyone, because we all desire the same liberties as generic individuals. But the picture changes when he offers some examples. One of his principal concerns is that the state governments had been passing debtor relief legislation; he hoped that Congress would be unable to muster a majority to pass similar legislation. This issue has a particular cultural context: Eastern creditors had extended credit to farmers on the frontier, who were having trouble paying it back because times were bad. Between these two groups, Eastern creditors and western debtors, fell a profound cultural divide based in different accents, economies, geographical orientations, educations, and so forth. Madison stood firmly on the side of the creditors. By his own terms, then, Madison was speaking for generic individuals happily co-existing outside government intrusion, but in the real world of messy pluralism, he was pleading the claim of one particular social group over another.

Madison’s approach eventually grew into the “harmony of interests” school of economic thought that dominated much East Coast thinking a century ago. In this view, all individuals have the same interest in blocking government regulation because immunity from regulation will create economic liberty that benefits all alike. Both workers and employers, rich and poor, should want to keep government out of our hair. Ergo, wages and hours laws, zoning regulations, workplace safety protections and the like should be unconstitutional. **Lochner v. New York** grew out of this philosophy. That case struck down a state law limiting the hours that bakery owners could require
bakery employees to work. In rejecting the law, Justice Peckham insisted that freedom of contract benefitted employers and employees in the same way, because it allowed them to work out their labor relations. In this vision, employer and employee are fundamentally the same as generic individuals: they possess will, reason, and private rights, and that is all that we need to know about them. Peckham ignores the fact that they are different in their bargaining power, such that employers but not employees might need government protection. Again, escape from government somehow promises escape from this sort of unsettling difference. Government has the annoying habit of noticing the fact of real world pluralism and responding to it, so it is better to confine it.

The Court has, however, overruled *Lochner v. New York*, and it has allowed government to provide for pluralist power sharing—and not only in the economic sphere. It has, inter alia, permitted some affirmative action, majority minority districts, tribal self-government, progressive income taxes, labor laws, workplace safety protections, minimum wage laws, multi-cultural education—and so forth. In the script of the libertarian fantasy, the government’s adoption and the court’s approval of such measures are wholly predictable: yet more evidence that government bodies are prone to capture by pluralist rent-seekers. If only we could refrain from feeding at the public trough, we might recognize that we are really all alike.

According to the libertarian fantasy, because government will not allow escape from itself, the only alternative is to find escape routes without government help. In the globalization age, some of these are familiar, such as multinational corporations moving factories to countries with few protections for labor or the environment. Others are less familiar, at least to the legal establishment. On some of these escape routes, libertarians and populists find themselves walking side by side, mingling elements of their different fantasies. Some libertarians insist, for example, that the second
amendment protects an individual right to own firearms so as to revolt against government. Others argue that they have a right to secede from the nation as a republic of one, with a jurisdiction co-extensive with its founder’s property. These libertarians have thus taken the doctrines of revolution and secession, so dear to populists, and given them an individualist reading. And they imagine that in that politically fragmented future, all will benefit alike because all fundamentally desire the same thing: separation from government, even if it must be achieved by force of arms. All this might be funny but for the fact that these views are not confined to a crackpot fringe. Millions of Americans share them, including a number of libertarian academics, lawyers, and politicians.

Let me return at last to the thesis of the conference. As in Europe, so in America, many want to develop functional representation for their interests outside of government. But in America, most of these people want to leave government not so as to remedy a pluralist deficit but to escape pluralism, as they associate it with intrusive government. In America, these devices largely grow out of an enduring ideology which posits a world of unity beyond or outside government, a world that we should recapture to the extent possible. This ideology also has connections with many other aspects of American culture: our celebration of militant patriotism, in which our differences cease; our inclination to Christian millennialism, hankering for an innocent past and yearning for a holy future through God’s appointed nation; our readiness to take up arms against each other and against other countries; and our willingness to displace bad governments, so that their people can, as an organic entity, take power into their own hands. Commonly, when we overturn a government, we find underneath not our imagined harmony but a world of socially constructed, often deeply divisive pluralism. This discovery is always a shock, we are never ready for it, and we seldom know how to respond. And so this fantasy costs us and the rest of the world dearly.
In short, we witness a similar phenomenon on both continents—the turn from government—but as always, the social meaning of this phenomenon depends on the background culture. Obviously, I am hesitant to bring American extra-governmental devices back to American government, because I think that they will only hurt pluralism. Indeed, I think that their philosophical inspiration is a desire to deny pluralism. In other words, in America, our challenge is not merely to find instrumental devices to allow for better representation of our pluralism; our deeper challenge is to accept the legitimacy of pluralism as such, to acknowledge that difference can be real without being threatening. And to accept the legitimacy of pluralism, we will probably also have to accept the fundamental legitimacy of government, as a structure for the peaceful resolution of difference in a pluralist world. So government still lies ahead of us, as a destination, not behind us, as a return. We will have to entertain, not fantasies that evaporate difference, but hopes for friendship across difference—which, come to think of it, may be the best abiding dream of the European Union.


vii. I survey these fantasies, especially the ones that involve the possibility of political violence, in a less cursory way in The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic (Yale Univ. Press: 2003).

viii. Buchanan offered this advice at the 1992 Republican National Convention, on national television and to wild applause from the conventioneers. See www.buchanan.org/p9-92-0817-mc.html.
ix. www.indianz.com/news/show.asp?IDzpol/4182001-1C. Actually, Congress gave citizenship to all Indians in 1924, see 8 USC section 1401(a)(2), and many were citizens even earlier.

x. See The Federalist No. Ten (Madison).

xi. 198 U.S. 45 (1905).