

# Introduction

## Liberal Education and Politics

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We offer these essays on the practice and theory of liberal democratic politics in honor of Murray P. Dry, the Charles A. Dana Professor of Political Science at Middlebury College. Lawyers, law professors, and political science professors who were his students during five decades of teaching at Middlebury—from 1968 onward, with no signs of slowing yet!—explore diverse but related themes, in the spirit of Socratic inquiry and the liberal education they encountered in his courses. His own teaching and scholarship are informed by his study of political philosophy with Leo Strauss and Joseph Cropsey, and of American politics with Herbert Storing, at the University of Chicago. The legacy Dry passed to students across several generations was not, however, any doctrine or particular school. His teaching, scholarship, and legacy embody a particular view of liberal education. In Dry's classrooms this meant the broadly philosophical study of politics from the perspective both of the serious citizen of a free regime and of the inquiring minds who pursue the deeper questions raised by politics. He taught us to take seriously the deepest concerns of human beings and citizens, and to pursue the truth in both realms. Such liberal study in Dry's courses embraces a range beyond most conventional political science and even political theory today—from literature, to philosophy of science, to the origins of America's first principles—but centers on questions of how communities can govern justly and how individuals can lead a good life. His courses have encompassed Western political philosophy from

the ancients to the present; American political thought; American institutions; and constitutional law. His students thought it fitting to contribute essays particularly addressing themes of constitutionalism, law, and modern philosophy predominant in his scholarship and teaching.

We note that the academic custom of honoring a distinguished teacher with a *festschrift* typically is reserved for professors at graduate schools who directly send students into academic positions. In the hills of Vermont far from the centers of power in academia or politics, Dry has fostered in students at a small liberal arts college an unusual ambition for graduate study of political science, as well as for legal study that has led to federal judicial clerkships, legal academia, and significant government positions. True to the spirit of liberal inquiry that Dry passes on to his students, the authors represent diverse views about legal and political questions.

In recent decades there has been some thoughtful study, and much tendentious criticism, about Leo Strauss and his legacy in academia and politics, including debate about supposed doctrines taught by Strauss and his protégés. Dry implicitly conveyed to his students that there was no doctrinaire “Strauss-ism” that he could discern, or would convey. Indeed, in his 1994 lecture upon taking up the Dana Professorship at Middlebury College, he spoke of his “vocation” as leading students up the same mountains, decade upon decade, in search of great debates, great ideas, and serious formation of the mind and soul. This activity sought to prepare them for an examined life and responsible citizenship. He identified himself not as a professor but as “a teacher,” invoking the guide who assists with, but does not presume to do, the climber’s work. The pursuit of truth is the student’s burden and ultimate aim, with success measured by the capacity to continue with trekking long after college studies. That said, the guide does recommend mountains, not foothills, let alone molehills; and recommends some mountains as more worthy of climbing than others.

In Dry’s courses such recommendations meant study of a range of philosophers spanning the likes of Plato, Aristotle, Aquinas, Machiavelli, Bacon, Spinoza, Kant, Tocqueville, or Nietzsche; and meant studying the American order through such seminal sources as Publius, the Anti-Federalists, Melville, Lincoln, Martin Luther King Jr., or landmark cases of constitutional law. The vistas from these peaks cannot be reconciled, and thus no doctrine is conveyed, but such diverse challenges prepare the intrepid student and citizen for

the intellectual and practical treks lying ahead. One wonders, for example, whether students in the Green Mountains had ever encountered much of Spinoza before Dry arrived in the late 1960s, and how vistas may have changed at Middlebury given the challenges posed by that daring philosopher.

Dry's dedication to teaching and the life of his college, and to fostering inquiry into fundamental alternatives about the ends and means of politics, permitted some time for scholarship. He completed the work of his mentor Storing in publishing path-breaking scholarship on the thought of the Anti-Federalists. He developed Storing's view that the American founding was unique for constituting both core principles and a lively debate about them, and he observed how this complex character echoes through our politics.

To his own articles and essays (a list of publications is appended to this volume) he more recently has added two books. His first, *Civil Peace and the Quest for Truth: The First Amendment Freedoms in Political Philosophy and American Constitutionalism* (2004), captures his complex approach to teaching and scholarship over many decades. Current legal-political developments deserve careful study, but this requires investigation of the institutional and philosophical sources that inform more familiar views and issues. Dry's focus is the civil liberties of speech and religion; he notices our tendency to separate the two, when instead we should ponder their intrinsic relation. Moreover, whether we are citizens, scholars, or jurists, we would do well to study the political philosophers who first debated whether a free but decent society could protect diverse speech and religious views. As if this approach connecting constitutional law and political philosophy were not already unusual, Dry further argues that liberal politics could have too much of a good thing. A deepening of the law and culture that achieved "civil peace" through toleration of nearly all views and beliefs might be undermining the capacity for, and priority of, "the quest for truth." Liberalism thus paradoxically calls for moderation—described by Dry as a classical virtue—that can help us to strike the right balance between freedom and the search for truth. Inquiry into Plato, Thucydides, and Aristotle reminds us that speech in a democracy can tend toward opposition to reason or higher inquiry. We may have some grounds for tempering the efforts of modern philosophy to lower and limit the aims of both government and communal authority regarding morals and religion. Can a merely skeptical, and ever-more emotive, political community sustain free

speech and religious pluralism for successive generations? Having said this much about *Civil Peace and the Quest for Truth* we leave the reader with this incomplete summary of a weighty and complex argument in part because Harvey C. Mansfield devotes much of his Foreword (which precedes this Introduction) to a philosophical appraisal of Murray's book.

Dry's second book is a sequel in spirit and approach, on *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, the Separation of Powers, and Individual Rights* (2015). Once again Dry combines philosophical and legal analysis to assess a recent moral-political controversy that has largely been framed as a matter of individual rights, and prominently contested in courts of law. Dry first describes the moral arguments about marriage, contrasting the views of traditionalists with those of advocates of same-sex marriage. Here he sees the reasonableness, as a policy matter, of the American principle of liberty developing to incorporate a redefinition of marriage to include two homosexual partners. In the second part he assesses the constitutional and civic propriety of courts of law settling this monumental policy matter of society and politics through interpretation of constitutional texts to the exclusion of, or overriding, the judgments of elected representatives and citizens. Dry concludes that in our constitutional order there is not such a clear legal-judicial warrant for allocating these questions to the courts; republican self-government would be undermined by seeking to settle the controversy in this manner. In both parts of the argument Dry seeks a hearing for the main opposing principles and arguments, and remains open to a reasonable middle ground that gives a proper result in light of a larger, comprehensive assessment of the enduring principles at stake.

The chapters in this volume were commissioned to mirror our teacher's blending of constitutionalism, constitutional law, and political philosophy, particularly his attention to liberal democratic politics and also to the philosophy that both informs and investigates it. It does not surprise us as editors that, as it turns out, the chapters collected here honor our teacher's interest in and commitment to both intellectual and political moderation. We did not cajole the authors to emphasize this theme, nor select the authors with this thread in mind, and there is no unified doctrine of moderation pronounced herein. In the spirit of Dry's explorations of the nexus between liberal education and politics, his students light upon the

questions of constitutional, legal, and philosophical balance in diverse ways. To guide the reader's journey, we have structured our exploration of these important themes in three sections. In Part I, "The Role of Courts in Constitutional Democracy," five contributors explore the proper functions and limits of the judiciary and judicial decision-making in constitutional government. Suzanna Sherry argues for the restoration of the original function of the judiciary as an institution intended to limit democratic majorities, concluding that activist courts, properly defined, are healthier for democracy than those passively deferential to popular branches. Karl Coplan assesses recent literature on legal realism that emphasizes the indeterminacy of legal meaning and the arbitrariness of legal outcomes; he then poses provocative questions about the troubling consequences of legal realism for judicial decisions and authority. Ayşe Zarakol studies the role of the judiciary in a comparative perspective, by investigating the elite push toward "judicialization" of politics in Turkey and India as an institutional bulwark against subversive and illiberal popular movements, and wonders what this means for democratic legitimacy. Barbara Kritchevsky explores whether federal courts can provide remedies to individuals who have suffered violations of constitutional rights, arguing that judges should infer a damages remedy from the Constitution itself.

In Part II, "Law and Executive Authority," scholars as well as contributors with experience in the federal executive and judicial branches reflect on the tensions between constitutionalism and presidential leadership in both domestic and international arenas. Sean Mattie focuses on Lincoln's Reconstruction policy to explore a larger lesson about political leadership in a free politics—namely, how the institution of the presidency addresses the demands of necessity while capturing a nobler aspirational element of constitutionalism that only a president can articulate through the exercise of constitutional rhetoric. C. Kevin Marshall, former deputy assistant attorney general under George W. Bush, provides an insider's account of the contests over war-making powers between the judiciary and the executive during a contentious and anxious period for constitutional government. Finally, James A. Morone assesses the continuities and discontinuities in the presidential pursuits of national health-care insurance in the administrations of Truman, Johnson, Clinton, George W. Bush, and Obama, and reflects on the important role of ideas in America's constitutional politics.

Part III, “Liberal Education, Constitutionalism, and Philosophic Moderation” shifts the focus to the relationship between constitutionalism and political philosophy, and especially to the modern modes of philosophy that most directly influenced the American Founders. James R. Stoner Jr. contrasts classical political philosophy and American political thought through comparative examination of Plato’s *Republic* and Madison’s *Notes of Debates in the Federal Convention of 1787*; these two divergent works pose enduring questions about the best regime, and the dialogue is more salient than modern Americans might appreciate. Peter Minowitz investigates the enduring importance of Adam Smith’s concept of the invisible hand, assessing Smith’s different formulations of the metaphor and their significance for grasping the moral as well as the economic dimensions of his philosophy. David R. Upham examines the arguments of *The Federalist* concerning the conditions necessary for responsible popular deliberation—as distinguished from impulsive popular or democratic choice—as a precondition for a healthy republican society. Paul O. Carrese explores Tocqueville’s arguments for political and philosophical moderation in liberal democracy; Tocqueville’s call for a new political science was informed by Montesquieu, but also by classical and medieval philosophy as well as religion, and seeks to temper democratic tendencies toward populism, rationalism, and the soft despotism of administration. Giorgi Areshidze closes the volume with an exploration of the philosophic shortcomings of more recent Rawlsian liberalism and its assertive secularism, by assessing whether its expression in European multiculturalism is sustainable given the strains caused by growing ethnic and religious migration in the European Union; he asks whether the American consensus that religious liberty accommodates both nonestablishment of religion and free exercise of faith is more reasonable and sustainable than the prevailing European options of either enforced secularism or a theory of radical pluralism.

As is true of Professor Dry’s range of courses and published writings, our volume tries to understand the historical development of constitutional theory and practice but also to appreciate the underlying foundation of philosophic moderation that is needed for the success of constitutional government. It is a reflection on Dry’s teaching and scholarship on the courts, therefore, that the essays in Part I defend a distinctive and significant role for the courts (and especially the Supreme Court) in American constitutionalism, against

calls today from both the left and the right to limit judicial power, but also against calls from recent strains of liberal jurisprudence to give too great a role to courts. Part II addresses several pressing questions of executive power in our constitutional order, both historical and contemporary, in the same spirit of assessing constitutional balance. Here the question is what constitutional constraints should guide an office that has grown in power quite substantially since the time of the constitutional founding. We are reminded that Dry's teaching and scholarship together argue for the necessity of understanding the range of views expressed at the founding about our constitutional republic. These include the Hamiltonian principle of a more capable central government, and the Anti-Federalist defense of local liberty and the small member republics, as well as the Jeffersonian spirit that democratic populism should guide the development of the new constitutional order. These chapters on presidential power in both foreign and domestic affairs consider the right balance between the rule of law and the capacity of the executive to pursue new ideals in public debate and legislative advocacy; the old question about tensions between constitutionalism and presidential leadership is alive and well, and our current debates should be more adequately grounded in these enduring ideas. Part III pursues the deeper principles of philosophical moderation that inform constitutionalism, courts, and executive power in both our constitutional republic and in other liberal democracies. These chapters suggest that we should rediscover moderation as the avoidance of extremes—suggesting, for example, that contemporary academic and political discourse should not veer toward thinking that only the latest theories, and only a focus on present concerns and debate, will help us to sustain a constitutional republic and a decent liberal order.

Another extreme that is questioned by these chapters is the view that the American founding, and the principles of our constitutional order, can be reduced to one principle or theory (with differing schools advocating for their favorite principle). The complexity of early modern liberalism, drawing on classical, medieval, and religious principles in the Western tradition, informs the ambition in our constitutional order to achieve a better politics by embracing and balancing various tensions. Regarding this meaning of moderation, we are familiar with the institutional design of balancing powers against one another, but these chapters explore the deliberate balancing or reconciling of principles in our politics—religious

liberty and secular reason, liberty and equality, the higher aims of the soul with the practical demands of politics, moral principle and economic interest, popular consent and practically wise deliberation. The Socratic spirit of debate and liberal education is an analogue for the aim of a moderate liberal constitution to encompass and reconcile these various tensions. This old idea of liberal education therefore might be a more useful guide to politics and policy—in a higher sense of utility—than we now tend to appreciate.

We have not thought it proper or possible here to summarize the many dimensions and achievements of Murray Dry's long career—the distinguished fellowships he has held; his several leadership positions in service to Middlebury College; his many dozens of public lectures in Vermont and beyond; his broad contributions to the disciplines of political science and law in America as a valued speaker and contributor to conferences, journals, and many other projects of inquiry, discourse, and civic education. We also could say more about our gratitude to Murray, and about the importance of his dedication to a traditional but very lively conception of liberal education. This would be especially proper given the contrast between Dry's efforts and the deepening emphasis on professionalism, and other kinds of pragmatism and narrowness, in American higher education during the past century (not to mention the new challenge of technophilia). We instead let the chapters speak for themselves on these points, so that Dry's efforts can be judged at least by the aspiration in his students' arguments to find deeper, higher, and enduring meanings about human affairs and politics. In part we can be brief once again thanks to the Foreword contributed by Professor Mansfield, which honors the principles of philosophy and education for which Dry has stood as both teacher and scholar.

Readers find other tributes to Dry's vocation, and his example, in the chapters themselves. Amid the serious prose are moments that, for us, fittingly provoke deep emotion. We close this introduction here, and perhaps err on the side of brevity or concision, also because of the echoes in our ears of Dry's regular exhortation to emulate Lincoln's Gettysburg Address in our writing: to reach for the highest thoughts with the greatest economy. Imagine the several generations of students receiving such a challenge! We know, as we knew all along, that we have not quite achieved that summit with our writing in this volume. Nonetheless, we are eternally grateful for the teacher and friend who posed such challenges to us, and so opened the life of the mind to us.