

# The AMERICAN INTEREST

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# CONTENTS

THE AMERICAN INTEREST • VOLUME III, NUMBER 1, AUTUMN (SEPTEMBER/OCTOBER) 2007



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## BUILDING LIBERTY

### 6 Faith and Progress

*by Walter Russell Mead*

Anglo-American freedoms, the very sources of worldly success, are rooted in religious faith.

### 17 Grudging Consent

*by Charles Tilly*

Democracy turns out to be a verb describing how some rulers acquire the resources to govern.

### 24 Democracy, Union Made

*by Phil Fishman*

Free trade unions have long been global democracy's most powerful accelerator. How did we forget that?

### 34 Labor Pains

*by Daniel Patrick Moynihan*

The late professor, Senator and Ambassador speaks again—from his 1960 doctoral dissertation.

### 41 The Right Side of the Law

*by Peter Ackerman & Michael J. Glennon*

Democracy promotion isn't "interference" into the sovereign affairs of autocracies. It's legal, and laudable.

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---

## DESIGN FAILURE

### 48 Breaking the Bank: Why Weapons Are So Expensive

*by Edward N. Luttwak*

The U.S. military needs to stop cramming new technologies into old platforms.

### 59 Marking Time: Why Government Is Too Slow

*by Bruce Berkowitz*

Bureaucratic sclerosis is the biggest threat to America's national security.

### 71 Managing to Fail: Why Strategy Is Disjointed

*by Paul Bracken*

The NSC/interagency system can't cope with a multi-dimensional strategic environment.

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## REPORTING THE “GOOD WAR”

**81 Over Here, Now**  
Documentary filmmaker Ken Burns talks about *The War* with Thomas Childers.

**90 Over There, Then**  
*by Roger Sandall*  
In 1936, John Gunther predicted the next nine years’ darkness.

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## REVIEWS

**96 Fast Food**  
*by Jennifer Hewett*  
We’ve been what we’ve eaten, evidently, for some ten millennia.

**100 Wising Up**  
*by Gregory F. Treverton*  
Two new books about what’s wrong with the CIA get it (mostly) right.

**104 Return of the Natives**  
*by Clifford Orwin*  
Kwame Anthony Appiah wrestles with “cosmopolitanism”, but it escapes him.

**108 Air Ball**  
*by David Wohl*  
Did the 1984 NBA draft change basketball “forever”?

**114 Retroview: Finding the Fair Way**  
*by Edward Allan Brawley*  
Crusader for the poor, master golf course designer. Same person.

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## LETTERS & NOTES

**122 Letter from a BlackBerry Addict**  
*by Andrew Erdmann*  
Think you can read this without checking your email?

**126 Letters to the Editor**  
Peter Robinson and John Kornblum on Reagan’s “Tear Down This Wall” speech.

**127 Autumn Note: The Kings and I**  
*by Francis Fukuyama*  
The *AI*’s chairman tells Putin and Nazarbayev a thing or two in St. Petersburg.

# The Right Side of the Law

*Peter Ackerman & Michael J. Glennon*

In early 2006, shortly after Russian President Vladimir Putin signed a law requiring NGOs to re-register and prohibiting the use of foreign funds for political activity, he pointed to the West's history of colonial intervention in justifying his government's resistance to democracy. He said:

If we go back a hundred years and look through the newspapers, we see what arguments the colonial powers of that time advanced to justify their expansion into Africa and Asia. They cited arguments such as playing a civilizing role, the particular role of the white man, the need to civilize 'primitive peoples.' If we replace the term 'civilizing role' with 'democratization', then we can transpose practically word for word what the newspapers were writing a hundred years ago.

Putin is hardly the first head of state to object to outside interference in his country's internal affairs. Nor, of course, is he the first to wield repressive power. Four centuries ago, King James I of England claimed that a people had no legitimate recourse against a tyrant other than "patience, earnest prayers to God and amendment

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of their lives." His argument turned out to be the high-water mark of the divine right of kings and also the turning of the tide: England's elites recoiled, and within three generations Locke's *Two Treatises on Government* had laid the immovable cornerstone of democratic theory.

The edifice built upon that theory, however, remains unfinished. Even in our own age, which has moved closer than any before it to fulfilling Locke's vision worldwide, the prerogatives of tyrants are still protected from Locke's philosophical progeny—the states, groups and individuals engaged in promoting democracy, human rights and civil society. But this time, Putin, other modern-day authoritarians and their sympathizers rely on bromides dredged up from international legal antiquity rather than invocations of the divine.

Contemporary autocrats hide behind the principles of sovereignty and its corollary prohibition against meddling in a state's internal affairs—international legal norms that emerged when moveable type was cutting-edge technology. Their argument no longer works as it did in Gutenberg's day. State sovereignty remains an important pillar in the structure of international law, but the notion that sovereignty resides in the head of state gave way long ago to recognition that it rests in a nation's people. The scope of sovereignty narrowed further in the 20<sup>th</sup> century, as a large body of law came to protect internationally recognized human rights. And with the number of electoral democracies nearly doubling in the past twenty years, an emerging right to democratic governance has become the centerpiece of human rights law.

Though today's autocrats are thus swimming against the tide of history, they are swimming hard. The *casus belli* of their new counter-offensive has been the triumph of the "colored revolutions" in Georgia and Ukraine, which brought greater political freedom to millions. Claiming that "foreign influence" is to blame for such events, and concerned that colored bells may soon toll for them, today's autocrats are determined to root out democracy advocates through police harassment and intimidation, false accusations and arrests, revoked registrations and shuttered offices. Security forces in China, Venezuela, Egypt, Iran, Zimbabwe and the former Soviet states of Eurasia have been among the most single-minded in this effort, forcing a number of democracy assistance programs to close. There is also evidence of coor-

## **Autocrats know that the key to the success of indigenous opposition movements was their ability to generate focused public pressure.**

ordinated activity among authoritarian regimes. Venezuelan President Hugo Chávez visited President Alexander Lukashenko of Belarus in July 2006 to bring him good news: "There are many possibilities now for forming a strategic alliance to save the world from madness, wars and color revolutions."

It is tempting to dismiss the likes of Hugo Chávez and Alexander Lukashenko as small-time opportunists destined for the dust-bin of an increasingly democratic history. This would be a mistake. The autocratic offensive against democracy and its promoters is a serious challenge and should be a high priority, especially for any American administration espousing a Freedom Agenda as its central theme.

The reason is that there is a real risk of the democratic advance stalling and falling backwards. The risk of a tipping point arises because autocrats are learning to eviscerate their peoples' civic choices incrementally, thereby avoiding the publicity that a frontal assault would generate. They "nickel and dime" the opposition, abridging only seemingly insignificant rights at first. A small town's votes are not counted, a union or local cooperative is banned, a petition cannot be

circulated, a book cannot be published, foreign travel is prohibited, a speech is outlawed, private assets are expropriated. The cumulative effect of individual choices can become a mighty force for freedom, and the reverse is just as true: If acts such as these are successfully suppressed, the ultimate result can be a dramatic regression in the direction of politics and civil society. The danger lies in the transference of the know-how of oppression from one tyrant to other tyrants around the world, thus putting multiple new democracies on the defensive.

Autocrats know that the key to the success of indigenous opposition movements in countries like South Africa, Poland and Chile was their ability to generate focused public pressure. Opposition movements did this by building broad-based, non-violent coalitions that targeted the pillars of an autocrat's support—economic and business allies, collaborators among the military and police, and sympathetic religious, cultural and ethnic organizations. When those pillars weakened or collapsed, democracy won.

In their attempts to prevent the loyalties of such groups from shifting under their feet, autocrats have targeted not only the indigenous opposition but individuals and groups that provide a wide range of external assistance falling under the general rubric of "democracy promotion." Among the besieged who receive such assistance are those fighting for workers' rights, racial equality and women's rights, as well as local advocates of more traditional objectives like governmental transparency, free elections and participatory rights. Numerous governments and international organizations, trade unions, political parties, legislatures and NGOs have all come under fire from Putin and his autocratic associates for their efforts to advance freedom around the globe.

Not all of these externally based groups focus on promoting classic democratic institutions and civil society. Where authoritarian regimes have subverted normal democratic processes, groups have offered training in non-violent resistance. This training has taken the form of general advice, the distribution of educational materials and the co-sponsorship of conferences





**New Friends: Robert Mugabe, Alexander Lukashenko and Hugo Chávez**

and workshops. Though it is more controversial (but often more useful), democracy promotion groups can offer training in the strategy and tactics of civic disruption—strikes, petitions, walkouts, mass demonstrations, sit-ins, blockades, boycotts, official resignations and the refusal to pay fees and taxes. U.S.-based civil society groups doing this kind of work are hardly the “ugly Americans” that autocrats seek to portray: The “offending” groups invariably steer clear of counseling or advocating violence, avoid those who use violence, and provide no training in techniques of violent resistance.

### Law and Legal Sophistry

**W**ith might but not right behind them, autocrats throughout history have seldom felt an obligation to spell out a legal rationale for suppressing dissidents. The “most respectable arguments of the rights of kings”, Frederick the Great counseled his brother Henry, are “your great guns.” Today, however, some have deigned to proffer a justification resting on the corollary of the sovereignty doctrine that prohibits intervention in the internal affairs of other states. In pushing a 2004 bill that would deny NGOs access to foreign funds, for example,

Zimbabwe’s President Robert Mugabe declared that his government “cannot allow [NGOs] to be conduits or instruments of foreign interference in our national affairs.” The Shanghai Cooperation Organization, consisting of Russia, China, Kyrgyzstan, Kazakhstan, Uzbekistan and Tajikistan, launched a thinly veiled attack on democracy promotion in 2005, insisting that “the right of every people to its own path of development must be fully guaranteed” pursuant to the principle of “non-intervention in internal affairs of sovereign states.”

There are, to be sure, many international legal instruments that inveigh against intervention. The United States is not alone in regulating foreign involvement in its electoral campaigns and lobbying, and it is fully justified in doing so. But three problems inhere in the reliance of authoritarian elites on the non-intervention norm: practice, progress and logic.

First, their rationale has been eviscerated by centuries of contrary state practice. From the outset the ban on intervention was honored more in the breach than in the observance. Even in the years immediately following the 1648 Peace of Westphalia, state borders proved permeable, and states remained subject to foreign interference. As Evan Louard detailed in *The Balance of Power* (1992), it was normal for governments to

seek to influence political affairs in other states. Many prominent politicians in rival states were directly in the pay of foreign governments, and opposition groups were frequently subsidized and manipulated from abroad.

Political interpenetration increased in the following centuries. By 1945, when the framers of the United Nations Charter convened to codify the norm of non-intervention, external involvement had become so widespread that the Charter's drafters prohibited only the use or threat of military force by one state against another. Non-violent efforts to influence a state's internal policies are not prohibited by the Charter, however intrusive those efforts might be. Today, with information, people and capital gushing across international borders in torrents, influencing every aspect of domestic politics, the norm against

## The original rationale behind the non-intervention norm has become illogical.

non-forcible intervention has all but vanished as a meaningful limit on state behavior.

Second, the emergence of internationally protected rights to information exchange, civic participation and democratic governance undermines the autocrats' protestations against intervention. Talleyrand's famous quip about non-intervention being "a metaphysical term which means about the same as intervention" may go a step too far, because even today there still exist unlawful forms of intervention, such as state-sponsored assassination or kidnapping. However, it is closer to juridical truth today than ever before. This is particularly true with the advent of internationally recognized human rights. Since 1945, explicit international restrictions have increasingly reached within state boundaries to prevent governments from denying basic rights to their citizenry. Central to these rights is the right to information exchange. The Universal Declaration of Human Rights affirms the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." This right is reinforced by the long-recognized right of free assembly, codified along with it in virtually all human rights legal instruments. Such rights

suggest the existence of other, implicit rights that are necessary to give them meaning. The right to exchange information, for example, would be empty without a right to gather information and communicate it effectively.

The protection of these rights by international law has gone hand in hand with the global advance of democratic self-government. The most profound event of the 20<sup>th</sup> century, as Thomas M. Franck has written, may well prove to be the "almost-complete triumph of the democratic notions of Hume, Locke, Jefferson and Madison—in Latin America, Africa, Eastern Europe, and, to a lesser extent, Asia."<sup>1</sup> That triumph is reflected in the words of numerous international agreements and UN General Assembly resolutions. Their net effect is to make clear that, in the words of the Universal Declaration: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." The will of the people is now the accepted basis of governmental authority, as the 2000

Warsaw Declaration declared. That authority must be expressed "by exercise of the right and civic duties of citizens to choose their representatives through regular, free and fair elections with universal and equal suffrage, open to multiple parties, conducted by secret ballot, monitored by independent electoral authorities, and free of fraud and intimidation." More than a hundred nations now join in the Declaration.

Third, the original rationale behind the non-intervention norm has become illogical in current circumstances. That rationale was intended to ensure that a state remains free to choose its own political system. But in the modern world, as Lori Damrosch puts it, "A state 'freely' chooses its political system only when its people are free to choose."<sup>2</sup> Efforts to strengthen the people's ability to select their governmental system, even efforts aided from

<sup>1</sup>Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law* (January 1992).

<sup>2</sup>Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs", *American Journal of International Law* (January 1989).

abroad, advance the purpose of the non-intervention norm by enhancing opportunities for self-determination. The original rationale for the norm thus supports, rather than disallows, actions by states and organizations to foster democratic governance and accountability in other states.

Of course, the line between democracy and autocracy is not always distinct. The advance of freedom often travels a circuitous path, with apparent advances in one category (electoral process, for example) accompanying real setbacks in another (such as free expression). These countervailing trends create confusion that foes of democracy can exploit. Indeed, the National Endowment for Democracy's 2006 report, "The Backlash against Democracy Assistance", describes "the emergence of semi-authoritarian hybrid regimes characterized by superficially democratic processes that disguise and help legitimate authoritarian rule." There are currently anywhere from 45 to sixty such regimes. Some present no obstacles to democracy promotion; others seek, in one way or another, to quash it.

Thus the lawfulness of specific state regulations that restrict democracy assistance will always depend on the facts of each case—whether the law's aim is to stifle democratic advocacy, whether it effectuates a legitimate state policy objective, whether it discriminates on its face, whether it is enforced even-handedly, and whether a more narrowly tailored regulation could achieve the same end. Part of the answer to these questions will always lie in the nature of the regime promulgating the regulations. Whatever the level of a state's commitment to freedom, however, international law as it exists today counsels that the presumption is on the side of democracy promotion. The governing principle is the same in all cases: Where a given regulation is part of a larger scheme aimed at depriving groups or individuals of internationally protected human rights, it violates international law.

Even democracy promotion in its most controversial form—the provision of information and resources to promote non-violent civic disruption—is therefore consistent with widely accepted international standards. Its beneficiaries have a right to receive it. Its providers have a right to give it. And neither an autocrat-in-full nor an autocrat "lite" has any right to obstruct it.

Let us not be confused by those who would conflate democracy promotion with other, less savory features of current U.S. foreign policy. An irreducible truth remains: Peacefully providing information and resources in response to requests from those waging a non-violent struggle for their freedom is a far cry from invading a country and offering its population unrequested "assistance"—in promoting democracy or anything else. President Putin is correct that, in centuries past, international law did little to stop the exploitation of colonial peoples and the plundering of their resources under the cover of a "civilizing mission." He is wrong, however, to equate contemporary democracy promotion to European colonialism. Democracy today is not a "white man's" idea; it is heard from West Papua to Western Sahara, from Belarus to Tibet. Its success, as its best advocates know, depends upon indigenous initiative and energy, not foreign influence or pressure. Democracy promotion does not deny any peoples' right to self-determination; it gives life to that right.

It is said, however, that even if they desire democracy, not all societies are ready for it. Some peoples, the argument goes, lack the cultural, civic or legal traditions to govern themselves effectively. They must be allowed to progress more slowly, and authoritarian regimes must be granted a measure of understanding and perhaps even a little sympathy. "When my people act like Swedes", the Shah of Iran reportedly said, "I will treat them like Swedes", and many observers in democratic countries professed to see his point. Yet the arrogance of an authoritarian's timetable is often overrun by history.

We do not suggest that democracy can spring like a tulip through autocratic concrete. Democracy works, or works best, when civil society not only exists, but is robust and united in a vision of its country's future and in its strategy for getting there. Once victorious, new leaders must be willing to accept process as an end as well as a means, respecting outcomes with which they disagree. Those outcomes, after all, are the product of processes to which they *did* agree. They must be firm about procedure and therefore tentative about truth. They must be committed to enriching their people rather



than themselves. They must be willing to leave office when they have agreed to leave. They must take pride in the slow and steady development of institutions. Not all oppressed people can expect a quick transition to such leadership. However, nearly all can, at least to some degree, drive positive change and build from one success to the next.

In meeting the claim that a given people are not ready for democracy, it is therefore essential to disaggregate the concept of democracy, to ask specifically *what* the people are not ready for. Not ready for television stations that lampoon apparatchiks' heavy-handedness? Not ready to boycott a fake election? Not ready to write a blog criticizing corruption? Not ready to read Thoreau's *Civil Disobedience*? When the issue of readiness is broken down into democracy's

## The rule of law among nations promotes the rule of law within nations.

component parts, it becomes harder to justify a specific infringement and easier to make the case for protecting other freedoms that might get lost in the fallout of political competition.

### Regime Change Is the Point

Democracy advocates thus have no reason to be sheepish or disingenuous about their intentions. The National Endowment for Democracy report asserts that equating democracy promotion with regime change is “unhelpful” and “has played into the hands of authoritarian regimes.” But where a people's right to self-determination is suppressed, the whole point of democracy promotion is to alter the character of the oppressive regime through long-term engagement. The entire enterprise would be set to naught if tyrannical regimes were expected to remain sublimely impervious to indigenous civic pressure.

Of course, efforts of democracy advocates to change the *character* of a regime may lead ultimately to a change in its *identity*. Non-violent change initiated from within, however, is very different from violent replacement instigated from abroad. Democracy promotion, even at its

most deliberately disruptive, is not about Iraq. Nor is it about the “ugly American” version of violent insurrection executed by a friendly military cadre that some may hope for in Iran or North Korea. It is about widespread civic resistance, as recently occurred in Georgia, Ukraine, Kyrgyzstan and Lebanon, and in the 20<sup>th</sup>-century in India, the Philippines, Poland, South Africa and Chile. In facing pressure to expand freedom, the choice between accommodation and disintegration belongs to the autocrat. Democracy advocates fail if they do not make autocrats own up to that choice. What most plays into the hands of autocrats is defensiveness and circumlocution about democracy promotion's objectives. The intended objective is to make authoritarian regimes change—or go.

That is exactly as it should be, for an autocrat's worst nightmare is not “regime change” as it occurred in Iraq. Rightly or wrongly, most are confident of their ability to

handle military threats successfully and, if necessary, to meet violence with greater violence. Their greatest fear is domestic isolation—facing unified non-violent resistance that wins over the regime's fair-weather friends, as occurred in the colored revolutions. Shi Zongyuan, China's top press regulator, spoke for many autocrats when asked recently why Beijing had halted plans to let foreign newspapers print in China: “When I think of color revolutions”, he said, “I feel afraid.”

It is good that Shi Zongyuan is afraid of oppressed people in China—much better than the people of China being afraid of Shi and his Communist Party associates. No oppressed people in the 21<sup>st</sup> century are obliged to be patient, pray to God, or amend their lives, rather than stand up for internationally recognized rights, the rule of law, free elections and democratic government. Nor are they obliged to struggle alone. They have every right to reach out for assistance from abroad in a non-violent struggle to throw off their oppressors. Contrary to the claims of autocrats, international law is on the side of those who seek democracy and those who help them. The rule of law among nations promotes the rule of law within nations. That, too, is as it should be. 🌐