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# Stephen F. Williams on Liberalism: The Need to See a Share of Truth on the Opposite Side, and a Share of Error on One's Own

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**Stephen F. Williams on Liberalism:  
The Need to See a Share of Truth on the Opposite Side,  
and a Share of Error on One's Own**

Nathaniel A.G. Zelinsky<sup>1</sup>

When Adam White invited me to discuss Judge Stephen F. Williams's views on liberalism and reform, I confess to feeling a certain trepidation. Judge Williams was a capacious thinker, and liberalism is a particularly elusive concept. I cannot capture the breadth and depth of Judge Williams' views on that subject, especially in a short paper. And Judge Williams expressed his views primarily through two books on prerevolutionary Russia. Until the last years of his life, the Judge preferred to hire a clerk who spoke Russian to assist with his scholarship. I was not that clerk, and I cannot provide the historical or cultural context his scholarship deserves.

But my worries abated somewhat, if not entirely, when I picked up the Judges' books. Some authors write in a way that the reader hears the words on the page in the author's voice. Judge Williams had that gift. As I listened to Judge Williams inside my head, I found myself remembering him and my clerkship.

One of the peculiar and most enjoyable tasks of a Williams clerk was to send the Judge op-eds, academic articles, or news items that might interest—often horrify—him. Invariably, attachments to a morning email turned into the topic of lunchtime conversations. Occasionally, the Judge would propose that the clerks read a book or an article to discuss. Once it was a draft manuscript from an academic acquaintance. Another time it was the upcoming assignment for his book club. (On that occasion, Judge Williams had proposed the book to the club and wanted to

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be prepared to lead the discussion.) Some judges like their clerks to be “yes men.” Not Stephen Williams. He loved questioning an idea—even his own scholarship and especially his judicial opinions. Though the Judge certainly had intellectual predispositions, there were no litmus tests or sacred texts in the Williams chambers. At lunch, everything was up for grabs.

When Judge Williams and I spoke, the conversation had a tendency to turn to contemporary events of a kind that might fall under the rubric of “liberalism and reform.” The year I clerked for Judge Williams saw President Donald Trump’s impeachment and pro-democracy protests in Hong Kong—to name just two topics that fit that label and which occupied our mutual interest. In the spirit of the Williams clerkship and its lunchtime discussions, I want to take Adam’s invitation as an opportunity to imagine what I might say to Judge Williams about his books and liberal democracy, were we to have lunch again.

Judge Williams wrote two books. *Liberal Reform in an Illiberal Regime* focuses on an effort to reform peasant property rights in revolutionary Russia and inculcate liberal values among the peasantry.<sup>2</sup> Above all, *Liberal Reform* is a richly detailed economic history. But Judge Williams uses prerevolutionary land reform to pose a broader question: Can rulers impose liberalism from above, by engaging in macro level reforms? Or must liberalism organically accrete from the ground up? The Judge ultimately concludes that top-down reform is difficult and more likely to succeed when it poses no immediate threat to those in power. This is a pessimistic if honest assessment about the limits of reform and the universal appeal of liberalism from a man who one suspects wished to provide a more hopeful answer.

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<sup>2</sup> Stephen F. Williams, *Liberal Reform in an Illiberal Regime: The Creation of Private Property in Russia, 1906-1915* (2006) (“*Liberal Reform*”).

*The Reformer: How One Liberal Fought to Preempt The Russian Revolution* traces the life of Vasily Maklakov, a lawyer, left-leaning politician, and something of a renaissance man.<sup>3</sup> Maklakov lived greatly in the law and outside it.<sup>4</sup> He was a celebrated courtroom advocate, friends with Leo Tolstoy, an important character in the plot to kill Rasputin, and Russia's ambassador to France under the Russian Provisional Government that ruled between the Tzar's fall and the Bolsheviks' rise to power. In the Judge's telling, Maklakov was an eloquent proponent of the idea that law must constrain the arbitrariness and abuses of Russian autocracy. More importantly, unlike some of his contemporaries and political allies on the left, Maklakov was no utopian. He recognized the practical necessity of compromise, the need for the state to be able to govern, and the value of real-world results over ideological purity. Maklakov's pragmatism was reflected in—and furthered by—his personal willingness to befriend those to his left and right.

It is difficult to read *The Reformer*—especially as a lawyer—and not like Maklakov. And it is equally difficult—especially as someone who loved Judge Williams—not to see some echo of the Judge reflected back in his portrait of Maklakov. The Judge tells us that Vassily Maklakov had a “charm and capacity for friendship with people radically different from himself,” as well as the “lawyer's professional habit of seeing a share of truth on the opposite side, and a share of error on his own.”<sup>5</sup> Much the same could be written of Stephen Fain Williams.

It is no surprise that both men were celebrated lawyers. At its best, this profession requires one “to see the world not just through their own eyes but through the eyes of their

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<sup>3</sup> Stephen F. Williams, *The Reformer: How One Liberal Fought to Preempt The Russian Revolution* (2017) (“*The Reformer*”).

<sup>4</sup> See Oliver Wendell Holmes, Jr., *The Profession of the Law: Conclusion of a Lecture Delivered to Undergraduates of Harvard University* (Feb. 17, 1886).

<sup>5</sup> *The Reformer*, *supra* at 2-3 (internal quotation marks omitted).

opponent.”<sup>6</sup> As a result, like so many excellent lawyers, both men exemplified what Judge Williams called the “habits of mind” essential for a liberal democracy to flourish: The willingness to engage with political adversaries and to seek common ground.<sup>7</sup> Liberal democracy requires a humility to recognize that one’s preferred policy positions will not always prevail, that the other side has an equally legitimate right to govern (and often will win elections), and that compromise will therefore be a necessary outcome in a society that encompasses competing viewpoints.

Because Judge Williams wrote about prerevolutionary Russia and reform in an authoritarian environment, it seems that, at least at first blush, the Judge had less to say about the challenges facing existing liberal democracies undergoing stress.<sup>8</sup> But a conversation with Judge Williams would have slid into a discussion of the health of liberal democracy in the United States. This nation is losing its collective willingness to seek compromise, those liberal “habits of mind” that are necessary for a democracy to function. And Judge Williams’ writings—and the life he lived—provide a useful point of departure to interrogate America’s current crises.

This paper is divided into three parts. Part I surveys *Liberal Reform in an Illiberal Regime* with an eye toward extracting its lessons beyond the Russian context. Part II does the same for *The Reformer*. Part III uses these two works to diagnose some concerning trends in American illiberalism.

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<sup>6</sup> Gerken, Heather, *The Lessons of Lawyering: Why Ours is an Honorable Profession*, (2018), Sibley Lecture Series. 90, [https://digitalcommons.law.uga.edu/lectures\\_pre\\_arch\\_lectures\\_sibley/90](https://digitalcommons.law.uga.edu/lectures_pre_arch_lectures_sibley/90) at 9:40. I am deeply influenced in this regard by Yale Law School Dean Heather Gerken, who has spoken eloquently and at length on this subject.

<sup>7</sup> *Liberal Reform*, *supra* at 16. To be sure, Judge Williams warns against assuming that Maklakov’s liberal habits of mind were the result of Maklakov’s being a lawyer, given that “many of the other [political] liberals were lawyers by trade but nevertheless prone to a doctrinaire utopianism quite alien to Maklakov.” *The Reformer*, *supra* at 64. My claim is narrower, namely that Maklakov’s training and experience as a lawyer reinforced and complemented his liberal sensibilities.

<sup>8</sup> Indeed, in his introduction to *The Reformer*, the Judge draws parallels to post-Soviet countries and the Arab Spring. See *The Reformer*, *supra* at 14.

Three caveats are in order. *First*, as was true of many of my conversations with Stephen Williams, none of my ideas are pathbreaking; they are simply sincerely felt. *Second*, I am not representing views Judge Williams divulged to me in private. As a former clerk, I am bound to preserve the Judge’s confidences. Nothing I say here reflects the actual content of our conversations. In fact, in a few areas of Part III, the Judge would likely have disagreed with me. Nevertheless, *third*, I know that my analysis of *The Reformer* is informed by conversations with the Judge and remarks he delivered at Yale University in 2018 discussing that book.<sup>9</sup> At a point or two, I have noted where an idea is traceable to the Judge’s public remarks, although those annotations are without doubt underinclusive.

### **I. *Liberal Reform*: Can reformers impose liberalism from above?**

*Liberal Reform* explores the efforts of Russian Prime Minister Petr Stolypin to reform peasant property rights in the decade before the First World War. Judge Williams’ account of Stolypin’s measures is exhaustive. In his introduction, he acknowledges that some “readers primarily interested in the broader theme of liberal reform” might “skim” the chapters with “numerical detail,” and assures us “that’s quite alright.”<sup>10</sup> Taking that hint, I will highlight two aspects of *Liberal Reform* that apply beyond the immediate history of Russian land reform: The Judge’s initial definition of liberal democracy, and his ultimately ambivalent assessment of reformers’ abilities to foster liberalism from above.

The term “liberal democracy” is a concept often-invoked yet less-frequently defined, though it is the adjective “liberal” that is the more difficult aspect to capture. At the most

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<sup>9</sup> Judge Williams did not publish his remarks, but I have in my possession a draft copy of his speech, which I cite as “Yale Remarks.” As a word of caution, there is a possibility that Judge Williams’ final remarks as delivered deviated from these prepared notes.

<sup>10</sup> *Liberal Reform*, *supra*, at 9.

abstract level—and I find the most useful definition—liberalism is that combination of formal institutions and values which “assure that the first free election won’t be the last.”<sup>11</sup> At a more specific level, the Judge identifies five characteristics of liberalism: (1) the rule of law; (2) property rights; (3) freedom of speech; (4) a vibrant civil society; (5) and suitable habits of mind.<sup>12</sup> In practice, the second, third, and fourth attributes might be understood as applications or permutations of the first and the fifth.

The Judge’s definition of the rule of law revolves around the notion that the law must do two things simultaneously: First, the law must constrain the government, “so as to limit government predation,” with a particular focus on protecting the individual from arbitrary government action.<sup>13</sup> Second, the law must protect individuals from private abuses. As *The Reformer* later acknowledges, these two values exist in some tension: The state must simultaneously be “strong enough to protect individual rights from private assault . . . yet constrained from violating individual rights itself.”<sup>14</sup>

For the rule of law’s proponents, the age-old question is how to achieve that balance. The Judge’s answer in part evokes the list of attributes that would be familiar to many scholars of the subject, such as independent courts, clear rules, and formal equality.<sup>15</sup> In *The Reformer*, the Judge includes additional elements to that list, like the principle of non-retroactivity, though he also warns against the tendency to consider “everything good under the sun” as necessary for the rule of law—such as government protection from “private discrimination.”<sup>16</sup>

Finally, and perhaps unsurprisingly because it profiles a lawyer, *The Reformer* also includes another aspect of the rule of law worth mentioning here, which one might dub the

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<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Liberal Reform, supra* at 14.

<sup>14</sup> *The Reformer, supra* at 373.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *The Reformer, supra* at 375.

lawyer’s “habit of mind”: The application of “serious craft values” to resolve legal issues, “for example, logic, analytical rigor, close reading of texts, tracing the path from facts and law to the outcome, [and] addressing arguments posed by the ultimately losing party.”<sup>17</sup>

What about the non-lawyerly “habits of mind” that define liberalism for everyday citizens? The Judge declares that attribute the “most elusive.”<sup>18</sup> But the Judge’s concise description of the liberal mindset is worth reproducing in full:

Individuals—not all of them, of course, but at least enough to set a tone—must think of themselves as responsible, rights-bearing citizens; be realistic, not fatalistic or utopian; be bold and outspoken, but capable of compromise; be ready to organize the sorts of groups that make up civil society; and be tolerant of groups with differing ideas and interests.<sup>19</sup>

The liberal mindset requires striking a delicate balance of knowing precisely how to find common ground, without sacrificing one’s core values. Put simply, and in words the Judge himself might have used, these are the values of moderation without being a squish.<sup>20</sup>

As the Judge acknowledges in part, the remaining three characteristics of liberalism—property rights, free speech, and a vibrant civil society—are subsets or applications of the rule of law and liberal habits of mind. For instance, property rights are an “aspect of rule of law” that enables property “holders to resist predation by government” and by private parties.<sup>21</sup> Likewise, freedom of speech is a negative legal right that protects dissenters from government reprisal, as well as the habit of mind to know how to dissent constructively.<sup>22</sup> A vibrant civil society is also a habit of mind, with rule of law overtones: People form “organizations that can actually do

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<sup>17</sup> *Id.*

<sup>18</sup> *Liberal Reform, supra* at 16.

<sup>19</sup> *Id.*

<sup>20</sup> I personally recall the Judge using the term “moderation” to express this sentiment at Yale. *See* Remarks at Yale 10-11. If Judge Williams did not use the exact word “squish,” he likely used something close.

<sup>21</sup> *Liberal Reform, supra* at 14.

<sup>22</sup> *Id.* at 16.



things for people,” which gives “people practice at self-rule and participation in constructive groups” and facilitates “cooperation against state predation.”<sup>23</sup>

As the Judge’s definition of civil society makes clear, these five attributes of liberalism are mutually reinforcing. In particular, throughout *Liberal Reform* lies the proposition that robust private property rights further liberal habits. Judge Williams tells us that “the bourgeois virtues” of “a market economy”—an outgrowth of robust property-rights—require individuals to learn how to bargain “toward win-win solutions, with each party’s main bargaining weapon being simply his ability to take his business elsewhere. Respect and protection for others’ rights is the common ground of liberalism and the sort of long-lived democracy in which incumbents reliably step down when defeated.”<sup>24</sup>

With that definition of liberalism in mind, the key question *Liberal Reform* asks quickly comes into focus: Must these five defining attributes of liberal democracy accrete from the bottom up, through the gradual development of associations, property rights, and habits of mind? Or can a ruling power successfully impose liberalism from above—for example, by establishing legal mechanisms to promote property ownership?

Because Judge Williams wrote *Liberal Reform* in 2006, one suspects this question had a particular salience at that moment in time. The Iron Curtain’s collapse in the early 1990s meant that a number of European countries—Russia included—were then seeking to transition (in some cases unsuccessfully) from Communism to Western-style liberal democracy. Meanwhile, the United States was at the height of its efforts to foster liberal democracy in Afghanistan and Iraq. But with that context set to one side, *Liberal Reform* is also very much a legal historian’s detailed analysis of a particular set of laws—Stoylpin’s reforms—in a very peculiar social and

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 18.

political context, prerevolutionary Russia. To the extent that the Judge offers a generalizable conclusion, he provides a sober warning about the difficulties of promoting a liberal mindset through structural reforms. In light of the Judge's personal love of liberal democracy and private property, that pessimism is honest, if unexpected.

To understand Stolypin's land reforms and the Judge's analysis of their effectiveness requires a brief sketch of the problem Stolypin sought to solve (and here I admit to vastly oversimplifying Judge Williams' analysis for sake of conciseness). At a general level, turn-of-the-century Russia saw social unrest, which rightly or not was considered an outgrowth of the peasantry's poverty. At a technical level, three features defined Russian agricultural laws, which in turn defined peasant life: First, Russia utilized an open field system, in which some resources were controlled by a commune and peasants' lands were scattered across a number of individual plots.<sup>25</sup> Second, some peasant communes underwent a repartition process, in which the land was periodically redivided among the peasants in the commune.<sup>26</sup> Third, where peasant communes did not engage in repartition, peasant lands were instead held by households, not individuals, and the household could extend well beyond an immediate nuclear family.<sup>27</sup>

Each of these technical features created inefficiencies and impeded individual enterprise. For instance, scattered plots made it difficult to achieve economies of scale.<sup>28</sup> Repartition discouraged investment because the peasant investor risked losing the investment in the next redistribution. Household ownership hindered land transfer because it required multiple parties within a family to consent to any transfer.

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<sup>25</sup> *Id.* at 31-39.

<sup>26</sup> *Id.* at 39-48.

<sup>27</sup> *Id.* at 49-51.

<sup>28</sup> *Id.* at 51.

Stoylpin's land reforms generally empowered peasants to convert their title to lands into personal property, thus taking land outside of the repatriational or hereditary systems of ownership, and consolidating disparate holdings into more efficient single tracts.<sup>29</sup> These targeted measures represented a middle ground between competing approaches toward Russia's impoverished and malcontent peasantry. On the most conservative end, Russia's landed gentry chiefly opposed redistributions of their own lands and fought to maintain the status quo.<sup>30</sup> On the left, options for reform ranged from radical calls for the uncompensated confiscation of noble land to the center-left Kadets' preference for more limited redistributions with compensation.<sup>31</sup>

In the Judge's assessment, the last of these groups—the center-left Kadets, the party of which Vassily Maklakov was a member—might have been amenable to supporting a version of Stoylpin's reforms. But neither the Tzar nor the Kadets wanted to compromise. The Tzar possessed a profound distaste for “constitutionalism,” and was loathe to give the Duma—the rather anemic Russian legislature—credit for agrarian reform.<sup>32</sup> Meanwhile, the Kadets (though, as we will see shortly, not Maklakov) believed that they should not compromise with the government and should instead ride a revolutionary wave of popular support.<sup>33</sup> As a result of this mutual animosity, Stoylpin enacted his liberalizing reforms through illiberal means: Instead of seeking approval in the Duma, Stoylpin invoked legal mechanisms that permitted the Russian executive to enact legislation without “legislative deliberation” in the Duma.<sup>34</sup>

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<sup>29</sup> *Id.* at 148-154.

<sup>30</sup> *Id.* at 116.

<sup>31</sup> *Id.* at 128-131; *see also The Reformer, supra* at 152 (noting that Kadet proposals would not have made peasants property owners, but would have allocated peasants' confiscated “lands as part of an ill-defined national land fund, to be allocated to peasants in some sort of equally ill-defined temporary tenancy, evidently subject thereafter to continuous bureaucratic reallocation.”).

<sup>32</sup> *Liberal Reform, supra* at 135.

<sup>33</sup> *Id.* at 135-136.

<sup>34</sup> *Id.* at 137.

While Stoylpin’s technical reforms contained a number of defects, three deserve particular emphasis: Despite holding title to property, peasants could only accumulate a limited amount of land. Peasants also could not transfer their title outside of the peasant class, which limited their ability to access credit secured by their land. And because peasants held “personal property” rather than “private property,” peasants did not gain the full political rights that accompanied private property.<sup>35</sup> According to Judge Williams, these illiberal limitations “appear to have been the natural products of the old regime’s condescension toward peasants, its assumption of their need for tutelage, and its skepticism toward—or fear and loathing of—markets.”<sup>36</sup> These illiberal limitations likewise clashed with Stoylpin’s stated hope—in his words—to transform the peasant into the “forger of his own happiness,” that is, to foster liberal habits of mind.<sup>37</sup>

Did Stoylpin’s reforms successfully foster liberal values among the peasantry? Because the First World War (and later the October Revolution) halted the reforms, we will never know. But despite his professed preference for private property and liberal democracy,<sup>38</sup> Judge Williams offers a truly mixed assessment that borders on pessimism. On the one hand, the Judge acknowledges anecdotal evidence of the reform’s success.<sup>39</sup> But he also emphasizes that “key elite actors”—the Tzar and the landed gentry—“did *not* deliberately choose a move toward liberal democracy.”<sup>40</sup> Instead, the elites viewed Stoylpin’s reforms as a way to mollify the peasants’ concerns—and these elites adopted restrictions that precluded full liberalization. In the Judge’s final analysis, “illiberal regimes will rarely if ever voluntarily give up power” and will only consent to liberalization “where the potential for eroding the elite’s existing power is

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<sup>35</sup> *Id.* at 219-223.

<sup>36</sup> *Id.* at 250.

<sup>37</sup> *Id.* at 239.

<sup>38</sup> *Id.* at 182.

<sup>39</sup> *Id.* at 242.

<sup>40</sup> *Id.* at 250.

obscure.”<sup>41</sup> In other words, authoritarian elites permit liberalization only when they cannot see liberalism’s gradual growth around the corner.

Even in the Judge’s most optimistic moments, he only suggests that Stoylpin’s reforms would have catalyzed a lengthy multistep process in which the peasantry organically developed liberal habits for themselves. In particular, more prosperous peasants would have needed to form civil organizations—which would have then provided the training ground for future political action. Thus, at best, institutional reforms might have provided the basic ground work that would have (maybe) allowed liberalism to slowly accrete in Russian society.

For a man who loved liberalism as much as Stephen Williams did, this is a sober, if not particularly cheerful, prescription. It suggests that the liberal habits of mind cannot be imposed from above—at least, not without a radical disruption in existing power structures—and will only accrete solely, over a period of time, and only then if the right preconditions emerge.

## **II. *The Reformer*: A Study In The Liberal Habits of Mind.**

If *Liberal Reform* presents a skeptical account of liberalism’s appeal, *The Reformer* offers something more hopeful, at least on the surface. The Judge’s portrait of Vassily Maklakov reveals a sophisticated lawyer-statesman championing the virtues of moderation and compromise. Yet even *The Reformer* contains a pessimistic undertone: Time and again, the reader confronts the fact that Maklakov was a rarity in embracing liberalism’s habits of mind in prerevolutionary Russia.

While his name is likely unfamiliar to non-Russophiles, Maklakov was far from an obscure figure, both at the time and in hindsight. As a lawyer, Maklakov successfully defended Menahem Beilis, the Jew notoriously accused of the ritualistic murder of a young child in an

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<sup>41</sup> *Id.* at 252.

antisemitic show trial.<sup>42</sup> (In an interesting twist, Vassily Maklakov's estranged brother Nikolay was the Minister of Interior orchestrating the Beilis trial—just one of many times the two Maklakovs occupied opposite sides of a struggle in Tzarist Russia.) As a statesman, Maklakov was an eloquent proponent of the rule of law, in particular of the notion that the law should constrain the arbitrariness of government officials. Perhaps most luridly, Maklakov participated in the plot to murder Rasputin, though the extent of his involvement is a subject of some debate.<sup>43</sup> (Maklakov provided a rubber truncheon with which assassins bludgeoned Rasputin after Rasputin had been shot.<sup>44</sup>) In the February 1917 Revolution—during which the Tzar resigned and the Provisional Government took power, only to fall to the Bolsheviks in the October Revolution—Maklakov was one of the provisional leaders dispatched to take control of the Ministry of Justice. That same government made Maklakov its Ambassador to Paris. In short, Maklakov was a *somebody* in prerevolutionary Russia—and, if nothing else, his life provides an interesting window into an important turning point in twentieth century history.

But for my more limited purposes, I want to highlight the aspects of Maklakov's personality—and Stephen Williams' telling of it—that bear on the subject of liberalism and reform. As a legislator, Maklakov sought compromise across political parties and embraced imperfect solutions that nonetheless advanced his core values. Although a center-left Kadet, Maklakov rejected a rigid ideological mindset, and bucked his party's line on a number of key issues. At a deeper level, these personality traits reflected a combination of an underlying personal warmth and intellectual humility. And they are concrete examples of the habits of mind necessary for liberalism to function.

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<sup>42</sup> See *The Reformer*, *supra* at 184-187.

<sup>43</sup> See *id.* at 297-307.

<sup>44</sup> See *id.* at 304-305.

Maklakov's liberal mindset started with an eagerness to engage with individuals on the other end of the political spectrum. Because that statement is anodyne standing alone—short of Chamberlin in Munich, how can one condemn dialogue?—consider two examples that reveal the extent of Maklakov's engagement across political and social lines.

Although Prime Minister Stolypin's first agrarian reforms were ultimately adopted without the Duma's approval, Stolypin initially had sought to secure the Duma's assent. To that end, Stolypin made secret overtures to four moderate Kadets, including Maklakov, to explore the possibility for compromise on multiple issues: enacting agrarian reform, arresting far left Social Democrat deputies in the Duma who had been accused of supporting terrorism, and expelling other Social Democrats from the chamber.<sup>45</sup> Maklakov and his colleagues drew a line at expelling the Social Democrats, but sought to foster agreement between the government and the Duma on agrarian reforms.<sup>46</sup> Those efforts proved unsuccessful—leading the Tzar to dismiss the legislature and leading Stolypin's liberal reforms to be birthed through illiberal means.<sup>47</sup>

When news of their clandestine meeting with Stolypin became public, Maklakov and his fellow Kadets received intense criticism from within their party—simply for meeting with Stolypin. Maklakov even offered to resign from the party—though to the Kadet leadership's "credit," his resignation was rebuffed.<sup>48</sup> In Stephen Williams' view, the left's response was more "ominous" than even the Tzar's dismissing the Duma.<sup>49</sup> While an "unbridgeable gulf between two of a country's institutions . . . is hardly novel in politics," the "dominant opinion on

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<sup>45</sup> *See id.* at 154.

<sup>46</sup> *See id.* at 154-156.

<sup>47</sup> *See id.* at 156-157.

<sup>48</sup> *Id.* at 157.

<sup>49</sup> *Id.* at 159.

both sides regarding even *talking* with their political opponents as a worthless activity, or worse.”<sup>50</sup>

Maklakov’s willingness to engage with the “other” also better informed his public policy-making. The February Revolution was sparked in part by grain shortages.<sup>51</sup> The liberal politician who would later become the minister of agriculture for the Provisional Government “scoffed at the idea that the grain shortage could be due to the low ceiling on prices paid to the peasants” and insisted instead that shortages were the result of the Tzarist “government’s lack of a ‘plan.’”<sup>52</sup> But Maklakov knew the peasant deputies in the Duma because of his prior work on a bill to codify peasant rights. He consulted with the peasant representatives, who “assured him the low ceiling prices were indeed the key”—presumably because low prices under incentivized grain production.<sup>53</sup> And those same peasants informed Maklakov of official abuse, which prompted Maklakov to organize a meeting for them with the Tzar’s minister of agriculture.<sup>54</sup>

Stephen Williams tells us that Maklakov’s outreach was uncommon among liberals,<sup>55</sup> and one suspects that unusualness had much to do with the class-divide that separated the liberal intelligentsia and the peasantry. Indeed, one imagines it took great personal humility for someone of Maklakov’s stature to admit that he needed input from those who—at least on the surface—surely appeared far less sophisticated.

But talk is cheap, and it is quite another thing for a legislator to cede part of his position and accept an imperfect solution in the name of pragmatism. We already saw this mentality in Maklakov’s secret meeting with Stoylpin, where Maklakov embraced the chance to compromise.

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 310.

<sup>52</sup> *Id.* at 310.

<sup>53</sup> *Id.* at 311.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 328.



Maklakov willingness to negotiate and his rejection of utopianism proved rare among his contemporaries in the Duma. Here again, a few vignettes are instructive.

In October of 1906, in the wake of unrest, the Tzar issued a unilateral decree known as the October Manifesto, which represented a marked departure from absolute autocratic rule to a more liberal regime. The manifesto permitted (on paper) freedom of conscience, speech, and assembly; provided for a legislative assembly (the Duma), though it did not guarantee universal suffrage; and provided that no law could be passed with the Duma's consent.<sup>56</sup>

From the Kadet perspective, the October Manifesto fell short in three respects: It did not sufficiently guarantee those rights; it did not provide for "universal, direct, equal and secret" suffrage, but instead overrepresented the landowning class; and it "did not call for a constituent assembly and thus kept the tsar very much in the picture for the ultimate crafting of any possible constitution."<sup>57</sup> While the October Manifesto initially gained praise in liberal circles, the Kadet party-line quickly turned to opposition, focusing on the Manifesto's flaws instead of its general liberalizing potential.<sup>58</sup> The Kadet leadership insisted "that society and the authorities remained at war."<sup>59</sup>

Unlike the Kadet leadership, however, Maklakov saw the October Manifesto as a rare opportunity for the regime and liberals to cooperate toward a shared goal. As a practical matter, by refusing to engage with the regime, the Kadets empowered "de facto rightest control" in suppressing unrest and "undermined moderates in the bureaucracy."<sup>60</sup> More generally, according to Judge Williams, Maklakov believed that the Kadets surrendered a chance to foster

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<sup>56</sup> *Id.* at 95.

<sup>57</sup> *Id.* at 96.

<sup>58</sup> *See id.* at 97-102.

<sup>59</sup> *Id.* at 97.

<sup>60</sup> *Id.* at 102.

the “habit of compromise, of recognition of the rights and interests of others” that is “the sort of activity required for constitutionalism.”<sup>61</sup>

Throughout *The Reformer*, this pattern emerges: Russian figures on the left adopted a purely oppositional perspective or championed policies with little chance of success, while Maklakov sought achievable, if imperfect, measures that meaningfully advanced the rule of law. Thus, Maklakov was the “reporter” in the Duma responsible for enshrining aspects of Stoylpin’s reforms involving peasant equality into Duma-approved legislation. (A reporter appears akin to a floor leader in the American Congress.) From that perch, Maklakov sought to shepherd a bill through the Duma, mindful of the procedural and practical political requirements that the bill not stray too far from the measures that Stoylpin had originally enacted through illiberal means.<sup>62</sup> Maklakov’s bill received criticism from Alexander Kerensky, later the leader of the Provisional Government. Maklakov’s rejoinder to Kerensky—which the Judge reprints in large part—highlighted the difference between Maklakov’s pragmatic statesmanship and Kerensky’s more radical political posturing:

While we live in a constitutional order we must know that constitutional life requires compromise. Kerensky has a different position. He would be glad if the Duma rejected the law, and threw off the mask, as they like to say. This would expose the illusion and show that it’s impossible to hope for peaceful legislation in a June 3 Duma. Of course in truth the peasants would gain nothing, but then they could read his attractive beautiful speech.<sup>63</sup>

More broadly, Maklakov recognized the need for effective government as a component of ordered liberty. By contrast, his fellow Kadets preferred to “never think as the government,

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<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 232-242.

<sup>63</sup> *Id.* at 244. In his speech at Yale, Judge Williams highlighted an incident, detailed in *The Reformer*, which occurred just before the collapse of the Tzarist regime. “Duma members had long argued that the food supply in St. Petersburg should be put in the hands of the St. Petersburg Duma, the local legislative body. When the Minister of Agriculture, Rittikh, did just that, the Duma attacked him ferociously.” Yale Remarks at 9 (citing *The Reformer*, supra at 311).

but always as a champion of the rights of man.”<sup>64</sup> It is no surprise, then, that Maklakov was a poor fit for that party—and, indeed, often rebelled against its leadership.<sup>65</sup> In Maklakov’s words, “[t]here was not a single party in which I would have felt at home.”<sup>66</sup>

When I reach the end of *The Reformer*, I cannot help but see some shadow of Stephen Williams in his portrait of Vassily Maklakov. I do not want to exaggerate the comparison. But Stephen Williams’ underlying character and the way in which he approached judging echo Maklakov’s approach to statesmanship. Above all, Williams was a man who believed in the power of ideas—regardless of their origin. As a result, he approached each case, not from a predetermined perspective of what the “right” outcome should be, but from what the law genuinely required. And like Maklakov, Judge Williams sought out the moderates on either side. He accompanied his overtures with warmth and kindness—and when he ultimately disagreed, that same sincerity and good faith followed.

His dear friend Judge David Tatel tells a story that captures the Stephen Williams I knew and loved. The two of them sat together on the D.C. Circuit panel that decided *Shelby County v. Holder*, in which the United States Supreme Court ultimately struck down Section Five of the Voting Rights Act.<sup>67</sup> After being assigned to the case, Judge Williams emailed Judge Tatel: “I’ve read the briefs, and I realize the Supreme Court has hinted where it’s headed. . . . But I remain uncertain. What’s your view, David?”<sup>68</sup>

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<sup>64</sup> *Id.* at 94.

<sup>65</sup> *Id.* at 278.

<sup>66</sup> *Id.*

<sup>67</sup> See 679 F.3d 848, 852 (D.C. Cir. 2012), rev’d, 570 U.S. 529 (2013).

<sup>68</sup> See Ann E. Marimow, *Judge David Tatel’s Lack of Eyesight Never Defined Him, but his Blindness is Woven into the Culture of the Influential Appeals Court in D.C.*, WASH. POST (July 8, 2021), [https://www.washingtonpost.com/local/legal-issues/dc-judge-david-tatel-career/2021/07/07/bf48778e-c486-11eb-8c18-fd53a628b992\\_story.html](https://www.washingtonpost.com/local/legal-issues/dc-judge-david-tatel-career/2021/07/07/bf48778e-c486-11eb-8c18-fd53a628b992_story.html).

In *Shelby County*, Judge Williams ultimately dissented—and adopted a position that one might characterize as “conservative” in its orientation. But as Judge Tatel noted at Judge Williams’ portrait unveiling, seven years before *Shelby County*,

[T]here is no one with whom I’d rather disagree. Steve defends his positions tenaciously and respectfully and gently, but always with an open mind to the views of others. When we disagree, Steve challenges me to think far more deeply about my own positions and to confer weaknesses that might otherwise have gone unexamined. On occasion, his reasoning has even changed my mind.<sup>69</sup>

Stephen Williams changed his views on occasion too. Judge Williams once publicly recalled a time when he had sat alongside Judges Abner Mikva and James Buckley. After argument, Judge Williams joined Judge Mikva, with Judge Buckley dissenting. But when Judge Buckley circulated his draft, Judge Williams became convinced and reversed his position.

Even when Judge Williams remained steadfast in his disagreement with a colleague, as Judge Tatel suggests, Judge Williams always strove to remove any hint of personal disagreement from his opinion. In his public talk about Maklakov at Yale, Judge Williams retold a story that I later heard him recount more than once: He and then-Judge Merrick Garland were authoring a majority opinion and a dissent. As can often happen when drafts circulate, their tone became increasingly snarky toward one another. At some point, one of them picked up the phone to the other—and they resolved to “de-snark” their respective writings.<sup>70</sup> When I clerked for him, Judge Williams proudly and tirelessly sought to de-snark each word to eliminate any note of animosity toward his colleagues.

In important ways, Stephen Williams also defied easy labeling as a “conservative” judge, at least as that term is often used today. In criminal law in particular, Judge Williams favored defendants as he sought to protect ordinary citizens from the arbitrary excesses of the American

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<sup>69</sup> *Portrait Presentation Ceremony Stephen F. Williams* 11 (Oct. 27, 2006).

<sup>70</sup> Remarks at Yale at 15.

criminal justice system.<sup>71</sup> Over and over, Stephen Williams bucked the stereotypically conservative approach—and made common cause with more than one left-leaning judge—without a second’s hesitation. As was said of Maklakov, Stephen Williams truly could see that share of truth on the opposite side, and a share of error on one’s own.

This was possible because, like Maklakov, Stephen Williams had an eagerness to befriend anyone, regardless of their political disposition. He left his chambers unlocked, an open invitation for any of his colleagues to stop by. When I was clerking, another judge once knocked on our door, heard no answer, and left. When the visiting judge returned the next day, I could hear Stephen Williams loudly chortling from down the hall: “My door is always open for you! You should have just come right on in.”

As I sit here now, one year after the Judge’s passing, I want to imagine the Judge has an office in heaven, just as disastrously messy as the one I knew in his life—with stacks of papers sliding to the floor and a dog running around. In my mind’s eye, there is another knock at the door, and Stephen Williams gregariously ushers in Vassily Maklakov, his likeminded friend from across the century. And I wonder: as they sit down to compare their notes on liberalism, would the two of them realize the extraordinary character that they each possessed? Or in their own modest ways, would they simply assume that everyone approaches life with the intellectual honesty and kind-heartedness that defined each of them?

### **III. Wither Liberalism in America?**

If this were a judicial opinion, Parts I and II would have provided an overview of the law, namely what Stephen Williams thought about liberalism and reform. This Part applies the law to the facts, and asks what Stephen Williams’ work says about America’s current predicament. To

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<sup>71</sup> See Peter Conti-Brown, *The Principled Leadership of Middle Management*, 38 Y.J. REG., 736, 743 (2021); Peter Conti-Brown, *Remembering Judge Stephen F. Williams*, REG. REV. (Aug. 18, 2020), <https://www.theregreview.org/2020/08/18/conti-brown-remembering-judge-stephen-f-williams/>.

avoid any confusion, I want to reiterate that this Part is not an account of what Judge Williams would have said. In Parts I and II, I strove to provide a window into Stephen Williams' ideas and his life, though I would note that my account (particularly of *The Reformer*) is necessarily abbreviated. Part III represents what I would tell Judge Williams were he here—not what he would have responded in kind.

Stephen Williams' work provides a useful lens to diagnose the current decline of America's civic sensibilities. At its most basic level, Americans of all political persuasions are losing the liberal habits of mind which Judge Williams so aptly portrays both in *Liberal Reform* and *The Reformer*. The parallels to prerevolutionary Russia—if imperfect—are disturbing. What Judge Williams wrote about the Kadet response to Maklakov's meeting with Stolypin rings true for modern America: “[B]oth sides regarding even *talking* with their political opponents as a worthless activity, or worse.”<sup>72</sup> And in the most prominent public events of the last four years, one sees a parallel to Kerensky's obstruction of Maklakov's peasant equality bill: Ensure that the other side fails, irrespective of its impact on the health of the Republic. Thus, Republicans in Congress twice acquitted a President who sought to subvert the legitimacy of a democratic election, once through foreign actors and once by stoking domestic unrest. No matter how well constructed, a constitutional system cannot survive if the measures of the correctness of an action are the naked accumulation of political power and a refusal to compromise.

A form of illiberalism has also appeared in the conservative legal movement, which might be best summed up by one assertion: Today, Stephen Fain Williams would not be nominated or confirmed to the federal bench by a Republican president or Senate. One can fairly accuse both sides of vetting judicial nominees for degrees of ideological fitness. But the Trump administration took vetting to a new extreme, privately ensuring and publicly touting judicial

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<sup>72</sup> *The Reformer*, *supra* at 159

nominees' orthodoxy. I strongly suspect that Judge Williams held too many idiosyncratic views to pass through that gauntlet unscathed.

It seems that some in the conservative legal movement view an increasingly narrow set of values—in particular, hyper-strict originalism and hyper-strict textualism—as the sole, legitimate tools of the legal craft. This is not to dismiss original meaning and text, or to suggest they should never be controlling considerations in any case. But taken to extremes, originalism and textualism are utopian views of the law. Just as the Kadets' utopianism prevented necessary political compromise, an extreme form of legal conservatism potentially reduces the ability for conservatives to find common cause in a broad legal middle.

At the same time, substantive aspects of legal conservatism also seem to be eliminating spaces for democratic actors to achieve compromise outside of the judiciary. Legal conservatism historically viewed approaches such as textualism and originalism as constraining judges' discretion, thereby providing increased space for the democratic branches to craft consensus solutions to society's problems. But in recent years, some judges and scholars have championed a muscular enforcement of a conservative conception of rights, which reduces the opportunity for the democratic process to foster durable compromise.

The predictable retorts to these observations contain some truth but are ultimately unsatisfactory. Yes, there have in the past been episodes of bitter political contention around judicial appointments, and Democrats may today be deploying ideological litmus tests for judicial appointments. And yes, uncompromising legal frameworks from the left can also hinder social negotiation and compromise. But without getting into a debate about relative shares of blame—though, my assessment is that the right owes a larger share in recent years—these retorts highlight how serious the contemporary crisis of liberalism is. And at worst, this kind of

“whataboutism” enables one to focus exclusively on the faults in one’s opponents and thereby ignore one’s preferred party’s measure of culpability.

In the law, as much as in the remainder of society, a portion of the problem may be due in part to an echo-chamber effect: It is common, for instance, to hear of certain judges only hiring clerks who bear the right ideological markers. And among younger conservative lawyers in particular, one sometimes finds a uncritical acceptance of the views of a certain select group of scholars or a narrow set of Supreme Court Justices. Up and down the food chain, elite lawyers may be losing sight of the values of liberalism—the ability to see a measure of fault in one’s own side and a virtue in the other—that defines our profession.

This was all truly anathema to Stephen Williams. As another former Williams clerk, Peter Conti-Brown, has written, the Judge hired someone solely for his or her capabilities; the Judge “did not give two whiffs about his clerks’ politics.”<sup>73</sup> In his remarks at Yale, the Judge referred to Maklakov as seeking out “a fellowship of people who are not so much like-minded as like-hearted.”<sup>74</sup> Judge Williams did much the same. As a result, Williams clerks ranged the political spectrum, perhaps more so than those of any other modern federal judge.<sup>75</sup> I suspect my experience in the Williams chambers moderated me, and I like to think it benefited the Judge as well.

It is unclear how American society reclaims moderation, either in politics generally or in the legal profession in particular. The cautionary message of *Liberal Reform* and *The Reformer* is that genuine liberal sensibilities are rare and difficult to inculcate from above. But that does not deprive each of us of our personal civic responsibility to live like Vassily Maklakov—and,

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<sup>73</sup> See Conti-Brown, *Remembering Judge Stephen F. Williams*, *supra*.

<sup>74</sup> *Id.* Remarks at Yale at 10 (quoting Alan Jacobs, *How to Think: A Survival Guide for a World at Odds* 62 (2017) (emphasis removed)). Judge Williams did much the same.

<sup>75</sup> See Conti-Brown, *Remembering Judge Stephen F. Williams*, *supra*.



yes, like Stephen Williams too. So here is our charge: Evaluate each idea on its own merits, extend an open hand to all, strive for compromise, and if compromise is not possible, disagree without snark or animus.<sup>76</sup>

I do not pretend I have always lived according to these values. In recent years, I have grown particularly mindful of the moments in the past where I have fallen short. Yet if America is to resist this illiberal moment, it will require a renewed commitment to the liberal habits of mind. We can all be grateful that Stephen Williams showed us the way.

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<sup>76</sup> See Yale Remarks at 2 (“I’d like to use the life of Vasily Maklakov, of whom I’ve just written a biography, as a model for depolarization. ‘What would Maklakov say, and how would he say it?’ I’m joking of course, but not 100%.” (emphases removed)).