

The 17th Annual Tom E. Moses Memorial Lecture on the U.S. Constitution
 “Re-energizing the American Experiment”
 Dr. Ray Smock

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We need to re-energize the American experiment, and that means a fresh look at our politics, our government, our history, our educational system, and at ourselves as citizens. This is a tall order, and what I hope to accomplish in this Constitution Day lecture is to suggest some of the things that we might want to think about, when we think of the Constitution and the State of our Union.

To talk about re-energizing the American Experiment suggests that the American experiment in government may be running low on energy. Maybe the United States is in Low Battery Mode and needs to be plugged in and re-charged. But whose charger do we use to get to full power?

You often hear that our divided politics today is as bad as it has been since the Civil War. So I will begin by setting the stage with what Abraham Lincoln said in his message to Congress in 1862. When he said to the members of Congress could not be more appropriate to say to the Congress of 2021 and to all the citizens of the United States.

This is what he wrote to Congress while the nation was tearing itself apart in bloody civil war: “The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise – with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.

“Fellow-citizens,” Lincoln continued, “we cannot escape history. We of this Congress and this administration, will be remembered in spite of ourselves.... The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation.

“We know how to save the Union,” Lincoln wrote, “The world knows we do know how to save it. We -- even we here -- hold the power and bear the responsibility. In giving freedom to the slave, we assure freedom to the free -- ... We shall nobly save, or meanly lose, the last best hope of earth. “

I have always liked the idea, “We must disenthrall ourselves if we are to save the country.” It was true then as it is in our time. Old thinking, old ways, the status quo, are not going to save our country.

In effect, Lincoln told his generation that they needed a big dose of *critical thinking*. To disenthrall means we need to free ourselves from bondage. He was talking to Congress. To white men. It wasn't just slaves who were in bondage. It was white people who were trapped in a state of unfreedom because of slavery.

In our time, we must take a hard look at where we are, overturn sacred cows, fight myths and lies that divide us, and think and act anew. This takes guts and new energy. The persistent problems of the past are holding us back from dealing with the existential problems of the present and the future.

There are two other phrases in Lincoln's message that always strike me like lightning. He said, "we cannot escape history." His generation would be judged down through the ages, and it is equally true of our time and how we will be judged in centuries to come. We cannot escape the reality of our time any more than Lincoln could his. Yet, whose history, whose narrative, will prevail? For some time now we have been engaged in history wars, and culture wars where competing narratives of American history are contested in our schools and in our politics.

Just last week the massive statue of Robert E. Lee, was taken down from its place of prominence in the former capital of the Confederacy in Richmond. For 131 years it stood as a symbol of the lost cause. New narratives are taking the place of the old.

If only the victors get to write history, as the common expression goes, how did the Confederate narrative last so long? Why is it still such a contentious part of our history? Why are we still fighting the Civil War in so many ways? Have we not disenthralled ourselves of that war?

The third insight in Lincoln's message to Congress, gives us the answer to his dilemma and ours. It is the most important idea in his message. "We know how to save the Union." Lincoln said, "In giving freedom to the slave, we assure freedom to the free -" _ As we know too well, abolishing slavery, while one of our history's greatest moments, did not lead to true freedom. Slavery was abolished but not white supremacy.

My late friend, the Pulitzer Prize winning historian Michael Kammen, wrote a brilliant book about the Constitution, published in 1986. Its title was, *A Machine that Would Go of Itself: The Constitution in American Culture*. His book helped me understand how earlier generations of Americans thought about the U.S. Constitution. Kammen documented how each generation of Americans since the founding of the nation have done in greater and lesser degrees the following: taken the Constitution for granted, ignored it, turned it into a frozen icon, declared that God wrote it or at least inspired it, and made it an object of worship.

Americans have argued, especially since World War II, over how to interpret it when it comes to civil rights and burning cultural issues like the rights of gun owners and the constitutionality of a woman's right to have an abortion. These issues have divided us like no others for more than half a century.

Kammen's book title is taken from a quotation from the poet James Russell Lowell in 1888, that the Constitution has been "a machine that would go of itself," a perpetual-motion device so perfectly crafted that it needed no further attention. It was about that same time that a young student of Congress and the Constitution, the future president Woodrow Wilson offered a different view that the Constitution was a living document that needed to fit the needs of each generation. In saying this he was echoing Thomas Jefferson, who never thought the Constitution should be set in stone and thought it would be amended regularly.

Today we still have these two thoughts about the Constitution. Some see it as a perfect clockwork machine that needs no fixing or tampering, while others see a living document, flexible enough to change when necessity arises. These two views have, in general, broken into liberal and conservative camps. Liberals tend to talk about the Constitution as a living document, while conservatives tend to see it as needing no fixing beyond what the Founders themselves said about it.

Since the mid-1980s conservatives have turned to the theory of originalism, or original intent, and claim the only way to interpret the Constitution is through the intentions and the meaning of the words used by the Founders in 1787.

It was just 13 years ago that the Supreme Court in the *District of Columbia vs Heller* declared that the Founders were not just thinking of militias when it came to arms. It meant every citizen had a right to bear arms. I have often pondered that single case, when I think of the flaws in the original intent doctrine. The world of the Founders was of muskets, not AK-47s. Yet by the time the court made that decision, the nation was awash in military grade weapons. I will come back to the Supreme Court a bit later.

The failure of American politics and culture to disenfranchise the United States of the dreadful notion of white supremacy keeps our nation from advancing toward freedom for all. This failure continues to haunt the nation and threatens us, again in our time like no other time since our Civil War and Reconstruction eras. As we gather this evening, the Capitol of the United States is surrounded with protective fencing in anticipation of another rally defending the January 6 insurrectionists who, 30,000 strong, carried the Confederate flag into the Capitol and tried to stop a constitutional process.

This past Saturday as the nation paused to reflect on the tragedy of 9/11, former President George W. Bush, speaking from the Pennsylvania site where Flight 93 went down, warned the nation: "There is little cultural overlap between violent extremists abroad and violent extremists at home. But in their disdain for pluralism, in their disregard for human life, in their determination to defile national symbols, they are children of the same foul spirit. And it is our continuing duty to confront them."

In the attack on the Capitol on 1/6, a new date to live in infamy, we saw Americans with beliefs not unlike those of the American terrorist organizations of the Reconstruction Era. And some of them had the same name.

Democracy is threatened today in the United States and in other parts of the world by the forces of oligarchy, demagoguery, and authoritarianism. The white nationalists in the United States today, use the same tactics as those employed during Reconstruction 150 years ago. They spread fear of the equality of African Americans, they scapegoat the nation's problems to immigrants, and anyone thought of as Non-white, and they use political power and intimidation to deny equal access to the ballot box.

American public education has too often ignored the controversial aspects of our history. But we must confront controversy and learn from it if we are to liberate ourselves from the past.

We have become a nation that is afraid of its own history. History and civics education have been neglected to the point that our education system is facing a crisis over what should or should not be taught.

This threat to democracy needs our serious, immediate attention. The reason it deserves new energetic action is as old as the idea of James Madison who said informed citizens were the only true safeguard of our liberties and our ability to govern ourselves.

Cicero said 2,000 years ago that to be ignorant of history was to remain always a child. This does not mean everyone should become a historian or a constitutional lawyer. It does mean that an awareness of the nation's history and a basic understanding of how government works under our Constitution and a good well-rounded education that includes the humanities can lead to better, more engaged, more energized citizens.

The problem with American history as taught to many generations, until fairly recently, is that it left out too much. It was a schoolbook version of patriotism and optimism about the greatness of America. It was a story mostly about white men who were heroes.

We live in a time when some of the best historical writing of any generation is underway. Scholars have enriched our understanding of American history and made the story more diverse, more realistic, and

sometimes darker and more critical than what has passed for schoolbook history in earlier times. This richer, more fascinating story of America has developed especially since World War II, with the inclusion of African American history, women's history, indigenous peoples history, immigrant history, and LGBTQ history. As America grows more diverse so has its history. We need to embrace these new studies and not be afraid of them. They will help liberate us if we give them a chance.

I once had a most interesting conversation with Michael Eisner, the head of the Disney Corporation. I was seated next to him at a ceremony at the Capitol which was delayed because the House was still voting. So I struck up a conversation with him about how Disney films were so widely popular. I asked him, do you think you are avoiding controversy in the stories to increase their popularity, especially with parents with young kids. He responded that Disney films were not afraid of controversy or difficult subjects, in fact, such things added drama. But, in the end, the difficulties had to be resolved, and the ending had to be positive and happy.

That is a good business model for the entertainment industry. But it is not a good model for American history or for Civics education, where the goals are not entertainment alone, but knowledge that can be used to make things better. Civics ultimately is about providing skills and knowledge that citizens can use, that elected officials can use, to get things done for the benefit of the people and the nation. History and civics give citizens the tools to cut through false narratives and political propaganda no matter who is pedaling it.

I see promising signs of new energy in history and civics education coming from philanthropic foundations and organizations that see the growing threats to democracy and government stability. A recently released two-year study by the U.S. Department of Education and the National Endowment for the Humanities calls for a renewal and a re-energizing of American history and civics education.

The Report, which I highly recommend to you, is called "Educating for American Democracy." You can find it online just by Googling the title. Read the whole report. Or at least read the executive summary. In this important Report, three hundred leaders from government, public and private universities, national organizations that promote civics education, and history educators, all came together to say, "Education in civics and history equips members of a democratic society to understand, appreciate, nurture, and, where necessary, improve their political system and civil society: to make our union 'more perfect,' as the Preamble to the U.S. Constitution says."

"This education," the Report continues, "must be designed to enable and enhance the capacity for self-government from the level of the individual, the family, and the neighborhood to the state, the nation, and even the world." The Report states that history and civics education have been neglected as our schools have focused on STEM programs. While Science, Technology, Engineering, and Math are vital to the education process, they argue, so is history and civics.

But here is the rub. We have, without much controversy, developed national standards for STEM education, but our political dysfunction and division, makes it difficult to find common ground on our historical narratives. We do not seem to be able to have a national dialogue about history and civics. The nation is badly polarized on these topics. And many citizens question the need for history and civics when STEM knowledge leads to jobs.

Right now the phony flap over teaching Critical Race Theory in grade schools and high schools, where it is not even taught, has virtually killed new civics education initiatives in Congress. Teachers who are required by state standards to teach about racial discrimination find parents raising hell over things long taught as if they are part of Critical Race Theory. Critical Race Theory has been around for forty years, mostly as a serious topic in law schools. Suddenly, it seems as deadly as the pandemic. It has become a new tool for

demagogues to create fear about what is taught in our schools. If those parents and school officials who are complaining the loudest had been taught history and civics, they would know better.

We can't make progress if a significant number of Americans are not only ignorant of government and history but are hostile to it. Many Americans do not trust government and actually despise it. We elect members to the House and Senate who run on anti-government platforms, and claim, that if elected, they will go to Washington and Drain the Swamp.

Who could have imagined that our political divisions and the distrust of government could play out as acts of defiance of the Federal government's vaccination program during a pandemic? Who could imagine governors of states that have strict laws about vaccinating kids from childhood diseases, would be against vaccinations and the wearing of masks during the worst pandemic in a century?

We have been debating, and sometimes fighting, from the beginning of the nation over what kind of government we want and what kind of country we want to live in. There have been two schools of thinking about this and most of us encompass parts of both schools.

There is the Jeffersonian model of small government, an agricultural society that has little need of government other than local government. Taxes should be kept low and provide only the minimal needed for government's basic functions.

The other model is the Hamiltonian vision of a strong central government that fosters the creation of a commercial colossus that can rival any nation in the world. In this model the government aids commerce and industry by spending tax dollars on infrastructure like post roads to carry the mail, lighthouses, and harbor improvements to aid navigation.

The Constitution in Hamilton's view was one of energetic government.

Our major political parties have reflected this big government/small government dichotomy and our unresolved racial issues throughout their history.

In the last century and a half the Republican Party and the Democratic Party have changed places from where they started in the 19th Century. Both parties have had parts of their history that have been for big, energized government, and at other times, advocating small, minimal government. Both parties have at times championed a solution to the racial issues that plague us, and at other times they have been the greatest impediment to civil rights.

The Democratic Party issued its first platform in 1840 and it was all about limiting the power of the federal government. Democrats were happy with state government being dominant. In that platform the party opposed spending money on internal improvements. Democrats opposed raising taxes beyond what is necessary to minimally maintain the government. The Democratic Party accepted slavery and was opposed to the abolition of slavery.

The history of the United States in the decades leading up to the Civil War is filled with struggle over the issue of slavery and its expansion into new territories. Congress made several compromises with slavery in 1820 and 1850 that held the Union together but never fixed the problem. The irreconcilable question was: How can a nation built on the idea of equality, countenance slavery?

By 1860, the value of the 4 million enslaved persons in the United States was worth more than all the money in all the banks in America. Most of the nation's millionaires were Southern planters. This was the

money power the slaveholding aristocrats of the South were protecting so they could continue to control the nation's politics.

As the nation moved West, slaveholders in the South wanted their plantation system to move West too. If slavery expanded into new states and territories it would violate the Compromise of 1820 which prohibited slavery in new territories above the southern border of Missouri.

From this crisis and political gridlock came a bold, new energetic party with a different vision of the slave issue, and also a different vision of what government should be. It was the Republican Party. The Republicans said no to human bondage and yes to economic opportunity.

Northerners wanted a piece of the action that had been politically controlled too long by southern oligarchs and they liked this new Republican Party. As the historian Heather Cox Richardson put it in her brilliant history of the Republican Party, "Northern men who aspired to better themselves rejected the idea that they were part of a permanent underclass meant to serve the rich; they reiterated the promise of the Declaration of Independence that every man was created equal. They argued that national prosperity could grow only from a strong and broad base, not from the top down...."

The first national political platform of the Republican Party came in 1856. It reads like a liberal manifesto. It drew on the idea of equality in the Declaration of Independence. It opposed the expansion of slavery in the territories. That Republican platform called for national infrastructure. It saw the government as a leader in promoting the building of railroads and fixing our rivers and harbors for expanded commerce which would lead to greater prosperity for all.

By the time of Lincoln's election in 1860, extensive propaganda spread by southern planters that a revolution was coming did, in fact, happen. The southern slave states feared Lincoln's election because it was a threat to their wealth built on slave labor. Rather than give these things up, Southern states left the Union and formed their own government to perpetuate the slave system.

The new Confederacy was not opposed to the U.S. Constitution. The one the Confederates drafted was almost word for word just like the U.S. Constitution, except for two things. Protecting slave property and preserving states' rights over the power of the central government.

When the Southern states seceded, it left the new Republican Party in charge of everything in the Federal government. This resulted in the greatest outpouring of energetic government since the drafting of the Constitution. Republicans amended the Constitution to abolish slavery, declared all former slaves (males that is) to be citizens, and then said all former slaves (males that is) could not be denied the right to vote.

This was very energetic government. It was about making a better nation that lived up to its founding principle of equality. Nothing was more energetic and revolutionary than the passage of the 13th, 14th, and 15th Amendments. These amendments created a new Constitution that finally made no compromise with slavery.

The Reconstruction Era began with high hopes of a new political start for the nation. Federal troops stayed in parts of the South as an occupying army to enforce these new constitutional amendments.

In response to black freedom and black voting and thousands of formerly enslaved persons getting elected to local, state, and national offices, the white supremacists of the old order started a new kind of war, one waged by terrorists who created secret organizations like the **Ku Klux Klan**.

The nation entered an era of segregation and racial discrimination called Jim Crow, that lasted from the 1880s until the 1960s. In the years following the Civil War the southern slaveholders regained power in the South. Slavery was gone, but a new system of labor that exploited the freed slaves, and the expansion of the Southern economy into the West, meant the old oligarchs were back in power.

For black Americans, the so-called New South became a totalitarian system designed to keep them in second class status, a system managed by white sheriffs, white judges, and white juries in every county of the Southern states and many more in the expanding Western states.

The Election of Franklin Roosevelt in 1932 was another kind of energetic government revolution. This was about what the power of government could do for ordinary people, not just those of wealth. The Democratic Party by the 1930s had won over most black voters who had for a half century remained loyal to the Party of Lincoln that freed their parents and grandparents from slavery. But the failure of the Republicans to deliver on the early promise of freedom, and the utter collapse of the economy in 1929, led a majority of blacks to change parties.

FDR was no great champion of African Americans, but the massive efforts of the Federal Government and a Democratic majority in both houses of Congress demonstrated like no other time in our history up to then, that the federal government could address poverty, while state governments were unable to address the magnitude of the economic collapse.

The Tennessee Valley Authority, for example, was one of dozens of FDR's agencies that made up an alphabet soup of energetic programs to aid the poor and attack the Depression. The TVA brought electricity to millions who were living without it and not prospering from its many benefits. This "energized" government brought electrical energy to millions. Today we talk about bringing broadband to places that do not have it.

FDR's administration used strong central government and majorities in Congress to experiment with solutions to the Depression. None of them worked very well, and it was only the build up to World War II that turned the economy around. But the bold experimentation of the New Deal demonstrated what a strong central government could do. FDR's critics called it socialism. They still call it that today.

Since FDR's administration, our national politics has continued to be a debate about how much government we should have. The Republican Party has made one of its main missions for the last 90 years, to undo or limit the Democratic Party's success in making big government work for ordinary people.

When President Lyndon Johnson, a Southern Democrat who was an old time FDR New Dealer, signed the Civil Rights bills of '64 and '65, he predicted it would drive voters in the South away from the Democratic Party for a generation.

It has now been more than a half century and the South is still Solid Republican, where it once was Solid Democratic. Starting with the Barry Goldwater presidential campaign of 1964, the Republican Party has had a "Southern Strategy" designed to rebuild the GOP in the South. It worked, but at the terrible price of acquiescence on the rights of African Americans.

Finally this year in two special elections, Georgia elected two Democratic Senators and shifted the balance of power, with a small but significant crack in the Solid Republican South.

Today's Republican Party now carries the position of the Democratic Party of the 1850s, that government's role is to protect property and wealth, not the middle class, and certainly not the poor. Property no longer

means slavery, of course. Now it means the property and wealth of corporate oligarchs who control a disproportionate amount of American wealth.

Republicans today also advocate what Democrats in the 1850s advocated: that state's rights should prevail over the power of the federal government. One of the great tragedies of our recent history was the ideological blinders of the previous Republican administration, which refused to lead on the pandemic and said the role of the federal government was to assist the states.

One way to re-energize the government would be to see Congress restored to its central place in the Constitutional structure. The founders clearly saw Congress as the leading branch of government, the place for debate, the place to set policy, the place to levy taxes, make laws, declare wars, and determine the annual budget. Congress, a poet once said, was the fulcrum of us all. The nation's balancing point. Yet in the last century the executive branch has become the dominate part of government. Congress abdicated much of its authority to presidents, who set the national agenda.

Up until the 1980s, despite sharp differences in our two political parties, compromise was often achieved on major issues. Such was the in the passage of the civil rights bills of 64 and 65, where Republican leader Senator Everett Dirksen teamed up with Senate majority Leader Lyndon Johnson. The historian and political scientist James MacGregor Burns said we had a 4 party system up until 1980. There were liberals and conservatives in both parties. This made it possible for coalitions of Republicans and Democrats to get things done.

Now, for a few specific recommendations about energizing government.

The filibuster in the Senate needs to be reformed or abolished. This device for delaying the passage of legislation, theoretically so there would be time for more consideration and debate has become a device to stifle debate and stop political action.

The filibuster's historical function has been to block legislation, especially legislation related to civil rights. The filibuster used to require Senators to stand on the floor of the Senate and talk and debate, or just read the newspaper, but to hold the floor to express opposition to a bill.

Today the filibuster has morphed into an easier delaying tactic where a single Senator can put a hold on legislation without ever going to the floor of the Senate. They can do it by phone. They block legislation by simply declaring their opposition, and, unless the Senate can get 60 votes on a cloture vote to end the filibuster, there is no way to get to a vote on the bill itself.

The filibuster prevents energetic government. It brings the legislative process to a halt. The filibuster is an anachronism of the past that serves no place in a Senate that is charged with dealing with the serious matters before the nation.

The filibuster is not in the Constitution. It is a Senate Rule. It could be abolished if there was the political will to do it. Right now that will does not exist.

The argument that the filibuster protects minority rights does not stand up to the historical evidence that it has been used primarily keep minorities of citizens from getting rights. So how do you define which minority is being protected?

Do we protect the minority in the Senate, or should we protect American Democracy and the voting rights of the entire nation, not just Senators?

Here is another way to re-energize Congress and bring more democracy to the House of Representatives.

Why not increase the size of the House of Representatives? Why not have smaller districts that represent only 200,000 or 300,000 instead of the 600,000 plus that each district now has?

We are a more populous, more diverse nation than at anytime in our history. We need that diversity in the House. This would not take a Constitutional amendment. The number of House seats is set by law. Congress could change it. The law has not been changed for 110 years, when it was set at 435. In that time the population of the United States has gone from 92 million to 333 million.

In 1911 when the number of seats in the House was set, women did not have the right to vote. It was Jim Crow America with blacks driven from polling places and from office-holding.

The United States has one of the smallest legislative bodies among the developed nations. The British Parliament has 650 members, representing 67 million citizens. The German Bundestag has 598 members, representing 84 million citizens. The French General Assembly has 577 members, representing 65 million citizens. Canada has a smaller parliament than our House of Representatives, at 338, but this is for only 37 million people.

We could energize democracy in our government and, perhaps, end gerrymandering (or make it more difficult) if we made the House more representative with more seats. Maybe we should change the Senate too. But that would take a Constitutional Amendment. A harder hill to climb, but possible if we are serious about expanding American democracy.

Finally, let me suggest one more way to re-energize government. I said I would get back to the Supreme Court. What I will suggest was tried once before, eighty-four years ago, and it was a big flop.

We do not need a Constitutional Amendment to change the number of justices on the Supreme Court. The number, like the number of members of the House, can be changed by law. When Franklin Roosevelt suggested the idea it was met with derision from Republicans and Democrats alike. FDR was fighting a conservative court of very old justices, all men, of course, who frequently declared the energetic actions of the New Deal Congress and the President as unconstitutional. That political disaster came to be called Court Packing. It was a bad idea, his critics said, because it politicized the Court, which was supposed to be outside of politics.

I do not subscribe to the notion that the high court is somehow higher than the other two branches, or less political. The Supreme Court is not detached from politics. Quite the opposite, the Supreme Court decides the hottest political issues of the day on a regular basis. There are plenty of examples of the political bias of the Court in cases as old as the Dred Scott decision of 1857 that said blacks could never be citizens, to the more recent case of *District of Columbia v Heller* (2008), that I mentioned earlier, which declared the right of militias to bear arms applied to individuals gun owners.

If the Supreme Court is supposed to be aloof from politics, why do appointees to the Court come from presidents of the United States with confirmation by Senators, the most political of creatures? This constitutionally prescribed process assumes that presidents and senators will always be neutral in approving the best candidates for the Supreme Court. Do you see neutrality in recent court appointees?

The number of justices on the Supreme Court has been changed for political reasons. The number started at 6, was lowered to 5 by outgoing president John Adams and his Congress, to keep Thomas Jefferson's incoming administration from appointing too many justices. Jefferson's Congress raised it to 7. It got to a high of ten during the Civil War, and in 1869 the law set the number at 9, where it remains to this day. We need a larger Supreme Court to deal with a larger, more diverse, more contentious nation. A court that can have a greater workload and handle more cases in a timely manner. Franklin D. Roosevelt considered

raising the size of the high court to as many as 15, and his Democratic Congress could have done that. While a serious flap at the time, FDR's court packing scheme did not keep Roosevelt from being elected president two more times.

The Constitution sets no requirements for members of the high court. Yet in recent times many of them have come from a narrow spectrum of Ivy League law schools. And every single justice since the first court have had law degrees or studied law. The court could use more diversity, not only in gender and race, but in citizens from other fields. Why not a court with a few great humanitarians, philosophers, scientists, medical doctors, maybe even a historian? Why all lawyers?

Let me conclude by thanking you for your kind attention, and for your interest in the programs of the Robert C. Byrd Center for Congressional History and Education at Shepherd University. Our mission is to advance representative democracy by promoting a better understanding of the United States Congress and the Constitution through programs and research that engage citizens.

I hope I have succeeded in engaging you on this eve of Constitution Day.

This lecture, including the audience Q&A, can be viewed on YouTube at:
<https://m.youtube.com/watch?v=ESVtxychi5M>

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