

**THE CONSTITUTION TO END ALL CONSTITUTIONS:**

**THE DESCENT OF THE AMERICAN FOUNDING  
INTO THE TWENTIETH CENTURY**

**or**

**The Perfect State is Not Ideal**

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I have a thesis regarding the American Constitution, which is, to express it in George Washington's words, "that better still may not be devised."<sup>2</sup> You may quite conceivably have divined such a likelihood from the announced title of this work. On the other hand, that title is intentionally ambiguous, playing the idea of decline off against the Darwinian notion of the accidental and adaptive. In the latter case my attention focuses on the problem of distinguishing the merely evolutionary from the genetic or developmental—from the teleological. In the former case the ancient idea of a Golden Age claims my attention, casting as it does all subsequent history in the mold of descent as opposed to ascent and conveying a sense of inevitable decline. In science a Darwinian reversal altered our orientation to the past by offering us "man the adapter of his environment" (by means of reason) as opposed to man adapting himself to it. My thesis suggests that an equivalent reversal has not occurred, and should not occur, in the realm of politics, albeit no inevitable decline need follow. In constitutional terms I would offer the image of institutions working to shape a people to their original goals, rather than changing fitfully to reflect a people's occasional goals. To have said so much already is also to have exposed my thesis to ridicule, for few students of the American founding are unaware that something like the Darwinian reversal in science does indeed prevail in standard interpretations of American constitutionalism. At length I shall distinguish the true force of American constitutionalism from those casual if pervasive opinions we hold about it. For now, however, I cannot duck the necessity to explain why, if no better Constitution may be devised, such learned critics as Gordon Wood, among many, might imagine that they could come up with a superior formula. That task, in turn, will be undertaken best when we have recast the terms of our discussion into the actual language of contemporary politics, for which we have a suitable vehicle to hand.

We need to situate ourselves firmly in the twentieth century in order to give full measure to our consideration of the descent of the founding—indeed, even to establish that it has descended to our day. *INS v. Chadha*, the "legislative veto" case, is appropriate for that on two counts. First, it is the most portentous judicial attempt to settle outstanding political disputes since *Dred Scott* and perhaps the most far-reaching attempt at constitutional interpretation since *McCulloch*. Secondly, it offers the clearest enunciation of the twentieth century version of the debate over the Constitution's descent. The majority opinion (by Chief Justice Burger) and the

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<sup>1</sup> The original version of this paper was delivered December 3, 1983 at "A Celebration of the Constitution: The Constitution of 1787 in a Changing World," University of St. Thomas, Houston, Texas.

<sup>2</sup> "Washington's Discarded Inaugural Address," fragments collected and edited by Nathaniel E. Stein, *Manuscripts*, x, 2, spring 1958, p. 12. The specific reference is to the constitutional design, the separation of powers and checks and balances, which are the primary focus of this paper. My thanks to Eldon Alexander for bringing this to my attention.

major dissent (Justice Byron White) square off to contest how far evolved administrative arrangements in the national government may acquire the certified approval of the Constitution via usage and prescription, and how far any practice of government, however desired or desirable, must conform strictly to formal provisions of the Constitution.<sup>3</sup>

### **The Legislative Veto—A Model of Constitutional Confusion**

When the Supreme Court of the United States struck down the legislative veto, it brought to an end one era of constitutional interpretation. At least, one might say, the Court's *INS v. Chadha* decision attempted to shift the focus of twentieth century constitutional interpretation. Yet, this point has attracted little attention. To this point the decision—breathtaking in its possible significance: more daring than *Dred Scott* and more comprehensive in scope than even *McCulloch*—incongruously draws little more than silence from the jurists and commentators one would have expected to take note of it. After a brief flurry of public agonizing, the general consensus seems to be that this bid for constitutional interpretation would be best left ignored. This result differs profoundly from *Chadha's* forerunner.

Thirty years prior to our Constitution's centennial anniversary, the *Dred Scott* decision underscored the significance of the question: can the American Constitution endure? It sought to make the rule of constitutional interpretation—judicial review—the ultimate arbiter of the meaning of the American way of life. By attempting so bold a maneuver that decision entailed a bloody, fratricidal war on the Union of the American States.

In a deeper sense, however, we may say that the Constitution itself—its form and substance—entailed that war upon its people, both by appealing to that Court's ambition to resolve once-for-all questions about the nation's moral foundation<sup>4</sup> and also by a conscious balancing of profound tension between interpretation and form or structure as competitors for sovereign influence. We remain today divided by the same terms upon which the Taney Court foundered. That makes every discussion of the meaning of the Constitution a contribution to the political debates of its era.

A century ago the nation declared the judgment of the Court insufficient to establish the limits of political sovereignty. In the context, this meant that no office of state, per se, could authoritatively settle questions of political sovereignty. That awful power was reserved to the people, even when its exercise should take on the aspect of revolution instead of the more moderate amending procedure. For some fifty years past, until the *Chadha* decision, the Court self-consciously reflected this accommodation by bending over backwards to avoid ruling on the constitutionality of acts of Congress. The lack of any office of state as the ultimate voice of the

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<sup>3</sup> In the past generation majoritarians like James M. Burns dubbed this the “deadlock of democracy” to express their frustrations with constitutional limitations. It is their view which is at stake in the case, *Immigration and Naturalization Service v. Jagdish Rai Chadha*, 33 Daily Journal D. A. R. 1657.

<sup>4</sup> “...the court majority appears incredibly unrealistic—indeed so foolish as to pour oil rather than water on fire.” Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), p. 3. See especially chs. 11-16. Cf., Henry Neville, *Plato Redivivus*, ed. By Caroline Robbins (Cambridge University Press, 1965), p. 87: “nothing is more certain than that politic defects breed moral ones.”

Constitution led ineluctably to the question: Does the Constitution have a voice of its own? Supreme Court Justice Lewis Powell doubted that it did, for he openly spoke of the Court settling questions of political right without a constitutional rule to follow and on the basis of the judge's own predilections.<sup>5</sup> Against this background, the Burger Court's legislative veto decision, seeking an absolute constitutional rule, indeed *not* to guide but to obviate the need for interpretation, seems iconoclastic. It argues an independent and enduring basis for the Constitution's sovereign authority. It does not, however, re-establish in any office of state an authoritative voice of the Constitution. Thus the essential debate as to the *meaning of the Constitution* remains unresolved even while the Constitution is appealed to as an absolute rule of political right.

### **Law Versus Opinion—The Constitution's Defenders:**

They who hold that the decisive form and content of the regime shift from era to era, agreeably to shifting authoritative interpretations of the Constitution, stand on one side. They have behind them an impressive and powerful argument. Because they believe correctly that every society of any form takes its existence solely from the content of our minds, they rightly regard *that* opinion whereby a country exists *and* obliges us as the true constitution. Accordingly, they argue that the interpretation of our opinions is, in the decisive sense, the Constitution.<sup>6</sup> The sociological analyses of the Court in *Plessy v. Ferguson* expressed the mind of the nation in 1896 no less than the divergent sociological analyses of the Court in *Brown v. Board of Education* expressed the mind of the nation in 1954. Yet, do not the two constitutions differ greatly?

On the other side there stand exponents of the idea that the very form in which the Constitution is originally established brings to life within and among us habits and opinions from which we can escape only by rejecting the Constitution itself. This argument is difficult to sustain. It requires that we accord the Constitution independent agency in shaping our characters and opinions. The argument implicitly challenges how far we may attain rational and objective distance on our Constitution. It causes the Constitution to live not as the reflecting chimera of our own undetermined whims but as the haunting presence of a benign spirit. In a skeptical age such an argument needs every authority, and reason besides, to establish itself. Its proponents therefore entrench themselves as the legitimate possessors of Marshall's dictum: "It is a Constitution we are expounding."<sup>7</sup>

We are fortunate. We find the latest manifestation of this last position, along with the struggle between the two views well framed in the *Chadha* opinions. While that decision is not less ambitious than *Dred Scott*, this Court attempts a surrender to constitutional form<sup>8</sup> where

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<sup>5</sup> Harry Chlor, "An Interview with Justice Lewis Powell," *Kenyon Review*.

<sup>6</sup> That is, the opinions of the majority of course. This position is majoritarian by definition. To consider how near truth it lies, see H. V. Jaffa, *Equality and Liberty*, "The Case Against Political Theory," p. 210 (New York: Oxford University Press, 1965).

<sup>7</sup> *McCulloch v. Maryland*, 4 Wheaton 316 (1819)

<sup>8</sup> It goes without saying, that where noting more than the court's *ruling* articulates this ambition, the Court in fact sustains *only* the authority of judicial review. Nevertheless, we may investigate the principle expounded.

Taney ventured free-form constitutional interpretation. It is not the purpose to present an exhaustive discussion of *Chadha*. The focus of this paper is the descent of the Constitution in the broader sense. Accordingly, I shall abstract from the case history and precedential adjudication except where directly relevant. Nevertheless, I find it advisable to present a fairly detailed summary, in the expectation that the case itself will for some time remain unknown.

The meaning of separation of powers is the obvious subject of *Chadha*. The relationship of separation of powers to checks and balances comes next in order. Then follows, somewhat less obviously, the question of the nature and function of the legislative body in a *national* democracy—that is, one in which the problem of federalism or states’ rights has been already legally resolved. The important question to emerge is this: Can a national Congress effectively debate and determine policy in the circumstance where its plenary authority is unchallenged? A final and still less obvious dimension remains: Is it possible in modern circumstances to concede the full extent of possible executive authority, subject only to explicit constitutional, legislative, and judicial restraints, without running into arbitrary and unaccountable determinations of social policy?

### **The Appeal of *Chadha*:**

The case arose from a challenge to the “Immigration and Nationality Act,” which provided for the deportation of aliens residing within the United States without admission and also for the attorney general to suspend deportation enforcement in exceptional cases. The attorney general was further required to report all suspensions to the houses of Congress, and the suspensions became permanent only when neither house objected within a stated period. *Chadha*, joined by the Immigration and Naturalization Service, challenged the constitutionality of action by the House of Representatives to dissent from the hardship suspension in his case and thus effectively to order his deportation from the United States. An Appeals Court decision ruled that the one-house veto violated the separation of powers and set the stage for full Supreme Court review of the principles involved. To reach its ultimate ruling in the case the Court had to wade through several opportunities to side-step directly confronting the statute. Questions of jurisdiction, severability,<sup>9</sup> standing, prior judgment, and Court of Appeals jurisdiction would or could all have restrained the Court’s view to the statute rather than the Constitution. The questions of adverseness and justiciability also might have served to limit the judgment short of the eventuality: the veto provision is unconstitutional. Plainly, the Court wished to address the substance of the matter—a fact further indicated by its extensive explications of passages from the *Federalist Papers*.

The ruling itself consists largely of the claim that the legislative power (action) is constitutionally confined to a single channel (process); namely, passage of a measure through the two houses of Congress plus the executive’s consent (or an over-ride). This, the Court held, is “integral to the constitutional design of separation of powers.” The thrust of the ruling confines law-making to deliberating; that is, it does not merely oppose the legislative branch’s interfering in enforcement activities *but it regards the inter-branch communications designed in the Constitution as the heart of the deliberative process* and finds the legislative process subordinated to that deliberation.

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<sup>9</sup> The challenge applied to a part, not the whole of the statute. When what remains may fully operate as law severability is established.

The Court returned to the original *McCulloch v. Maryland* rule which began the historical elaboration of broad Congressional powers with its interpretation of the “necessary and proper” clause.<sup>10</sup> The Court added to that 1819 decision the proviso that “necessary and proper” in fact means *implicitly* as well as explicitly “constitutionally permissible.” That a legislative initiative might qualify as “necessary and proper” it must be capable of surviving a challenge of unconstitutionality. In this case the Court found the presentment clauses<sup>11</sup> governing passage of legislation and presentation to the executive to impose limitations on methods available to Congress for assuring accountability in the bureaucracy. Democratic governing ought not to be gauged by objectives of convenience and efficiency. The Court majority rejected Justice White’s “useful political invention” as an “utilitarian argument.” For, it maintained, the Constitution not only “defines powers” but “sets out how” they are to be exercised. And the “how” of executive and legislative relations is “explicit and unambiguous,” not to be subjected to “evolving interpretations” in the style of common law juries.<sup>12</sup> The Court interpreted those provisions not as *describing* but as *implementing* the separation of powers. Therein lay the key to this decision and, indeed, to the question of this paper; what is there in the Constitution that is meant to endure?

### **The Case for the Majority:**

What it means to *implement* the separation of powers, presumably, is that the advantage to be gained therefrom derives rather more from the specific operation than the mere structure. The integrity of the principle seems not to lie so much in the formal designation of separate legislative, executive, and judicial authorities as in the consequences of the actual powers they wield— as if the same powers thus separated acquire a distinct character and produce differing results when arranged along other lines. We will return to this central problem later in this paper.<sup>13</sup> For now it suffices to inquire what character and what result the Supreme Court expects from separation of powers.

As noted, the Court turned primarily to the *Federalist Papers*. Actually, they engaged in perhaps more in-depth analysis of those essays than any prior case has given place to, a thing striking in itself. Here, at least, it was rather the reason than the authority of the founders they invoked. They turned initially to Justice Story’s version of that reason:

In the first place, there is a natural tendency in the legislative department to intrude upon the rights and to absorb the powers of the other departments of government. A mere parchment delineation of the boundaries of each is wholly insufficient for the protection of the weaker branch, as the executive unquestionably is...<sup>14</sup>

To modern ears trained by scribes such as James M. Burns and Arthur Schlesinger, Jr. it is necessary hastily to insist that a Court in 1983 might *still* regard the executive branch as by nature weaker. In our own politics it may a go a long way to identify the source of concern in

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<sup>10</sup> “If a challenged action does not violate the Constitution, it must be sustained.” *Chadha*, 1660.

<sup>11</sup> Art. I, Sec. 7, cls. 2, 3.

<sup>12</sup> Cf. W. Nelson, *Americanization of the Common Law* (Cambridge, Mass.: Harvard University Press, 1982).

<sup>13</sup> See the final section, “Rule by the Many—A Constitutional Strait-Jacket and Liberation for Man.”

<sup>14</sup> Joseph Storey, *Commentaries on the Constitution of the United States* (Boston: Charles Little and James Brown, 1851), vol. I, p. 615.

*Chadha* merely to reflect the extent to which it has become necessary for American presidents to “call on the people” in every “crisis.”

There is to all appearance some correlation between an actual decline in presidential power and the increase in popular presidential influence, and it seems further to correspond with the manifold increase in opportunities for legislative intervention in administration. The key difference here, of course, is that legislative intervention usually centers on the committee level in Congress, at which level specific interest groups have enormous impact. Thus, under the one-house veto, coupled with broad delegations of legislative authority and a minimum of programmatic direction from Congress, interest groups can far more effectively design and implement “legislation” for themselves without taking into account the nation as a whole. To the same extent, therefore, the executive must have less control over administration, save where he can marshal apparent popular and nationwide opinion on his side. In the case of President Reagan, for example, the ultimate compliment, “the Great Communicator,” has ironically been the strongest evidence of the erosion of power in the presidency. Presidents with real power do not have to preach so much (Washington remains the ultimate model for this). To all appearances, the Supreme Court was sufficiently struck with this reasoning that it took the bold step of seeking to restore in one fell swoop the full range of presidential power which had been eroded over a period of fifty years.

The several analyses of the *Federalist* (mainly essays #51 and 73, as per Story) give substance to this analysis. “Ambition checking ambition” is interpreted as supplying the constitutional means of self-defense in coordinate bodies. For the ambition—and the self-defense—to come into play, the fighters must be confined to acting within the prescribed ring, under such handicapping as prescribed. Further, the Court found in the mechanisms a substitute for relying upon virtue, or, what Madison called supplying the “defect of better motives.” They also include the goal to “divide and disperse popular power” for liberty’s sake as necessary to the constitutional process. What results is an overall analysis that “a single, finely wrought and exhaustively considered procedure” actually can produce deliberation. The Court, besides enhancing presidential power, also seeks to restore deliberation to Congress. By effectively confining legislative attention to a “single shot” at each statute (the legislative veto leaves the barn door open), the Court would encourage deliberateness as well as deliberation and the full debate which must occur when Congress cannot side-step tough questions with saving clauses.

Finally, the majority fully embraced the obvious consequence of its position: the founding design intended to impede even desirable legislation or other governmental action where acting would require exceeding the limits of authority. That is why the emphasis lay upon implementing rather than describing the separation of powers: the implementation does involve some cost. The separate powers are “functionally identifiable” rather than isolated. One presumes the action of each branch to fall within its own charter—that is, legislative action should be primarily legislative, executive action primarily executive, and so forth. The actions of Congress are “determinations of policy that Congress can implement in *only one way*: bicameral passage followed by presentment to the President.” Thus, the Constitution imposes a procedural strait-jacket, an absolute rule, to the measure of legitimate legislative action, which may not be altered by ever so little for even salutary purposes. It is precisely these “certain prescribed steps” rather than policy outcomes which “protect the people from improvident exercises of power.”

There is unmistakable expression [by the framers] of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

### **Dissent—The Constitution Belongs to Us the Living:**

The *Chadha* decision constitutes a far-reaching political catechism. It establishes conditions of political acceptability—threshold requirements—which require us to regard the Constitution as a complete expression of the *conditions* necessary to safeguard liberty. Given the history of constitutional interpretation in the twentieth century, it is not difficult to comprehend how radical a doctrine this is, despite the irony that in our time iconoclasm comes in the guise of extreme reverence for the sacred origins. One cannot be surprised to witness Justice White’s eloquent dissent and plaintive protest:

The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting.

No amount of catechizing on the sanctity of the separation of powers will shake Justice White from the firm conviction that the Constitution meant to frame a government proportioned to the dimensions of ordinary human beings.

White manfully argued against the majority’s inclination to settle upon an undeviating interpretation of the work of the Constitutional Convention in the areas of separation of powers and legitimate governmental powers. For White the grace and charm of the Constitution lay in its tensile resilience beneath the changing hands of passing generations bred to a spirit of exploration, adventure, and productive exertion. A constitution designed to be effective, he urged, must also be designed to sustain innovation. How, he demanded to know, if the legislative veto were so flagrantly unconstitutional, how could Congress have used it so much?

If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or ‘quasi-legislative’ in character, I cannot accept that Article I—which is, after all, the source of the non-delegation doctrine—should forbid Congress from qualifying that grant with a legislative veto. [this] disagreement stems from the silence of the Constitution on the precise question: the Constitution does not directly authorize or prohibit the legislative veto... I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half-century has the complexity and size of the Federal Government’s responsibilities grown so greatly that Congress *must* rely on the legislative veto as the most effective if not the only means to insure their role as the nation’s lawmaker.<sup>15</sup>

I have quoted from White at length in order to assure the reader that the subject of this paper is no mere caricature. The genuine point in dispute in *Chadha* is precisely the question of what there is in the Constitution of 1787 which is enduring? Is the rule of constitutional interpretation in the twentieth century, or any century for that matter, properly an absolute rule applied without respect to evolved political tastes or is it a reflection of that evolution? Justice White applied the dispute to contemporary politics:

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<sup>15</sup> Emphasis supplied.

I regret that I am in disagreement with my colleagues on the fundamental questions that this case presents. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.

Seeing it in its full significance sharpens our focus. Justice White regrets the fall of the "modern administrative state," meaning mainly the edifice of New Deal legislation. Let's be more precise: we said before that the Court sought two objectives: first, to enhance presidential power; and second to force Congress to deliberate as it has done only rarely in recent years. Justice White sees more sharply than we: he remembers that the President at the moment is Ronald Reagan; the enhanced power for Reagan, coupled with the fall of the modern administrative state, means nothing less than Reagan's opportunity to supplant Franklin Roosevelt. In other words, White seems to believe that the Court believes that a Congress which reconsiders the entire edifice of New Deal legislation, actually deliberates about it, will produce rather a new "look" for administration in the United States. This puts a new face on matters, for we may want to ask, which position now seems reverential, which innovative? And we would pose that question, if the policy question were our concern. But we rather seek to learn what there is that endures in the Constitution.

### **Can the Constitution Speak for Itself?**

To return to the Constitution, we may note that the Court majority has a response to Justice White. It is that the aim of the Constitution is stable, responsible government. On that ground they reject what they read in White as an appeal for institutionalized radicalism. The problem is very like that which divided Hamilton and Washington, on the one side, from Jefferson and Madison, on the other side, in the first administration under the Constitution. Stated as simply as possible, the Federalists maintained that the Constitution erected a political system founded on public opinion and the institutions of which, once established, constituted the very expression of public opinion. Hence, great respect and deference was owed to the offices and officers of the United States in their capacities as exponents of the public mind.<sup>16</sup>

The Republicans by contrast maintained that the Constitution erected a political system founded on but therefore subject to popular opinion. Accordingly, the offices and officers of the United States owed special deference and respect to popular opinion, and it would be appropriate to provide a special conveyance outside of government for the expression of that opinion.<sup>17</sup> The struggle over the question, whether the opinion of the people prevailed *in* or *over* the government gave rise to that party debate which to this date provides the pure form of all political disputes in

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<sup>16</sup> Fisher Ames, "Against Jacobins," in *Works of Fisher Ames*, edited by W. B. Allen, (Indianapolis: Liberty Classics, 1983), vol. II, p. 980: "The sober sense of the nation, collected in the regular way prescribed by the wisdom of the Constitution, is the fairest way and the only one that can be relied on, is opposed, and instead of it the will of a faction is set up in defiance of the sovereign will of the nation." This essay is the first full expression of the Federalist principles, but it remained unpublished until now. The ultimate refinement of this view is, of course, Washington's "Farewell Address."

<sup>17</sup> See James Madison's "Virginia Report" of 1799, and his party press essay, "A Candid State of Parties," (*National Gazette*, Sept. 1792), in which Madison establishes the principle that, how the government shall be *administered* is as important a question as how it shall be constituted. Men who agree as the latter may yet disagree as to the former.

the United States. As in the present case, then, the question is really how far the Constitution guides, forms the people and how far the people form the Constitution as they wish. The Court majority takes the former view, Justice White the latter.

What are the chances to incorporate *both* positions in a single view of the Constitution as an enduring principle of government? Or, what chance for institutionalized radicalism within permanent institutions? This question is less unexpected than may appear. Justice White's liberal perspective is not so far removed from certain conservative views. Forrest McDonald puts it thus:

Conservatives believe that social continuity is crucial and that, while a good society must allow for the dignity of its individual members, the needs of society itself are primary.<sup>18</sup>

So long as the absolute view of the Constitution aims at protecting individual liberty above policy outcomes or principles of efficiency in governing, it is opposed both to liberal and conservative inclinations.<sup>19</sup> That is, the absolute view frustrates ideas of prescription and tradition no less than it does ideas of innovation and radical legislative initiative. Let us see why this may be so.

### **The Governing of a Free People:**

The leap beyond the apparent liberal and conservative agreement lies in the reformulation of the absolute view. We have referred to it as the protection of individual liberty. For the framers the same objective could be phrased as the guarantee of self-government. That is, they held that whatever else the society might aim at, it must eventuate in self-government. And that phrase has a curious double meaning, in the original. It is individual as well as social, and could be accorded social priority only on the strength of its recognition in individuals under the form of the consent of the governed.<sup>20</sup> It is a leap beyond our difficulties because it lands us amidst non-instrumental reasons for the limitations on the exercise of governmental power which have an intrinsic value apart from serving as obstacles to tyranny.

The founders accepted the necessity to govern. They did not, however, see any necessity to establish an independent, powerful authority capable of governing on its own. George Washington's "Farewell Address" sets the case elegantly: his own work was completed only as his own, founding authority receded and the unquestioned authority of the people emerged. Washington did not mean the suffrage, or even the people's control over the institutions of

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<sup>18</sup> Forrest McDonald, "How Conservatism Guided America's Founding," *Imprimis*, vol. 12, no. 7, July 1983.

<sup>19</sup> Where White believes that a constitution must allow for government to evolve along unforeseen, even irrational lines, and prescription therefore crowns the "latest" constitution the authoritative one, controlling any prior will of certain individuals in a departed generation (much as, for Hobbes, "choice" is the last in the deliberative succession of appetites, so too would the constitution be the last appetite of the most recent majority); then conservatives *correlatively* believe that societies and governmental forms evolve over long, immemorial periods and irrationally, and that what is thereby produced is authoritative, controlling any future will of individuals in a given generation.

<sup>20</sup> I have noted elsewhere that this is for the framers not a mechanical principle but a moral principle, predicated on the identification of self-mastery or self-rule as the *decisive* human good. Thus, political life which does not aim to assure self-rule in the highest degree possible fails the test which mattered to the framers: to secure the unalienable rights to... Cf., "A Guide to the Reading of *Uncle Tom's Cabin*," *Claremont Journal of Public Affairs*, vol. 5, 1978, p. 2.

government. He rather referred to a plenary authority outside of yet somehow working through the Constitution. It lay in the sphere of self-governing which Washington identified as the sphere of “private morality” in his first inaugural. The true limitations on the power of government are the limitations the people sustain over themselves, as part of the affirmation of the priority of self-governing. Within the measure of that priority, the institutions of government have room for innovation. Indeed, Washington’s principles suggest an inherent connection between self-government and institutionalized radicalism; that is, he expected the consistent and fervent pursuit of justice and humanity.

I would maintain that only a permanent constitution with unbreachable bounds can sustain the innovations occasioned by serious self-governing. Such has been, for example, the relentless expansion of the suffrage in the United States. Had the powers of government materially changed along with each stage in this process, the Constitution had long since been changed beyond recognition. We may make that statement with the confidence born of historical examples beyond enumeration (Rome is but the best) and because of the sufficiency of the theoretical account of the cycle of regimes offered by Aristotle.<sup>21</sup> The changes described by Aristotle may in the decisive sense be regarded as suffrage changes or revolutions. What accounts for this persistence through change has much to do with Washington’s expectations and the actual intentions of the design of American institutions.

It is interesting to note that the *Chadha* debate in fact failed on both sides to hit upon the actual basis of the Constitution. The connection between the constitutional arrangement and self-governing was not even hinted at, except, insofar as liberty was to be the mere result of the separate powers checking one another. The Court’s analysis of *Federalist* fifty-one remained at the surface, however much it advanced beyond past practice. It failed to note in that essay the intricate discussion of the true rulers in the United States—the majority—and the means employed to confine their activities and dealings so as to obviate the need for special privileges (or suppressed regimes). In short, the Court began and ended with a set decision.

### **Foundations of Self-Government:**

I would not make over much of the Court’s oversight, for they are not alone in their reading of the founding. It is a curious historical oddity of the past two hundred years that the idea of an absolute separation of powers persists despite irrefragable evidence to the contrary. Critics say Montesquieu invented the idea. He specifically rejected it. Opponents of the Constitution said that its drafters had violated the idea. James Madison proved that no one ever advanced such an idea. The *Chadha* decision actually ruled that Congress *must share* legislative power with the executive in accord with the Constitution. Yet, one contemporary critic attacked the decision as calling for “a rigid separation of powers.”<sup>22</sup>

There is much room for confusion. Some relief from confusion may be sought in the observation that our “experts” perpetuate an obvious historical error with a certainty which would suggest they received it from revelation. However comforting it may be to reflect that the teachers are as ignorant as the students, it is nevertheless well to reflect also that we can ill afford to leave the meaning of the Constitution to confusion. Clarity about the Constitution and the intentions of the founders is the precondition for clarity about the social and political capabilities of our political system.

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<sup>21</sup> *Politics*, Books III-IV.

<sup>22</sup> Bernard Schwartz, “The Legislative Veto—Now that It’s Gone,” *New York Times*, June 30, 1983.

To place this analysis on the firmest ground, I shall return to the beginning—the source of our difficulty. As there is no evidence anywhere outside a few state constitutions that anyone ever argued for an absolute separation of powers, so too is it difficult to find a historical basis for the view of the Constitution as an evolving instrument of government. These two historical errors are in fact closely linked, and the balance of this paper seeks to portray those linkages in such a way as to account for the erroneous impressions conveyed by such excellent scholarship as that of Wood and Gwyn.<sup>23</sup>

The claim that the historical basis for the evolutionary view is obscure reposes on the best testimony of the leading founders. It occurred in the past year that a jurist from the United States Court of Appeals, D. C. Circuit, made a presentation at a seminar in which he at length elucidated the view of the Constitution as a living, changing entity adapting to the needs of changing generations. After many exchanges and explorations one student, who had done some recent reading in the founding, addressed a question to the jurist. Why might it be, he queried, that, if the Constitution were designed to be a changing instrument, the framers so nearly universally spoke of it as enduring, lasting, permanent, a last best hope? The honest jurist paused, pondered, and at length confessed that he had no idea why. The fact is, he said, he had never thought about it!

What, then, do the founders say about the Constitution and their intentions in regard to it? What comes now to be said is not meant to be iconoclastic or excessively pietistic. I readily acknowledge that in every era of human history hitherto the greatest minds have bent their energies to the task of reforming their countries' institutions, moral and political. If, however, the founders lay claim to surpassing achievement in new modeling human institutions,<sup>24</sup> we require to acknowledge that claim even at the possible cost of diverting our attentions from ideas of "further improvements." To hear the founders of the last age as they meant to be heard, I shall set the stage in terms of expectations to which they were accustomed.

First, their ideas of the "work" of mankind were no narrower, and perhaps somewhat broader, than such ideas ever had been. The emergence of new political philosophies greatly influenced their assessments of what was possible and what was not. Nevertheless, they always remained informed by a generous understanding of the constitution of humanity. Even the brash Gouverneur Morris, who boldly asserted in the Constitutional Convention that not liberty but property was the object of government, had considerably to refine his view once it emerged clearly that slaves were a politically relevant property holding.<sup>25</sup> Not many delegates, perhaps not even Morris, joined James Wilson to declare that the "elevation of the human mind" was the noblest end of government,<sup>26</sup> but they all did agree finally that wealth had no claims which could be articulated apart from the claims of humanity. To that extent, accordingly, they reflected the lesson George Washington had imbibed from Addison:

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<sup>23</sup> Gordon Wood, *The Creation of the American Republic, 1776-1787* (New York: W. W. Norton & Company, 1972 [1969]); W. B. Gwyn, *The Meaning of the Separation of Powers* (New Orleans: Tulane University [The Hague: Martinus Nijhoff], 1965).

<sup>24</sup> James Madison, for example, made such a claim in 1792, in his essay "Universal Peace," for the *National Gazette*, and later reinforced it in the essay, "Spirit of Governments." In 1793, the same point explicitly animates his "Helvidius" #1.

<sup>25</sup> James Madison, [*Records of the Debates in the Federal Convention of 1787*, edited by Max Farrand (New Haven: Yale University Press)], July 5, 1787.

<sup>26</sup> Madison's *Notes*, July 13.

To make man mild,  
    and sociable to man;  
To cultivate the wild licentious savage  
    With wisdom, discipline, and liberal arts  
The embellishments of life;  
    Virtues like these  
Make human nature shine,  
    reform the soul  
And break our fierce barbarians into men.<sup>27</sup>

That same lesson was apparent to American colonials, well before the modern notion of freedom had come to be a term of mediation within the traditional commerce between virtue and politics. Not only did they accept the charge to “break our fierce barbarians” into men, but they in fact expressed that work as a constitutional endeavor from the earliest possible moment. Pastor Robinson’s bon voyage to the Mayflower congregation consisted not only of prayers for their salvation but of well-aimed advice about their civil constitution.<sup>28</sup> In working out the terms of their endeavors the Americans in Massachusetts came early to note differences in kind—not just degree—between their constitution and that of the metropolis.

The best example I have found of this is in the 1646 “Remonstrance and Petition of Robert Child, and Others.”<sup>29</sup> The petitioners sought redress of injuries they thought they suffered in their rights as Englishmen at the hands of the General Court of Massachusetts. The dispute arose over the notion that all the King’s subjects had the right to exercise citizenship in the colony on grounds harmonious with the exercise of rights in England. The petitioners, however, found that they “cannot, according to our judgments, discern a settled forme of government according to the lawes of England, which may seem strange to our countrymen, yea to the whole world, especially considering we are Englishmen. Neither do we so understand and perceyve our owne lawes or libertyes, or any body of lawes here so established, as that thereby there may be a sure and comfortable enjoyment of our lives, liberties, and estates, according to our due and naturall rights, as freeborne subjects of the English nation... Neither can we tell whether the Lord hath blest many in these parts with such eminent politicall gifts, so as to contrive better lawes and customs than the wisest of our nation have with great consideration composed, and by many hundred yeares of experience have found most equall and just; which have procured to the nation much honour and renowne among strangers, and long peace and tranquility amongst themselves.”

Quite early, then, the Americans were suspected, if not suspect. They were viewed as setting their judgment against the weight of tradition, even at the risk of endangering the secure and comfortable enjoyment of the natural rights to life, liberty, and estate. Well before the impact of Hobbes and Montesquieu, in a word, the full impact of European (including Scottish) Enlightenment, and even the bulk of English republicanism, the terms of constitutional debate were set in America, with only one significant exception. The exception involves the question of ultimate sovereignty: who shall have the last word? The General Court, like John Locke later,

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<sup>27</sup> Joseph Addison, “Cato,” I, 1.

<sup>28</sup> See the “Letter of Pastor Robinson to John Carver, Pilgrim,” in *Plymouth Church Records*, vol. I.

<sup>29</sup> See the “Remonstrance and Petition of Robert Childs, et.al. to the General Court of Massachusetts, 1646,” published in Thomas Hutchinson’s *Collection of Papers*.

stuck on legislative supremacy, because it could not conceive another arrangement. The claim involved in the citation of Madison<sup>30</sup> above is that this is where the breakthrough came.

The exception comes out clearly in the General Court's reply to Robert Child. They acknowledged his complaint about the civil incapacitation resulting from the practice of inappropriate religions and also their refusal to support a bishop in the "true church." They even pointed with pride to their indulgence of the founders of Rhode Island, who were allowed to emigrate there and to undergo the "naturall corruption" to which such "liberty and equality" were known to be subject. In Boston, though, the General Court held fast for breaking our barbarians by "the ordinary means of instruction," as a precondition for the civil and ecclesiastical "peace and prosperity" to which all aspired. This firm stand followed a lengthy review of the petitioners' arguments about the civil constitution, in which review the General Court distinguished itself by considering the constitutional question seriously. The review has two parts. In the first, they array the petitioners' arguments against themselves. They thence conclude that their "manifest contradictions" have overthrown their case, in light of which "we might have throwne out their petition, as not worth our further trouble..." Ever liberal and indulgent, however, the General Court proceeded to what must rank as one of the most singular productions in all human history.

We will therefore, for the petitioners more cleare conviction, and further satisfaction to all the world, examine their particular grievances, and other passages which we meete with in their remonstrance, etc. and *give such account of our government and administrations both civil and ecclesiastical, as none shall be able (we hope) to contradict the truth thereof.* (Emphasis added)

This unprecedented and magnanimous appeal to reason—exceeding even the Declaration of Independence's faith in a "candid world"—then sets forth the Court's claim to a "settled government." They claim affinity with the fundamental laws of England "(takeing the words of eternal truth and righteousness along with them, as that rule by which all kingdoms...must render account)," and exemption from patterning their "positive lawes" after England's due to differing necessities. Then they proceed to set forth in parallel columns, article by article, the fundamental laws of England (collected from Magna Charta and the Common Law) and the "Fundamentalls of the Massachusetts" (collected from the Body of Liberties, the Charter, and custom). Throughout this production they sustain their case: their government closely resembles that of England. Nevertheless, they clearly affirm their independent authority.

Here is where the important exception at length emerges. The Massachusetts's General Court in 1646 ended up where Locke will end up in 1680: they affirm parliamentary supremacy. The first article under the "common law" column reads: "The supream authorities is in the high court of parliament." This anticipation of the settlement of 1688 would not so necessarily offend Robert Child as the parallel column under the "Fundamentalls:" "The highest authorities here is in the General Court, both by our charter, and by our own positive lawes." In reading this we are torn two ways. We wish to know if already by 1646 some really did wish to exclude parliamentary authority over internal matters. Our purpose in citing this is quite different, however. Finding an indigenous precursor to Locke is significant here solely because it shows that, while every other question of the Revolution was present to the mind of the General Court, and in principle resolved, the one difficulty in Locke which the Americans required to surpass

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<sup>30</sup> Note 25.

was the identical difficulty in the mind of the General Court: both regarded the representative legislature as supreme!

The story of the American Revolution begins with the story of the derailing of the English Revolution, which Montesquieu described as,

a lovely enough spectacle in the past century, to see the impotent efforts of the English to establish democracy among themselves...since the spirit of one faction was repressed only by the spirit of another, the government changed ceaselessly. The astonished people searched for democracy but found it nowhere. Finally, after many movements, shocks, and shake-ups, it even became necessary to settle on the government which they had proscribed.<sup>31</sup>

The Restoration was rather the result of the derailing than a derailing itself. The true derailing takes expression in the Act of Parliament, “Declaring England to be a Commonwealth,” May 18, 1649. In that Act Parliament was declared to be the “supreme authority of this nation.” And no one, not Roundhead, or Leveller, or Digger, or the Lord Protector, could ever arrive at a suitable formula whereby the people might supplant the Parliament without the utter destruction of order and government. All believed stable government to depend upon what Madison later called “a will independent of the society,” the institutional foundation of tyranny. Even after the second Revolution of 1688, this fundamental tenet remained the sticking point of British republicanism, ultimately codified as permanent principle by Blackstone on the very eve of the singular American advance beyond this dilemma.<sup>32</sup>

There is a connection between legislative supremacy and the General Court’s determination to man the barrier to vice. This does not show up immediately in Locke’s version: the form of government depends upon the placing of supreme power, which is the legislative; the people appoint the form of government by establishing the legislature and appointing its members; the society holds the supreme power, not in any form of government, but only in the absence or dissolution of government; and in society under government all powers must derive from and be subordinate to the legislature.<sup>33</sup> This argument in Locke is the basis for the

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<sup>31</sup> Montesquieu, *Esprit des Loix*, III, 3. My translation.

<sup>32</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. Introduction by Stanley N. Katz, a facsimile of the first edition of 1765-69 (Chicago: University of Chicago Press, 1979). While it is true that Blackstone specifically affirmed parliamentary supremacy, it may also be said that the purpose of the *Commentaries* altogether is to unfold English law in such a manner as to sustain the “inability of sovereignty to revert to the people.”

<sup>33</sup> Locke repeatedly affirmed that “the form of government depending upon the placing of the supreme power, which is the legislative...” This may, however, seem only a delegation of limited powers, in light of the proviso that men cannot convey to others the power of “their preservation” and “always have a right to preserve what they have not a power to part with.” Locke explains, however, that the residual power of individuals cannot assume any governmental form—that is, it cannot be comprehended *within* the constitution. While, therefore, the power of the community may seem supreme, it is only figuratively so, since the only power the community as such can exercise is to form a constitution. They are not even able, under the constitution, to redress the deprivation of their rights. “Though the people cannot judge so as to have by the constitution of that society any superior power to determine and give effective sentence in the case, yet they have by law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth—viz., to judge whether they have just cause to make their appeal to heaven.” This is the light in which one

argument in Blackstone that the British Parliament has permanent and necessary custody of the British constitution.<sup>34</sup> In substance, that is the same argument the General Court relied upon to persuade Robert Child that it should exercise caution in admitting persons, first to citizenship in the colony, but most importantly to membership in the church. Locke's argument seems only to concern itself with the form of government.<sup>35</sup> In fact, however, it rests on his argument that the only joint action the people are capable of is to constitute the society, and that the society's preservation requires a superintending will independent of the society. While he admits the right of revolution, he excludes the possibility that every man can be left to liberty of conscience in his civil obligations. Thus, he leaves work for the public to assign and order men's civil obligations whether aimed at virtue or no. He seems to have done so on the same ground that led the General Court similarly to reject such liberty. Where they found natural corruption and dissension, Locke found the state of war, simply.<sup>36</sup>

The founders, therefore, had to contend at once with a legacy of pride in superior institutions and the unresolved problem of how to entrust to human beings, thought to need public formation toward virtue, a conceded right to be governed by their own consent. Obviously, virtue's claim to public authority had somehow to be relaxed at the same time as the aim of virtue—self-government—had somehow to be produced. It will immediately appear to everyone that virtue's claim to rule does not automatically transfer into a title on the part of those civil authorities approved by the church or other interpreters of virtue. Indeed, one may see that dependence on consent is partially generated by genuine skepticism as to the rightful priests of virtue. The highway to government by consent—to modern liberty—passes by way of the recognition that virtue, to rule at all, must be left to fend for itself, for every other arrangement enslaves or subordinates virtue to some one superstition or another.<sup>37</sup> We can document this process of discovery for one founder, John Adams.

### **The Birth of Modern Liberty:**

The *Journals* of the debates of the Continental Congress reveal continued concern and unhappiness over the role of private interests not just in republican government but throughout the Revolution. Adams's "Notes" report a debate over troop supplies in which he blasted the evil of mixing private interests in public matters. "It is almost impossible to move anything but you instantly see private friendships and enmities, and provincial views and prejudices, intermingle in the consultation. These are degrees of corruption. They are deviations from the

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must read the assertion that the "legislative must needs be supreme, and *all other powers* in any members or parts of the society derived from and subordinate to it." According to Locke, the legislative has permanent custody of the constitution, and that is the precise meaning of legislative supremacy. See the *Second Treatise of Civil Government*, especially chs. 11-14. N.B. paragraphs 132, 141, and 150.

<sup>34</sup> Cf., Blackstone, vol. I 149-157; Cf., James Wilson (with Thomas McKean), *Commentaries on the Constitution of the United States of America* (Philadelphia: T. Lloyd, 1792), pp. 38, 62: "Sir William Blackstone will tell you, that in Britain, the [supreme] power is lodged in the British Parliament, that the Parliament may alter the form of government; and that its power is absolute without control. The idea of a constitution limiting and superintending the operations of legislative authority, seems not have been accurately understood in Britain."

<sup>35</sup> See his "Constitutions of the Carolinas."

<sup>36</sup> Op cit., Locke, paragraphs 13 & 21. In the latter he sees the state of war as that in which "every the *least* difference is apt to end."

<sup>37</sup> George Washington, "Circular Letter to the Governors of All the States on Disbanding the Army," June 8, 1783.

public interest and from rectitude.”<sup>38</sup> Here one sees the familiar and conventional notion which is challenged in *Federalist* ten: wherever private interests enter political calculations it is of necessity at the expense of public good. One month later Adams recorded in his notes a daring heresy from the cosmopolitan John Jay. Jay expostulated in a trade debate that “Public virtue is not so active as private love of gain. Shall we shut the door against private enterprise?”<sup>39</sup>

A similar issue arose amidst debates over a federal constitution for the new nation. As early as March 4, 1776, a call went forth from Congress that it be enabled to defend, preserve, support, and establish “right and liberty” throughout the colonies. The problem raised thereby grew into the question of governmental form. Benjamin Franklin insisted that only proportional representation would suit their federal congress. Others held out for federalism itself, that is, an equality of votes for sovereign states. There was a tension, an increasing tension, between the states as such and, not only the individuals in Congress, but the individual inhabitants of the United States. The tension involved doubts as to how national necessities should be expressed and how far calculations of private, individual interests might enter the process. John Adams chose to resolve the ambiguity in his own mind by maturing his view of interests. In support of Franklin he argued that “reason, justice and equity never had weight enough on the face of the earth to govern the councils of men; it is interest alone which does it; and it is interest alone which can be trusted.”<sup>40</sup>

Having said this much, no one now will be surprised to hear me say that the founders thought they had resolved a problem, the very existence of which was alone the cause of all revolutions in governments.<sup>41</sup> Thus, they thought they had found the Constitution to put an end to revolutions in government—the Constitution to end all constitutions. At about the same time that Adams discovered the salutary influence of private interest he began to publish initial, tentative reflections on constitutional matters, in which he was moved to query:

When, before the present epoch, had three million people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?<sup>42</sup>

We may be tempted to trace Adams’s pride back to his Massachusetts ancestors. He, however, did not stand alone in anticipating a radical shift in the human condition as a direct result of consummating American constitutional experiments. Abraham Lincoln fully appreciated the dimensions of these hopes. He saw that both in formal terms and in terms of the founders’ intentions the union and Constitution had to be perpetual. In formal terms, he argued, no government admits into its “organic law” provision for its own termination. In other words, Lincoln held every Constitution to be an assertion about the unvarying human good. So far the United States Constitution differs from no other. Beyond the formal provisions, however, Lincoln saw the founders to aim at succeeding in precisely what others had failed to achieve—at least insofar as chance alone did not destroy it.

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<sup>38</sup> *Journals of the Continental Congress, 1775*, p. 473.

<sup>39</sup> *Ibid.*, p. 495

<sup>40</sup> *Ibid.*, “Jefferson’s Notes,” p. 1104.

<sup>41</sup> “Thoughts on Government,” *Works of John Adams*, vol. LV (Boston: Little & Brown, 1851), p. 200.

<sup>42</sup> Cf., Harry V. Jaffa, *Crisis of the House Divided*, ch. x, pp. 269-272 (Seattle: University of Washington Press, 1973 [1958]): the “solution to the problem of man’s capability to govern himself.”

The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and expressly declared and pledged, to be perpetual, by the Articles of Confederation in 1777-1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was ‘to form a more perfect Union.’<sup>43</sup>

The thrust of Lincoln’s remarks in his first inaugural is to focus our attention on the Preamble’s “more perfect union” in the context of a long series of efforts to erect a “perpetual union.” The union becomes more perfect relative to perpetuity, by becoming perpetual in fact as opposed to perpetual in aspiration. Rhode Island was the last state to ratify the Constitution and then only after a long, bitter struggle. Yet, that state was not untouched by the pre-Convention focus on the end in view. The *United States Chronicle* in Providence reprinted in March, 1787 George Washington’s “Circular Letter of 1783.” This was the start “of an avalanche of newspaper items associating Washington with the idea of strengthening the central government.”<sup>44</sup> What the newspaper editorialists found at the heart of the “Circular Letter,” however was a far broader idea:

...it appears to me, there is an option still left to the United States of America, whether they will be respectable and prosperous, or contemptible and miserable as a nation: This is the time of their political probation; this is the moment, when the eyes of the whole world are turned upon them, this the moment, to establish or ruin their national character forever...

Given such occasion, and liberated from the “gloomy age of ignorance and superstition,” the people’s fate truly lay in their own hands. Their faith in Washington but barely exceeded their confidence in their good fortune. An anonymous contribution to the Newport Rhode Island Herald summed it up, just after the Convention met: “...the goodness of our God was truly apparent in having influenced the people to constitute a Convention to remedy these disorders, and in leading them on to organize a government upon the lasting basis of liberty and order. This is the seed time of Union...”<sup>45</sup>

### **Ambition and Humanity—A Happy Conjunction:**

While the case by now has been made for the expectation to found an unchanging Constitution, before we raise the much tougher question (how was this expectation to be realized?) let us indulge a not quite random sampling of the opinions of other founders. In the Convention itself we find Alexander Hamilton associating himself with Madison’s opinion that “we were now to decide forever the fate of Republican Government.”<sup>46</sup> An American failure to achieve “stability and wisdom” would represent a loss of credit for that form of government itself and its loss “to mankind forever.” Gouverneur Morris of Pennsylvania attended the convention not only as a “Representative of America” but “of the whole human race.” He accordingly appealed for a broadening of ideas to encompass “the true interests of man, instead

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<sup>43</sup> “First Inaugural,” *Works of Abraham Lincoln*, Roy P. Basler, ed., IV (New Brunswick: Rutgers University Press, 1953), pp. 252-253.

<sup>44</sup> *Documentary History of the Ratification of the Constitution* (Madison: Wisconsin State Historical Society, 1981), vol. XIII.

<sup>45</sup> *Ibid.*, Document 198.

<sup>46</sup> June 26.

of being circumscribed within the narrow compass of a particular spot.”<sup>47</sup> Elbridge Gerry of Massachusetts feared to “disappoint not only America, but the whole world,”<sup>48</sup> while James Wilson urged “a Constitution for future generations, and not merely for the peculiar circumstances of the moment.”<sup>49</sup> In the Pennsylvania ratifying convention, which led the nation, Wilson expanded: this “great struggle for liberty...will probably be the last one...in any part of the globe,” should we miscarry.”<sup>50</sup>

Even those reluctant to accept or who were opposed to the grandest ambitions of the founding seem to confirm its essential character. Noah Webster, in the midst of the ratification debate, used his *American Magazine* to challenge the assumption “that our posterity should not be judges of their own circumstances(.) The very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.”<sup>51</sup> Connecticut’s Ellsworth checked the Convention’s steamroller: “We are razing the foundations of the building when we need only repair the roof.”<sup>52</sup> And Delaware’s George Read came quite close to assuming the voice of dire prophecy, when he declared too precise constitutionalism a threat: “It would make the Constitution like Religious Creeds, embarrassing to those bound to conform to them & more likely to produce dissatisfaction and Scism, than harmony and union.”<sup>53</sup>

Alexander Hamilton persisted against doubts through what became the pages of the *Federalist Papers*. He gave substance to the design of the first *Federalist* to form good government “on reflection and choice” when, in the thirty-fourth *Federalist*, he explained the approach to that end as basing the Constitution on “the probable exigencies of ages, according to the natural and tried course of human affairs.” He was emphatic in a way Justice White could not have missed: “Constitutions of civil Government are not to be framed upon a calculation of existing exigencies.” James Madison agreed, at least as Yates understood him, when he cautioned that the delegates “should not lose sight of the changes which ages will produce.” For the end in view was that “the government we mean to erect is intended to last for ages.”<sup>54</sup> And Edmund Randolph asked delegates not to “sacrifice right & justice” to popular prejudices of the moment.<sup>55</sup> “What is the inference from all these observations,” Hamilton asked? “That we ought to go as far in order to attain stability and permanency as republican principles will admit.”<sup>56</sup>

I have heightened the dimensions of the founders’ project not, like Wilson, because I have been “lost in the magnitude of the object.”<sup>57</sup> I have rather done so as an offset to that

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<sup>47</sup> July 5.

<sup>48</sup> July 2.

<sup>49</sup> July 26. This, I believe, is the true gloss on Marshall’s opinion in *McCulloch v. Maryland*: “a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

<sup>50</sup> Wilson & McKean, op. cit., p. 36

<sup>51</sup> *American Magazine*, December, 1787, p. 14.

<sup>52</sup> June 30.

<sup>53</sup> July 11.

<sup>54</sup> June 26.

<sup>55</sup> June 22.

<sup>56</sup> June 18.

<sup>57</sup> June 25.

opinion of Gordon Wood's, that the framers largely reacted to momentary circumstances which pushed them, so to speak, faster than they ever dreamed go.<sup>58</sup> I could as easily mention Bailyn's abstracting from the actual political struggle to uncover the "prevailing" ideology, chimeras which drive men to new chimeras with no more than passing regard for the results.<sup>59</sup> Or again, I might cite the misleading emphases of J.G. A. Pocock, that the founding occurred under the influence of "a nascent historicism," in which the rending alternatives they confronted become little more than a battle of political slogans.<sup>60</sup> Pocock's position is buttressed by his reliance on Wood's trivialization of Federalist thought to the creation of interest-group politics on the strength of the discovery of so-called divided sovereignty—i.e., the people could yield or delegate sovereign authority to representatives piecemeal rather than in one Lockean fell-swoop. Thus, Wood's own misunderstanding is the more important. For it, or views very like it, is more probably the source of Justice White's view. And until that can be overcome, the intentions of the founders can not be regarded as expounding anything beyond their reactions to their own circumstances.

What is at stake is nothing more complicated—yet nothing less valuable—than our own ability to accept the genuineness of Washington's plea, in the letter with which he transmitted the Constitution to the Confederation Congress, "that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish." Similarly, we gain the ability to understand the value of Washington's deeds by crediting the genuineness of his ambition and his general faith in reason. Thus, in 1789, his arrangement with Madison to influence the manner of establishing the government: "As the first of everything, in our situation, will serve to establish a precedent, it is devoutly to be wished on my part, that these precedents may be fixed on true principles."<sup>61</sup> Thomas McKean, in the Philadelphia Convention, pleaded a life of study and practice of the law, and office-holding at every level, to justify his conclusion:

from all my study, observation, and experience, I must declare that from a full examination and due consideration of this system, it appears to me the best the world has

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<sup>58</sup> Cf., Wood, pp. 523-524: "Under the severest kinds of political and polemical pressures old words had assumed new meanings, and old institutions had taken on new significance."

<sup>59</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), p. 150. In general, Bailyn treats the "constitution" disputed by the colonists as basically only the mixed regime of England, with specified liberties derived from the general grants of natural rights. Note chapter 3. The decisive case for a different view, wherein the British constitution conjured up by the colonists not only was inconsistent with the monarchical-parliamentary accommodation prevailing in England since George II, but was already strongly suggestive of the ultimate federative result in the United States Constitution, has been set forth in the accomplished Ph.D. thesis, *Noble Sentiments and Manly Eloquence: The First Continental Congress and the Decision for American Independence*, by Stephen A. Cambone (Claremont Graduate School, 1981). Compare this with Gordon Wood: "By the end of the Revolutionary era, however, the Americans' idea of a constitution had become very different from that of the English. "Eighteenth-Century American Constitutionalism," *This Constitution*, #1, September 1983, p. 9.

<sup>60</sup> "Virtue and Commerce in the Eighteenth Century," *Journal of Interdisciplinary History*, vol. III (1972-73): p. 129.

<sup>61</sup> Letter to James Madison, May 5, 1789.

yet seen... you will hereafter have a SALUTARY PERMANENCY, in magistracy and STABILITY IN THE LAWS.<sup>62</sup>

James Wilson proclaimed that adopting the Constitution would mean “erecting temples of liberty in every part of the earth.”<sup>63</sup> Even the young Fisher Ames imbibed the infectious spirit: “I flatter myself that this country will be what China is, with this difference, that freedom and science shall do here, what bigotry and prejudice do there, to secure the government.”<sup>64</sup> If the opinions of the leading statesmen of his age are any test, Washington’s hopes were vindicated. There remains for us but to learn how freedom and science came to do the work of bigotry and prejudice—what in past eras had been thought sending boys to men’s work. It is of course trivially true that the laws must change, conditions and interpretations alter, from age to age. But what is at stake is rather the foundations, how far they were set once for all and, in being set, how far their range extended over the ordinary activities of government and concerns of humanity.

### **The Challenge to Constitutionalism:**

A good place to launch this final voyage is perhaps with a restatement of the problem posed by Gordon Wood’s understanding. The preliminary version set forth above is true to the terms of his analysis. Nevertheless, he sets forth further reflections which seem more fundamental and, in some degree, the foundation of his belief that the founders were rather impelled by events than driving them. To Wood the Constitution was counter-revolutionary in design, whatever its historical result now. The powerful rhetoric of the era but masked the real purposes of the Federalists. Benjamin Rush’s pre-Convention appeal abused the people’s Whiggish susceptibilities:

Patriots of 1774, 1775, 1776—Heroes of 1778, 1779 1780! Come Forward! Your Country demands your services!—Philosophers and friends to mankind come forward! Your country demands your studies and speculations! Lovers of peace and order who declined taking part in the late war, come forward! Your country forgives your timidity, and demands your influence and advice! Hear her proclaiming, in sighs and groans, in her governments, in her finances, in her trade, in her manufactures, in her morals, and in her manners, ‘The Revolution is not over’!<sup>65</sup>

To Wood this is a sly, aristocratic bid for power! His position is rooted in a fundamental conception of politics as class-based. Indeed, Wood considers the Federalist ruse to have been so successful that the American people ever after have been denied a true understanding of their political situation.

In effect they appropriated and exploited language that more rightfully belonged to their opponents. The result was the beginning of a hiatus in American politics between ideology and motives that was never again closed. By using the most popular and democratic rhetoric available to explain and justify their aristocratic system, the Federalists helped to foreclose the development of an American intellectual tradition in

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<sup>62</sup> Op. cit., Wilson & McKean, p. 147.

<sup>63</sup> Ibid., pp. 134-135.

<sup>64</sup> Op. cit., Ames, Letter to G. R. Minot, July 23, 1789.

<sup>65</sup> “Address to the People of the United States,” January, 1787, *American Museum*; reprinted in, op cit., *Documentary History of the Ratification*, p. 49.

which differing ideas of politics would be intimately and genuinely related to differing social interests.<sup>66</sup>

Here Wood was carried far beyond his subject, far enough, indeed, to reveal the source of his explanatory model. His lament is that what he takes to be interest-group liberalism has served to confine class-based social analysis to Europe and else where. It could not take root in America, not because it is not as true here as anywhere, but because our peculiar beliefs obscure the truths about politics. Accordingly, not only does Wood reject—without argument—the framers’ claims to have eliminated that source of revolutions in governments, he also argues that the American political system has been so-to-speak unconsciously evolving under the pressure of class-based politics. The rhetoric of American politics is radically disjoined from the facts of political life. What is really at stake in *INS v. Chadha* is the question: what is the true language of politics?

It were better to rely upon an independent formulation of the position Wood believes to have overthrown in the founders. On the one hand, the obvious subject of discussion is the analyses of factions and the separation of powers—Wood’s claim that they do not do what they’re sold for. James Madison, however, repeatedly used a single formulation as his point of departure, as the genesis of the case for the analysis of faction and the machinery of republicanism. He always reflected that republican theory supposes power and right to be synonymous with the will of the majority—that is, those terms could be conjoined only when they coincide with the sense of the majority.<sup>67</sup> As he recognized most openly in *Federalist* forty-three—and then provided a full response in number fifty-one—this position begs the question of whether the will of the majority, if unjust, still enjoys the authority derived from the union of power and right. Madison’s solution—which Wood distrusts—is to restrain the will of the majority to justice. We will return to that slight matter in the end.

A consequence of the founder’s position is the emergence of a new, modern conception of democracy wherein it comes exclusively to be endowed with the conceptions of fairness, virtue, justice, equality—one is almost tempted to say beauty! This produces the democratic dogma, synthesized by Tocqueville and formulated anew by Pierre Manent:

Democracy is a dogma; this dogma postulates that the natural state of man, in other words, that the humanity of man is wholly contained in each individual; man’s humanity is in right, if not in fact, separable from the body politic in which he lives; what the tradition conceived as the result of a rigorous practice of civic or moral virtues—with the aid of fortune or the grace of God,—which is to say: democracy takes as the minimal necessity of humanity to live free. Independence (autonomy) then ought to have a spot in every human relationship, between man and woman, between father and children, between master and servant, between man and God. All departments of human life ought to be organized in conformity with this dogma. Democracy poses as a necessary

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<sup>66</sup> Op. cit., Wood, p. 562. Earlier he had argued that “most Americans in 1776 had as yet no real modern appreciation of the permanent and unalterable nature of the constitution, or if they did they possessed a little knowledge of the means by which it was to be made permanent and fundamental;” a statement which says exactly nothing. Cf., p. 307.

<sup>67</sup> Cf., *Debates in the Continental Congress*, February 19, 1787; “Vices of the Political System of the United States,” *Records of the Federal Convention*, especially June 19; and *Federalist Papers* #43.

beginning what the tradition judged an ultimate and fragile accomplishment; from this the entire economy of human life is found radically modified.<sup>68</sup>

Manent uncovered a “beginning” which bears a naturally close relationship to Washington’s “private morality,” and the radical modification of the economy of human life is nothing less than the consciously designed political structure intended to realize, in general if not in particular, this portrait.

What then was the source of Wood’s objection? Is it not that this sounds somehow too utopian, while the defense of class interest has the smell of realism? Did not the opponents of the Constitution react similarly? Consider the Pennsylvania opposition: their chief complaint was that there was no express security for the people visible in all the machinery of government (as if the most the people could ever be were dependent subjects). From every evidence they meant the people in the dogma, not Wood’s proletariat. That is, while they were drawn to the image held forth by Federalists, they too suspected it was too utopian. While they doubted the mechanism, Wood doubts the reason itself and accordingly fails to give the opponents credit for their real opinion. He depicts a transition among Americans from the belief that legislation would take its inspiration from knowledge of “the rises, revolutions, and declensions” of other states, to the view that legislation would emerge from the clamant confrontation of interests. In that story he finds a tension between expectations of wise and virtuous representatives, on the one hand, and representatives who mirror popular passions on the other hand. Both apparently contradictory views derive from Whig theory, as Wood employs it. Yet, a better explanation of American constitutionalism than the residues of Whig thought is available: the decent republic relies upon virtue in the people and thus wisdom in the representatives as a consequence. This view requires only that one abandon the older notion that the state’s work is to produce virtue *ex nihilo*. At that point political theory is free to invoke claims of interest<sup>69</sup> precisely because no general license is granted to the interests of the vicious.

To see that this view is not necessarily utopian one needs to pursue the idea of faction in the opposite direction of that characteristically employed. Madison himself only settled on the narrow economic distinction after introducing first the broader distinction.<sup>70</sup> James Wilson pointed out the proper relation of the two directions for inquiry at the Pennsylvania Convention: “In forming this system, it was proper to give minute attention to the interest of all the parts; but there was a duty of still higher import—to feel and to shew a predominating regard to the superior interests of the whole.”<sup>71</sup> What seems pietistic exhortation in Wilson gains practical import from Madison’s further observation:

But the United States have not reached the stage of society in which conflicting feelings of the Class with, and the Class without property, have the operation natural to them in Countries fully peopled. The most difficult of all political arrangements is that of so adjusting the claims of the two Classes as to give security to each, and to promote the

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<sup>68</sup> P. Manent, *Tocqueville et la nature de la démocratie* (Paris: Commentaire Juilliard, 1982), p. 174. My translation.

<sup>69</sup> Not, however, interest-group pluralism. I have explained in a separate monograph that that theory is falsely attributed to Madison. A very similar though less comprehensive argument is also made by Paul F. Bourke, “The Pluralist Reading of James Madison’s Tenth Federalist,” *Perspectives in American History*, vol. 9 pp.271-295.

<sup>70</sup> Cf., *Federalist Papers*, #10.

<sup>71</sup> Op. cit., Wilson & McKean, p. 35.

welfare of all. The federal principle, which enlarges the sphere of power without departing from the elective basis of it...will be found the best expedient yet tried for solving the problem.<sup>72</sup>

It ought to be clear in this that Madison not only knows class-based politics but, first, insists on the factual claim that it is not politically relevant in 1787 and, secondly, precisely because of this good chance, the opportunity exists to obviate its ever becoming relevant. That is, what Wood took to be the accidental result of the political circumstance, Madison owned as a conscious enterprise. What Wood rues as the great regret of American politics, the general absence of class-based political rhetoric, is the best evidence of the success of the Federalist enterprise, establishing a serious claim to be understood comprehensively.

The broader direction of inquiry into faction is that which recognizes in it something very much akin to the city—or country—itself. Hume's analyses of faction are the foundation of this discovery. He divided "real factions" into those which stem from interest, principle, and affection.<sup>73</sup> Hume identified the first, that of interest, as "most reasonable" and "most excusable." This must be judged in the light of a second discussion, however, wherein the definition of faction is actually the claim that the term may be reduced to "city" or "state," etc.

When men act in a faction, they are apt, without shame or remorse, to neglect all the ties of honor and morality, in order to serve their party; and yet, when a faction is formed upon a point of right or principle, there is no occasion, where men discover a greater obstinacy, and a more determined sense of justice and equity. The same social disposition of mankind is the cause of these contradictory appearances.<sup>74</sup>

The discussion of faction, then, is still in Hume what it was in Aristotle: a discussion of regime alternatives. From here matters become more difficult. It is easy to see how the "point of right" generates a regime, exclusive of other principled alternatives. But if the faction of interest is the most reasonable (and excusable?), can the same insight apply? Among other things, this must mean that men more naturally, or more easily form factions of interest than factions of principle or affection. The reasoning would involve recognizing that the faction of interest, directly deriving from self-interest or the desire of self-preservation, requires of men far less detachment and self-abnegation and therefore far more readily achieves a common vice in which to express itself. The problem, of course, is the instability of interest as a principle of community. For just as the faction of interest is readily formed, it is readily sundered when the interests of the members diverge. A homogeneity of self-interests is transient by definition.

What the argument explains is the origin of that "opinion of right" which subtends every government which endures, however oppressive or free. The opinion of right is precisely a perduring conception of social order, in which communicants find the expression of the good of the community as determining their own prospects. When next the "opinion of right" is joined to the "opinion of interest" [producing the "sense of the general advantage reaped from government"], one obtains the "foundation of government." To become a basis for government, however, the conception of a community determining one's own prospects must be allied with one's own sense of his own or private interest. This is what Montesquieu means when,

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<sup>72</sup> Note for his convention speech, August 7, 1787.

<sup>73</sup> "Of Parties in General," in *Essays Political, Moral, and Literary*, ed. by T. H. Greene and T. H. Grose, London, 1889.

<sup>74</sup> "Of the First Principles of Government," *Essays*, pp. 110ff.

explaining the origins of society, he shows warfare to result from the initial imposition of an “opinion of right” followed by the efforts of individuals “to turn the principal advantages of society in their own favor.” That is, the “opinion of right,” to become a regime principle, requires to assume the expression of *meum et tuum*. When interest supplies that distinction (both principle and affection may do so as well, as Madison notes in *Federalist* #10) the “opinion of right” acquires the politically significant form, “right to power and right to property.” In this we find the faction which is nearest and least avoidable for all men (perhaps most excusable for that reason), that of self-interest, expanded to the point of corresponding with the moral horizon (point of right) and thus crowding out competing factions. To return to our cited passage, however, the claim associated with this is that men discover therein a “determined sense of justice and equity.” This must mean that the “opinion of right” converts a given account of interests into the form of principles of justice and equity. Accordingly, the particular self-interest which inspired the faction of interest is supplanted by a public faith in which the particular account of interest is rendered permanent rather than transient. By appealing back to the public faith instead of the self-interest as self-interest, men reinforce an original basis of community. Thus faction, or the natural social inclination of man, can in principle be turned into a weapon against obstinacy and intolerance, at the same time as it moderates the conflict over wealth.

Given this account of the principle of faction in the broad view, Washington’s comments in his letter of transmittal<sup>75</sup> take on greater significance and raise far more urgently the question whether what was in principle possible was also possible in practice. The practical remedy Madison described was to “enlarge the sphere of power without departing from the elective basis of it.” The sphere of power as such may be defined as the range of objectives which fall within legitimate or conceded power. Necessarily, the sphere of power may be enlarged or contracted in any state, without respect to its extent of territory. The “opinion of right” concerns itself not only with the hierarchical ordering of the community, but also with the relative weight of command to which each rank and file will be subject. This is why the federalists, as Hamilton in *Federalist Paper* fifteen, were so emphatic about extending the powers of the national government directly to the individuals throughout the states. This corresponds much more nearly with Hume’s initial statement than the notion of an enlargement of the territory, which is characteristically derived from the *Federalist* ten language about enlarging the orbit. Upon reflection, however, even that misplaced metaphor better suits the notion of enlarged power, placing our focus on the satellite rather than on the space inscribed by its motion. In other words, Madison proposed to bring more of everything within the grasp of interest factions at the same time as requiring them to extend their grasp via democratic procedures—on the basis of a point of right. Does it work?

### **A Distracting Objection:**

Before I explain the practical details of the operation of this system, I must take note of a serious objection to this proceeding, although it has yet to be formulated in an acceptable scholarly form. Recent years have seen the emergence of a trend of analysis in political philosophy which begins by discounting the philosophical relevance of the American founding. The teachers in this school argue, roughly, that the American experience constitutes a

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<sup>75</sup> “It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet to provide for the interest and safety of all—Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained.”

compromise with the traditional objectives of human moral and philosophic exertion. In the one case they say the end in view for man has always been virtue. They point to the ancient city state.<sup>76</sup> In the other case they regard the end as the beautiful. On the basis of their analysis, accordingly, no mind or soul which occupies a human being with concerns or persons that fall manifestly short of any possibility for excellence in these respects is worthy.

The very idea of a wide elective basis, acquisitiveness largely unchecked, and far-reaching powers in American life constitutes for them a case made that nothing worthy of reflection or contemplation can be produced thereby. They regard the task of government, the service of the public realm, to be the elevation of what is best. They understand self-government, rightly, as excellence with respect to what is best. They expect, inexplicably, self-government to lead to preferment relative to public service. Naturally, however, with a wide elective basis and far-reaching powers, preferment relative to public service will turn on many and varying interests. Finally, therefore, they maintain that to investigate the foundations and workings of such a government is a profoundly unphilosophic and distracting task. They have a touching affection for the liberties and privileges accorded within this system; they even regard it as charming that it makes no serious demands of their souls and nevertheless relies upon their sustained decency. They do not think any human being can be improved by this regime or by reflection on it, except insofar as such reflection awakens a longing for a hardier mind broth than they find in the pseudo-philosophic productions of men naive enough to believe a decent regime can be constructed on the strength of ordinary humanity.

My answer to their doubts about the validity if not the value of this work is twofold. First, and speaking practically, I think it is necessary to distinguish the tradition of philosophy from philosophy itself. While I am convinced that they are fairly knowledgeable about the traditions of philosophy, I persist in doubts about their mastery of philosophy. Perhaps I remain too strongly under the impression that the question of one's own conduct and the requirements of life among one's own people are so nearly intertwined as to constitute, in the inquiry, a single question. If that were so, to be sure, only someone who genuinely felt the obligations of citizenship would ever arrive to the question, what am I to do? For everyone else the question could never arise, because the answer could never matter.

I think that life differs in America from what it has been heretofore, precisely because its demands on the soul are so apparently ill-formed. After all, where the catechism consists exclusively of "Consent!" there are generally passions enough too ready and too willing to comply, to leave much time for the inquiry, "Consent to what?" Not surprisingly, therefore, the available response, "Reflect and choose!" is not often heard, and what is a merely a missed opportunity is taken for absolute silence. For the true philosopher, however, of whom I have elsewhere written that he, like all men, must live under the guidance of some regime, under politics and, hence, must encounter and practice the duties man owes to man, it would be difficult to imagine what formulation of social obligation could be sweeter than this!

Nor is it the case that political philosophers are so restrained in their ambit as philosophy is in its bearing. A short story may convey the significance of this reflection. For many centuries now, Plutarch's account of the life of Alexander, of his instruction by Aristotle, has

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<sup>76</sup> Interestingly, the ancient thinkers, whenever they have pointed to the ends of cities existing in their time, disagree profoundly with these modern students. Not once, to my knowledge, did they indicate an existing regime whose end was virtue.

been a story told with a misplaced emphasis. Our attention has unfailingly lighted upon a supposed relation between the greatness of Alexander's ambition and the influence of a de-divinizing philosophy. At first, however, Plutarch related the story with a far more significant measure of the circumstances and weight of philosophy, one which points not to the bright youth but to the prudent Aristotle.

According to Plutarch, Alexander's father recruited "the most learned and most celebrated philosopher of his time." Aristotle, however, came at considerable cost; that is, Philip re-settled Stagira, Aristotle's native town, which Philip had previously smashed and whose citizens he had killed, enslaved, or dispersed. Aristotle's efforts not only won his compatriots freedom, but restored them to their homeland. According to Plutarch again, that was a rich and seemingly reward for Aristotle's great care of Alexander.

That Aristotle did take care—keeping his part of the bargain—we discover indirectly, from a letter in which Alexander discloses that Aristotle revealed to him the esoteric teachings. Thus did our philosopher ply his arts to the collateral (though not at all subordinate) purpose of his country's political restoration. The reputation of philosophy combined in Philip with the love of his son, to overcome the pronounced animus against Stagira. Aristotle achieved his people's salvation through philosophizing, at least as far as he was able. Philosophy's power for good is indelibly set in this story.

That very good, I have written elsewhere, is in fact the object of political philosophy. As such, it cannot fail to be relevant wherever there are human beings and cities. It is still more relevant at the heart of a regime which self-consciously invokes its sanction.

Secondly, I respond to these philosophical critics that their theoretical foundation is suspect—that is, the supposed lowering of human ends attributable to modern liberalism becomes questionable the moment it is applied, not to a philosophy, but to a regime per se. For every statement about the character of the regime is obligated to repose on an authority for the regime itself. Not even a good philosophical approximation of a given regime is an adequate explanation of the regime, if in fact it does not enter into that authoritative opinion in accord with which citizens understand their rights and obligations. In other words, a history of ideas, however relevant to the development of our notions, does not constitute a constitutional history for a people.

What this means, accordingly, is that your criticism of the regime will not earn a fuller hearing than the present until you can actually succeed to make out your case from the authorities for the regime itself. Naturally enough, then, I regard the present essay as proof that such a case is more difficult than a course in the history of philosophy has inclined you to think.

It may be thought most unchivalrous of me thus to pick a fight with individuals whom even I describe as not possessing deep enough interest in things American to bring them so far back into this essay. I may seem to wish to argue without providing occasion for rebuttal, for even I can recognize that those who hold the opposing view would long before now have gotten the general drift of this essay and dismissed it as excessively pietistic.<sup>77</sup> I ask, however, to be

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<sup>77</sup> Questions of piety and innovation have never been simple to resolve. Whether one examines Euthydemus's irreverent ambition or the simple faith of Hippodamus which Aristotle ridiculed, one remains awed by the sense that a peculiar balance is required to hold love of the good to love of the antique. The problem is captured nowhere so well as in the Saracen Sultan's outburst of revenge upon his

indulged in the contrary assumption; to wit: I have no interest in prosecuting a dispute and write as I do at this point solely to make clear to persons genuinely interested in this regime and talented enough to comprehend the argument the grounds of this analysis and the principles it is forced to take into account.

### **Rule by the Many—A Constitutional Strait-Jacket and Liberation for Man:**

As we return to the decisive practical improvement in human affairs, here is a fit pause for a confession: I very much enjoy reflecting on the Constitution and founding of the United States. The reason for that one may not expect. I have found nothing else so surely to convey me to direct reflection on the good and nature of man. I believe that result to be inherent in American republicanism in a way never achieved before the time of the founding. I very much enjoy to read and think about Plato, and he no less brings me to reflect on the good and nature of man. Unless I err, however, I think every serious student of philosophy and of the founding would concede that something always remains unachieved in the reflection which departs from Plato, while that which departs from the founding has the character of consummation.<sup>78</sup>

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gods, after his forces were overcome by the extraordinary powers of Guy of Warwick:

This is done, the Sultan before him brings  
All his gods, without exception:  
Toward them he was wrathful  
He completely rent his clothes  
And said: 'You false, untrustworthy gods,  
You do us shame and great injury.  
You are against us, being in a wicked mood.  
You bring sorrow to us and not any good.  
When we needed you most  
Then did you treat us worst.  
Fie, fie on you, you Appollyon!  
You shall have a wholly evil end,  
And you, Termagant, also:  
May much sorrow come to you;  
And you, Mahound, their underlord,  
You aren't worth a mouse's turd!  
Therefore you shall catch it  
With hard stroking upon your back.  
He took a good hawthorn that lay near him,  
And belaid his gods front and back.  
So he began to clout his gods,  
That strew the ground all about.  
Their arms and legs he stripped away,  
And called them impotent wretches.  
'In you goodness was never found  
Nor anymore might be than in a hound'  
In this way he drove them off  
And thereby shamed them quite enough.

*The Romance of Guy of Warwick*, Part I, 11. 3690-3715 (London: Early English Text Society, 1883), ed. by Julius Zupitza. My own free but faithful translation.

<sup>78</sup> Perhaps I should blush to speak so before intellectuals, whose standards do not readily admit of such a

I don't mean to be paradoxical in making this comparison. I mean only to show an ordinary distinction which nevertheless has profound implications. While the pleasure of thinking about Plato lies much in what in that thinking does not succeed, the pleasure I derive from thinking about the Constitution and founding of the United States arises from that in which the founding succeeds.

The founding succeeds, as I've said before, to establish the government of the least without the sacrifice of the good. The story of how this is achieved stretches over a long period of time. A useful reference is the road from Henry Neville to James Wilson. Neville's *Plato Redivivus* sets forth the conundrum:

Sir, you over-value, not only me, but the wisdom of my fellow-citizens; for we have none of these high speculations, nor has scarce any of our body read Aristotle, Plato, Cicero, or any of those great artists ancient or modern, who teach that great science of governing and increasing great states and cities; without studying which science no man can be fit to discourse pertinently of these matters; much less to found, or mend a government, or so much as find the defects of it. We only study our own government; and that too chiefly to be fit for advantageous employments, rather than to foresee our dangers.<sup>79</sup>

Wilson proclaimed the journey's end:

...he could not agree that property was the sole or the primary object of Government & Society. The cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other personal rights, numbers were surely the natural & precise measure of Representation.<sup>80</sup>

That mind might become one personal interest among many with a right to fair representation; that the cultivation of the human mind as a public endeavor might be compatible with a system of rule which makes no further distinctions among men than their raw numbers; this could not fail to expose a people to the influence of folly in their affairs. The "great artists ancient and modern" taught so, and the tradition of British-American republicanism<sup>81</sup> remained persuaded of that teaching from Neville's epoch up to the very eve of the American founding.

We must account for that sea-change in opinion which brought Americans to doubt that there was any acceptable alternative to risking dangers of folly in the commonwealth. To do so we must keep firmly in mind a distinction generally ignored in the historical scholarship. The American *problem* was how to build a decent republican life, although the materials in which the artificers labored were ordinary humanity of no uncommon virtue. The Massachusetts General Court accepted that task from the beginning, and in those terms. Until the founding, however, there was *no characteristic American solution!* The labyrinthine trail of pre-revolutionary opinions is easily traceable to England, Europe, and antiquity precisely because the American

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judgment about what we are pleased to call an ideology. I am sustained, however, by the very practices of the Americans themselves, whose confessed ambitions openly aimed to evoke just such a response from me.

<sup>79</sup> "Second dialogue," p. 83. [Caroline Robbins, ed., *Two British Republican Tracts* (Cambridge: Cambridge University Press, 1969).]

<sup>80</sup> *Records*, July 13.

<sup>81</sup> This term is far preferable, as more inclusive than the term whig, in the attempt to identify the Anglo-American tradition. At a minimum it emphasizes that the Americans were "born republicans" (or at least "christened" so by Pastor Robinson) from the beginning, justifying Tocqueville's perception.

problem was the age-old human political problem and the solutions discussed, far reaching as they were, were always the old solutions, the most characteristic of which was some version of the mixed regime. The central characteristic of the mixed regime solution, from Plato-Aristotle to Isaac Pennington<sup>82</sup> and beyond, was a firm belief in the necessity for a constitutionally imposed and balancing hierarchy of souls in the commonwealth. The mixed regime accomplished two purposes: it restrained the violence of conflicts between the well-born and the many; and it prostrated folly to the influence of substance and experienced judgment. It achieved these vital objectives, however, only at the cost of keeping the constitution at an arms length remove from the people—that is, only by keeping the people subject to superior titles to rule.

So long as any mixed regime persisted, representatives of the varying estates actually represented not the body politic but their respective warring “cities,” between or among whom an uneasy truce was enforced in the guise of a constitution.<sup>83</sup> That is the import of Montesquieu’s observation on the futile efforts of the English to establish a democracy, which eventuated in restoring the monarchy. They were unable to find a means of representing everyone in their absolute parliament. Every change in faction in fact constituted a change of government. The only solution they knew was the enforced truce among factions under the independent authority of the estates.<sup>84</sup> The many have always seemed not merely unfit but unable to rule.

To say that the many are unable to rule emphasizes the rule of folly where they prevail. More: it suggests that they fail to attain either the good or the objective at which they aim, due to their incapacity. The justification for their subjection to superior authorities, therefore, derives from the claim that the many are better served in their own ends by the institution of sovereign powers not restrained in their ability to mold and govern the many.

It seems to be in this way that rulers came into view as guardians of a common good or public rights rather than as defenders of their own interests. “But how easily are base and selfish measures masked by pretexts of public good and apparent expediency.”<sup>85</sup> That is, the assertion of superior claims to rule on the foundation of the good or virtue of the many tacitly but

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<sup>82</sup> Quoted at length in Gwyn, *op. cit.*, pp. 57-65.

<sup>83</sup> Every adjustment or new accommodation in the terms of the truce constituted an “amendment of the constitution.” The constitution evolved under the pressure of class warfare.

<sup>84</sup> *Esprit des Lois*. Because this is the light in which Montesquieu’s development of the description of a “separation of authorities” is best understood, they are far wrong who accuse him of presenting an idealized or simply inaccurate picture of the British constitution. This is the case, for example, with Kemp’s summary: “In March 1806 Montesquieu’s authority as an interpreter of the English constitution was repudiated in both houses, in the course of debates on resolutions deploring the inclusion in the Cabinet of Ellenborough, Lord Chief Justice. In the House of Lords, St. John contended that the ‘blended composition and functions’ of the Lords ‘served to prove how little relative to the constitution of this country, could be gathered from Montesquieu. He should look to better sources...the Statute Book and the practice and usage of the country;’ and Fox declared that, for Montesquieu, ‘as a general political philosopher, I entertain the highest respect; but the application of his principles to, or his clear comprehension of, the constitution of England, I am not disposed to admit.’” *King and Commons*, by Betty Kemp (London: Macmillan & Co., 1965), p. 83n. The error here is closely related to that discussed above relative to *Chadha*.

<sup>85</sup> Cf., James Madison, “Vices of the Political System of the United States,” April, 1787, *Papers*, vol. 9; also see Donald Lutz, *Popular Consent and Popular Control* (Baton Rouge: Louisiana State University Press, 1979), especially his discussion of the “covenant tradition.”

necessarily shifts the basis of the superior title from the rulers own knowledge or capacity to the actual good of the commonwealth and primarily of the many. To the degree that rulers must be free of the influence and authority of folly, to the same degree are they free to abuse the powers they exercise. The recognition of this problem produces the interest in finding ways to bind down, or chain the rulers to the pursuit of the common good.

This was the context in which the doctrine of *Non tallagio non concedendo* (as well as that of religious toleration) came to express a deep and abiding distrust not just of rulers but of regimes themselves.<sup>86</sup> The very end of politics began to seem impossible to attain. Aristotle's cycle of regimes, reified in the concept of the mixed regime, was viewed as a cruel hoax.<sup>87</sup> Indeed, Aristotle's typification of the end of politics, the surpassing virtue of the *pambasileia*, was read as a second Plato's Republic: "Aristotle proves that no man is to be entrusted with an absolute power, by showing, that no one knows how to execute it, but such a man as is not to be found."<sup>88</sup> The idea of ruling and being ruled in turn became much less appealing when read as a concession admitting the inevitability of governing instead of the expectation of self-government. In short, traditional political science seemed to offer no "alternative to popular government—to the love of the community of interests—but that men and their parties take turns using one another for their own ends."<sup>89</sup>

In the English republican tradition this led to the development of incomplete notions of separation of powers and gave a new thrust to the idea of a rule of law, as a device aimed at limiting the damage from the cycle of regimes by qualifying the authority granted to rulers. In America that project was ultimately abandoned as impossible. There the idea of the rule of law was kept (Paine's the "law is our king") and deepened in a way which eliminated the *express* dependence on superior titles to rule once for all.<sup>90</sup> The vehicle was a radicalized notion of the separation of powers and a detachment of the idea of sovereignty from the idea of representation. Indeed, the one development was a consequence of the other, and together they constitute the distinctive American solution.

The single best discussion of the development of the separation of powers doctrine is Gwyn's *Meaning of the Separation of Powers*. In it he provides the necessary foundation to understand both the Anglo-American tradition and the American divergence from the tradition. What his account shows clearly is that the separation of powers is not merely a mature version of the mixed regime. When it seems so, that results from the fact that *incomplete* theories of

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<sup>86</sup> Cf., Henry Care, *English Liberties*, in any of the various editions published between 1690 and 1774 in London, Providence, and Philadelphia.

<sup>87</sup> Wood's discussion of the import of this insight in America, pp. 602-606, is genuinely brilliant. Surprisingly, however, he concludes it with complete puzzlement about the result. "Madison believed the public good, the true perfection of the whole, would *somehow* arise. The impulses and passions would so counteract each other, so neutralize their potencies, that reason adhering in the natural aristocracy would be able to assert itself and dominate." Wood misconstrued the active principle of the new constitutional doctrine.

<sup>88</sup> Algernon Sidney, *Discourses Concerning Government*, III, 23. Quoted in Gwyn, p. 36.

<sup>89</sup> W. B. Allen, "Cares, Labors, and Dangers: A Free Society in an Unfree World," an unpublished paper prepared for a Liberty Fund, Inc. conference in October, 1981, Claremont, California.

<sup>90</sup> Cf., Wood, *Creation*, p. 604. Also consult the 1983 essay in *This Constitution*, in which Wood advances his view to the point of appreciating the radical breakthrough in constitutionalism in America but nevertheless continues to miss the point that it is precisely an alternative to the cycle of regimes and, therefore, class warfare.

separation of powers still affirm the existence of a sovereign authority apart from the people and heterogeneous in its social constitution. What Gwyn's account shows less clearly is that the *complete* theory of separation of powers requires an overruling sovereignty outside government itself and homogeneous in its social constitution:<sup>91</sup> Wilson's rule of numbers!

Gwyn actually uncovered five versions, or stages in the development of separation of powers.<sup>92</sup> Each points to an essentially mechanical view of the theory. The five arguments are: 1. to ensure efficient operations of government; 2. to ensure accountability in offices of government; 3. to guarantee the impartial rule of law; 4. to maintain a balance of governmental power; and 5. to assure legislation in the common interest. In each case it is the mechanism itself which must produce the result, by means of checking in the representatives ambitions and interests tending in contrary directions. Gwyn's discussions of the evolution of Commonwealth thought show this especially well. Another way to express the same idea: the objective is to confine the wills of the representatives, the governors, to channels thought safe.

The foregoing description seems to express fully the conception of the separation of powers and theories of representation developed in the opinions in *INS v. Chadha*. Indeed, it may be the common misconception of ours that the separation of powers is a device designed to fragment the power of representatives. Gwyn, in fact, while rightly deflating the exaggerated notion of Montesquieu's historical novelty, then culminates his analysis by showing the form of the theory in Montesquieu as its completion (rightly so), but only as the *cumulative* completion of foregoing stages. Thus, the best treatment of the subject to date perpetuates the misunderstanding.

There was a breakthrough in Montesquieu's account of the separation of powers. To comprehend the breakthrough, one needs to consider not the processes but the objectives of government. In the chapters immediately preceding and succeeding his famous chapter on the separation of powers,<sup>93</sup> Montesquieu discussed the "objectives" of differing states and the relevance of liberty as an objective. The purpose of the central discussion is to illustrate the manner in which liberty might become a "direct object" of a constitution. In other words, Montesquieu discussed not the restraint of powers as an exception to otherwise accepted principles of government but the active pursuit of liberty.

The idea was known by Montesquieu to be a radical change in perspective. Before, he held, the people's "power had been confused with their liberty." It was accordingly thought that to concede liberty meant to concede power, to create democracy. But "democracy and aristocracy are not free states by their nature." Why? because the people's power may be used, and abused, much as any other form. And in the most likely case it will be used to form citizens in the name of spurious claims of virtue.<sup>94</sup> In a democracy, then, the people can enjoy liberty only when their laws conform to what they ought to wish. But in a democracy the people can make any laws they want; their power cannot be limited.

Political liberty is found only under moderate governments. But it is not always in moderate states. Liberty is there only when they do not abuse power. But it is an eternal

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<sup>91</sup> Wood does recognize this point, especially in "Eighteenth-Century American Constitutionalism."

<sup>92</sup> He summarized them at p. 128.

<sup>93</sup> *Spirit of the Laws*, Book XI, the series is chs. 5-7.

<sup>94</sup> Claims which require of citizens "self-renunciation," or the submission to being governed by prejudice and superstition.

experience that every man who holds some power is inclined to abuse it. He carries it to the point at which he finds limits. Who could say it! Virtue itself needs some limits.<sup>95</sup>

Montesquieu's review of other states ancient and modern showed that none had political liberty for its objective. Only the constitution of England had it—whether the *government* actually reflected it or not<sup>96</sup>—and that was due entirely to the separation of powers. The separation of powers is a device through which one conveys power to the people and they, in the same instant, renounce the intention to exercise that power themselves. Their sovereign will—Montesquieu introduces the term “general will”—is held in suspension by means of the creation of separate authorities (legislative, executive, judicial) none of which has independent power but all of which may act together in the name of the people.

This subordination of the powers and officers of government hinges utterly upon the renunciation of the power to form the citizens in virtue, for such an endeavor requires comprehensive, unlimited authority. Only the people now hold such power, and they forswear to use it. Their oath is insufficient, naturally enough, and it is further required so to organize the processes, the mechanics of government, as to keep them true to themselves even in their worst moments. That separation of powers entails representation is no accident, though neither does it result by definition. It's possible to imagine the authorities being divided among the people themselves—even by lot. Representation, then, what Madison calls the alienation of the people's authority,<sup>97</sup> has a separate defense: it is the surrogate, the voodoo doll if you wish, upon which the operations designed to restrain the people can be effected without any harm to the people's rights. The government which aims to assure liberty (as much freedom from the cycle of regimes as from arbitrary power in the abstract) must also be constructed on principles of liberty, on the people's right of revolution. Such a government will exercise only such powers as the people condescend to suffer, albeit they owe to suffer it gladly.

To conclude, I must note that the American appropriation of Montesquieu's breakthrough<sup>98</sup> did not fail to add a significant dimension. They, like Bolingbroke, appreciated the implications of the theory. He held that “all simple forms of government were by their very nature tyrannical.”<sup>99</sup> They held that democracy was so by definition. The universally accepted formula, “the accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny,”<sup>100</sup>—this definition actually covers the entire cycle of regimes, good and bad. But it applies with greater force to democracy than any other form precisely because, as the constituent body (the ultimate sovereign), even if one sought the people *one* of the authorities of government, whenever they should meet to exercise it they could

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<sup>95</sup> Op. cit., Montesquieu, ch. 4.

<sup>96</sup> See the end of ch. t. Gwyn is not rare in failing to appreciate the force of this caveat. Even Englishmen were confused. See note 83 above.

<sup>97</sup> *Federalist Papers* #63.

<sup>98</sup> Op. ci., Wilson & McKean: “for the American states, were reserved the glory and happiness of diffusing this vital principle throughout the constituent parts of government. *Representation is the chain of communication between people, and those to whom they have committed the exercise of the powers of government. This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernable.*”

<sup>99</sup> In Gwyn, p. 92.

<sup>100</sup> *Federalist Papers* #47.

assume control of the other powers at their whim. Accordingly, popular government lay under a ban which could not be lifted by any improvement in theory or science.

The founders nevertheless affirmed that it were not sufficient for the people to be thought to rule; they actually had to prevail, or at least the majority, in governing.<sup>101</sup> Moreover, no authority able to act on its own, apart from dependence on the people, could be expected to adopt liberty as the objective of its government. Therefore there could be no “will independent of the society” allowed to act with public authority. What the founders added to Montesquieu was the claim that the people, the majority, actually does govern—that representation accomplishes the transformation into law of the actual wishes of the people. They forbear to act unjustly only, not altogether. The next step is to confine majority sentiment to salutary principles.

In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good...

Yet another step is to make “justice and the general good” the *necessary means* of governmental action, or, to confine the majority to the pursuit of the public good.<sup>102</sup>

The very operation of majority rule defends against minority-inspired injustice. The interest of justice is served, however, by distinguishing right and might. Where “the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature.” The rule of the stronger faction, even a majority, is not the same as majority tyranny. The definition of tyranny applies most emphatically in direct democracy, where the actual separation of powers is not possible. The rule of the stronger faction, likened to the anarchy of the state of nature, is not founded in abuse of power. It is a denial that anything beyond force legitimizes the claim of right.

While essentially democratic tyranny affirms the bonds of citizenship, essentially undemocratic anarchy sunders those bonds. Anarchy, the rule of the stronger faction, is rule by a will independent of the society. It has more in common with “government possessing an hereditary or self-appointed authority” than with either democracy or tyranny. To avoid the evil of majority faction, while relying on majority rule, calls for a *conscious attachment on the part of the citizens to republican principles and processes*. This is the conclusion the founders relied on as the active principle of the regime: the people’s determination to work through certain well designed and established processes would not only provide safety for liberty but the pursuit of “justice and the general good.” This is the purpose of the defense of the separation of powers and representation; not so much wisdom and the adaptability of the representatives (which were important), but the stability and decency of democratic opinion would be ensured thereby. The constitutional debate over separation of powers, at its best, would not be a debate about the prerogatives or necessities of administrative accommodation. It would be a debate about how far the people’s continuing justice and happiness might be impaired in departures from the design.

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<sup>101</sup> *Federalist Papers* #37.

<sup>102</sup> Publius defines the public good thus: that status of social life wherein the weaker may forcefully maintain claims of right within the very structures and processes of government. In those terms, political and social contradictions (class conflict) are eliminated. The majority confirms and protects the rights of the weaker party when the majority party can exercise its powers only in behalf of the public good. Accordingly, there is “no pretext” for defending minority rights in a well constituted republic. Cf., *Federalist Papers* #51.

Can any confidence be placed in evolved administrative procedures, from the point of view of the wisdom or folly of entrusting large authority to the many? To rely upon the judgment of the representatives, relative to their perception of what allows them to govern best, reverts to an older, discredited political science, no longer a suitable foundation for political judgment. Washington's "Farewell" announced the terms of the new political judgment: The people, he held, who must guard the sanctity of their constitution, ought to provide themselves with the religious and moral habits necessary to sustain a "national morality," and thus to rule the conditions of public service, or the tie between "public and private felicity" will perish.

The answer to the question, ought the formal requirements of the Constitution to prevail over present exigencies, finds its answer in the original intentions, which derived from the decisive advance beyond Locke in the recognition of the people's complete and immediate authority. That intention was to design a constitution which bars—not the need for constitutional refinements—but the introduction of new constitutions or alternative regimes under unanticipated exigencies.

To control the power and conduct of the legislature by an over-ruling Constitution was an improvement in the science and practice of government reserved to the American states.<sup>103</sup>

The improvement consisted in giving formal status to the right of revolution, the foundation of an "over-ruling Constitution." The right is not thereby eliminated, but it should not require to be exercised, inasmuch as nothing could be accomplished thereby (save to return to the cycle of heterogeneous regimes) which could not be accomplished by the recognized and conceded power of the sovereign acting legitimately. The essence of constitutional adjudication is to distinguish elements subject to change and accommodation from those first principles which legitimate change. The Constitutional Convention's committee of detail hoped to facilitate that task by confining the fundamental law as far as possible to "essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."<sup>104</sup>

No provision of the United States Constitution is more fundamental than the procedure through which the majority safely finds its tongue. Every detail of those provisions should be regarded as permanent and unalterable, wherever the basis of judgment is anything but the further guarantee of safety and clarity for the voice of the people.

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<sup>103</sup> Op. cit., Wilson & McKean, p. 38.

<sup>104</sup> Farrand, *Records of the Federal Convention*, vol. 2, p. 137.