

THE AMERICAN FOUNDING: AN ACCOMPLISHMENT IN VIRTUE

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In 1832, on the occasion of the centennial of George Washington's birthday, John Quincy Adams, a former President of the United States and then a Congressman, delivered in New York a centennial address, which occasion he used to rehearse the events and the principles of the founding of the United States. I have read the address; it is really a remarkable *tour de force*. It must have extended somewhere between four and six hours. I wondered at the fortitude of his audience in that day and age. I will take a little time tonight, to be sure. For we have something very important, something precious to talk about.

One of the things I've often related to people in giving somewhat less formal presentations on our Constitution in these years of bicentennial anniversary is the fact that I regard our founding very much as a vineyard. And I am moved by three particular images of vineyards, which have been for me always very precious. Two of them come from the Holy Text; one is of course Naboth's vineyard. I probably do not have to relate to you Naboth's story and his refusal to sell his patrimony. He said, "God forbid." The other is the story of the ungrateful tenants, who slew the master's servants and finally his son. The only thing left was for him to come, fearing which, they exclaimed, "God forbid." Yet a third tale was told by Aesop. In it you find a dying father who gathered his sons about his death bed and there related to them that there was a treasure buried in the vineyard. The old man died soon thereafter, and the boys did their duty. Once their father was laid away, they betook themselves to that vineyard with might and main. Working as you could never imagine, they turned up every inch of that vineyard. They never found a trunk or other container of gems or gold or jewels. Frankly, they were somewhat disappointed; they wondered how the old-man whom they loved so dearly could have played so fine a trick on them. But they got over it; they went back to their routines, their daily work. And yet that fall, when harvest season came, they found that they had the most bountiful harvest they had ever experienced in all of their lives. Then they knew what was the treasure in the vineyard.

That is very much the way I regard the American founding, as a vineyard left for us to labor in. And in it there is a treasure buried. To discover that treasure requires our effort, a willingness to labor in the field a while and a willingness to wait until the harvest comes in. I wish to consider what the harvest may look like, for us and for every generation, which willingly undertakes this work.

It's necessary to begin by avowing my principles. I regard the government of the United States, as it was founded, as the best form of government for human beings—the best, simply. I use no qualifications, and I mean all that you can imagine in saying that. I maintain it in the face of very strong reservations on the part of intelligent people—criticisms long and deep. Nonetheless, I think it is true. Still, I am

trained in the academy, and I do accept the obligation to honor and respect those who have worked with no less diligence than I and arrived at different conclusions than I have arrived at.

I wish, then, initially to share some of the problems of interpretation that may seem to call into question the conclusion which I have announced. One of the most obvious you likely know already, since it has received much news attention. A famous historian has led a group of scholars and civic minded individuals in encouraging us to regard this bicentennial season as an occasion to reflect upon the possibility of a new constitutional convention—one in which we may revise the terms of the founding charter, one in which we may opt rather for a parliamentary system than the presidential system which we now have. James MacGregor Burns argues from a few simple propositions. The first is that he believes American government would be more efficient in this modern age, if we like European states, enjoyed party discipline and coherence between the executive and the legislative branches, such that, the executive proposing a program, he could count on moving it through the Congress of the United States without the kind of “deadlock” (one of his favorite terms) we presently experience.

Reflecting upon that proposal one might ask what it reveals about Burns’ understanding of the Constitution. Are we in fact barred from acting on the basis of the kind of efficiency which he envisions? Or, does his argument conceal yet a deeper criticism of the United States? Has he in fact read the Constitution? Does he not know that there is not within the Constitution of the United States a single syllable which mandates that the president of the United States shall submit a budget to the Congress of the United States—or any other legislative program, so far as that goes—that it is, in fact, possible, within the terms of the existing Constitution, that that body which is entrusted with originating money bills could very well delegate the task of submitting the legislative program to its own speaker of the house; that he could be just such an executive as Professor Burns would have without changing jot or tittle of the Constitution?

Perhaps Professor Burns is unhappy, not with the constitutional structure, but rather with the way in which Americans make use of the constitutional structure. He must seek an alternative constitutional structure for the purpose of minimizing what he regards as their misuse of the constitutional structure. Thus, he would like to proscribe certain procedures—and perhaps policy options—constitutionally, because he regrets to see these things worked out in the usually messy political way. A response to that kind of criticism and interpretation is that if the problem does not inhere in the terms of the constitutional charter, it is rather a problem to be resolved by political means than through the charade of constitutional reform. They who propose constitutional reform to achieve political aims only reveal themselves as incapable of conducting themselves within the constitutional framework. Let us exonerate the Founders on that score; if Americans wish a parliamentary government, then they can have it. The Constitution leaves all the room that is needed.

There are, however, criticisms far more serious than those of Professor Burns. Indeed, they are the criticisms that often come rather from friends than enemies of the Constitution, even when they grow out of fundamental misconceptions about the nature of our polity. Consider a friendly case, the case of someone whose name you will recognize, Thomas Mann. Mann, of course, fled Hitler’s Germany in 1933. He came to the United States and, indeed, took out citizenship within the United States. In 1940 Mann authored an essay entitled “War and Democracy.” It was, in fact, a speech he delivered in Claremont at Scripps College (and thus perhaps, a bit parochial of me to refer to it tonight). In the course of the speech Mann mused about the nature of democracy, in a way which brings us closer to the more fundamental criticism, which I must deal with in order to establish the point that the government of the United States is the best government and not merely a good government. I will quote:

The political is no longer what it was—a problem for experts and incidentally for discussion material for beer-house *dilettanti*. It is no longer a game, played according to certain, generally acknowledged rules, based on a universal agreement on its fundamentals—a game which brings only external changes and transformations which do not affect anyone to his very depths. Today, indeed, it's a matter of ultimate values, of the foundations of civilization, of the very idea of mankind, of those universal times which we call 'religion,' religion which is in danger of destruction by a Caliban-like species of man or rather beast-men who have dedicated themselves to force and to nihilism. [p. 3]¹

What disturbed Mann was the rise of Hitlerism and Stalinism. Thus, the same mind which earlier had written of "Hitler my brother" now turned toward "democracy" and "freedom" to discover an asylum from terror. He did so in a way which rendered the meaning of those terms problematic: "we mean by the word 'democracy' the acknowledgment of those religious ties whose continued existence or churlish destruction is the problem of today—we mean the acknowledgment of truth, freedom, and right ..." [p. 4] On the model of English gentleness, Mann sought a version of political life in which freedom would prevail over power. He rightly regarded this as the legacy of "liberalism." [p.15] Freedom thus understood demanded "social self discipline" as well, "in the inward as well as the outward life of the nation." [p. 17] Difficulties emerge, however, when we consider the form he expected social self-discipline to take. For, though Mann was indeed a friend to freedom—and democracy—his argument did not end there.

It is a strange fact that the two basic ideas of democracy, freedom and equality, form a certain contrast, a logical contradiction. For logically and absolutely considered, freedom and equality are mutually exclusive, just as the individual and society are mutually exclusive. Freedom is the need of the individual but equality is a social need, and social equality, obviously, limits the freedom of the individual. [p. 20, emphasis added]

Social self-discipline, then, came to mean attenuating the demands of equality; while power came to mean the leveling impulse of the modern tyrannies. [p. 21]

Now, it is not hard to see the thrust of Mann's reflections, but I submit that he is wrong in this. There is not such a contradiction as he imagines. He thinks so only because he has fastened upon those wrong freedoms and equalities. He has grafted the wrong branches onto the stock of "truth, freedom, and right," which he saw as the foundation of legitimate political life. Though he began a friend to American liberty, he ended an unjust critic. We require to reformulate Mann's express purpose in order to avoid similar mistakes. He put it thus:

... freedom has always been a problem. The crisis of democracy is, in truth, the crisis of freedom; and the salvation of democracy from the hostile attack which threatens it will only be possible through an honest solution of the problem of freedom. [p. 23]

So that is what is at stake in achieving a correct understanding of our Constitution and indeed the case is even stronger—there are even worse criticisms. There are critics of America today who regard the founding as having sacrificed the social self-discipline, which Mann described, for the sake of base, vulgar concerns. Ultimately, these are the critics whom it matters most to refute. For these critics regard the birth of the Constitution in the manner of that nurse, who came out of the delivery room looking for a new father. She spotted a man who was ugly and misshapen, beyond belief. She greeted him and said, "congratulations, it's a baby."

There are very many examples of the scholarly criticism which sees the Constitution, in the words of Vergil, as a "*monstrum horrendum, lumen ademptum, ingens at informis*"—a horrid monster, blind and

misshapen. All of them, however, derive from or share affinity with a single, powerful, and classical statement of the problem. That is the work of the late Martin Diamond, considering which at some length one may ponder the difficulty. Then I will show you what I think to be the response to that argument (and in doing so discover how to correct Mann's view). Diamond began on a high note, but ultimately we will see that he descended.

In studying them [the Founders] we may manage to lift ourselves to their level. In achieving their level we may free ourselves from limitations that, ironically, they tend to impose upon us ... And in so freeing ourselves we may be enabled, if it is necessary, to go beyond their wisdom. [p. 2]²

...despite the enormous amount that has been written about the Founding Fathers, very little has been written from a point of view which emphasizes their reflections on what constitute the good life and therefore the best regime. [p. 3]

... our major political problems today are problems of democracy... [p. 4]

These conceptions [a Thermidorean reaction and a Jacksonian reaction to the former] are based implicitly on a questionable modern approach to democracy and have tended to have the effect, moreover, of relegating the political teaching of the Founding Fathers to the predemocratic past ... [p. 6]

We must learn to ask as they did what are the real defects with respect to the good life, of democracy [*sic*] and earn the right to ask the question by thinking through the assumptions about the good life and its knowability upon which its formulation rests. [p. 29]

It is no exaggeration to say that, for Martin Diamond, the source to probe these questions is *The Federalist*. Nevertheless, he insisted that *The Federalist* "does not discuss systematically, as would a theoretical treatise, the question of the ends or purpose's of government." [p. 31] In its discussion of "preservation," however, we learn that the idea "includes 'happiness' as well as 'safety'." Accordingly, reasoning that *The Federalist* rejects the notion of a regime founded on narrow self-interest, one might expect it also explicitly to reject Hobbes and the view that,

nothing less than the chains of despotism can restrain (men) from destroying and devouring one another. [p. 33, citing *Federalist* 55, p. 365]

Acknowledging the Framers' detestation of tyranny, coupled with their boasted "scientific means" for solving the anarchic tendencies of republican government, Diamond assessed the proposed solution—the "liberal" and middle way"—by their tendencies. But notice that, on this view, liberalism and republicanism are not the means by which men may ascend to a nobler life, but rather are simply instrumentalities which solve Hobbesean problems in a more moderate manner. [I will indicate shortly what he means by "Hobbesean problems"] It is tempting to suggest that if America is a "Lockean nation," as is so often heard, it is true in the very precise sense that Locke's "comfortable preservation" displaces only the harshness of the Hobbesean view. [p. 34-35]

Now the Hobbesean view, let me remind you, was based on the maxim, that in the state of nature, the life of man was "nasty, brutish, and short." And the Hobbesean solution was, of course, that despotism which treated human beings as having no interests other than immediate self-preservation and regarded, therefore, political life to be centered on those immediate, usually material, concerns.

Diamond accordingly demonstrated that “the theme of ‘happiness’ which is the most frequently occurring definition of the ‘object of government’ received no very thorough explanation. Publius seemed not to have in mind ‘traditional philosophical or theological understandings of happiness.’” (p. 37; citing *Federalists* 30 & 15, pp. 186, 88] He concluded that their vaunted “knowledge of the means” to happiness amounted to no more than “physical preservation from external and internal danger and ... the comforts afforded by a commercial society.” [p.38]

This contrasts sharply with those political theories, which “rank highly” the propagation of “religion, education, military courage, civic virtue, moderation, individual excellence in the virtues, etc.” About these *The Federalist* either says nothing, offers at best “pallid versions, of the originals,” or even holds in “contempt.” [p. 40] They praise instead the operation of a multiplicity of interests to assure republican safety. It will be “profoundly democratic” and encourage men, who “must be free,” to seek their “immediate profit.” The government will not be a mixture of distinct classes but rather based on a broad invitation to all classes to scramble for the prizes of social competition, for it is “the lowliest, from whom the most is to be feared, who must feel most sanguine about the prospects of achieving immediate benefits.” [p. 46]

But once consent has been given to the new wisdom, when the government has been properly founded, it will be a durable regime whose perpetuation requires nothing like the wisdom and virtue necessary for its creation. [p. 52]

Now, if you follow this view, the argument always seems to begin by regarding the Founding Fathers as wise and virtuous, while concluding that the descendants are mean and miserable. In fact, it’s rather like saying, “congratulations! It’s a nation—but not much of one.” This particular presentation of the founding—a view of its democracy as low, but solid—I call a criticism. For it denies to us any claim of nobility or of excellence. It is a view which maintains not only that the Founders expected little from men in general, but that they so contrived matters as never to allow for anything more—never to allow for, let alone to demand, virtue of Americans. In addition, this view flies in the face of the evidence.

The evidence: there begins a long story. We, of course, cannot rehearse all of the testimony, reflections, and considerations of the Founding Fathers tonight. But I wish to give you at least an apostrophe of what they were about and to leave you then to judge whether the founding not only was an accomplishment but an accomplishment of virtue

The Framers read Locke, Hobbes, Smith, Hume, and Hutcheson to be sure. But they had no less available the Aristotle of John Gillies.³ Gillies offered trenchant criticism of the modern views on the origins of politics. Writing in the aftermath of the American and French Revolutions in his “Introduction” to the *Politics*, he defended Aristotle against “the cunning, cowardly principles of Hobbes and Mandeville” as well as “the benevolent moral affections espoused by Hutcheson and Shaftesbury.” Aristotle rather built on the foundation “that both society and government are as congenial to the nature of man, as it is natural for a plant to fix its roots in the earth, to extend its branches, and to scatter its seeds.” I trace the significance of this argument to the fact that, for the critics of the framing, Aristotle is the singular source of the supposed antithesis to a base America (not Plato, who, if he says anything, rather he criticizes the ancient city, if he criticizes anything). Aristotle defended the city, the actual city whose end was virtue. Plato, on the other hand, never approaches an account of an actual city save through the mouths of the Thrasymachuses and Callicleses whose views, of course, are almost as thoroughly base—thus, as modern—as Hobbes’s.

Gillies rejected both Locke’s social contract and, while accepting in principle “the inalienable right to be self-governed,” the egalitarian freight of “the new inalienable right to be fairly represented.”

Locke's mistake, he held, was to settle for the hypothetical argument of a state of nature rather than to follow up the implications of Aristotle's teaching on a "system" of civil society. In this system, it will be found that not the arbitrary assertion of universal sovereignty but the articulation of the idea of a common good—"the good of the community"—will more surely defend the "expedient" of "giving to the people at large a control in the government." Gillies continued:

This control in all large communities can only be conveniently exercised, either by particular magistrates, or by representative assemblies. Things, therefore, that have not any necessary connection with the origin of government, (so far from being its only just principle) may be found admissible expedients for carrying it on.

Gillies's rejection of Locke—and the teaching of the Declaration—does not reestablish a solid defense of the *ancient regime*. As the echo of James Madison's *Federalist* sixty-three suggests, something more is going on. Where Gillies had argued "that the ancients were not unacquainted with representation in the usual and only practical sense" (emphasis added), Madison concurred:

The difference most relied on between the American and other republics consists in the principle of representation... The ignorance of the ancient governments on the subject of representation is by no means precisely true in the latitude commonly given to it... [p. 386] ... the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. [p. 387]

Madison went on to insist that the modern improvement over the ancients was the total exclusion of the people in their collective capacity from any share in the government. This means, in fine, a radical qualification of popular sovereignty, tending in the identical direction of Gillies' defense of Aristotle!

It need not follow that Madison concludes, as Gillies did, that government is "a trust the very nature of which is totally incompatible with the supposed inalienable rights of all man to be self-governed." For Gillies's principle, "the good of the governed is the main end and aim of every good government," eventually returns to the Declaration, now rescued from Locke. His specific concern was the manifest truth that not every man, literally, was capable of self-government, and the parsimonious terms of Lockean analysis, treating the minimum conditions of human life and not the conditions of a good life, obscure fact. The Declaration, however, speaks in principle of man *qua* man and in practice of almost all men, admitting no further distinctions than the variable accidents of human birth. It follows then that those men for whom self-government is indeed possible and where that is the good aimed at can enjoy no good government when self-government does not prevail. That is why it is "expedient" to give control to the people at large, as Gillies reads Aristotle. And that is why his conclusion may be considered a gloss on the founding:

Those rights, and those only, are inalienable, which it is impossible for one person to exercise for another: and to maintain those to be natural and inalienable rights, which the persons supposed to be invested with then can never probably exercise consistently either with their own safety, or with the good of the community, is to confound all notions of things, and to invert the whole order of nature; of which it is the primary and unalterable law, that forecast should direct providence, reason control passion, and wisdom command folly. (emphasis added)

Following an identical form of analysis, Gillies proceeded to blast the conception of mere acquisitiveness of natural wealth. Not the amount of wealth, but its effect on the soul and character of the citizen "ought to form the main object of the statesman's case." Here, too, he reasoned much like Madison in bringing Aristotle's praise of the agricultural and pastoral ways of life to bear on national character. He allowed, however, the ruling power of necessity, which made "manufacturers and commerce" the

necessary means of subsistence for the modern nation. Concerned primarily with Aristotle's teaching, though, Gillies did not comment on the expedient whereby almost all men are rendered apt for self-government: namely, the opening of just avenues to ambition sufficient to foster a pursuit of wealth by just means. Insofar as an economic system predicated on expanding wealth diminishes recourse to predatory means of material aggrandizement, it, too, operates to foster the character appropriate to self-government. It enlarges the chance for the love of justice to become resident in the souls of citizens. This assumes, naturally, that passions will not increase in number or intensity in proportion as means to satisfy them expand.

Gillies' stout defense of the ancients against the moderns constituted an apt expression of the conception by which the founding may be seen to work in the finer elements of the human soul. Gillies cited Locke himself—though faulting him for not following through—as recognizing the enduring significance of Aristotle in matters of morals and politics.

To proceed orderly in this, the foundation should be laid in inquiring into the ground of nature and of civil society, and how it is formed into different models of government, and what are the several species of it. Aristotle is allowed a master in this science, and few enter into this consideration of government without reading his *Politics*. (Locke to a Mr. King, *Correspondence*)

Over and above the Founders' demonstration in their new science of politics that they were unspoiled by our contemporary affectation that ancient regimes actually had virtue for their goal,⁴ Gillies's work showed most clearly how nearly their considerations and reflection fell within range of elevated sentiments and serious moral purposes. The notion that their politics focused exclusively on the low or base can only proceed from a fundamental misapprehension of their accomplishment.

Much of their ancient history they learned from Charles Rollin's *Ancient History*,⁵ in which they encountered formulas which would recur in their own work, such as, "the greatest and most noble function in the world is to be the author of the happiness of a nation." Could they have avoided to take them seriously? Consider that these accounts of ancient virtue always assumed a contemporary voice: "all agree, and it cannot be too often inculcated, that the end of all government and the duty of every one invested with it, be the form what it may, is to use his utmost endeavors to render those under his command happy and just, by obtaining for them, on the one side, safety and tranquility, with the advantages and conveniences of life; and on the other, all the means and helps that may contribute to making them virtuous." [p. 479, x] Perhaps the Founders regarded such remarks as relics of archaism. In this case, for example, Rollin described the Cretan constitution and Cretan monarchy. Here the Founders met the figure of a king who had "absolute power to do good, but his hands are tied up from doing evil." [484] There were to be no kings in America, but the people, the true sovereign; but behold the fate of the sovereign majority in *Federalist* 51: unchecked power to express the will of the society, but checked from doing evil! In sum, the familiar conceptions from the defense of the republicanism at the time of the founding ring no less clearly with echoes of distant virtue than of nearby vice. Perhaps the peal of virtue stirred less resolve than once it had done. After all, the *areopagus* condemned to death a child who had made it his past time to put out the eyes of quails. If the critics of the founding were to make that degree of resolve their standard, however, they should first have to respond to George Washington's claim that virtue's chances had improved with advanced humanity.

Review but briefly James Wilson's formulation of the original vision, and judge who most resembles the founding, the critic or the ancient. Wilson vaunted wisdom, virtue, and liberty, and the organization of government had no other account.⁶ "Communicate to the operations of government as great a share as possible of the good, and as small a share as possible of the bad propensities of our nature," he

urged. But this “second effort” was viable only after “first” having succeeded to provide that “the wisest and best” of citizens were established in office. [289] Wilson himself became rhapsodic while contemplating the implications of this reflection:

It is only under a good constitution that liberty—the precious gift of heaven—can be enjoyed and be secure ... its most generous ingredient, the happy consciousness of being free. What energetic, what delightful sensations must this enlivening principle diffuse over the whole man!

His mind is roused and elevated; his heart is rectified and enlarged: dignity appears in his countenance, and animation in his every gesture and word. He knows that if he is innocent and upright, the laws and constitution of his country will ensure him protection. He trusts, that, if to innocence and integrity he adds faithful and meritorious services, his country, in addition to protection, will confer upon him honorable testimonies of her esteem. Hence he derives a cheerful and habitual confidence, this pervades and invigorates his conduct, and spreads a noble air over every part of his character. [307]

Who the man so little penetrating as not to desire to live such a life in such a land? Is this a false picture of American hopes—the monstrosity which Justice Marshall finds in the founding?⁷ Were the Founders dishonest with their posterity, ignorant of the effects of their own innovations, or simply elusive to latter day critics? Grant this much: Wilson’s portrait at least frees him from the imputation of knowingly “lowering the ends” of political life. Then we must inquire whether, if he misperceived modernity, we shall be able to recreate within our own souls the actual opportunity—the pause at the crossroads between ancient and modern worlds—to make the choice which our Founders admittedly enjoyed. To do that, however, we must first rescue from the detritus of historical interpretation and accidents the lights of the founding as our proper heritage.

We begin by noting some evidence that Wilson’s view is not unrelated to the life of Americans. Where, for example, can we find a better account of the characteristic American tendency to expect innocence to be vindicated, if not the belief that our freedom is freedom for goodness, not license for every evil? Americans persist in such opinions despite the fact that veritable legions have sought to persuade them that the advantages of the society accrue to evil and chicane. More forcefully still, judge how far Wilson’s portrait of the state contrasting to freedom resonates with popular opinion about these matters:

the slave ... is afraid to act, or speak, or look ... What effects must this man’s situation produce upon his mind and temper? Can his views be great or exalted? No. Such views instead of being encouraged, would give offence; and he is well aware what would follow. Can openness and candour beam from his soul? No. Such light would be hateful to his masters; it must be extinguished. Can he feel affection for his country, its constitution, or its government? No. His country is his prison; its constitution is his curse; ... What must this man be? He must be abject, fawning, dastardly, selfish, disingenuous, deceitful, cunning, base...

Wilson concluded:

Such are the influences of a constitution, good or bad, upon the political body ... Surely, then, the first consideration of a state, and its most important duty, is to form that constitution which will be best in itself, and best adapted to the genius, and character, and manners of her citizens. Such a constitution will be the basis of her preservation, her happiness, and her perfection. [307-308]

While testimony of this character can refute the specific claims about the intentions of the Founders, on the one hand, and clarify the confusion about liberty and equality, on the other hand, I would readily admit that we confront a methodological difficulty at this point. The question of whether the regime points to a lowly pursuit of immediate interest or a pursuit of excellence cannot be resolved by testimony. It must, in the end, be subject to a demonstration of the actual character of the regime, independent of all testimony. For that purpose, however, we have few resources to hand, perhaps only the one, of revealing the character of the regime through the articulated accomplishment of that statesman or statesmen who can be definitively identified as having produced it. Methodologically, then, that would mean opposing the statesman's purpose (assuming it can be identified) to the theoretician's understanding. Because the political craftsman labors in human matter, his work can be judged no less by the shape he gives it than that of a Phidias by its look. The full story of the American founding covers a period of certainly no fewer than twenty years and perhaps as many as forty-five years (if Washington's testimony is to be credited). Accordingly, we can only sketch the case, which would enable us to assess the character of the founding in point of its excellence. A sketch may suffice, however, to respond to the specific challenge that has been posed.

Let me begin with what I think is the most important place to direct our attention—namely, with that one Founding Father who foremost held before himself and his fellows throughout the founding era the objective of a decent, republican life as the providential destiny of the American people. That is George Washington. When Washington was elected to the presidency, the first presidency under the new Constitution, he thought it was time to say something about what he believed America was about. He had said many things through the years—little pieces here or there, occasional pieces, words of exhortation and encouragement. Yet, unlike Thomas Jefferson, John Adams, James Madison, Alexander Hamilton, James Wilson, and others, we have no comprehensive treatise from George Washington.

As he sat to prepare his first inaugural, however, his first impulse was to give us just such a comprehensive treatise. It is one of the great, tragic losses of historical scholarship that we do not have that document today. Washington ultimately decided not to deliver it, and he put aside the lengthy, comprehensive draft of the first inaugural, which revealed his own judgment of political principles and objectives. Instead he chose, working with James Madison, to give us a rather pithy First Inaugural—which he did in fact deliver.

Once the first draft was put aside, it ended up among sundry papers quite naturally. Those papers ultimately fell into the hands of an historian, Jared Sparks, in the middle of the nineteenth century. He did not know quite what to do with the Discarded Inaugural. He inquired of Madison as to its status, and Madison—without avowing a reason—responded that he should not publish it, for it would be an embarrassment to Washington. Sparks then, thinking it utterly worthless, treated it as a source of souvenirs. He proceeded to clip the manuscripts into little snippets, which he could distribute to friends as Washington autographs.

We have succeeded somewhat in gathering a significant portion—though far from all—of those snippets. In a volume appearing later this year I will publish what is, until now, the most comprehensive version of those snippets, collected back together and the jig-saw puzzle arranged in some order. We still do not have the entire address. What exists, though, by my estimation, approximates sixty percent of the total address. In the portions of the address that we have, at one point, Washington made a pregnant statement. Describing the Constitution that had been accomplished, he said, "I presume now to assert that better still may not be devised." An extraordinary statement, an expression of his judgment about the level of accomplishment in the Constitutional Convention and the ratification process—which I take in

his characteristic approach, approached as nearly as he ever could to saying that it was the best, simply. Why would George Washington declare the regime the best?

It seems to me that Washington's judgment rests on a few simple considerations, some of which are elucidated in the inaugural and others of which are elucidated in documents prior and subsequent to that time. Most important, surely, is what he had originally set out as the objective for the founding. He expressed it in 1783 in his "Circular Address to the Governors and People" of the thirteen states. In that address Washington noted that the original attempt at a Constitution was a failure. The Articles of Confederation did not supply the needs of the nation, not least a trustworthy defense. It was unable to legislate for itself as a nation, unable to provide for that peace and prosperity, that stability, which were conditions for the attainment of the fundamental objective. And that, said Washington, was the objective of self-government.

That little expression, self-government, wears old with us by now. We've heard it often, and we perhaps do not experience all the resonance, which George Washington intended when he wrote it in 1783. There was someone who did experience its full resonance a year earlier, in 1782, and that was Colonel Lewis Nicola. Nicola had written to Washington suggesting that things were in such poor state in the country that only a monarchy could rescue America and, naturally, only Washington could be monarch. Washington responded to Nicola with the kind of letter which could still instruct protocol secretaries (or law firms refining rejection letters). He managed to convey in a few well chosen words so complete a horror of Nicola's suggestion, so resolute a defense of, the idea of republicanism, the idea of self-government, that poor Colonel Nicola spent most of the rest of his life apologizing to Washington. He understood what the general meant.

To try to create within yourself that same resonance, you might recall that self-government does not mean majority rule—for any of the American Founders. It certainly does include the processes of majority rule ultimately; it is a popular government. But that is only a mechanism, a means—not what was being aimed at. What they meant by self-government was rather more a moral conception. What Washington constantly held before his fellow citizens was a moral conception, as he expressed it in his Farewell, when he eulogized the people as "now" loving to be "one people," and now governing themselves. At that moment, at least, they became in Washington's eyes a republic, and had also to accept the responsibility for its perpetuation.

Washington's Farewell is truly a masterpiece in literary craftsmanship—and, yes, it's partly a masterpiece because Hamilton participated in drafting it. Still, no one should mislead you; Hamilton was guided by Washington throughout the process of drafting that address, including where certain things would be placed in the address. The address carries the people from the Revolution through the time of Washington's departure. In effect, he confessed that he had asserted authority in the early years, of necessity. He did so in a self-deprecating manner, indeed rendering his authority virtually invisible, but he did so and with the purpose in mind of attaining the very eminence from which he then spoke, the point at which the people could assume the authority of self-government and himself become superfluous. Thus, he left office declaring that he, George Washington, does not govern in the United States; the people do.

Washington meant in this precisely what he meant in the First Inaugural address, which he did deliver, namely, his claim that "private morality" is the foundation of our national happiness. That is an extraordinary claim in the context of general discussions of political principles and ideas. It may not strike a contemporary soul so, but most philosophers would demand to know what on earth he was talking about. Did he mean that everyone has his own opinion and does what he wishes? That is not what Washington meant. He meant precisely what all of the Founders meant whenever they used the expression, self-government—namely, that this was to be a government in which not only the authority to govern

oneself fell upon the shoulders of each, but the success of the government itself would derive from placing that authority on the shoulders of each and having it accepted.

There remains a problem: Who, under heaven, would ever imagine that the mass of mankind are capable of so awesome a responsibility? The answer, of course, is virtually no one, save for the American Founders—an extraordinary event. True, they did not simply set sail on new and uncharted seas without regard for the past, without regard for past reflection, and without regard for past theoretical accomplishments. They were learned people; they were well schooled. They had much respect for the achievements of the past. Still, they did conceive that the past was wrong in one very fundamental respect—namely, the conclusion that a few were by nature suited to rule, and most were by nature suited to be ruled. With that they did disagree. They had already confirmed their disagreement in the Declaration of Independence, for that is what the language of the Declaration means. When it holds “all men created equal,” it means no more than that there is not any human being set aside by God or nature as the natural ruler of any other human being. Abraham Lincoln understood it correctly. But the Founders, to arrive at that conclusion, tried to satisfy the doubts of ages of philosophy, ages of political experience; they had to pursue their wager, not mindless of that philosophical past which lay behind them but rather convincing themselves that they had satisfied those doubts and come up with a reasonable response.

Now, the reasonable response is what the evidence of the words of the founding reveals to us. I have said often to folk that to retell secondary interpretations of the founding is no way to understand what took place in America. There is no substitute to reading the words of the Founders themselves. Let me consider very briefly Diamond’s analysis of *The Federalist*, to show you how this may work.

His argument was, you recall, that they took the object of government to be happiness; they took happiness to be comfortable self-preservation, and that means, essentially, thriving in a commercial society and being concerned with material interests. Not even *The Federalist* itself, on a fair reading, can be interpreted that way. Yes, to be sure, *The Federalist* is highly concerned to eliminate the problem, which it terms “majority faction.” We recall the definition of a faction from *The Federalist* number ten: a group of people actuated by what Madison termed an “impulse” or “interest” adverse to the rights or interest of the whole society. One could have minority factions—small groups antagonistic to everyone also; one could have majority factions. We all know what the problem of democratic government is; that is, where the majority rules, if the majority happens to be a faction, heaven help the minority. Therefore, we, like Madison, seek to know how the problem is to be solved. Publius answered throughout *The Federalist*, above all in numbers ten and fifty-one. The answer, however, was not that everyone should be persuaded that nothing in life matters besides self-interest. Madison’s answer was not that religion was to be discounted, that virtue could not be relied upon, or any of the other etceteras which were related in Diamond’s argument as I reproduced it.

Madison answered that we have to find a way to confine majority rule to principles of justice. The reasoning by which that conclusion is produced is rather straightforward. We know how to get rid of minority faction; the majority out votes the minority. Now does one get rid of majority faction? Every immediate alternative poses a great problem. Each relies upon creating a will independent of the society—that is, some authority that can rule in its own name, as a monarch or an aristocratic body. It is usually a minority of the community, which disposes of absolute authority over every one else. That is unacceptable, for it is the mode that the Americans originally set out to alter. They had affirmed the priority of self-government.

The solution had to be produced in a combination of ways—looking at the structure of government, the questions of separation of powers, checks and balances, and many such things as are too familiar to excuse my rehearsing them here. More important, however, stand the considerations beyond these,

as Madison elucidated them. For Madison argued, in the end, that the checks and separations are not, themselves, the salvation of self-government. They are means of keeping representatives in check, while the question which concerns us is what is the nature of these representatives.

We regard all of the officers of government—legislators, executive, justices—as representatives. What do they represent? They represent essentially the will of the society, the will of the majority to be sure. Now, how is it that they can represent that will of the majority without that will of the majority becoming unjust? One of the things we have to do, according to Madison in *The Federalist* number fifty-one, is resort to precisely the same measure we employ to protect ourselves from religious intolerance. There he argues that the remedy is the multiplicity of sects; not a law, but the multiplicity of sects defends against religious intolerance. Similarly, he said, it is the multiplicity of interests in society, which shall help defend against the emergence of majority faction through the voices of representatives. How will they do that? This government is constructed in such a way that it can not work—it can not do anything at all—until it is put in motion by the clamant interests of the society. Thus, it turns out, we have to return to those interests which are capable of becoming factions in order to understand American politics. The political process turns upon the multiplicity of interests only in the sense in which those interests and their demands are what set the political agenda within the society. They set that agenda under certain restrictions, namely, that they can virtually never accomplish their ends without coming to terms with numerous other such interests, and then only through representatives, never directly.

According to James Madison, the consequence of this whole procedure (and it's much more complicated than I have presented, but what I have shown is sufficient to give you an indication of what he relied upon)—the entire procedure will eventuate in just majorities alone being able to form at that level of significance which will transform their will into legislation (something considerably different than a Gallup Poll). One might ask, "Is not that just a bit utopian?" I ask, however, that that be put aside for a moment. The important question at this point is why it has to be done that way and not whether it works.

It turns out that matters must be shaped thus because one can not take what had been our initial assumption about how to avoid majority faction—one cannot erect a will independent of the society. Madison interpreted that to mean that there could be no special privileges for any minority. Therefore, the only way to establish any protection for minorities within a society is to find a way to restrain the majority to just pursuits. That was his conclusion. Justice is not an empty term; it is not a mere matter of commerce or self-interest. Justice is a near-relation of virtue, and even virtue is not absent from the reflections of *The Federalist*.

What you find throughout the founding era, in the Constitutional Convention, in the ratification conventions, and in the letters and papers of the Founding Fathers is the continual emphasis of one theme: namely, that the idea of building a nation within the United States turns on the prospect of being able to assure that the processes of self-government can work hand-in-hand with this conception of justice (or, if you prefer, with an expectation of virtue), without at the same time lodging somewhere within the community a specific power to form individuals in virtue. That is the key. They noted that, usually in the ancient world, folk relied upon a moral censor to sustain a decent society (though rarely, if ever, with full success). Someone ultimately had the authority, in the name of the law, to tell people how to conduct themselves. Thus, if virtue were the objective, folk know it had some teeth behind it. Folk could be compelled to attend Sunday School by the force of law. According to the Founders, however, that ancient approach was mistaken. Not only did it not produce virtue to any significant degree, but it was self-contradictory.

Consider: why would folk wish to produce virtue in human beings? The answer would be that such human beings would then become capable of conducting themselves by their own lights—self-government. What happens when one cedes to someone else the authority to compel folk to conduct themselves virtuously? Is it not the case that such folk never have occasion to conduct themselves by their own lights? The very purpose for the sake of which one makes virtue the end is rendered impossible in the ancient regime, in the pre-American state of things. As the Founders pondered that contradiction, they argued that their gamble was necessary, consistent with the objective of virtue. That this society would succeed if its people were decent was the fundamental principle of the drafting and adoption of the Constitution. It was not drafted with the idea in mind that virtue no longer counted. It was not drafted for the sake of denying what had been maintained in the ancient world, that human decency was important to human society. It was designed, finally and for the first time in human life, to make possible what all had always longed for.

Hence, the analysis of Professor Diamond and the mistake which Thomas Mann made was to seize upon the wrong idea of freedom and equality. Freedom was not a freedom to do what you will; freedom was an opportunity to be decent. Equality was not an assimilation of individual differences through the despotic power of a state; equality was the recognition of the necessity of consent and the obligation of self-government (an obligation which could be enforced). That was their concern. Liberty, moreover, was the same as equality at the time of the founding and in the Declaration of Independence. It is not in tension. Recall that equality—namely, the notion that no one has the right to rule another without his consent. That means, therefore, that all relations of rule (if legitimate) are expressions of one's free and willing agency. One decides for oneself that one will consent; that governs one's conduct—the things that one will do are expressions of one's equality and that is, at the same time, one's liberty. The notion that the two might be in conflict, finally, can only arise from a misunderstanding of democracy—one which assumes that the objectives of the American Founders was rather to produce procedures of government than what I would call a "regime." Now, that word, "regime," is not ordinarily used by us in the manner I am now using it, but I use it because there is not in our language another word which expresses what was once meant by the word "regime." We say "regime" when we wish to convey the idea that the order in a given community shapes the character and experiences of an entire people. It's more than a constitution understood as a legal document; it's a way of life. The Founding Fathers meant to create a regime, in the context of which there would be a people and which people would conduct themselves in accord with virtue so long as that regime should last. How they differed from others, let James Wilson again relate:

Of some governments, the foundation has been laid in necessity; of others, in fraud; of others, in force; of how few, in deliberate and discerning choice! If, in their commencements, they have been so unpropitious to principles of freedom, and to the means of happiness, shall we wonder, that, in their progress, they have been equally unfavourable to advances in virtue and excellence? [301]

I shall conclude with the following proviso. I believe that it is the best government, and I've provided a snapshot as to how I arrived at the conclusion. But there is a proviso; the government that was founded under the Constitution of the United States can endure only so long as the private morality, of which Washington spoke in his First Inaugural, does characterize the people of the United States. There is an implicit and necessary connection between the two. It is the best government, and after two hundred years we have some idea that it can work. If the people cease to be decent in ordinary ways, if they cease to be virtuous, in the expectation of the Founders and as far as I can tell, the Constitution will cease to prevail.

NOTES

¹ Thomas Mann, *War And Democracy* (Claremont, California: The Claremont Colleges, 1940).

² Martin Diamond: "Notes on the Political Theory of the Founding Fathers, Working Paper No. 10, Center for the Study of Federalism, January 1971 (attribution: paper prepared for delivery at Fund for the Republic, September, 1957).

³ Charles Rollin, *The Ancient History*, Two volumes in one, vol. I, Book x (New York: American Book Exchange, reprint, 1880).

⁴ Cf., *The Federalist*, numbers 9, 18, & 37.

⁵ N.Y.: American Book Exchange, 1880, VOL. citation from book x

⁶ *The Works of James Wilson*, ed. by Robert Green McCloskey, vol. I, "Lectures on Law and Government" (Cambridge; Harvard University Press, 1967).

⁷ Thurgood Marshall, address at The Annual Seminar of the San Francisco Patent and Trademark Law Association, Maui, Hawaii, May 6, 1987. Justice Marshall described the Constitution as "defective from the start" on account of the "contradiction between guaranteeing liberty and justice to all, and denying both to Negroes." The Justice is gravely mistaken in his history, however. The compromises touching slavery certainly did occur, though not as he described them. They neither rejected the principle of the Declaration, that "all men are created equal," nor described American blacks as three-fifths human beings (as Justice Marshall and too many others have frequently but erroneously repeated). The language of the Constitution distinguishes free and slave persons, not white and black persons. This, too, only echoed the original three-fifths provision of 1783, which dealt not with representation but taxation. Nevertheless, its authors spoke then of white citizens and other free persons in addition to three-fifths of all other persons. Thus, the class of free white and black persons were distinguished from the class of slaves, who were black persons also. In the Constitution, the distinction between white persons and other free persons was dropped for the comprehensive "free persons," sealing forever the understanding that American blacks were no less included within the guarantees of the Constitution than American whites, Supreme Court Justices Marshall and Taney (1857) to the contrary notwithstanding.