PERSPECTIVES
ON THE CONSTITUTION
OF THE UNITED STATES
OF AMERICA
1787–1987
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Brigham Young University Studies

Volume 27  Summer 1987  Number 3

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ISSN 0007–0106

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Printed in the United States of America

6-88-37366-4M

Opinions and statements expressed by contributors to *Brigham Young University Studies* are their own and do not necessarily reflect the views of The Church of Jesus Christ of Latter-day Saints, Brigham Young University, the editors, or the editorial board.
Perspectives on the Constitution—
Origins, Development, Philosophy, and Contemporary Applications

Thomas B. McAffee

It is fitting that BYU Studies should publish a special issue on the United States Constitution in connection with the nation’s bicentennial celebration. As a group, Latter-day Saints are part of a perhaps increasingly small minority that continues to see the hand of divinity in the founding of this nation and the coming forth of the Constitution. This fact not only suggests that the Constitution’s bicentennial should be observed at Brigham Young University, but that it ought to be observed in a way that takes the document seriously, not merely as a symbol of the nation but also as an instrument that seeks to ensure effective government while preserving human rights and the rule of law.

In the effort to take the Constitution seriously in 1987, our solicitation for this issue was deliberately cast broadly. We sought the widest range of thoughtful perspectives on the Constitution by individuals whose scholarly interests tied into the Constitution. And this effort yielded essays and articles that range from the origins of the Constitution to the most controversial issues of the present day. Within this range of methods and disciplines, however, there is significant unity of purpose—every author, whether explicitly or implicitly, offers us a perspective on the nature of our constitutional system and insight that may contribute to our own attempts to confront competing conceptions of its central elements.

Ask typical American students about the intellectual origins of the Constitution and, based on their exposure to the materials in undergraduate courses in history, political science, or philosophy, many would mention social contract political theory and most of those would associate that theory with the writings of John Locke. Lynn D. Wardle’s “The Constitution as Covenant” confirms the centrality of social contract theory to understanding the Constitution while providing the reader with an understanding of the origins of this kind of political thought in the covenant theology that dominated American colonial religion.

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In fairness, the theological origins of the social compact view of government are generally mentioned in undergraduate texts that treat the origins of the Constitution. The real problem, in addition to the compressed nature of the treatment required in light of the scope of such courses, is that we tend to see the Constitution through the filter of an increasingly secular society that confronts religion awkwardly in almost every context. Obviously the theoretical writing of John Locke is the most convenient starting point for discussion of modern (mainly secular) theories of individual rights. But if what is learned is more important than what is taught, the religious underpinnings of a good deal of our constitutional thought is given short shrift in the teaching of constitutional history just as it is in teaching the modern Civil Rights movement and other subjects as well.

The most surprising revelation in Wardle’s treatment is the powerful influence of the clergy and their decidedly religious views, rooted in covenant theology, right down to and including the years of the nation’s founding. The reader will also be surprised to discover the range and depth of the influence of covenant theology on the basic assumptions about government that animated the framers. At the very least, these materials strongly suggest that the framers of our constitutional system would have been startled by the modern suggestions that uniquely religious perspectives on public questions should be viewed with suspicion, or even with constitutional doubt when those perspectives influence law or policy.

Perhaps the most important development in modern historiography of the founding period is the renewal of emphasis on the theme of republican virtue and its importance in preserving republican forms of government. Wardle links this preoccupation with republican virtue with covenant theology in ways that are likely to ignite sparks of recognition in those familiar with the Book of Mormon’s promises concerning this land and its explicit linkage of righteousness and freedom. The far-ranging connections between the founding generation’s thinking about public virtue and constitutional government are explored in depth by Richard Vetterli and Gary Bryner in “Public Virtue and the Roots of American Government.” Vetterli and Bryner develop the connections between republican thought and the concept of public virtue with a number of the central issues confronting the founders. An important issue, for example, is the extent to which Madison and other key figures abandoned reliance on public virtue as the key to republican government in favor of institutional safeguards designed to set the self-interested actions of individuals and groups against each other to the ends of avoiding tyranny and generating something approaching the common good. Vetterli and Bryner develop the case for the view that Madison’s defense of the concept of an extended republic, which may have been his
most original contribution to the theory of government, sought both to promote and supplement the possibility of public virtue.

In short, our constitutional system may not rest wholly on either classical republicanism or on some variation of interest-group pluralism. Madison’s argument was that the federal system would both promote selection of men of virtue and provide a check against the tendencies toward faction and oppression. Similar analysis sheds light on the balanced assessment of human nature that animated the founders’ reliance on separation of powers and checks and balances within the national government. Vetterli and Bryner demonstrate that a proper understanding of the evolving concept of public virtue sheds light on the entire constitutional design, as well as on such ancillary questions as the extent to which the Constitution represented a new synthesis that rejected republicanism in favor of an emerging “liberal” conception of government.

The modern tendency to see the Constitution almost exclusively as an embodiment of eighteenth-century political philosophy, and perhaps in particular of the political liberalism of John Locke, receives another sort of critique in Mel Bradford’s “The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law.” Bradford traces the extent to which the founders looked primarily to the traditions they saw embodied in Great Britain’s unwritten constitution, right down to a number of the specific rights set forth in the Bill of Rights that was added to the Constitution drafted in Philadelphia. For Bradford, this preference for the lessons of experience under the British constitution overshadowed reliance on philosophical conceptions of natural law and justice and represents the more reliable guide to understanding the 1787 Constitution as we seek to give it effect in our own day.

Forrest McDonald observed that the only problem with various ingredients that contributed to our constitutionalism—the commitment to individual rights and republicanism, the sense of history, and a large (and largely common) storehouse of political theory—was that it was not entirely clear that they were compatible. The task of harmonizing the tensions within these ingredients, as well as brokering the conflicting interests of the nation’s diverse regions, fell upon the delegates from the states who met in Philadelphia in 1787. While the story has been told before, it bears repeating here both for the sense of history and drama it provides, as well as for the light it sheds on the finished product. J. D. Williams’s treatment of the Great Convention, “The Summer of 1787: Getting a Constitution,” conveys both the historical drama and the critical governmental elements it generated. In reading this treatment, we experience the tenuous nature of the enterprise of reaching agreement on the terms of a national compact and learn of crucial compromises that
saved the effort. While being introduced to the critical elements of the constitutional government agreed upon, we also obtain one thoughtful commentator’s perspective as to precisely where the “miracles” occurred at Philadelphia.

It is not enough to frame a government dedicated to avoiding tyranny and protecting individual rights. The promise of freedom must be delivered over an extended period of time. The Mormons learned this early, as the Prophet Joseph Smith once remarked that the only weakness he perceived in the Constitution was its failure to provide effective means to compel executive compliance with its mandates. Another sticking point, of course, can be the willingness of the judiciary to defer to the majoritarian sentiments of the day. Edwin B. Firmage’s “The Judicial Campaign against Polygamy and the Enduring Legal Questions” builds the case that the judicial deference paid to antipolygamy legislation represented this sort of abdication of the judicial function to protect the constitutional rights of individuals. This abdication presented itself most clearly and forcefully as the courts manipulated traditional standards of notice, proof, and due process to sustain convictions under vaguely-worded criminal statutes. Arguably, the upholding of traditional rule of law requirements is among the most important duties of courts, inasmuch as substance follows form and the values of fair procedures are among those most likely to go unappreciated by an aroused public or legislature. Firmage also criticizes, however, the Supreme Court’s restrictive interpretation of the free exercise of religion guaranteed by the First Amendment.

The Supreme Court’s constitutional standard as to free exercise, which has been implicitly rejected as insufficiently protective by the modern Court, gave almost no protection to religious conviction as it moved along the continuum from belief to conduct. In failing to confront the central value of religious freedom or to distinguish truly harmful conduct from the merely disfavored, the Court diluted the significance of the First Amendment as a bulwark against the persecution of disfavored minorities. While Firmage concludes that there is perhaps not a definitive answer as to how the modern Supreme Court would rule on the precise issue presented in the original polygamy case, this treatment of the historical materials at least demonstrates that individual freedom is not a meaningful concept if courts are willing to calibrate the scales of freedom by reference only to the majority’s preferences.

The Mormon experience squarely raises the issue as to the nature and justification of the commitment to individual rights embodied in the Constitution. For many Latter-day Saints, this constitutional commitment to the sanctity of individual rights may seem anomalous, particularly when it offers protection to conduct or the promulgation of ideas that run counter to the standards they accept as part of the gospel
of Jesus Christ. Collin Mangrum suggests that we might best understand our individual rights commitment and tradition in terms of liberal political theory; and that, in turn, we might best understand our religious commitment to acceptance of diversity through protection of rights as a reflection of the different roles that government and theology play in our lives. Mangrum shows that philosophical liberalism, with its emphasis on tolerance and individual autonomy, can be seen as a natural outgrowth of the Reformation and the intellectual justification of religious tolerance. America’s tradition of religious dissent and toleration of religious diversity, the growth of religious and philosophical outlooks that emphasized moral freedom and responsibility, and Enlightenment perspectives that challenged the authority of traditional religious dogma, all contributed to the acceptance of natural rights theory as embodied, for example, in the Declaration of Independence.

While acknowledging that liberalism’s historical connection to the Constitution is controversial, Mangrum suggests that the history and structure of our constitutional system is at least harmonious with liberal theory’s emphasis on the moral equality of individuals and the limited nature of adequate justifications for overriding individual choice. Whether the framers were philosophical liberals or not, liberalism may be the most adequate system of thought for explicating the Constitution’s clear commitment to individual rights. On this view, the State’s role is to preserve a system of ordered liberty that permits all individuals, including Latter-day Saints, to pursue their respective visions of the good life while permitting others the same privilege.

If the Constitution reflects or embodies currents of philosophical thought, it is also a system of law. Indeed, as I observe in “Constitutional Interpretation and the American Tradition of Individual Rights,” it is the Constitution’s status as law, enforceable in courts as the supreme law of the land, that is perhaps its most important, and distinguishing, feature. The Supreme Court’s controversial role as the arbiter of constitutional meaning has prompted an engaging modern debate over whether the constitutional text does (or should) constrain authoritative decision-makers. Some see the modern Court as a usurper of constitutional authority in ignoring the original intentions behind constitutional texts; others see the text as almost infinitely malleable and the notion of binding intent chimerical. I seek a middle ground that acknowledges the judicial duty to be bound by the text read in a relevant context, but also the legitimacy (and inevitability) of a creative judicial role where the application of constitutional language requires supplementation or calls for gap-filling where the search for meaning has been exhausted.

On this view, when courts confront the Constitution’s most general and vague texts, their role in giving them effect becomes largely a matter of constitutional (and therefore political) theory—a theory that
individuals bring to the text at least as much as they take from it. The debate over the judicial role in constitutional decision-making has become most pronounced in the boundary between government power and individual rights. Indeed, in the individual rights context there is even debate as to whether the source of constitutional law is limited to the written text of the document we call the Constitution. This article contrasts competing views that the Constitution is a system of limited government that implicitly protects all the natural rights that people bring with them to the social contract, whether specified in text or not; or, alternatively, that the written Constitution embodies the social contract, with the implication that rights not reasonably found in the text itself are not constitutional in nature and may not be enforced by any court.

An equally fundamental division contrasts the view that individual rights form a normative system by which law and culture may be judged with the conception that rights arise from within human culture and embody what text, history, or consensus have established as the basic claims of individuals. Collin Mangrum’s treatment of philosophical liberalism is suggestive of the first view, while Mel Bradford’s emphasis on the framers’ commitment to British constitutional tradition reflects the latter conception. In many respects, this debate over the nature of our constitutional order parallels the historical debate as to whether the founding generation was more committed to classical republican ideals or to liberal political theory.

Even when we confront the most immediate and pressing problems of constitutional decision-making, these fundamental questions about the nature of the Constitution are never far from the surface. Bruce C. Hafen’s essay, “Bicentennial Reflections on the Media and the First Amendment,” for example, combines respectful reflection on the Lord’s affirmation of the inspiration underlying protection of freedom of conscience with an analysis of the Constitution’s commitment to freedom of speech and press that emphasizes their contribution to the public interest in our democratic system of government. In emphasizing this connection, Hafen sees room for recognizing rational limits to free speech rights, such as the traditional exclusion of obscenity from free speech protection, as well as for the exercise of restraint by a judiciary charged with enforcing these rights. At risk of overinterpreting a brief essay, Hafen’s thesis seems comfortably at home within the nonliberal legal and political tradition that harks back to the emphasis on self-discipline and public virtue that represents one strand of our constitutional origins.

In “One Moment, Please: Private Devotion in the Public Schools,” Richard G. Wilkins takes on one of the vexing areas of modern constitutional adjudication—the proper constitutional relationship between church and state and the connection between church and state issues and
religious freedom. Wilkins concludes that the modern Supreme Court’s construction of the establishment clause of the First Amendment would flunk any “strict historical test” that looked to the intentions of the founders. More centrally, however, he defends the view that the modern Court’s establishment clause formulations have not been adequately linked up with the questions that should dominate church and state issues—the problem of coercion of individual right of conscience and the potential for debilitation of government and religion. Wilkins concludes that to interpret the Court’s tests in the light of these central purposes is to perceive that schools might properly facilitate private religious devotion through sponsoring moments of silence because to do so enhances religious freedom without risking coercion of religious belief (however subtle) or mixing the proper functions of church and state.

Finally, Christopher L. Blakesley turns our attention back to the structure of the Constitution and the concept of the rule of law in “Terrorism and the Constitution.” In the context of the frighteningly relevant problem of the growth of international terrorism, Blakesley addresses the question of whether traditional constitutional limitations and, indeed, the very notion of principled application of law, can control executive conduct in confronting the threat posed by our international enemies in a dangerous world. The affirmative answer developed in his essay reminds one of St. Thomas More’s famous speech in Bolt’s A Man for All Seasons in which he confirms that he would give the devil the benefit of the laws because they are the source of our protection from the howling winds of oppression. (It should be noted that Blakesley and I were taught constitutional law by the same teacher, Ed Firmage, who was known to cite Bolt’s play alongside the United States Reports.)

If we trample over constitutional and international legal norms to combat terrorism, we undercut the system that has provided the greatest amount of personal freedom the world has known. Blakesley reminds us of our constitutional heritage and asks us to consider the values that are most easily left behind in the passion for immediate results in addressing vexing and serious problems. Whether or not one concurs in all of Blakesley’s particular conclusions, such thoughtful consideration of fundamental questions is what constitutionalism is all about. This being so, the readers of this special issue will be better constitutionalists for having considered the essays contained herein.
From an English Major Teaching Law

Sometimes I wonder if these are real books,
And think about the breath and blood and bones
That would have fleshed the issues out (before).
A little romance couldn’t hurt the law;
A little poetry would do law good:
Not the poetry of the perfect word,
The tightened syntax and the sharpened sight.
The law has that.

We need the tenderness,
The mythos and the suffering and the love.
While we dissect words, wealthy, erudite,
To feel the pain in all the world below,
Around, above. To see when all the words
Will not heal like a touch and share of tears.
Escape the arguments, and, quietly,
Protect the fragile, pray, conserve, and care.

—Lisa Bolin Hawkins

Lisa Bolin Hawkins taught as a visiting assistant professor at the J. Reuben Clark Law School at Brigham Young University from 1981 to 1983.
The Constitution as Covenant

Lynn D. Wardle

The Constitution of the United States is the legacy of "a peculiar moment in history when all knowledge coincided, when classical antiquity, Christian theology, English empiricism, and European rationalism could all be linked."1 And covenant was the linking concept. The religious idea of covenant was particularly and profoundly important in the evolution and inspiration of the American Constitution, for the political idea of, and the political concepts embodied in, the Constitution can be traced in "an unbroken line of descent" to the seventeenth-century covenant theology.2 In this sense, the constitution of the American republic was formed long before the Constitution of the United States was drafted in the summer of 1787. It had been evolving in the hearts and minds, and in the habits and customs, of the people who inhabited the thirteen colonies since the days of the first settlements.

In this essay, I will review the origins of the Constitution in covenant theology. But the concept of covenant was not limited to religious doctrines; it was "central and dominant" in the everyday lives of American Protestants and in their view of the world and all of God's workings in it.3 Particularly important to the development of American constitutionalism were the organization of the church by covenant and the belief in the covenant origins of civil government. The covenant legacy is also apparent in the fundamental principles of the Constitution, especially the two most important principles, popular sovereignty and limited governmental authority, which were derived directly from covenant theology.

The influence of the clergy and of religion at the crucial period of history was also important. The sense of divine destiny, or "millennialism," that prepared the American people for the tumultuous events of the last quarter of the eighteenth century was significantly attributable to religious influence. The covenant clergy's preaching of the right (if not the duty) to resist ultra vires governmental authority stimulated and supported the War of Independence. Covenant clergy led the insistent

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demands for constitutional conventions where "the people" rather than the legislatures could compose the basic civil covenant.

THREE DIMENSIONS OF COVENANT THEOLOGY

Covenant theology, sometimes called federal theology (from the Latin *feodus*, meaning *covenant*), had roots in Calvinism and developed prominently among the Dutch dissenting Protestants, particularly the Anabaptists, the English Dissenters, especially the Puritans, and Scottish Presbyterians. The influence of covenant theology was not limited to the dissenting churches; the Westminster Confession provides compelling proof that even established churches embraced covenant concepts. "Wherever the Reformed religion made its appearance, the idea of the covenant became prominent."4

Covenant theology came to America with the separatist Pilgrims, the reformist Puritans, the dissenting Anabaptists, the independent Presbyterians—indeed with virtually all the churches and settlements. The influence of covenant theology in the New World was so broad that "it could be received with minor variations, by almost the entire spectrum of American Protestantism."5 The covenant perspective "permeated the mind of the American Puritan."6 The Puritans were "obsessed with the covenant or contract, relying on this handy instrument to explain almost every relation of man to man and man to God."7 But the concept of covenant was particularly dominant and central in three respects: in religious doctrine (theology), in church government, and in civil or political organization.8

Building upon the essential Calvinist ideas of the depravity of man, the sovereignty of God, and the necessity of ordering the church in strict accordance with biblical prescriptions, covenant theology emphasized that the foreordained and saving grace of God was extended to the "elect" by covenant.9 God had made a covenant of works with Adam and Eve, who breached that covenant. Then, in his mercy, God made a covenant of grace with the descendants of Adam and Eve by which Christ, having voluntarily covenanted with the Father to be the Mediator, paid the penalty for the broken covenant and became the Lord and Savior of mankind. Salvation was promised to the predestined elect who exercised faith in Christ.10 The heart of covenant theology was the idea that God's predestination of mankind was not arbitrary and impersonal, but was the fulfilling of the covenant of grace made with Abraham and his seed. Individuals "called" to the election of grace by conversion were allowed to make a personal covenant with God, as had Abraham.11

Covenant theology was revolutionary for its time, emphasizing individualism, breaking with traditional doctrines, and challenging established order.12 And in America, the theology came to emphasize the
part that man played in salvation, deemphasizing predestination.\textsuperscript{15} Individual conscience and consent became prominent. The God-given right of individuals to associate by covenant was the underlying principle for which these believers, and their descendants, eventually went to war.

Covenant was also the foundation of church government for the dissenting Protestants in America. As it was at the root of all God's dealings with men, so it was the basis for all dealings of men with one another.\textsuperscript{16} "Family, church, and commonwealth were established by covenant, like all human voluntary relationships."\textsuperscript{17} Churches were established by believers in covenant with each other "as a 'communion of saints.'"\textsuperscript{18}

The belief that church government should be by covenant (that is, by consent of the congregation) was one of the most revolutionary aspects of covenant theology, especially in the early years of its development. At a time when established churches exercised absolute ecclesiastical control in the states of Europe, this was a radical notion.\textsuperscript{19} The sacrifices made by the Dutch Anabaptists and the English Dissenters to establish this principle were enormous. The Anabaptists united "because they felt the need of each other's help in their struggle against many adversaries."\textsuperscript{20} They used the term \textit{covenant} to describe their "Christian brotherhoods" a century before the Reformation was viable.\textsuperscript{21} Robert Browne, the father of Congregationalism, "insisted that the church is a voluntary association of those who have pledged themselves by covenant to lead a Christian life."\textsuperscript{22} John Robinson, the influential Separatist pastor at Scrooby, England, defined a church as a company of two or more individuals, separated from the world and gathered to Christ "by a covenant made to walk in all his ways."\textsuperscript{23}

From the time the Puritans came to America, "the idea of a covenant or contractual relationship was the central and pivotal idea of the organization of the church. Where Congregationalism or Separatism or Independency went, there went also the theory and the fact of compact and covenant."\textsuperscript{24} The members of these Protestant faiths, "who made up perhaps four-fifths of church-going New England, believed that the church could only exist by covenant, a sacred and binding agreement or compact made by the members with each other and with God. . . . Only so could they be given power one over the other."\textsuperscript{25} As Thomas Hooker wrote in \textit{The Summe of Church-Discipline}, "Mutuall covenanting and confoederating of the Saints in the fellowship of the faith according to the order of the Gospel, is that which gives constitution and being to a visible Church."\textsuperscript{26}

The political theory of social compact can be traced to its roots in covenant theology. It was inevitable that the covenant theologians who wrote about church government and sacred history would also write about the origins and limitations of civil government and would apply the
same principles. The Pilgrims and Puritans who came to Massachusetts attempted to put their Christian ideals into practice in civic life. In the Mayflower Compact, the Pilgrims agreed to “covenant and combine [them]selves together in to a civil body politic ... and by vertue [t]hereof to enact, constitute, and frame such just and equal laws, ordinances, acts and constitutions, and offices ... as shall be thought most meete and convenient for the general good.” Their intent was to establish a theocracy—a “Holy Commonwealth.” A Critical Bibliography of Religion in America states:

The covenant is the clue to the New England Puritan understanding of ... the order of the church and society—the “Holy Commonwealth.” ... To the Puritan, God had always dealt with his children by covenant. ... It was not only individual, between each man and God; it was also public, respecting the formation of Churches and of civil government. ... [T]he state was established upon a covenant, like the Mayflower Compact of 1620. The Puritan theology therefore considered economic, political and social affairs in a corporate sense, and the Church assumed responsibility for society because the Puritans considered both church and state as under covenant.

Church and state in the early New England colonies were organized on equal footing. Accordingly, in 1631 the General Court of Massachusetts Bay Colony decided “that the franchise would be limited to those who had entered the church covenant.” While this limitation on the franchise, which continued until 1691, restricted the actual number of voters, the underlying principle was democratic.

Similarly, John Winthrop, in a sermon written on board the Arabella, which brought the founders of Boston to America, preached that his people had covenanted with God to obtain a new place and new government by mutual consent. A generation later, John Cotton, teacher of the Boston church, proclaimed from the pulpit that “there is no other way” for God’s people to be governed “but only by mutual Covenant.” When Rhode Island was settled in 1637, under Roger Williams, “The Bible was searched, as doubtless it had been many times before, to demonstrate that covenanting was the Lord’s chosen method for social and religious combination.”

Throughout New England, towns were organized in this fashion. Thus, the settlers of Guilford, Massachusetts, organized their town government by “gathering together in a church way.” The “Fundamental Orders” adopted by the river towns of Connecticut in January 1639, which has been called “the first written constitution in history,” opened with an explicit acknowledgment that “God requires” his people to form their civil government “by common consent according to God.” In 1639 the inhabitants of New Haven, Connecticut, “by a show of hands” adopted the “Fundamental Articles of New Haven,” incorporating a reference to an earlier “plantation covenant.”
Thomas Hooker, the founder of Connecticut, taught that “there must of necessity be a mutual engagement each of the other, by their free consent, before by any rule of God they have any right or power, or can exercise either, each towards the other.”

Twenty years before John Locke wrote his Second Treatise of Government, John Davenport, in New England, “outlined the organization of civil society in compact, as indeed he had done some years before in his Power of the Congregational Churches.” Massachusetts divine John Wise likewise taught that the civil state had its moral origins in covenant. Rossiter states, “The doctrines of popular government held in many a Massachusetts village were largely a secularized and expanded Congregationalism.”

THE COVENANT LEGACY IN CONSTITUTIONAL PRINCIPLES

The fundamental principles of American constitutionalism developed naturally out of covenant theology. Combined with other intellectual, economic, political, and social influences, covenant theology generated and nurtured the principles of popular sovereignty, limited government, the written constitution, supreme law, inalienable rights, and republican virtue.

The line between religious and political ideas, especially during the crucial prerevolutionary years, was very fine and extremely porous. The analogy between covenant religious theology and Enlightenment political philosophy of the American settlers is very close. Nowhere is this more apparent than in the development of the idea of popular sovereignty.

By the time of the American Revolution, the principle that the origins of society and of government rested upon the common consent of the people was familiar throughout the American states “to men whatever their faith.” As Rossiter states, “The Puritan theory of the origin of the church in the consent of the believers led directly to the popular theory of the origin of government in the consent of the governed.” He adds, “It was hardly accidental that New England ministers gave the first and most cordial reception to the arguments of John Locke and other great English liberals, and broadcast from their pulpits the new gospel of government by consent.” Presbyterian and Congregationalist preachers “taught the political doctrines of Locke and Milton until the members of their congregations held the liberal theories of government which rendered them most sensitive to governmental oppression.” Indeed, some American preachers “stated Locke’s theories more clearly than Locke himself.” Locke, who has been called “America’s philosopher” because of the enormous and lasting influence of his political writings, and who was one of the most frequently cited nonbiblical writers in the
revolutionary era,47 "rode into New England on the backs of Moses and the prophets."48

The sentiments of popular sovereignty were formally expressed time and again. The freeholders of Mendon, Massachusetts, voted "that all just and lawful Government must necessarily originate in the free Consent of the People."49 And, not surprisingly, the Massachusetts Constitution of 1780 stated: "The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."50

In her masterful monograph, The New England Clergy and the American Revolution, Alice Baldwin wrote:

The New England Clergy preserved, extended and popularized the essential doctrines of [Enlightenment] political philosophy, thus making familiar to every church-going New Engander long before 1763 not only the doctrines of natural right, the social compact, and the right of resistance but also the fundamental principle of American Constitutional law, that government, like citizens, is bounded by law.51

Thus, the theological doctrine that government and society are predicated upon covenant "paved the way" for the ultimate triumph of popular sovereignty in America.52

An indispensable component of covenant theology was the rejection of absolute authority and the belief that rulers were subject to limitations and boundaries, defined in the civil covenant, which God required them to observe. The governor or government that exceeded its proper limits "did not have the sanction of God."53 The God of covenant theology was a God who governed by laws which even he observed. The universe He ruled was a constitutional one.54 If God had bound himself by covenant to observe certain laws, no earthly delegate could claim unlimited authority.55 So long as authorities were acting within the sphere of authority established by covenant, the people were obligated to obey.56 As God's laws were inviolable, so also the covenants which bound his rulers on earth were binding and immutable.57 Thomas Hooker, in the first half of the seventeenth century, was an exponent of this principle.58 In a dispute with Governor Winthrop, Hooker resisted the proposition of absolute discretion of judges with the argument that even the rulers are subject to law. Taking as his authority Deuteronomy 17:10–11, Hooker reasoned: "The law is not subject to passion, nor to be taken aside with self seeking ends, and therfore ought to have chief rule over rulers them selves."59

Thus, starting with a belief in the supremacy of God's law, covenant clergy emphasized that even the rulers were subject to that law, and therefore there were God-given limits on the powers of government and governors. As God's boundaries on government were derived from
the covenant, the government was limited by the power given to it by the people who made the covenant. In this manner did covenant-believers move themselves, and eventually an entire nation, from the rule of men to the rule of law.

With their covenant theology background, Americans in 1787 viewed a constitution as "a fundamental law designed by the people to be separate from and controlling of all the institutions of government." The government created by a constitution would be circumscribed and limited by it. So profound was the influence of this basic covenant idea in the American consciousness that it has been said that The Federalist, which so clearly articulate the notion of limited but effective central government, "can be read as Puritan contributions to Enlightenment political theory."61

A basic principle of covenantism was the idea of fixed, immutable, supreme law. "God and Christ governed by fixed rules, by a divine constitution, and therefore so must human rulers." As God's constitutional universe was governed by divine, immutable law, the basic constitution of men must also be fixed and unchanging. "To men of the eighteenth century there was no more solemn and forceful word than 'compact' unless possibly 'constitution.' "64 Thus, the pastor of one Massachusetts village emphasized the need for the state government to be established "upon a permanent foundation that no length of time can undermine."65

In accordance with covenant theory, then, a civil constitution needed to be the supreme, inviolable law of society. A century before the American Constitution was written, the "Levellers" made an agreement that declared "that all laws made or that shall run contrary to any part of this Agreement, are hereby made null and void."66 Nearly twenty years later, a former governor of Massachusetts Colony wrote a "fundamental constitution, [which] shall be laid and inviolably observed as the conditions upon which the whole body . . . do consent" and which, when adopted, "will be without danger of being broken or departed from."67 Thus, a belief in a settled, supreme law limiting government authority was an established part of the covenant tradition.

Because covenant theology emphasized man's spiritual ability more than God's predestination, it was natural for the political concept of individual rights to be nurtured by this faith. Indeed, one of the bedrock premises of covenant theology was the existence of the individual with certain God-given rights, beginning with the rights to worship God and to assemble with fellow believers to do so.68 Covenant theologians believed that civil government was ordained of God and for the good of the people. "The good of the people . . . meant it assured the protection of their natural rights."69

Clinton Rossiter, the noted historian, has written:
American democracy owes its greatest debt to colonial Protestantism for the momentum it gave to the growth of individualism. The Reformation, which was powered by the revolutionary notion that man could commune with God without the intercession of a priest, did as much as the rise of capitalism to spread the doctrine of individualism.  

Covenant theology put individual rights of conscience (obedience to God) at the top of the list of moral duties where prior philosophies had put obedience to established authority. Thus, not only did the struggle of American dissenters for religious liberty contribute to the development of constitutional protection for the freedom to worship, and protection against an established church, as well as recognition of the right of assembly, the right to petition, and other specific rights guaranteed by the Bill of Rights, but the very notion of inalienable individual liberties germinated and grew in the fertile soil of covenant theology.

The American wilderness was settled by God-fearing people who came to establish a “Holy Commonwealth.” To merit the blessings of God, they believed they had to be virtuous. Around the meaning of that requirement developed significant theological controversies, but the belief in the necessity of virtue was unquestioned. They clearly believed that God expected “strict observance” of his laws if they were to enjoy his blessing in their new land. By the time of the American Revolution, the oppressions of the British government were viewed as God’s punishment for iniquity, as well as a trial of the faith and obedience of his American Israel. Deliverance (independence) was seen as the blessing that would come from purification and repentance.

The evolving political science of social compact also emphasized the necessity for public virtue. Montesquieu, the nonbiblical writer cited most frequently during the constitution-drafting decade of 1780, identified the fundamental principle of democratic government to be “virtue.” The eighteenth-century mind was thoroughly convinced that a popularly based government ‘cannot be supported without Virtue.’ The kind of virtue that the republican theorists focused on was public virtue—the willingness of each citizen to subordinate his or her personal wants to the greater good of the community. But public virtue was the companion of, and could not be separated from, private virtues. In Britain, Edmund Burke eloquently summarized this doctrine:

> Men are qualified for civil liberty in exact proportion to their disposition to put moral chains on their own appetites. . . . Society cannot exist unless a controlling power upon the will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.

In America, as Vetterli and Bryner have pointed out,
The idea of virtue was central to the political thought of the Founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of republican government by which they were influenced emphasized the importance of personal and public virtue. It was understood by the Founders to be the preconditions for republican government.79

Samuel Adams declared, “We shall succeed if we are virtuous.” And Benjamin Rush believed that “liberty without virtue would be no blessing to us.”80

COVENANT LEGACY IN ESTABLISHING THE CONSTITUTION

The principles of constitutionalism and covenant were of little benefit to anyone while the government denied their validity and prevented their implementation. Thus, perhaps the greatest contribution of covenant theology and theologians was not conceptual or intellectual, but the practical political establishment of the Constitution of the United States. In large degree, the prerevolutionary sense of destiny that united the country, the revolutionary war itself, and the constitutional conventions were the results of the pervasive influence of covenant religion.

Owing to their covenant theology, the settlers of America had a particular view of their place in world history. They believed that God’s hand could be seen in history. God governed not only in space, but in time as well, and there was a divine purpose in the major events that manifested themselves in history. They firmly believed that the new world was a special land of opportunity prepared and reserved by God for his special purposes, and that they had been brought by the hand of God to work his will in this chosen land.81

Particularly noteworthy was the ever present religiously oriented sense of mission which guided people of all ranks to the New World early during the period between 1607–1820…. A favoring Providence was seen as directing the destiny of His “chosen people” in the abundant wilderness called America.82

By the middle of the eighteenth century, the idea that “America had a special place, as yet not revealed, in the architecture of God’s intent” was pervasive in the American colonies.83 The Great Awakening in the fourth decade of the eighteenth century fueled Americans’ beliefs that they were on the verge of great events in which they were destined to play a major role. The sense of millennialism in the revolutionary era is evident even in the writings of the most secular political leaders of the time.84 But undergirding and overarching all the rest were religious statements of impending providential events. “The clergy, like many other Americans, felt the country *to be on the eve of some great and
unusual events’ and their language, ecstatic but not uniquely religious, took on the millennial tone.” Combined with emphatic calls for purification and repentance of the people, this religious millennialism imparted a sense of crisis that prepared the Americans for the convulsive events about to unfold. After the war, “American destiny” became a “civil religion.” The war was seen as another Exodus from Egypt, and Washington was considered to be the Moses of the new world.

The resistance of American Protestants that ultimately led them to declare their independence from Britain and to create a separate nation on this continent derived from two covenant-religion sources: the tradition of dissent and the belief in the duty to resist ungodly authority. Historically, the American dissenting Protestant churches had been resisting the authority of established churches for two centuries before the first shot was fired in the War of Independence. America was settled by dissenters fleeing persecutions that resulted from their resistance to government-supported ecclesiastical authorities. These churches owed their very existence to their unrelenting resistance to the unjustified exercise of authority. As Burke observed, the American Protestants of the revolutionary era were

of that kind which is the most adverse to all implicit submission of mind and opinion. This is a persuasion not only favourable to liberty, but built upon it. . . . The dissenting interests have sprung up in direct opposition to all the ordinary powers of the world. . . . Their very existence depended on the powerful and unremitted assertion of that claim [to natural liberty].

When Britain forced dissenting Protestants to flee to America, it merely postponed for a hundred and fifty years the ultimate separation and conflict.

But more profoundly influential than the history of practical resistance to established churches was the belief, grounded in covenant theology, that resistance to the exercise of authority beyond the limits established by consent was a basic moral duty. This belief was the unavoidable consequence of the concept of the sacredness of covenant. Over and over again the American clergy of the seventeenth and eighteenth centuries taught their congregations about “the sacredness of covenant and the divine character of government.” For instance, the Reverend Jonas Clerk explained to his fellow townsmen that “a civil Constitution or form of government is of the nature of the most sacred covenant or contract.” Because government established by covenant was sacred, God expected strict compliance with its terms. As God’s delegates on earth, rulers and magistrates were expected to imitate God’s government. When they exceeded the bounds of authority established by covenant, they defied God. Covenants of government, like God’s covenants of salvation, “were always conditional and implied
strict obligations on each side.”

Social compacts, like the covenants entered into by ministers and their congregations, “were sacred and binding and to break them was a serious offense. Their nature and their sanctity were the constant theme for the clergy for more than a hundred years before the Revolution.”

The culmination of this tradition and this theology was the doctrine of the right to resist. New England ministers, and their counterparts throughout the colonies, “were preaching . . . that people were justified in rising even against the sovereign himself in order to ‘redress their grievances; to vindicate their natural and legal rights; to break the yoke of tyranny.’” Both religious and secular writers placed “special emphasis” on the broken covenant as a justification for community resistance to British laws. Reflecting two centuries of covenant theology, leading American writers argued that King George had “unkinged” himself by breaking social compact. Resistance to illegal governmental authority, exercised in breach of the social compact, “was more than just a right and ‘a virtue.’ It was ‘the Christian and social duty of each individual.’” One pamphleteer thundered that “the man who refuses to assert his right to liberty, property, and life, is guilty of the worst kind of rebellion; he commits high treason against God.”

A generation before the revolutionary war, the Reverend John Wise, of Ipswich, Massachusetts, refused to pay taxes and was imprisoned by the royal governor. Afterward he published compelling arguments establishing the connection between democracy in church government, based on covenant, and democracy in political government based on social compact. In 1772, two of his tracts on resisting unlawful authority, written fifty years earlier, were republished in Boston and were so popular that second editions were published. In 1740, Reverend Jonathon Mayhew published his startling “Discourse Concerning Unlimited Submission” in which he preached openly the doctrine of resistance to extracovenantal authority. A few years later, John Adams was to write, “If the orators on the 4th of July really wish to investigate the principles and feelings which produced the Revolution, they ought to study . . . Dr. Mayhew’s sermon on passive obedience and non-resistance.”

After hostilities broke out, the dissenting clergy in every section of the country took up the work of arousing the people. “The Bible was raked with a fine Calvinistic comb for every quotation seeming to give divine sanction for resistance to Great Britain.” Independence became not only a political ideal but a religious and moral article of faith. “Revolution, republicanism, and regeneration all blended in American thinking.”

After the Americans had declared their independence from Great Britain, the influence of covenant-based theology in political
philosophy was directly manifest in the great decade of constitution writing. Constitutionalism was the logical outgrowth of covenant theology.

Three dimensions of the covenant faiths combined to create a powerful impetus for the adoption of written constitutions. In the first place, rationalism constituted a potent strain of federal theology. The New England clergy were well-educated, thoughtful men. The clergy believed in a constitutional God who grounded his universe in laws that could be perceived and understood by rational men, who administered his immutable laws in conformity with natural-law reason. Covenant theologians believed that the will of God was manifest through reason and nature as well as divine revelation. Believers in a higher law, they insisted that the higher law could be known and should be expressed clearly. "The traditional American insistence on a written constitution owes something to the insistence of the Puritan that higher law could be written law."

The second dimension of covenant theology that created such a forceful influence for a written constitution was the enormous respect for and use of the Bible. "The Puritans were confirmed believers in higher law, going most men one better in being able to point to its existence in writing! . . . It was their conviction . . . that the Scriptures offered correct answers to all problems of individual conduct, church government, and social and political organization." The thinking of the covenant clergyman was markedly legalistic: "He started with a written document; he applied his logical faculties to its interpretation, and to the application of its teachings and its examples or precedents." If God's holy laws could be written in the Bible, then man's basic covenants could also be written.

Finally, not only did the belief in written constitutions stem from covenant theology, but "the insistent demands from the towns for a constitutional convention seems to have been due in part at least to the ministers." The clergy would tolerate no "make-shift government" set up by a mere legislature. The people, by breaking with the British government, were in a state of nature, and only they, the people, had the right to set up a new government by "a compact made by themselves in a constitutional convention for that purpose." Thus, when the Massachusetts legislature drafted a constitution and presented it to the people, the ministers of the towns and villages led the opposition to its ratification because only the people, they reasoned, had the right to create a constitution. The Constitutional Convention, the brilliantly simple institution created during this era as a means of implementing the covenant-social compact theory of government, has been called "America's basic institution." And the clergy helped conceive and implement it.
Although the influence of the clergy and of the churches had diminished by the time of the actual drafting of the Constitution, significant vestiges remained of the tremendous role the clergy had played in the settling of America. “In the days of New England’s foundation, political leadership as well as moral guidance was beyond question with the clergy, and only the commandments of God took precedence over their teachings.” For more than a century after the first colonies were planted in the New World, ministers, as a class, exercised predominant leadership in civic and social affairs, as well as ecclesiastical matters. As late as 1740, clergymen exercised greater political influence and leadership than lawyers, as a class. And while “non-professing” Christians accounted for a large percentage of American population in the early eighteenth century, it would be erroneous to construe this to mean that these “nonprofessing” Christians were neither religious nor influenced by the clergy. In the first place, the fact that many believers were not admitted to the church covenant was due to the strictness of the Calvinist doctrine of election. The fact that God had not predestined them for election (or church membership) did not mean they did not seek the blessings of his grace, or respect the influence of ministers in civic affairs. Moreover, after the Great Awakening the number of churches and church members dramatically increased. By 1780 there were more than nineteen hundred congregations of “covenant theology” mainline denominations (Congregationalists, Presbyterians, and Baptists).

By the time of the revolutionary war, the roles of clergymen and churches, if “not always consistent and calculated,” were conspicuous and critical. “Men of the time asserted that the dissenting clergy and especially the Puritan clergy of New England were among the chief agitators of the Revolution and, after it began, among the most zealous and successful in keeping it alive.” The evidence strongly supports this claim. The pulpits “thundered” with patriotic sermons. And “it must be remembered, too, that the pulpit was in that day the most direct and effectual way in reaching the masses—far outrivaling the newspaper, then only in its infancy.” The educated and literate citizenry, moreover, were inundated with the pervasive written influence of the clergy. In the first half of the eighteenth century, more than two-thirds of the books and pamphlets printed in the American colonies were on religious subjects. And from 1750 to 1775, approximately one-half of all American publications dealt with religious matters.

The political leaders of the revolutionary movement openly courted the clergy. In some cases, little persuasion was necessary. The legend and lore of American revolutionary history are filled with stories of the colorful, firebrand, liberty-preaching clergymen of the day, such as the pastor of the German church in the Shenandoah Valley, who, after
preaching from Ecclesiastes 3:8 ("A time of war, and a time of peace") ended his sermon with the declaration: "There is a time to fight and the time is here." Removing his clerical gown, he appeared in a colonel's uniform; whereupon, three hundred men of his congregation enlisted under him." And there is also the story of the Presbyterian minister in South Carolina who reportedly "preached with a gun in his pulpit and a powderhorn suspended about his neck."

After the military victory was won, the clergy also played a "conspicuous role" in setting up the new constitutional governments of the various states and of the United States. It was natural for citizens who had learned the fundamental ideas of political philosophy from the pulpit to turn to their ministers for assistance in writing their constitutions. For example, in the three New England states in which state constitutions were drafted during this era, sixty-six different ministers were listed as members of congresses, conventions, or public committees, and more than half of them were directly involved in writing or amending constitutions. In Massachusetts alone, thirty-eight ministers were identified, including twenty-six who were directly involved in constitution-drafting bodies.

It should be clear, then, that "covenant" was the germinal concept for many of the feelings, thoughts, and practices that gave rise to American constitutionalism. And this driving idea was manifest first, and most importantly, in covenant theology. The most fundamental concepts and institutions that were incorporated into the Constitution of the United States evolved out of the values and institutions of covenant theology, including popular sovereignty, limited government, and the notion of supreme, immutable law. The leaders and members of covenant-based churches believed in, and fought for centuries to assert, God-given inalienable rights. And they believed in and preached the necessity for republican virtue.

The covenant perspective on the Constitution has particular significance for members of The Church of Jesus Christ of Latter-day Saints, who consider themselves to be the modern heirs of the Abrahamic covenant. The doctrines of the restored Church emphasize the covenant perspective. A computerized scripture search indicates that the word "covenant" and derivations of it appear 294 times in modern revealed scriptures, 159 times in the Book of Mormon alone, and a total of 637 times in all the canon including the Bible; the word "promise" and derivations of it appear 188 times in modern revealed scriptures, 119 times in the Book of Mormon alone, and 361 times in all the scriptures including the Bible. Latter-day Saints believe that America was settled, liberated, and raised up as a nation "by the power of God" (1 Ne. 13) and that God "established the Constitution of this land, by the hands of wise men whom [he] raised up unto this very
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purpose” (D&C 101:80). The Book of Mormon teaches that Americans will forfeit their liberties and suffer destruction if they break the covenant which is upon all the inhabitants of this land to worship and obey the Savior.  

In this year of the bicentennial of the signing of the Constitution, we would do well to remember the heritage of our Constitution as a covenant. For the covenant perspective that so thoroughly pervaded the spirit and values of the Constitution, as well as its words and institutions, is still relevant today. It holds enormous significance for such contemporary controversies as whether judges hearing constitutional cases are bound to interpret the Constitution or whether they may take a modern “noninterpretivist” approach. More importantly, if the founders of 1787 and their covenanting forebears were right about the necessity of a virtuous citizenry, the sacredness of civil covenants, and the serious consequences that attend their neglect or breach, Americans of 1987 have an urgent duty to rediscover the Constitution as a covenant.

NOTES


2 McLaughlin, Foundations, 70. McLaughlin makes an impressive argument that the fundamental principles of American constitutionalism derive from Reformation covenant theology, colonial corporate organization, and Enlightenment political philosophy.

3 Ibid., 72; De Jong, Covenant Idea, 61.


5 Ahlstrom, Religious History 1:131.

6 De Jong, Covenant Idea, 24.


8 McLaughlin, Foundations, 33. McLaughlin also declares that the concept of covenant was “dominant and central” (72).

9 Rossiter, Seedtime, 53.

10 See Baldwin, New England Clergy, 24.


13 Ahlstrom, Religious History 1:131; De Jong, Covenant Idea, 87–92.

14 McLaughlin, Foundations, 14–16.


16 Baldwin, New England Clergy, 24; De Jong, Covenant Idea, 80.


18 Ibid. 4:969–70.

19 See, generally, McLaughlin, Foundations, 14–16.
20Dejong, *Covenant Idea*, 64. According to DeJong, the Anabaptists emphasized covenant in church government; the Reformers emphasized covenant in church doctrine (73).
21Ibid., 64.
22Ibid., 68.
23Ibid., 81. The Pilgrims were separatists from the established church; the Puritans were reformers who tried to remain within the established church. Nevertheless, as DeJong points out, within a month after the establishment of the first Puritan settlement at Salem the settlers "had formulated and agreed upon a church covenant" (83).
26Quoted in Rossiter, *Seedtime*, 172.
29DeJong, *Covenant Idea*, 78.
30Burr, Smith, and Jamison, eds., *Critical Bibliography* 4:969–70.
31Ibid.
32Ibid., 214; see also Rossiter, *Seedtime*, 43–47; see, generally, DeJong, *Covenant Idea*, 110–22. Indeed, evolution of a theological doctrine of the Half-Way Covenant can be seen in terms of political theory as an attempt to extend the franchise to more members of the community.
34Ibid., 69.
35Ibid., 34.
38McLaughlin, *Foundations*, 69, see also Rossiter, *Seedtime*, 172–74. Hooker also taught that "the foundation of authority is laid, firstly, in the free consent of the people" (Baldwin, *New England Clergy*, 26–27). Hooker's explanation of the covenant basis of society and of government was so clear that it has been said he "could have written Chapters 7 and 8 of Locke's *Second Treatise*" (Baldwin, *New England Clergy*, xii).
40Ibid., 74.
42Baldwin, *New England Clergy*, 74: "The continuity of this [covenant] theory of religion and civil organization is perfectly plain."
45Van Tyne, "Influences," 48. "Samuel Davies, the eloquent Virginia preacher to whom Patrick Henry listened from his eleventh to his twenty-second year, taught that the British constitution was 'but the voluntary compact of sovereign and subject.'" It is not surprising to find Patrick Henry espousing the same idea (ibid., 49).
46Ibid., 49.
49Ibid., 407.
50Ibid., 406.
55Ibid., 75.
58Hooker was the most constructive exponent among orthodox Puritans of . . . the sovereignty of the people, which is the logical foundation of the theory of free association, and limited magisterial authority, which is its most logical extension" (Rossiter, *Seedtime*, 174).
59Ibid., 177.
60Wood, *Creation*, 283.
64Ibid., 82.
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6Ibid., 102 (describing a monograph published in 1656 by Sir Henry Vane).
6Ibid., 21, 72.
6Baldwin, New England Clergy, 23.
6Rossiter, Seedtime, 40.
7Ibid., 54.
7See, generally, DeJong, Covenant Idea, 93–176.
8Wood, Creation, 116.
8Chap. 3 of bk. 3 of Charles Louis de Montesquieu, The Spirit of Laws [1748], trans. Thomas Nugent, 2 vols. (London: G. Bell and Sons, 1902). Montesquieu is identified as the most cited theorist of the 1780s in Eidsmoe, Christianity, 53.
8Wood, Creation, 68.
8Ibid., 69.
8Wood, Creation, 124. Fifty years after the Constitution was adopted, Tocqueville documented the continued belief in the necessity of virtue: "Religion in America takes no direct part in the government of society, but nevertheless it must be regarded as the foremost of the political institutions of that country. . . . [Americans] hold it to be indispensable to the maintenance of republican institutions. This opinion . . . belongs to the whole nation, and every rank of society" (Alexis de Tocqueville, Democracy in America [1835], 2 vols. [New York: Alfred A. Knopf, 1945], 1:305–6; see also 2:20, 145). In his farewell address, George Washington warned: "Morality is a necessary spring of popular government. Let us with caution indulge this opinion that morality can be maintained without religion. . . . Reason and experience both forbid us to expect the national morality can prevail in exclusion of religious principle" (John C. Fitzpatrick, "George Washington and Religion," Catholic Historical Review 15 [April 1929]: 23, 41–42). Even today it is widely believed (though perhaps less widely than before) that "American democracy rests squarely on the assumption of a pious, honest, self-disciplined, moral people" (Rossiter, Seedtime, 55).
8On these ideas see McLaughlin, Foundations, 33; DeJong, Covenant Idea, 61; Sidney E. Mead, "Abraham Lincoln's 'Last, Best Hope of Earth': The American Dream of Destiny and Democracy," Church History 23 (March 1954): 3, 5–9; and Bailyn, Ideological Origins, 32.
8Bailyn, Ideological Origins, 33.
8Wood, Creation, 117.
8Rossiter, Seedtime, 39.
8Van Tyne, "Influences," 44.
8McLaughlin, Foundations, 71.
8In a sermon written aboard the Arabella, John Winthrop taught that if God would bring them to a new place and give them a new government, which they would establish by consent, "then hath he ratified this covenant and sealed our Commission, and will expect a strict performance of the articles contained in it" (McLaughlin, Foundations, 33).
8Ibid., 15. The clergy believed that rulers were God's delegates and as such were entitled to all respect and obedience. But the delegation did not come directly from God; rather, God had authorized the people to establish their governments.
8Ibid., 20.
8Van Tyne, "Influences," 50.
8Rossiter, Seedtime, 393–94. Scores of published letters and pamphlets developed this argument (see ibid., 395–97).
8Ibid., 395. See also Van Tyne, "Influences," 54–56.
8Baldwin, New England Clergy, 29.
8McLaughlin, Foundations, 75.
8Van Tyne, "Influences," 59.
8Ibid., 58.
8Wood, Creation, 117. British tyranny had been explained at least in part as divine punishment for the wickedness of the American people. Deliverance would come as a result of repentance (ibid., 116).
8Ahstrom, Religious History 1:130.
8Burr, Smith, and Jamison, eds., Critical Bibliography 4:974: "The aim of Puritan theology was to elucidate the laws of God's universe"; McLaughlin, Foundations, 71.
82Baldwin, New England Clergy, 29 n. 22.
80Rossiter, Seedtime, 54. Another scholar has written that these clergymen “took nothing upon human authority alone” (Frank H. Foster, “The Eschatology of the New England Divines,” Bibliotheca Sacra 43 [1886]: 1).
81Rossiter, Seedtime, 54.
82McLaughlin, Foundations, 76.
83Baldwin, New England Clergy, 137.
Ibid., 136.
81McLaughlin, Foundations, 95. During the decade prior to the drafting of the Constitution of the United States, all of the American states, except for Rhode Island and Connecticut, were engaged in drawing up constitutions for their own state governments.
82Van Tyne, “Influences,” 54.
85Marty, Religion, 120. In New England alone, the number of local churches trebled after the Great Awakening, going from 146 in 1700 to 423. This number nearly doubled again, rising to 749 by the time of the Revolutionary War (ibid., 53).
86Ibid., 112; see, generally, McLaughlin, Foundations, 71; Marty, Religion, 112–15.
88Van Tyne, “Influences,” 52, 57.
89Ibid., 54. From the earliest colonial times, the custom had developed of preaching “Election Day Sermons” which were subsequently printed, widely distributed, and widely read (especially after 1760).
90Ibid., 54 n. 48. In the 1770s, 44 percent of the political writings cited the Bible (Eidsmoe, Christianity, 51–52).
91Van Tyne, “Influences,” 55.
92Ibid., 56.
93Ibid., 57.
94McLaughlin, Foundations, 71.
95Baldwin, New England Clergy, 134.
96Ibid., 183–89.
Public Virtue and the Roots of American Government

Richard Vetterli and Gary Bryner

The idea of virtue was central to the political thought of the founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of republican government by which they were influenced emphasized the importance of personal and public virtue. It was understood by the founders to be the precondition for republican government, the base upon which the structure of government would be built. Virtue was the common bond that tied together the Greek, Roman, Christian, British, and European ideas of government and politics to which the founders responded. There were, of course, a variety of views among the framers, yet there was general agreement over two critical elements of republican government: first, that there were essential preconditions that must exist before republican government is a possibility and that those preconditions must be continually fostered and maintained; and second, that the elements of republican government included public and private institutions, governing structures and procedures, popular beliefs, personal character, and shared commitments.

As the leaders of the new American states considered the viability of a republic, the fundamental question they asked was whether Americans had sufficient virtue to make self-government work: to soften the sharpest edges of self-interests, to temper the most disruptive personal and social passions, and to ensure sentiments of support and patriotism for the polity. Given the nature of man as they understood it, they were not at all confident that self-government over time was even a possibility. But of one thing they appear to have been certain: a citizenry lacking in virtue was not capable of sustaining a democratic republic, whatever its structure.

The founders repeatedly emphasized the importance of the character of the people and their political culture as the precondition for republican government. James Madison, for example, the foremost political theorist of the founding generation, emphasized the importance

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of the “genius of the people of America, [which is] the spirit, which actuates the state legislatures, and the principles which are incorporated with the political character of every class of citizens.” For Madison, republican government was the only form of government “reconcilable with the genius of the people of America; [and] with the fundamental principles of the revolution.” In his important discussion of the structure of government in The Federalist, Madison wrote that “a dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” The structure of government, the separation of powers and checks and balances, the scheme of representation—all were auxiliary to the primary protection against the excesses of governmental power.

Constitutional structures and procedures were designed to filter out corrupt leaders and promote virtuous officials to exercise political power. While the Federalists and Anti-Federalists disagreed over how to assure virtuous government, they agreed on its importance and argued together that a virtuous people were essential for republican government. Government itself was necessary because of a lack of virtue, because men were not “angels,” as Madison put it. The less virtue possessed by the people, the more government they needed. The less able they were to exercise their rights and liberties in moderation, the greater need there would be for government coercion and limitations on individual actions.

THE EVOLUTION OF MODERN VIRTUE

Unlike the classical idea of virtue, where the organized development of civic virtue in the citizenry was the prime objective of government, the founders saw virtue as a means to assure individual liberty and self-government. The concept of virtue had evolved considerably from the Greeks’ understanding of it. In part, however, virtue was still equated with “public regardedness,” a willingness to sacrifice individual concerns for the benefit of society as a whole; but this was seen as a concern for the common well-being, not an all-consuming and unqualified acquiescence to the political regime. It was expected that people would voluntarily temper and moderate their demands and pursuits enough so that liberty could flourish. The ideal of virtue was an important source of personal restraint and willingness to contribute to the common good. Colonial Americans claimed that they possessed these qualities necessary for self-government. And, in part, virtue was equated with wisdom and foresight, enlightened leadership and statesmanship. The cardinal virtues dating from classical times—wisdom, courage, discipline, and justice—were still considered important, although with somewhat different connotations. An appeal to virtue
in elected officials meant that their pride and desire for a positive reputation, as well as the pride of the people in being represented by virtuous men, would cause them to rise above selfish, narrow concerns.\textsuperscript{5}

Virtue became intertwined with the Judeo-Christian virtues of faith, hope, and charity (or love and benevolence). People were to be motivated by a sincere interest in and love for one another, so that the freedom and pursuit of their own self-interest would be voluntarily channeled and constrained. Social peace and harmony could not proceed from governmental direction alone; there must be popular commitment to those values as well.\textsuperscript{6} Religion was expected to lead to a fusion of \textit{personal} and \textit{public} virtue—a modern republican virtue—that represented an amalgam of some elements of traditional civic virtue and of personal virtue, imbued with biblical moral theology.

The founders believed that virtue was a practical necessity for a people determined to govern themselves. More than the classical notions that emphasized such ideas as patriotism and willingness to fight and die for the state, public virtue represented voluntary self-restraint, a commitment to moral social order, honesty and obedience to law, benevolence, and a willingness to respect the unwritten rules and norms of social life. Whether this was a result of fear of God's wrath and judgment or a pure love of others did not particularly matter to the polity as a whole. It was \textit{assumed} that there was sufficient virtue to make a system based on individual liberty work. If there were insufficient virtue, then order would have to be imposed by force and coercion, by pervasive governmental intervention in individuals’ lives. The founders clearly recognized that contradiction, and their whole effort in forming a government assumed it could be avoided.

During the same period that Alexis de Tocqueville’s \textit{Democracy in America} was being published in Paris (1835), an Austrian immigrant named Francis Grund published two commentaries in the United States (1837 and 1839), which were similar in observation to de ‘Tocqueville’s work. Grund was singularly impressed with the domestic virtue he perceived among the American people in his day and suggested that there was a relationship between the “domestic habits” of Americans and their beliefs. In all the world, he wrote, “few people have so great respect for the law and are so well able to govern themselves.” Perhaps, he surmised, they were “the only people capable of enjoying so large a portion of liberty without abusing it.” He continued:

\begin{quote}
I consider the domestic virtue of the Americans as the principal source of all their other qualities. It acts as a promoter of industry, as a stimulus to enterprise and as the most powerful restraint of public vice. . . . No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a
\end{quote}
different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.\(^7\)

Out of this concern for the necessity of virtue came the belief that virtue and morality—specifically biblical morality—were synonymous, although they were sometimes referred to as separate concepts. Moral theology had pushed the stark differences in behavior expectation between the clergy and the masses, once typical in Europe, into the background. Modern casuistry, using a scriptural base, presented to the common man—as well as the “elites”—a code of moral or virtuous behavior to which he too was expected to adhere. The growth of sentiments of human dignity was fertilized by the belief of a direct relationship between man and his Creator. This belief in turn stimulated the growth of theology, and together they enhanced a vital, revolutionary sense of individualism and individual worth. Virtue came to be seen as a form of restraint against corruption and, at the same time, as a stimulator of positive moral action. Virtuous restraint applied to governments, to sovereigns, and to individuals. On the other hand, virtuous obligation to purposeful moral behavior as expounded by the Bible became incumbent on every person. The Bible was a guide that left little doubt about what constituted individual virtuous or moral behavior. Indeed, the Ten Commandments, the Sermon on the Mount, and a variety of other biblical exhortations provided a yardstick, an expected norm, with which to measure not only the actions of individuals, but the relative “justice” of government. “Individualism” was expected to lead not to anarchy but to personal energy and creativity, held in bounds by responsible behavior. Together, these beliefs helped energize a common system of symbols and values that contributed to the unity of society.

While some of the colonial thinkers apparently believed that virtue could be inculcated through reason, most thought its primary source to be in religion. Yet the founders were vigorously opposed to establishing a state church; their concern was with freedom of conscience and religion as a fundamental right for all Americans to enjoy. To a substantial degree, they saw virtue as a product of the general Judeo-Christian beliefs that permeated the colonies, and of organized religion and family life.\(^8\) Virtue was primarily to be privately developed and nurtured. The state itself was not to be responsible for it. Since general Christianity and the different churches were already viewed as a primary source of virtue, government need only keep from interfering in these areas. There was a clear and fundamental recognition of the importance of religion and its relationship with republican government, as reflected in legislation enacted by the first Congresses. The Northwest Ordinance of 1787, which was reenacted by the first Congress, declared that “religion,
morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” As Clinton Rossiter has noted, schools in America had long since been actively involved in promoting virtue, “whether designed to reinforce true religion or ‘to form the Minds of the Youth, to Virtue, and to make them useful Members of Society.’ ” Primary education had been devoted to what Rossiter calls the five R’s—“Reading, Riting, Rithmatic, Rules of virtuous conduct, and Religion.”

State constitutions and declarations reinforce the idea of the importance of religion in making self-government possible. The final clause in the Virginia Declaration of Rights, for example, states that “it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.” A religious oath was often required of candidates running for elected office. In Pennsylvania, each member of the legislature was required to make the following declaration: “I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and the New Testament to be given by Divine inspiration.” There would be no national religious orthodoxy, and the idea of an ecclesiastical policy or theocracy was clearly rejected. Freedom of belief and conscience were to be assured. But the assumption was that there would be a moral foundation for republican government and that private religion and general Christian beliefs would serve as an important source of that foundation.

VIRTUE, LIBERALISM, AND REPUBLICANISM

The failure to recognize the evolution in the meaning of public virtue has led some scholars to argue that the framing of the Constitution did not presuppose the continued existence of public virtue, that the idea of public virtue was central to the Revolution but had lost its significance by 1787. Madison and others are described as accepting the decline in virtue and embracing the belief that the common good was but the outcome of the mediation of individual conflict and competition. Gordon S. Wood, for example, has argued that the founders abandoned the idea of public virtue because Americans as a people failed to satisfy the classical expectations essential to virtue. Wood claims that the lack of a natural aristocracy and the absence of class differentiations caused Madison and others to give up the idea of public virtue and resign themselves to facilitating the pursuit of self-interest and hoping that the ensuing conflict would produce the public interest. While Wood acknowledges that the founders continued to champion virtue, he concludes that the lack of the necessary cultural preconditions meant that virtue would not be part of the new American republic and that, indeed,
the Constitution had provided a new revolutionary republic "which did not require a virtuous people for its sustenance."\textsuperscript{12} John Diggins argues in his study of American political thought that "the Classical idea of virtue . . . was an idea whose time had come and gone by 1787."\textsuperscript{13} Similarly, J. G. A. Pocock has written that the "decline of virtue had as its logical corollary the use of interest," and that the idea of classical virtue gave way to the belief that individuals would only pursue their own desires. Interests and factions were to function in an atmosphere not constrained by notions of virtue, but by the inevitable restraints imposed as individual interests collided.\textsuperscript{14}

These interpretations among scholars can be traced, at least in part, to the beliefs that virtue and self-interest are incompatible; that the founders recognized the pervasiveness of self-interest and simply concluded that virtue was not possible; that their attention shifted to structural and procedural devices to check the effects of the pursuit of unbridled self-interest; and that they became convinced that pluralistic competition would produce the public, collective good they sought. Conflicting interpretations are further rooted in efforts to place the founders in one of two basic schools of political thought. For some, the founders were champions of liberalism, of a Lockean economic, materialistic individualism that sought to maximize opportunities for the pursuit of self-interest. For others, the founders were republicans, following Montesquieu, the English Commonwealthmen, and Machiavelli in the "tradition of republican humanism" that "called upon the citizen to control his passions and subordinate his interests to the common good." Liberalism and republicanism are offered as contradictory explanations of the intellectual roots of the American founding.\textsuperscript{15}

The founders attempted to respond to both traditions and were ultimately successful. They believed republican virtue and liberal individualism—\textit{self-interest, properly understood}—are compatible and interdependent. Liberty requires individual restraint. If those restraints are developed voluntarily to a substantial degree, then external, governmental coercion may be minimal. If voluntary restraints are lacking, if the people are not able to limit their own interests when necessary to accomplish public purposes or to protect the rights of others, then government intervention becomes increasingly pervasive and the purposes of liberalism are not achieved.

The tension between liberal and republican ideas is greatly reduced when we recognize the evolutionary nature of virtue. Actually, the kind of stringent classical virtue identified by Wood, Diggins, Pocock, and others was, to a significant degree, rejected by the founders as inconsistent with the "genius" or spirit of the American people. They clearly believed that some of the more severe classical notions of virtue were
inappropriate for modern republics, and especially the American. But they also recognized that a modern virtue was very much a part of the American political culture of the eighteenth century. Thus, while rejecting the extremes of one meaning of virtue, they built their scheme of government upon a substantially modified conception of virtue.

The Constitution itself makes no mention of public virtue. For the framers, personal and public virtue were a precondition for the kind of government embodied in the Constitution. Public virtue, general religious beliefs, personal restraint, and concern for others were not to be provided for through national governmental institutions in the classical tradition, but through private efforts and primary institutions, supported by local government. The idea of religious freedom precluded constitutional provisions establishing national orthodoxy. State governments could encourage and support religious activity, but the political culture of civic virtue was to be produced primarily by the individual churches, family life, local education, and by a general commitment to Christian principles of personal restraint and benevolence.

While much of their attention was directed to the structure of government and the governing process, the framers of the Constitution held a sober view of human nature and its consequences for the prospects of self-government. They were keenly aware of the interaction of the framework of government and the people who were to serve in it and be governed by it. The constitutional structure, the separation of powers, checks and balances, federalism, and enumerated powers cannot be understood without recognizing the expectation of public virtue on which they were built. These constitutional elements were "auxiliary precautions," designed in response to the limitations of human nature. The structure of government was to channel and check the ambition and factionalism the framers believed to be inherent in human nature and social life. But they did not believe that structure was sufficient, that process alone could produce effective and restrained government. The Constitution was ultimately nothing more than "parchment barriers" to tyranny if there was not at least some commitment to self-restraint, to making the constitutional checks and balances work in a way that constrained power and made self-government possible.

The founders understood well the nature of man. Madison, Hamilton, and others viewed man as possessing a dual nature of both good and corruption, with corruption predominate. It was man's fallen nature that made government necessary and yet made a lasting democracy impossible. "Why has government been instituted at all?" asked Hamilton. "Because the passions of men will not conform to the dictates of reason and justice, without constraint."\(^\text{16}\) "If men were angels," Madison concurred, "no government would be necessary. . . . But what is government itself but the greatest of all reflections on human
nature?" Madison typically referred to "the caprice and wickedness of man," and Franklin was convinced that men "are generally more easily provok'd than reconcil'd, more disposed to do Mischief to each other than to make Reparation, much more easily deceiv'd than undeceiv'd, and having more Pride and even Pleasure in killing than in begetting one another."

The American founders had no illusions about man and virtue. They avoided the temptation, typical of utopians, to glorify man, creating expectations that were impossible to fulfill. If, however, they had stopped here in their evaluation of man, their response would undoubtedly have been that, after all, an attempt to establish a democratic republic would be futile and they would have been driven, in desperation, to return to the idea of monarchy. Yet, inherent in their religious tradition was the belief, similar to that of the Renaissance or Christian humanists, that while man was "fallen," and as such prone to depravity, he was capable of regeneration and virtue, and therefore possessed the potential for self-government. Perhaps in this new land man could rise above himself. "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust," Madison argued, "[s]o there are other qualities in human nature which justify a certain portion of esteem and confidence." Hamilton suggested that one should be disposed "to view human nature as it is, without either flattering its virtues or exaggerating its vices."

Jefferson, Adams, and Paine were among those who believed that God had created man with the necessary qualities to live in a social environment. "The Almighty has implanted in us these unextinguishable feelings for good and wise purposes," wrote Paine at the conclusion of his Common Sense. "They are the guardians of his image in our heart. They distinguish us from the herd of common animals." According to Adams, men were "intended for society," and therefore the Creator had "furnished them with passions, appetites, and propensities ... calculated ... to render them useful to each other and in their social connections." Man has a dual nature. His "passions and appetites are parts of human nature," but so are "reason and the moral sense." "It would have been inconsistent in creation," confirmed Jefferson, "to have formed man for the social state, and not to have provided virtue and wisdom enough to manage the concerns of the society." "The Creator would indeed have been a bungling artist, had he intended man for a social animal, without planting in him social dispositions." Jefferson emphasized that this "moral sense" or "conscience" was not left by the Creator to the wiles of men's intellect; it was rather part of their makeup: "I believe ... that it is instinct, and innate, that the moral sense is as much a part of our constitution as that of feeling, seeing, or hearing; as a wise creator must have seen to be necessary in an animal destined to live in society."
Public Virtue

The founders accepted the necessity of a "science of politics" that would, without sacrificing "the spirit and the form of popular government," provide a working republic free of the infectious diseases that had forever prostituted and destroyed republics, "a Republican remedy for the diseases most incident to Republican Government," and a "defense against the inconveniences of democracy consistent with the democratic form of government." What was needed was a structure and program that would help check the vices of men while allowing and promoting the development of virtue and talents; a firm basis to overcome the baseness in man without destroying his spirit, energy, and freedom; a rejuvenating principle that would have the tendency to elevate man to a higher plane of existence. As Clinton Rossiter puts it,

If man was a composite of good and evil, of ennobling excellencies and degrading imperfections, then one of the chief ends of the community, an anonymous Virginian advised, was "to separate his virtues from his vices," to help him purposefully to pursue his better nature. The achievement of this purpose called for two types of collective action: establishing or encouraging institutions, especially religious and political institutions, that would give free play to his virtues while controlling or suppressing his vices; educating him to recognize the sweet harvest of the one and bitter fruits of the other. True religion encouraged man to suppress his savage impulses; constitutional government forced him to think before acting; sound education taught him the delights of virtue and liberty.

VIRTUE AND A NATURAL ARISTOCRACY

The scheme of government envisioned by the framers accepted as given a moderately virtuous people and moderately virtuous officeholders. Some of the American founders were so concerned that "men of talents and virtue" be selected to manage republican government that they perceived the necessity of a particular kind of "elite": a natural aristocracy, one that was compatible with "modern" virtue. Edmund Burke had written of a "natural aristocracy" of men possessing extraordinary wisdom, talents, and virtue who emerged to leadership in society by means of their excellence. Without this "natural aristocracy," Burke had reasoned, "there is no nation." John Adams wrote that "although there is a moral and political and natural Equality among Mankind, all being born free and equal, yet there are other Inequalities which are equally natural, such as Strength, Activity, Industry, Genius, Talents, Virtues, Benevolence." Hamilton agreed that "there are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general." "There are men," he emphasized, "who, under any circumstances will have the courage to do their duty at every hazard." Like
Burke, Hamilton believed that these highly qualified and virtuous individuals served in political office in a form of stewardship, where they might at times hold opinions different from those of their constituents. In that case, while “the republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they [the people] intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.” Since the people will constantly be faced with “the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it,” the natural aristocracy must hold its ground:

> When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.\(^{35}\)

Jefferson expressed his belief that “there is a natural aristocracy among men. The grounds of this,” he submitted, are virtue and talents. . . . The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society. And indeed, it would have been inconsistent in creation to have formed man for the social state, and not to have provided virtue and wisdom enough to manage the concerns of society. *May we not even say, that that form of government is the best, which provides the most effectually for a pure selection of these natural aristos into the offices of government?*

Here Jefferson saw republicanism as the best possible form of government to secure men of virtue and wisdom for these offices.

> I think the best remedy is exactly that provided by all our constitutions, to leave to the citizens the free election and separation of the aristos from the pseudo-aristos, of the wheat from the chaff. In general they will elect the really good and wise, . . . *It suffices for us, if the moral and physical condition of our own citizens qualifies them to select the able and good for the direction of their government,* with a recurrence of election at such short periods as will enable them to displace an unfaithful servant, before the mischief he meditates may be irremediable.\(^{36}\)

Many at the founding saw the Constitutional Convention as an example of this natural elite. Madison marveled that there never had been
“an assembly of men . . . who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them”—that of “devising and proposing a constitutional system . . . to best secure the permanent liberty and happiness of their country.”37 John Jay praised the Convention, composed of men who possessed the confidence of the people, and many of whom had become highly distinguished by their patriotism, virtue, and wisdom, in times which tried the minds and hearts of men. . . . In the mild season of peace, with minds unoccupied by other subjects, they passed many months in cool, uninterrupted, and daily consultation; and finally, without having been awed by power, or influenced by any passions except love for their Country, they presented and recommended to the people the plan produced by their joint and very unanimous councils.38

VIRTUE AND THE ANTI-FEDERALISTS

While the Anti-Federalists shared the Federalists’ concern for virtue, they feared that Madison’s extended republic would be inimical to its strength. They had a tendency to accept the classical ideal, and many believed, with Montesquieu, that republican government could thrive only in a relatively small geographic unit with a limited and homogeneous population, where public interest would be more pronounced, obvious, and acknowledged, and where abuse would be more quickly identified and exposed. They argued that a large republic would be unable to adjust to the cultural diversity and the sectional and economic differences of the people in the new thirteen states, that human wisdom was incapable of controlling or administering a continental republic, that local concerns and interests would be sacrificed, and that the close relationship between the citizens and their representatives would be lost. A large republic, they feared, would diminish civic virtue and lead to factional conflict, corruption, and tyranny. The further removed the representatives were from their electoral source, the more difficult it would be to select representatives sensitive to the people’s sentiments.39 James Winthrop of Massachusetts reasoned that a large republic would prevent the people from enjoying the same “standard of morals, of habits, and of laws.”40

Like the Federalists, many Anti-Federalists argued that the virtue of rulers could not be counted upon. Federalists were frequently charged with excessive optimism in human nature and for not fitting adequate safeguards against corruption and tyranny, such as a bill of rights, into the proposed Constitution. While Madison argued that a large republic, rather than a small one, was more conducive to the selection of virtuous political leadership, Anti-Federalists such as George Mason and Patrick Henry offered the very opposite view. Both Federalists and Anti-Federalists were concerned about the dangers inherent in trusting men
with political power, and sought ways to perpetuate virtue in the people and rules of government. As one scholar has argued, Madison believed "that the level of virtue necessary to make small republics and by extension the state constitutions work was unrealistically high. Madison and other leading framers sought to establish a constitution, still republican in character, that could be founded on a more realistic level of virtue." At the same time Madison apparently believed that there was a greater chance of electing men of character and virtue to a national legislature than was generally possible in the state systems characterized by "factious" tempers and "local prejudices." The Anti-Federalists countered with the proposition that representatives close to and similar to their constituencies would best share their moral sensibilities, their character, and their needs; and hence a greater influence would be exerted upon those representatives to be virtuous spokesmen. But Hamilton argued that the criteria advocated by Montesquieu for small states had already been outgrown by the American states, leaving only "the alternative, either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt." 

VIRTUE, CORRUPTION, AND THE REPUBLIC

Both Federalists and Anti-Federalists were searching for the best way to promote virtue, for neither side believed that a corrupt people could sustain a republic, large or small. With Montesquieu, Americans of the Revolutionary era had concluded, "Fear is the principle of a despotic, honour of a kingly, and virtue is the principle of a republican government." Writing in 1775, Samuel Williams declared, "In a despotic government, the only principle by which the Tyrant who is to move the whole machine, means to regulate and manage the people, is Fear; by a servile dread of his power. But a free government, which of all others is far the most preferable, cannot be supported without Virtue."

If virtue was essential to a popular republic, as both Federalists and Anti-Federalists believed, then immorality and corruption could be looked upon as forerunners of tyranny. Benjamin Franklin, in the Constitutional Convention of 1787, voiced his concern that although the new government would likely "be well administered for a course of years," it would "end in Despotism, as other forms have done before it, when the people shall have become so corrupted as to need despotic Government, being incapable of any other." "Only a virtuous people," he said on another occasion, "are capable of freedom. As nations become corrupt and vicious, they have more need of masters." In a letter to
Lafayette in 1778, Washington reasoned that “when a people shall have become incapable of governing themselves and fit for a master, it is of little consequence from what quarter he comes.” He also declared, “Free suffrage of the people” can be assured only “so long as there shall remain any virtue in the body of the people.”

In giving his assent to the Constitution in the Massachusetts ratifying convention, John Hancock expressed his belief that the people would be secure under the new government “until they themselves become corrupt.” Before the Virginia ratifying convention, Madison stated: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimical idea.” Samuel Adams agreed that “neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt.” “If we are universally vicious and debauched in our manners,” he warned, “though the form of our Constitution carries the face of the most exalted freedom, we shall in reality be the most abject of slaves.” To Richard Henry Lee he wrote that whether or not America was to be able to enjoy its hard won “independence and freedom . . . depends on her virtue.”

Madison believed that in an extended republic, based upon representation, the “effects” of factions or political divisions might best be controlled. In a small democracy or republic, with relatively fewer factions, it would be easier for a large faction or class, or a corrupt coalition of factions, to become a tyrannous majority and thus the oppressors of the minority faction or factions. But an extended republic, with its system of representation, would open promises for the “cure we are seeking.” The system of representation would allow the republic to grow both in terms of its geographical size and its population, thus allowing the republic to absorb a large population and multiple interests. In a further turnabout of traditional republican theory, Madison suggested that multiple factions in an extended republic might well be a stabilizing force, which would allow the expression of self-interest without endangering public liberty. Not only would these factions tend to check and balance each other, but each representative would have to take into consideration the fact that he represented multiple interests, a phenomenon that would tend to moderate his performance if not his views. In order to be elected, he would have to pull himself in from extreme political fringes to more moderate public attitudes and expectations.

Madison believed that the selection of representatives whose responsibility would generally extend to a comparatively large population with multiple interests would better tend to promote men of virtue. He championed the idea that the citizens would be more likely to select men of virtue at the national than at the state level, since
the former will present a greater option, and consequently a greater probability of a fit choice. ... [A]s each representative will be chosen by a greater number of citizens in the large than in the small Republic, it will be more difficult for unworthy candidates to practice with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

In pure democracies and small republics, "men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people." On the other hand, "extensive republics are more favorable to the election of proper guardians of the public weal"—that is, men of substantial civic virtue. "It follows," reasoned Madison, "that, if the proportion of fit characters be not less in the large than the small republic, the former will present a greater option, and consequently a greater probability of a fit choice." 54

Madison emphasized his belief that it was not only important "to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." Here the variety of interests and the multiplicity of factions in the new republic came into play, nurturing in society "so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable." Although "all authority in [the federal republic] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority." The pluralistic, multifaceted society, then, would support so many different interests, from the economic to the religious, as to support the civil rights of each. "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." 55 The extended republic would, by its nature, tend to frustrate the building up of a national majority faction. Madison concluded:

Extend the sphere, and you take in a greater variety of parties and interests: you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked, that where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust, in proportion to the number whose concurrence is necessary. 56

Throughout The Federalist, one finds the argument that the elaborate constitutional structure the Federalists proposed would
provide structural and functional “filters” that would tend to sift out the least virtuous while allowing the more virtuous to gain political power. In this, Madison hoped to avoid the loss of virtue that had plagued earlier republics. In *The Federalist*, Hamilton suggests that “the institution of delegated power implies, that there is a portion of virtue and honor among mankind.” And also in *The Federalist*, Madison contends that “Republican government presupposes the existence of these qualities in a higher degree than any other form.” Indeed, if man were not in possession of these “other qualities in human nature,” a Hobbesian monarchy rather than a democratic republic would be necessary. “Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character,” continued Madison, “the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.” In his “Address to the States” of April 1783, Madison saw virtue as synonymous with true liberty:

If justice, good faith, honor, gratitude, and all the other qualities which enable the character of a nation and fulfill the ends of government, be the fruits of our establishments, the cause of liberty will acquire a dignity and luster which it has never yet enjoyed, and an example will be set which cannot but have the most favorable influence on the rights of mankind. If, on the other side, our governments should be unfortunately blotted with the reverse of these cardinal and essential virtues, the great cause which we have engaged to vindicate, will be dishonored and betrayed; the last and fairest experiment in favor of the rights of human nature will be turned against them.

Madison left no doubt that the future of the republican system would depend to a significant degree upon the amount of virtue displayed by the people of the republic. It was his belief that reason had “clearly decided in favor of” a large republic, where the greatest possibility existed for the selection of virtuous men as the representatives of the people, “whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice.” He believed that the scheme of representation announced in *The Federalist* would not only make the extended republic possible, but would, in the process, elicit a more virtuous representative republic. He argued, “it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.” A large republic, in Madison’s view, would have a greater number of fit men to be selected as representatives by extended constituencies. The “greater sphere,” he argued, would tend to engender better representation. The election of “proper guardians of the public
weal” is therefore much more likely in an “extensive republic” than a small one.  

Jay agreed with Madison that an extended republic provided the greatest opportunity for the selection of men of virtue and quality to political power. He reasoned:

When once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it; for altho’ town or country, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments, yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government,—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States. Hence, it will result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more safe with respect to us.

VIRTUE, THE PEOPLE, AND THE REPUBLIC

Even though Madison believed the citizens of the republic would be more likely to elect proper guardians at the national level than at the state level, he did not simply assume the virtue of those who ruled. The interim period between the Revolution and the Constitution had taught the bitter lesson that virtue in government cannot be taken for granted. Madison was also concerned with keeping men virtuous once they had obtained political power. “The aim of every political Constitution,” he reasoned, “is or ought to be first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.” One of the most effectual means to secure this in republican government, he surmised, was limited terms of office and periodic elections: “a limitation of the term of appointments as will maintain a proper responsibility to the people.”

Madison clearly recognized both the limits and necessity of structural arrangements and emphasized the importance of the spirit of the people. Representatives, according to his view, “will have been distinguished by the preference of their fellow citizens, we are to presume, that in general, they will be somewhat distinguished also, by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.” These representatives
will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature; and it must be confessed that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires is itself a proof of the energy and prevalence of the contrary sentiment.

At the same time, the "pride and vanity" of the representative will generally attach him to a form of government which favors his pretensions and gives him a share in its honors and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen that a great proportion of the men deriving their advancement from their influence with the people, would have more to hope from a preservation of the favor, than from innovations in the government subversive of the authority of the people.

The real check upon oppression at any level or branch of government was bound up in the "genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it."64

The Federalists emphasized that in their proposed federal republic the final depository of power would remain in the people. Madison wrote that "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."65 Madison had successfully argued that ratification of the Constitution ought to be consummated by special conventions in each state rather than by the state legislatures. As far as he was concerned, the Constitution became a compact not between the states, but by the people:

Our governmental system is established by a compact, not between the Government of the United States and the State governments, but between the States as sovereign communities, stipulating each with the other a surrender of certain portions of their respective authorities to be exercised by a common government, and a reservation, for their own exercise, of all their other authorities.66

In Madison's concept of the people as "the only legitimate fountain of power," he assumed a people possessed of sufficient virtue to support a republic. At the same time, the want of "better motives" of human nature dictated that this moderately virtuous people would need "auxiliary precautions" to help maintain a certain "equilibrium" in the republic. Since the citizens were the only proper objects of government,
it was to be the responsibility of government to regulate their “common concerns” and preserve “the general tranquility.” Madison believed that the policy of supplying [compensating for], by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

The major “auxiliary precautions”—federalism, separation of powers, and checks and balances—were inextricably intertwined with Madison’s beliefs concerning human nature. He warned that “enlightened statesmen will not always be at the helm.” This statement not only emphasizes the need for “auxiliary precautions,” but illustrates the point that writers such as Willmoore Kendall and George Carey have tried to make: that the founders still believed in the need for virtuous leaders as well as citizens. Government and society could survive lapses in virtue, but not its complete disappearance.

In constructing the Constitution of the United States, the American founders dealt with problems that were ancient in origin and yet still problematic. The authors of The Federalist assumed that passion, self-interest, ambition, and faction would have to be dealt with by “auxiliary precautions” and “safeguards.” Yet, at the same time, the founders assumed that there was a measure of virtue in man, especially the American, which, balanced against his less praiseworthy characteristics and motives, provided a foundation upon which a republic could be built and maintained.

Structures, separations of power, and checks and balances are simply not enough to maintain equilibrium or order in a democratic republic whose citizens are not supportive of the system, or who are motivated purely by crass self-interest and contentious and factious ambition. Even more importantly, government officials must place some restraints on the pursuit of their own individual and political interests in order to maintain the viability of constitutional government. Officers of the government must have some personal commitment to making the constitutional system work. Madison, in a well-known phrase in The Federalist, argued that “ambition must be made to counteract ambition.” The next sentence explains how that is to take place: “The interest of the man must be connected with the constitutional rights of the place.” This assumes that elected officials will be virtuous, that they will be selected by the people because of their virtue, and that they will be possessed of “enlightened views and virtuous sentiments.”
that would "render them superior to local prejudices and to schemes of injustice."71

However, it is not necessarily in the self-interest of the individual to attempt to counter ambition in others so as to protect the integrity of a constitutional institution. Constitutional "safeguards" can be circumvented, as well as protected by self-interest. When government officials work to protect the integrity of their offices, that is, when they merge their interests with the rights and obligations of their offices—thereby in turn protecting the integrity of the Constitution—they reflect the kind of civic virtue essential for republican government. The Constitution is not simply a mechanical device, but requires a careful balance between the structure of government and the nature and political culture of the people who are required to make it work.

NOTES

2James Madison, no. 39 of The Federalist, 250.
3James Madison, no. 51 of The Federalist, 349.
10Quoted in Cecilia M. Kenyon, "Constitutionalism in Revolutionary America," in Pennock and Chapman, Constitutionalism, 97.
11Ibid., 101.

Alexander Hamilton, no. 15 of The Federalist, 96.

James Madison, no. 51 of The Federalist, 349.

James Madison, no. 57 of The Federalist, 387.


James Madison, no. 55 of The Federalist, 378.

Alexander Hamilton, no. 76 of The Federalist, 514.


Ibid., 6:115.


Adams-Jefferson Letters, 492.

Alexander Hamilton, no. 9 of The Federalist, 51.

James Madison, no. 10 of The Federalist, 65.


Edmund Burke, “Appeal from the New to the Old Whigs,” in The Writings and Speeches of Edmund Burke, 12 vols. (Boston: Little, Brown, 1901), 4:174–75. The theory that an “elite” will, in fact, rule in any social or political organization is of long standing. According to Harold J. Laski, “What, as a matter of history, can alone be predicted of the State is that it has always presented the striking phenomenon of a vast multitude owing allegiance to a comparatively small number of men” (A Grammar of Politics [London: George Allen and Unwin, 1925], 21).

Harold D. Laswell and Abraham Kaplan insist that “whether a social structure is democratic depends not on whether or not there is an elite, but on the relations of the elite to the mass—how it is recruited and how it exercises its power” (Power and Society: A Framework for Political Inquiry [New Haven: Yale University Press, 1950], 202).


Alexander Hamilton, no. 36 of The Federalist, 225.

Alexander Hamilton, no. 73 of The Federalist, 497.

Alexander Hamilton, no. 71 of The Federalist, 482.

The Writings of Thomas Jefferson 13:396–401 (emphasis added).

The Writings of James Madison 2:441–12.

John Jay, no. 2 of The Federalist, 10–11.


Quoted in Paul Leicester Ford, Essays on the Constitution of the United States (Brooklyn, N.Y.: Historical Printing Club, 1892), 65.


Alexander Hamilton, no. 9 of The Federalist, 52–53.

Rossiter, Political Thought, 199.


American colonists of the latter part of the eighteenth century readily identified the English church and government with corruption—the Church with its pampered hierarchy and impoverished parish priests, and the government with its rotten boroughs and members of Parliament whose votes were bought by the monarch with seneoures” (Clarence B. Carson, The Rebirth of Liberty [New York: Arlington House, 1973], 23).

Public Virtue

[5] Ibid. 3:175.
[5] James Madison, no. 10 of The Federalist, 62. In The Authority of Publius (Ithaca, N. Y.: Cornell University Press, 1984), Albert Furtwangler contends that The Federalist should be read first and foremost as political propaganda and not necessarily as a clear expression of political ideology. While this view may have some merit, we believe The Federalist makes a statement that both explains the basic philosophy of the writers and masterfully elicits the acceptance of the readers essentially on the basis of that philosophy.
Her Body

Stepping out of the tub,
Nancy waited
For the cloud to clear,
Then found a blue ring
At the bottom
Of her pregnancy test.

Later she cruised
Downtown like a foreigner
Looking for hap-
Piness and found
The clinic, next door
To the takeout.

One legal visit fixed
Her up for good;
Her boyfriend even paid
For dinner that night,
For her sixteenth
Birthday, not knowing

She had lost her
Appetite, no longer
Wanted to touch
Her steak. She left it
Cold on the table,
Not saying a word.

—Timothy Liu

Timothy Liu is a student in English at Brigham Young University.
The Best Constitution in Existence: 
The Influence of the British Example 
on the Framers of Our Fundamental Law

M. E. Bradford

When in 1787 a carefully chosen body of distinguished citizens from twelve of the original British colonies in North America met to consider how they should go about improving or replacing their existing bond of “perpetual union” in the Articles of Confederation, they enjoyed as a basis for their deliberations an agreement on what they meant by a constitution: a “fundamental law.” Both for the outlines and for the details of that concept they went primarily to the example they knew best: to the history of the British constitution, in whose name they had recently achieved an independence ironically outside of the protection of the authorizing authority. Contrary to what Sir Henry Maine observes in his *Popular Government*, the Constitution of the United States is not “a modified version of the British Constitution . . . which was in existence between 1760 and 1787.” For its prototype is the minimal constitution put aside with the passage of the Stamp Act, the constitution of 1688. It was a bond by way of inheritance, shaped more by corporate memory than by first principles: a legal bond, composed of a few texts, favored glosses upon these texts, and a disposition or habit of mind most easily identified with the Whig magnates of eighteenth-century England—magnates whose spokesmen put text, gloss, and memory together.

Because it is the current fashion to read history backwards, tracing the records of actions and attitudes back from our time through 1763 instead of forward from, shall we say, the Norman Conquest, it is predictable that this generation should persist in construing the United States Constitution in a vacuum, that they should forget how most of our American forefathers cherished the English constitution and did not change their opinion of its merits just because Parliament and the ministers of King George III failed to observe some of its provisions. When we see the framers in proper historical context, it becomes clear that their handiwork, like its prototype, “was the result not merely of philosophy, but of an historical upgrowth.” Sir Herbert Butterfield, in

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remarking the difference between the political spirit of Western man
since the French Revolution and how he had once, long before 1789,
responded to the intractable difficulties of human coexistence and social
order, has observed that "men make gods now, not out of wood and stone,
which though a waste of time is a comparatively harmless proceeding,
but out of abstract nouns, which are the most treacherous and explosive
things in the world." Because they came out of the American version of
the English experience still admiring the nonideological British constitu-
tion, because (in most cases) they pled no larger arguments for
revolution than the law, and at worst spoke of no authority beyond its text
(saving only the right of self-preservation), the members of the Great
Convention divinized no abstractions, avoiding with conscious intent the
now familiar language of multitudinous "rights" and thus the idolatry of
which Butterfield has written.

In an era that urges us from every quarter to accept the notion of the
United States Constitution as a bundle of general propositions about the
a priori purpose of government and its function in fulfilling the expecta-
tions generated by a universal human nature; in an age that recognizes in
the fundamental sovereign law little more than a set of anterior, program-
matic social, economic, and political goals to be achieved by inventive
constructions of the silences of the framers, it is difficult to over-
emphasize the English constitutional inheritance of the American
people. For, as its enemies obliquely proclaim in noisy denials of its
importance, a public memory of that inheritance has heretofore stood
almost alone in obstructing the way toward certain kinds of chaos. It is
a memory that precludes mischief already in motion and other mischief
(judicial and legislative) soon to be attempted in the name of "constitu-
tional principles"—misnomers extrapolated from the "sacred text" by
people who know next to nothing about its origins and have no intention
of correcting what they find to be, for their own purposes, a useful
ignorance.

The Whig legalists who authored and then ratified the American
Constitution did not, however, proceed at so great a remove from the
spirit of modernity out of ancestral piety or by reason of the British
constitution’s overall impact on their lives (though it had been clearly
beneficent). Instead, they were moved to emulation by its specific virtues
which they had come to value more and more as they fought to protect
them during the Revolution and then struggled to institutionalize them as
part of American law once the fighting had ended. Perpetuation was their
objective, even sometimes when they modified the British original—as
in making their Constitution entirely a thing written down.

It has been argued that as much as three-fourths of the document
approved by the several states (including the Bill of Rights) makes no
sense apart from an intimate familiarity with British legal history.
Studies of the Constitution written before 1930 emphasized these continuities. I will in passing mention only a few.\(^5\)

From the English Bill of Rights we derive our guarantees of regular sessions of Congress, our rules prescribing that money bills originate in the House of Representatives, our protections for the privileges of Congress to regulate itself, many limitations on the president’s power, and the elaborate provisions for the impeachment of government officers of every description, including judges. The language in the Constitution protecting the writ of habeas corpus comes from the English Act of 1679 (31 Chas. 2, c. 2, 27) and before that from Magna Carta. The English Bill of Rights is also reflected in the First, Second, Fifth, Sixth, and Eighth amendments to the United States Constitution. The First and Third amendments also derive from the glorious Petition of Right (3 Chas. 1, c. 1, 1) of June 1628, which King Charles I made law by giving his assent to it while sitting in the midst of his Parliament. The definition of treason is, of course, from Edward III’s 1352 Statute of Treasons—and a protection of the subject against political prosecutions. For protection of the right to petition and assemble and of the particular right not to be amerced except through a judgment of one’s peers, according to the law of the land, the source is antiquity itself, the Great Charter, especially Chapter 39 in the original text signed by King John. There the Latin of 1215 declares:

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuleter, aut aliquo modo distratur, nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.\(^6\)

Sir Edward Coke, in *The Second Part of the Institutes of the Laws of England*, renders this most widely accepted declaration of our most fundamental guarantees of the liberties (as opposed to *Liberty*) of the subject in these terms:

that no man be taken or imprisoned but *per legum terrae*, that is, by Common Law, Statute Law or Custome of England. . . . No man shall be disseised . . . unless it be by lawful judgment, that is, verdict of his equals (that is men of his own condition) or by the Law of the Land (that is to speak it once for all) by the due course, and processe of Law.\(^7\)

Attached to Coke’s rendering of the essential passage are others linking the king’s majesty and the necessities of the royal purse with the orderly processes through which a free people tax themselves. Finally, in the matter of the authority of the law over the will of princes and parliaments, the ground for even thinking of the possibility of a constitution, there are the Jacobean digests which, together, presuppose a sovereign law. In the language of Dr. Bonhams’s Case (8 Co. Rep. 107a, 114a [C.P. 1610]), we are assured with respect to any positive law or judgment “against common right and reason [that] . . . the common law
will control it and adjudge such act to be void." From this matrix of promulgations, charters, customs, cases, and prescriptions emerges most of the particular properties, features, and provisions of the United States Constitution, except for those that have to do with the specific shortcomings of the Articles of Confederation, specific problems of the newly independent nation, republicanism, or federalism. And even the latter had its origins in the operations of the British constitution among Englishmen in North America, as had (according to Madison) the idea of judicial review as a way of preserving the Constitution whenever it was threatened—a procedure inspired by the examination given to the acts of American legislatures and governors by the Board of Trade or the ministry in power. To approach the text of the framers’ Constitution without knowing the history of the Domesday Book, the Wars of the Roses, the attainder of the Earl of Strafford, or the Glorious Revolution; to read it without some introduction to the English Civil War of the 1640s and the eighteenth-century debate about the nature of rightful authority over free Englishmen is to misconceive the purpose embodied in the new American Constitution as it stood in 1791, especially where the document embodies improvements on its model, improvements that British statesmen had been talking about and proposing for generations: privileges and immunities, and proscriptions of ex post facto laws, bills of attainder, and the like.

What unites this partial survey of connections and derivations is precisely that they concern primarily discrete, particular commitments, not generalized positions. Contained in these guarantees is no equal protection or general welfare or necessary and proper fanfaronade; yet the commitments are most valuable precisely because they are not subject to distortion by construction and extrapolation into whatever judges or legislatures, for extraconstitutional reasons, might make of them. But the most important of these established reasons for the framers’ honoring and valuing the inherited constitution made over time by their ancestors was its protection of the political liberty of the subject, the freeholder, in the exercise of his customary, inherited, and chartered rights of self-government. The hope of the members of the Philadelphia Convention of 1787 was to frame a document that would do the same for themselves and for succeeding generations of Americans.

Consideration of the impact of the British constitution on the workings of the Great Convention should not begin with the subject proper, however, but with the hundred and fifty years of colonial history of British North America as an extension and completion of an antecedent identity. Americans, we must remember, had a long and unbroken experience of adapting the British original to their peculiar purposes before they undertook to replace the prototype with a unifying, homemade substitute. As no less a critic than Edmund Burke maintained, the
original United States Constitution has the virtue of being a version of the British constitution "well adapted to its circumstances." By preserving what was useful from the inherited structure of English government as it stood in 1787, by utilizing the "republican education" achieved in the process of governing themselves in colonial British America, the framers authored a revision of the total system that connected them as countrymen. It is a revision that has the merit of not attempting to "conquer absolute and speculative liberty," being satisfied with a lesser and more durable ambition. That lesson Englishmen had learned before they reached these shores. They relearned it thoroughly in governing themselves in all but a few respects as overseas subjects of the Crown in the New World, under various royal charters. Led by appointed and elected chief magistrates, Americans enjoyed a version of self-government that provided for no taxes but such as they put upon themselves. The lack of a resident nobility and a complete religious establishment, along with the remoteness of the king and his imperial machinery, made them a different sort of Englishmen. But not too different. For even three thousand miles from Land's End, the British constitution was their context for thinking about politics—a constitution already (according to John Adams) "republican," but given an even more republican flavor by distance, diminution, and distinctions of circumstance in the New World.

English colonials in North America, as has been demonstrated in recent scholarship, developed a great interest in constitutional questions during the Glorious Revolution and took sides in the significant disputes about the relation of prince to fundamental law within the larger English tradition. They preserved their place within the patrimony of an inherited political system by transplanting and applying the common law of England to their own unique situations and by deriving, theoretically, the legitimacy of their own local systems of government from their origins in the acts of the Crown in Parliament or the antecedent exercises of unquestioned royal prerogatives. Their laws were the outworks of a general constitution, provisions of which applied only to them. Other components made outside the mother country might be applicable only to Scots or Canadians or Irish—with the ancient constitution itself resting underneath them, linking into oneness all such local variety. In the days of the Stamp Act Crisis, during 1765–66, all freemen on this side of the Atlantic invoked the quintessentially English idea of a sovereign law that personified the national character by being derivative of the entire national experience: the law of Henry de Bracton, which both makes and unmakes princes, a power "superior" to the king, "through which he has been made king." All of the British colonies in North America invoked the constitution against Parliament's unsanctioned claims of supremacy. They insisted that Parliament could not vote as it wished if in violation of fundamental law. If the English constitution
were to be strictly observed by all who had authority, Americans had nothing to fear. So said John Dickinson and Daniel Dulany and other protesting pamphleteers. Their professed loyalty was to a legal inheritance and to the institutions designed to give it force—incidentally, conditionally, according to the cases—so long as those institutions served the ends for which they came into being. The British constitution meant mixed government and a separation of powers with a local legislature for all local issues: a little Parliament with courts attached, supported by American taxes. Therefore, it meant a check upon despotism, which everyone deplored as a condition to be avoided, the antithesis of the rule of law. The Crown would sometimes be represented by governors, by the Board of Trade, or various ministers. The King’s Bench (his judges) either enforced the constitution or forfeited their authority. Out of these adaptations emerged a fully-developed notion of a fundamental law, logically prior to the assertion of legislative supremacy or the royal prerogative or even abstract principle. In arguing against the Sugar Act, the Stamp Act, and subsequent assertions of a remote, hostile, and arbitrary power, Americans prepared themselves to envision a particular constitution of their own, a fundamental law that would preclude such errors; and they also developed an idea of what it would be like to observe such a law.

While it shaped their side of the argument with Whitehall and George III’s ministers, propelling them toward pressing that case to its logical conclusion in an assertion of the right of independent self-preservation within the British constitution as it stood after the abdication of James II (minus monarch, and much else besides), the version of this constitution, preserved among its American apologists, also acted as a check on how much their “struggle” might attempt or signify in the way of radical change in the local operations of their laws, their economic and political systems, and the rest of their culture. A revolution on these grounds could be revolutionary only up to a point; and once independence had been formalized in the September 1783 Treaty of Paris, the same reverence for the English constitutional achievement surrounded, conditioned, and provided a language for reflection on their own legal necessities. Of course, there were radicals at the fringes of the American body politic—even a few close to the center—and a number of them would have been pleased to believe with Patrick Henry (though for very different reasons) that what distinguished the new American government was that it had “not an English feature in it.”11 But among those capable of coherent, consistent political thought (as opposed to mere protest), there were not many radicals, and those few who did enjoy a temporary influence worried other patriots no end, since the characteristic concern regarding constitutions had to do with setting limits on change.
As a sample of the operation of these restraints, we should consider the 1774 speech of James Duane of New York in which he recommends, as opposed to some teaching on natural equality, “grounding our rights on the laws and constitution of the country from whence we sprung.” Facing the prospect of independence, Duane declares, “Let us hope . . . to rise in time to a perfect copy of that bright Original [the British constitution], which is the envy of the world!”\textsuperscript{12} An equivalent to Duane’s Old Whiggery can be found in the eloquence of Carter Braxton of Virginia, who in May of 1776 urged independence upon the citizens of the Old Dominion from the example of 1688—but no more than independence:

However necessary it may be to shake off the authority of arbitrary British dictators, we ought nonetheless to adopt and perfect that system, which England has suffered to be so grossly abused, and the experience of ages has taught us to venerate. . . ..

This constitution and these laws have also been those of Virginia and let it be remembered that under them she flourished and was happy. The same principle which led the English to greatness animates us. To that principle our laws, our customs and our manners are adapted, and it would be perverting all order to oblige us, by a novel government, to give up our laws, our customs, and our manners. . . .

The testimony of the learned Montesquieu is very respectable. “There is,” he writes, “one nation in the world that has for the direct end of its constitution political liberty.”\textsuperscript{13}

John Jay of New York, at this stage in his career, sounds very like his ally from Virginia. First he objects to any rush toward independence because he doubts “that all government is at an end”—that George III and his ministers have broken all bonds between Great Britain and its colonies on these shores as James II had forfeited his royal authority in the mother country almost ninety years earlier. Before the Continental Congress he declares that the “measure of arbitrary powers is not yet full and I think it must run over before we attempt to frame a new Constitution.”\textsuperscript{14} Later, when that measure had been accomplished, Jay went forward to a secession “in defence of old liberties, not in search of new.”\textsuperscript{15} Thus, looking back in 1800, he describes not only himself but the entire Continental Congress from 1774 to 1776. In letters of the time he often invokes the law of self-preservation.\textsuperscript{16} And in the October 1775 “Address to the People of Great Britain,” he appeals to the sanction of inherited rights, following the pattern of other well-respected Whig resistance to tyranny.

Further examples of piety toward English institutions among a people at war with Great Britain are preserved in John Drayton’s Memoirs of the American Revolution from Its Commencement to the Year 1776. The 25 June 1775 “Address to His Excellency, The Right Honorable Lord William Campbell” from the Provincial Congress of
South Carolina was probably written by John Drayton's father, William Henry Drayton, the principal theorist of the Revolution for his very conservative community. Yet what Drayton says here is echoed at other times by John Rutledge, Henry Laurens, Charles C. Pinckney, Edward Rutledge, and Rawlins Lowndes: that Carolinians have, even as they stand ready to fight, "no love of innovation—no desire of altering the Constitution of Government—no lust of independence"; that "Carolinians wish for nothing more ardently than a speedy reconciliation with our mother country, upon constitutional principles"; that Carolinians love the British constitution, even in "taking up arms" as the "result of dire necessity, and in compliance with the first law of nature." 17

It is a simple matter to find the same kind of Whig doctrine coming from leading figures in each of the original thirteen states. Edmund Pendleton of Virginia explains to a younger countryman that the leaders of the Revolution wanted only a "redress of grievances, not a revolution of government." 18 In other words, they wished matters put back as they had been. And James Iredell of North Carolina writes to his angry Loyalist uncle in Jamaica that Americans in 1776 acted only as Englishmen, under an English constitution, even in achieving independence. 19 He continues, "The same principles which led to the steps taken against royal authority [in 1688] would justify any others." 20 Elsewhere he adds that no oath of allegiance to a prince is binding if it is "not consistent with the safety and liberties of the people." Political apologetics in this vein are the commonplace matter of thousands of letters to friends and relatives in England written by new Americans who were still proud of being English and protective of their political inheritance under Mr. Burke's version of a constitution. Their originally English voices were also heard in redefining the relation of American beginnings to the great political traditions of the mother country.

The next stage in this process of perpetuation and re-embodiment belongs to the period when, while fighting out the Revolution with their kinsmen from Great Britain, our forefathers wrote new constitutions for the thirteen former colonies. The notable characteristic of these new constitutions is how little they differed from the charters they emulated and replaced. Willi Paul Adams, the authority on these documents, writes:

The central role played by British constitutionalism in justifying colonial resistance was carried over into American thinking when the colonies began writing their own in 1776. The basic premise of the colonists' argument was that the political order created in 1688, though formulated only in statutes [which appealed to other statutes, petitions, rulings, and charters], could not be changed, even by a majority decision in Parliament approved by the Crown. This English Constitution, the colonists argued, was a permanent code to which the stewards of government power—the King and Parliament—were subject and that they had no authority to alter. 21
Of course, there were bills of rights in some of these constitutions, and some of them spoke (as the British constitution did not) of the generic rights of man—or at least of rights available to all, once they enter into a social condition. Furthermore, a few American radicals had lost their respect for the British constitution before the colonies won their freedom, while others among their countrymen doubted that it was relevant to their problems as citizens of a new republic. The latter opinion was supported even by several members of the Great Convention. Finally, eighteenth-century Americans read the British constitution in several different ways: in the fashion of Blackstone, according to the method of Lord Bolingbroke, or following the manner of David Hume. For some of our forefathers, the British constitution was an illustration of the medieval doctrine of the mixed regime, with the great estates of King, Lords, and Commons interacting with and through each other. Others interpreted the same evidence so as to find in the British tradition an even greater protection against tyranny in the separation of executive, legislative, and judicial power. Yet another, smaller group was convinced that the secret of their inheritance from the mother country was to be found in the balance between “country” and “court” parties. Despite this variety of interpretative strategies employed by the framers, they understood the ancestral constitution and used it in different ways, according to their political assumptions.

There is a temptation to prescind from this spread of evidence an attenuation of British constitutionalism among George III’s erstwhile subjects in North America. Yet even in the first years of their collective existence as part of a new political order (novus ordo seclorum), most thoughtful Americans invoked the British constitution primarily to explain why the Articles of Confederation would not be enough to foster their country’s tenuous internal order, inner strength, and social cohesion. However, they expected even after revisions in Philadelphia that their government, once reformed, would probably continue to preserve the pattern of jealously independent colonies in tension with a distant and high-handed central authority. Though the federal government would not be so far away as Whitehall or, with its power to tax directly, so restricted in its influence, it was perpetually on trial, thanks to the nature of federalism itself and by virtue of its status as the creation of the sovereign people of the sovereign states. Americans in 1783–86 enjoyed spinning out arguments about the justice of their resistance to tyranny and thus about the proper role of British law in their lives while they had been British subjects. Particularly in New England, the great men of law (Theophilus Parsons, Francis Dana, James Bowdoin, Theodore Sedgwick) feared that the Revolution would continue beyond independence into “democratic excesses.” John Adams, especially, admired the fundamental law of Great Britain, describing it as “the most
stupendous fabric of human invention” and a greater source of “honor to human understanding” than any other artifact in the “history of civilization.” In this discourse, over against Captain Shays and his “rebellion,” stands the authority of the stable social teaching of the British constitution. Adams’s opinion of the value of a mixed constitution summarizes his region’s commitment to English continuity, especially as he writes of these subjects in A Defence of the Constitution of Government of the United States of America.

References to the British constitution are scattered throughout the records of the Great Convention and in the pamphlet literature surrounding that assembly. Indeed, they occurred so frequently that some of the delegates—who in many respects preferred to emulate the British example—registered complaints about their number. These references are basically of two kinds: those that assume the complete usefulness of comparisons to English originals, even when they are incomplete and partially misleading; and those that object to too much dependence on antique analogies and blind retrospection, even though they recognize their role in the Convention. For John Dickinson, the British constitution was a “singular and admirable mechanism,” a creation of the national experience, which is always of more value than the fruits of a priori rational speculation. Charles Pinckney called it “the best Constitution in Existence.” Edmund Randolph spoke of its “excellent fabric,” which he hoped the framers would copy to the best of their ability. The point is that such sentiments are a major component of the discourse within the Great Convention, not exceptional anglophile outbursts. Forrest McDonald writes, “Whatever their political philosophies, most (though by no means all) of the delegates sought to pattern the United States Constitution, as closely as circumstances would permit, after the English constitution.” What is most clear about affirmative comments on America’s continuing link to a British inheritance is that they focus on the advantages of the mixed regime, with roots reaching all the way back into medieval history, and that they predicate within that inheritance a level of political liberty and shared self-respect not easily preserved in a simple political structure—monarchy, democracy, or oligarchy—of any of the classical varieties. Invariably, whether the speakers were Federalist or Anti-Federalist, the leitmotif in their song of praise for inherited ways, modes, and institutions was preserving a balance of liberty with order that can be sustained against enemies within and without: a balance provided in the eighteenth-century British constitution through a sovereign law, coming down from the Magna Carta, the Forest Charters, the Petition of Right and the Bill of Rights, and a distribution of power between King, Lords, and Commons, mixing the characteristics of various kinds of government.
In both the Great Convention and in The Federalist, there are extensive comparisons of the American president as chief executive with the functions of the British Crown, and of the House of Representatives with the House of Commons. In these debates and apologetics, differences are developed to show our system as a perfection of its prototype, not as a rejection of the patrimony. In a passage of even more startling applicability to this exposition, John Dickinson of Delaware draws a direct comparison between the United States Senate and the House of Lords—since senators are expected to have a long tenure in office, to represent "rank," property, and establishment, and to check the democratic enthusiasms of a directly elected lower house. According to Dickinson, senators would represent territory, places, as do the peers of England, but not populations, becoming "as near as may be to the House of Lords in England." When the architects of our political identity as a people both one and many set out to define their enterprise, they turned to the constitution of Great Britain as it stood from 1688 to 1750 and to their own colonial experience under that constitution—not to Greek leagues, Holland, Venice, Switzerland, and Genoa; not even (though they respected it immensely) to the Roman constitution under the Republic. Naturally they looked first closer to home and merged the lessons from other quarters into their readings of Anglo-American history. But what they might think and how far they might reach toward a republic of abstract proposition and ideological purposes was greatly limited thereby.

What sounds in all this Old Whig music is, of course, not the individualistic sirens' song of Locke or the French philosophers but the organ tones of Bracton, Fortescue, Sir Matthew Hale, Sir Edward Coke, and the independent gentlemen who preserved Magna Carta, framed the Petition of Right, and required An Answer to XIX Propositions from Charles I: the tradition of the mixed regime, the balanced constitution, in which Lex is Rex: the law (meaning the nation's soul, embodied in customs and charters, expectations and language) as sovereign, rooted in the very nature of things. That kind of law is a continuum, an unfolding harmony which, as Ellis Sandoz has argued recently, identifies the American Revolution and its law-giving aftermath as the last event in Renaissance political history. The beginnings of its modern antitype, of another, more abstract species of law, came a few years later in France with the Rights of Man and Citizen Robespierre. When Gouverneur Morris, Charles Pinckney, Dickinson, Hamilton, Randolph, Pierce Butler, George Mason, and James Madison invoked the British constitution among their fellow framers, they were merely recalling their more speculative colleagues to a known and recognized norm that no amount of theoretical ingenuity could have contrived, and to a
limited, antiabstractionist view of their lawmaking function. So much of the question before them had been settled long before they were born. That such was a view most of them accepted can be proved from the Constitution they assembled—even though they were very proud of how much they had incidentally improved on the original (in such achievements as a solution to the problem of extended republics) and of the way in which they had converted it into a mutually binding text, with a negative on both the states and the central power.

After the United States Constitution had been drafted and sent out for examination by the states, British constitutional history became a major influence on how it was interpreted by both advocates and adversaries. In North Carolina, Massachusetts, and New York (and in assorted pamphlet literature), pointed comparisons between analogous components of each system were commonplace elements of ratification debates. In Virginia, under the watchcare of Patrick Henry, the inherited rights of Englishmen qua Americans, the chartered rights, became the issue in a criticism of what the framers had proposed. Moreover, we can see in the fragments of debate preserved from South Carolina that these rights had an equivalent importance there.

Patrick Henry, the most important of the Anti-Federalists, the man who had set the inertia toward revolution in motion in Virginia as defender of “the spirit of liberty” that Americans “drew . . . from their British ancestors,” called the British constitution “the fairest fabric that ever human nature reared.” Of the Philadelphia instrument he complains, “there is not an English feature in it.”\(^33\) Henry frames his objections to the proposed constitution by declaring:

> We are descended from a people whose government was founded on liberty: our glorious forefathers of Great Britain made liberty the foundation of everything. That country is become a great, mighty and splendid nation; not because the government is strong and energetic, but, sir, because liberty is its direct end and foundation.\(^34\)

In the same ratifying convention, in support of the handiwork of the framers, George Nicholas reasoned the other way around: that our Constitution preserves what is of value in the English and also adds improvements. Future president James Monroe, following after Henry’s argument, contended, “The wisdom of the English Constitution has given a share of legislation to each of the three branches, which enables it effectively to defend itself, and which preserves the liberty of that country.”\(^35\) Other Virginians contributed to this same set of invocations, honoring the old authority so as to shape the new.

The variety of Henry’s allusions to the British example is extraordinary—almost as if the Revolution had not occurred. But Henry is in
no way more surprising than Patrick Dollard of South Carolina during that state’s ratification convention, or Francis Kinlock, a fellow Carolinian, in a letter written soon after its conclusion. Dollard, living under the Articles of Confederation in a sovereign South Carolina, still speaks of a “birthright” under Magna Carta and of how it has been “made over” by friends of the new constitution. And Kinlock, writing to former Lieutenant Governor Bull two days after he had cast his own vote for ratification, summarizes his view of the implications of the new “bond of Union” with “we are getting back fast to the system we destroyed some years ago.” These lines represent only a few of many such passages which survive to us in the ratification records of the various states or in the private correspondence of the framers.

If there is one constant in the political discourse of eighteenth-century Americans, it is a generous and undeviating admiration for the British constitution as they knew it. Even the greatest theorist whom they recognized, the Baron de Montesquieu, spoke constantly of the merits of the nontheoretical English system. In everything they attempted from 1765 and the quarrel over the Stamp Act through the drafting and adoption of the original United States Constitution in 1787–90 and the addition to it of the Bill of Rights in 1789–91, our forefathers invoked the authority of that antecedent constitution as it stood in 1689, following the Glorious Revolution. Neither war nor independence diminished this relationship. In the opinion of many scholars, it is an explanation of the essential character of our fundamental law as a sovereign power, expressive of the deliberate sense of the American people, binding them in a lasting way to an inheritance of specific rights and limited governmental authority that runs all the way back to the Great Charter affirmed in 1215 at Runnymede.

It is impossible to understand what the framers attempted with the Constitution of the United States without first recognizing why most of them dreaded pure democracy, judicial tyranny, or absolute legislative supremacy and sought instead to secure for themselves and their posterity the sort of specific, negative and procedural guarantees that had grown up within the context of that (until very recently) most stable and continuous version of the rule of law known to the civilized world: the premise that every freeman should be protected by the law of the land. Sir William Holdsworth, in his History of English Law, contrasts the spirit which we discover in the apologies for the American Revolution and the ideological flavor of what its authors said about making the original United States Constitution. He writes in summary that the latter company “went for inspiration to the eighteenth-century British Constitution, with which they were familiar.” In another context he expands this idea:
[The United States Constitution was] built up by skilful adaptation to a new situation, of sound institutional traditions derived to some extent from the old relations formerly existing between Great Britain and her American colonies and to a large extent from the British Constitution. . . .

They [the framers] were not inclined to entrust unfettered powers to a popularly elected legislature; for they recognized that the usurpations of such a legislature would lead to tyranny as quickly as usurpations of the Executive. They were not believers in equalitarian theories.38

On the basis of the evidence I have found, Sir William cannot be disputed; and his is the general opinion of other British authorities on the subject.39 For early English constitutional history is a universe of discourse, a structure of values inherent in the language of its expression that is the opposite of metaphysical speech concerning abstract moral principles and ideal regimes. In other words, it is well suited to the articulation and protection of what the English political theorist Michael Oakeshott speaks of as “nomocratic” orders—those better defined by an established way of conducting their business than by a set of goals.40 The opposite is found in “teleocratic” regimes, which attempt to embody some large idea such as Justice, Liberty, or Equality in an always incomplete, ever more insistent, process. About this kind of government we know more than we would like. Thinking about the difference between the familiar intellectual context of contemporary ideological politics and what the framers intended in the way of limited government, we may, even at the distance of two hundred years, recognize how far we have come from those origins, away from securing “the blessings of liberty to ourselves and our posterity.” How far, and at what cost.

NOTES

2C. Ellis Stevens, Sources of the Constitution of the United States, Considered in Relation to Colonial and English History (New York: Macmillan, 1894), xi. Stevens also argues that “it is beginning to be realized [contra the enthusiasts of an American radical democracy, the local disciples of Rousseau] that the Constitution of the United States, though possessing elements of novelty, is not, after all, what this [radical idea of an invention ex nihilo] would imply. It is not, properly speaking, the original composition of one body of men, nor the outcome of one definite epoch, . . . it is better than that. It does not stand in historical isolation, free of antecedents. It rests upon very old principles worked out by long ages of constitutional struggle. It looks back to the annals of the colonies and of the motherland for its sources and explanation” (vi–vii).


8Doris M. Stenton, After Runnymede: Magna Carta in the Middle Ages (Charlottesville: University of Virginia Press, 1964), 40.


11Quoted in Founders' Constitution 1:671.


22See Gordon Wood, The Creation of the American Republic, 1776–1787 (Chapel Hill: University of North Carolina Press, 1969), 11: "No Government that ever existed, was so essentially free." See also 575–86. Adams is quoted as saying in 1775 that the "British constitution is nothing more nor less than a republic, in which the king is first magistrate" (206).

23James Madison, Notes of Debates in the Federal Convention of 1787 (Athens: Ohio University Press, 1966), 447. Madison quotes Dickinson as declaring, "It was not Reason that discovered [this mechanism]." Experience takes the place of reason.

24Ibid., 184.

25Ibid., 46.

26McDonald, Novus Ordo Seculorum, 209; in James Madison, no. 56 of The Federalist, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 382, Madison speaks of the "experience of Great Britain which presents to mankind so many political lessons... [as] frequently consulted in the course of these inquiries."

27See William Henry Drayton, A Letter from Freeman of South Carolina to Deputies of North America, Assembled in the High Court of Congress in Philadelphia (Charleston: Peter Timothy, 1774), 20, 24: "Magna Carta is such a fellow that he will have no other sovereign." See also Stephen D. White, Sir Edward Coke and the "Grievances of the Commonwealth," 1621–1628 (Chapel Hill: University of North Carolina Press, 1979), 267. The quotation is an echo of debates in the Parliament of 1628 leading up to the Petition of Right.

28For a comparison of royal and republican executives in Madison's Notes, see James Wilson, 46, 252, 244; Pierce Butler, 63, 113; Governor Morris, 319, 335–36, 360, 373; George Mason, 64; Benjamin Franklin, 64; James Madison, 80, 305; and Roger Sherman, 527. For a sample of analogies of Parliament, see George Mason, 177, 252; Gunning Bedford, 229; and Roger Sherman, 399.

29Madison, Notes, 82; the same comparison is made by Oliver Ellsworth (223), Edmund Randolph (436), and George Mason (443).


31Elliot, Debates in the Several State Conventions 3:170, 174.

32Ibid., 53–54.

33Ibid., 450–51, 219. Henry Lee argues from the ability of Parliament to contend with a king that Congress will be able to prevent executive tyranny (43).
Ibid. 4:354.


Sir William Holdsworth, *The History of English Law*, 17 vols. (London: Methuen and Co., 1938), 11:137. Holdsworth adds remarks to the effect that talk of the “equality of men, their inalienable rights . . . [though] such theories might be suited to a period of revolution, [was] of very little help in a period of reconstruction.” See also Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979), 1:91, 237, for an idea of the British constitution contrary to the one suggested in Dr. Bonham’s case. Blackstone declares, “if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.” Yet he denies that Parliament is free to exercise a “power precarious and impracticable.”


The Summer of 1787: Getting a Constitution

J. D. Williams

It is not at all certain that complex historical events really have beginnings, but it is absolutely certain that all essays must. And so we begin with my favorite living Frenchman, Jean-Francois Revel, commenting on the revolution in eighteenth-century America: "That revolution was, in any case, the only revolution ever to keep more promises than it broke." What made that possible in America was the Constitution of the United States, written eleven years after the Declaration of Independence and six years after our defeat of the British at Yorktown. On 17 September 1987, that document was two hundred years old; and it is to that birthday—and to all of us—that this essay is fondly dedicated.

My intent here is threefold: to recall how one American government (the Articles of Confederation) was overthrown; to tell the story of the Philadelphia Convention in the summer of 1787; and to assess the truly critical features of the Constitutional Convention and the Constitution.

A GOVERNMENT THAT WOULD NOT LAST

Three years into the Revolutionary War, the Continental Congress realized that the disunited states could never defeat the British without a regular government. Thus on 8 August 1778, they drafted the Articles of Confederation, which neatly illustrated Newton's law that every action has an equal and opposite reaction. We were then fighting a centralized British system and were not about to recreate it here. Under the Articles, the thirteen states were to hold the sovereignty, with a weak central government being delegated "express powers" only. The Articles created a simple structure: a unicameral Congress in which the thirteen states had an equal voice, and no executive or judicial branches. Those

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who dislike the federal government today would have loved the system then. Congress could not act directly on citizens at all and was absolutely dependent on the good will of the states in meeting congressional requests for money and soldiers to fight the war.

The gloomy fiscal history of the Articles tells the story (especially when one remembers George Washington’s constant need for supplies and munitions). In the six-year period from 1781 to 1786, Congress asked the states for $15,670,000 and raised just one-sixth of the amount, $2,419,000. Economically, the country began to fall apart during the 1780s. States erected tariffs against each other, printed paper money, and refused to recognize their neighbors’ currency as legal tender. The stagnation of that decade may have exceeded the 1970s. And even though the government of the Articles accomplished some major things, such as winning the war with England in 1781, passing the Northwest Ordinance in 1787, and preserving the idea of union, keen observers saw early on that states’ wrongs exceeded states’ rights, and that something had to be done.

One of the first to sound the alarm was an extraordinary twenty-three-year-old named Alexander Hamilton, an aide to General Washington, who may have learned about “Confederate pain” from watching the general’s face when supplies didn’t show up in time. In September 1780, this adopted son of the United States wrote a friend of his “a short note” (seventeen pages long, as a matter of fact), analyzing the weaknesses of the Articles of Confederation. This Congress cannot govern the nation, Hamilton wrote, because thirteen sovereign states will not give it adequate power. There is but one remedy: call a convention of all the states to change the form of government. But first, he said, with political wisdom far beyond his years, the people should be prepared “by sensible and popular writings.”

Three years later, General Washington would plead for the states to give Congress enough power to govern. And two years after that, in 1785, commissioners from Maryland and Virginia would assemble in Washington’s living room in the Alexandria Conference to discuss commercial and navigation tension between the two states (such as poaching on each other’s oyster beds). The hidden agenda, however, may well have been to cast a spell over them, by George, on the need for changing the confederacy.

The commissioners who met there issued a call for a broader gathering of the states for September 1786, at Annapolis, Maryland, and five states showed up. They failed to come to any agreement about their commercial problems, but Alexander Hamilton then taught the delegates—and all would-be reformers—a valuable lesson: how to use a defeat on small matters as a springboard for victory on large ones. Hamilton wrote the report the five states unanimously agreed to on
14 September 1786: that Congress should assemble a convention in Philadelphia on the second Monday of May, 1787, to devise a plan that would “render the constitution of the Federal Government adequate to the exigencies of the Union.” (Marxists especially should learn a lesson from the diagnosis: politics was more fundamental than economics in the country’s malaise.) The tasks ahead of the “Reform Caucus” were formidable: to build a base in state capitolis for a new national government; get the states’ delegates in Congress to support the call for a convention; and send delegates to the Philadelphia convention who would be favorable to the nationalist proposals of the Caucus.

In the fall of 1786, an event occurred in western Massachusetts that was a bane to the state government and a boon to the Reform Caucus. Riding on a wave of deep agrarian and debtor discontent, one Daniel Shays mounted a rebellion against the courts that were putting impoverished farmers in jail (a tough place to pay off your creditors). When the Shaysites marched on Springfield in December, the governor marshalled the state militia and broke the rebellion.

These were shots heard all the way to New York, where Congress sat, and beyond. Additional reports of disturbances came from Georgia, where martial law had been imposed, and from Rhode Island, where paper money miscreants had taken control. A rumor came from New York that a seditious party had opened communications with the Viceroy of Canada. Congress had to act. And they did, one month after the end of Shays’s rebellion. They passed a resolution calling for a convention of delegates from the several states to meet at Philadelphia on 14 May 1787, “for the purpose of revising the Articles of Confederation” with such “alterations and amendments . . . [as to] render them adequate to the preservation and support of the Union” (Hamilton’s exact phrase from the Annapolis Convention). The Reform Caucus had won a beachhead in Philadelphia.

AN ASSEMBLY OF DEMIGODS?

When the Convention had finished its work, Jefferson would call it “an assembly of demigods.” But we should see them at the outset on a lower plane, one best described by Walton Hamilton: “The time has come to raise the Framers from immortality to mortality, to give them credit for their magnificent demonstration of the art of democratic politics. They made history and did it within the limits of consensus.”

James Madison, fully prepared, came from New York where he sat in Congress on 3 May. He had already written Washington in April, outlining the issues that needed to be addressed by the Convention. Washington, without any question the country’s first citizen, arrived on 13 May. Some old lines describe the scene: “And there was Captain
Washington, upon a slapping stallion, a-giving orders to his men, I guess there was a million." Philadephia was in awe.

But the State House (better known to us as Independence Hall) was more in a posture of waiting. Only the Virginia and Pennsylvania delegations were present for the scheduled start on 14 May, but they wasted no time dawdling while the others drifted in. Caucusing daily, the Virginians polished their "fifteen Resolves" (termed the "Randolph Plan," for their leader, Governor Edmund Randolph) and began to woo the Pennsylvanians to the nationalist cause. A quorum of seven states would finally be present on 25 May, and the convention opened, electing George Washington to be its president.

They assembled in a building and a hall already precious in American history. Here the Continental Congress had sat during the war. The Congress of the Articles had met in an adjoining building. But what is most important is that in the historic Assembly Room in July 1776, the Declaration of Independence had been adopted. When one comes now into that chamber with its quiet gray walls and its green baize covering the desks, it is so easy in the mind's eye to see Thomas Jefferson there, John Adams, John Hancock, and Benjamin Franklin, who had resolved "to stand together or hang separately." Now as one returns, the guide points out where Ben Franklin's sedan chair was put down in the summer of 1787, the aisle chair for Gouverneur Morris with peg leg, and the "front row-center" seat of James Madison that enabled him to capture essentially every word that was uttered. Just beyond on the dais was President George Washington, in the chair with the sun painted on its crest. With only a little imagination, the viewer feels the room come alive to the tempestuous debates of that extraordinary gathering between May and September.

Who were these fifty-five who had come here to make a constitution? Three-fourths had served in the Continental Congress and knew intimately the problems of the Confederation; eight in that very hall had signed the Declaration of Independence eleven years before; seven were governors (through what prism would they view the work of this body?). There were the scholars: William Samuel Johnson of Connecticut, the president of Columbia College; James Wilson of Pennsylvania, bringing to the debates his fierce intellect and the fruits of the Scottish Enlightenment; George Wythe of Williamsburg, Virginia, Jefferson's law professor at William and Mary; and that extraordinary student of governments ancient and modern, James Madison of Virginia. Madison had written to his dear friend Jefferson, our ambassador in Paris, asking for treatises in political science and history. How our Leonardo in the City of Lights ever obtained over a hundred volumes to send to Madison is unknown, but I surmise he was on "the most wanted list" of the National Library of France after the shipments were made.
There were the filibusterers and cranks such as Luther Martin of Maryland; the angry small state men such as Gunning Bedford of Delaware; the voluble ones such as Gouverneur Morris of Pennsylvania, the Rufus King of Massachusetts, and the handsome Randolph of Virginia. To compensate, there were also the "silent Cals" of the Convention, principally Jared Ingersoll of Pennsylvania. This lawyer who normally was paid by the word did not utter a single one in the debate during the whole summer (at least none within Madison's earshot). There were the shakers and movers such as Madison and Hamilton and Morris; the shrewd compromisers—Franklin, Sherman of Connecticut, and Madison; the incredibly bad sports such as Elbridge Gerry of Massachusetts and Randolph of Virginia; and the great sports, living with a document far from their own plans, Madison and Hamilton. Their ages were extraordinary, from the youngest delegates, Jonathan Dayton of New Jersey, at twenty-six, to the junior Pinckney of South Carolina at twenty-nine, Hamilton at thirty, Madison at thirty-six. George Washington was fifty-five, and "der Alte" was, of course, Benjamin Franklin, at eighty-one, going on forty-five. The average age was forty-three.

We should note who was not there. John Adams was our ambassador at the Court of St. James, and Jefferson, as noted, was our ambassador to France. Patrick Henry had been elected to the Virginia delegation but declined to serve. Why? Because, he said, "I smelt a Rat." A sad omission was the Rhode Island delegation. Rhode Island was under the control of an agrarian party that wanted a cheap currency and feared that a strong central government would move to hard money. (They remained holdouts under the new government until 1790, a year after Washington took office.)

The delegates brought considerable baggage with them in the form of briefs for slavery and the slave trade, protection of property, some democratic sentiments, attachments to states' rights, and blueprints for a strong nationalist government. The property interest, in particular, needs to be addressed. Since the publication of Charles A. Beard's *An Economic Interpretation of the Constitution of the United States*, in 1913, the question has disturbed students as to how laden the delegates were with concerns for their own pocketbooks. Specifically, those among them holding bonds in the Confederacy stood to gain substantially if the new government were given the power to tax and pay off its debts. The Beard thesis boils down closely to what we might call today "insider trading."

Property interests have a powerful effect in blinding legislators to the public interest, especially when the property is their own. John Jay, not a delegate but one who fought for the ratification of the Constitution later in New York, put the matter baldly: "The people who own the
country ought to govern it." Cold turkey . . . just like that. No thought about who may have to defend it; no thought of the Jeffersonian view that the country exists to protect all people’s rights. But then it has always been true that if you hold a dime close enough to your eye, you can block out the whole world.

Beard said something enormously important in that book: that men with self-interests wrote the Constitution, not angels in eighteenth-century garb. But he went too far in advancing his self-interest doctrine. Although half the delegates probably owned some stocks and bonds that would benefit from a more efficient government, the preponderance of stocks and bonds was held by just six delegates, two of whom were inconspicuous in the deliberations and one of whom, Elbridge Gerry, refused to sign the finished document (it was Gerry who was so badly frightened by Shays’s rebellion in his own state). Madison and Hamilton, by the way, owned virtually no stocks or bonds.

In one of his many wise moments, Benjamin Franklin addressed himself to the terrible dangers in a government of the wealthy, by the PACs, and for the special interests:

[I must express my dislike] of everything that tended to debase the spirit of the common people. If honesty was often the companion of wealth, and if poverty was exposed to peculiar temptation, it was not less true that the possession of property increased the desire of more property—Some of the greatest rogues [I have ever been] acquainted with, were the richest rogues. . . . This Constitution will be much read and attended to in Europe, and if it should betray a great partiality to the rich—[it] will not only hurt us in the esteem of the most liberal and enlightened men there, but discourage the common people from removing to this Country.12

It was predictable that an eighteenth-century constitution, produced by an assembly of upper-class representatives, would make ample provision for the protection of property. U.S. senators would be chosen by the state legislatures, which in many states would represent propertied interests. Gerry put it plainly: The country is divided into the “landed interest and the commercial. . . . [And those interests will] be more secure in the hands of [a Senate chosen in this way] than [in the hands] of the people at large. . . . The people are for paper money when the Legislatures are against it.”13 Furthermore, the state legislatures could specify how presidential electors were to be chosen, extending the property interest to possible control of the presidency. In addition, contracts were protected against state impairment.

But perhaps more important than their property interests were the ideas in delegate heads as they arrived in Philadelphia. Those ideas would define the battlegrounds that lay directly ahead as the Convention began its work.
THE IDEOLOGICAL BATTLE GROUNDS

Democrat vs. Aristocrat

Should the new government be elected by the people or chosen in large part by state legislatures? Should the draft Constitution be submitted to popularly-elected conventions or be referred to state legislatures? How should we perceive the common people of America?

Gouverneur Morris, like many others at Philadelphia, had little faith in the people. Elbridge Gerry was blunt on the issue: "The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots."14 Alexander Hamilton admitted, "I am not much attached to the majesty of the multitude. . . . I consider them in general as very ill-qualified to judge for themselves what government will best suit their peculiar situations."15 But on some key issues he danced to another drummer, voting for popular election of representatives and presidential electors.

The intellectual leaders of the small band of democrats were clearly the scholars, James Wilson and James Madison. Power, Wilson said, ought "to flow immediately from the legitimate source of all authority [the people]. . . . The Govt. ought to possess not only 1st. the force but 2ndly. the mind or sense of the people at large. The legislature ought to be the most exact transcript of the whole society."16 Wilson proposed direct popular election of both the Senate and the president, losing on both counts. Madison exhibited his faith in the people in his proposals for direct popular election of representatives; and nowhere was his commitment to popular sovereignty more clear than in his insistence on ratification of the Constitution by elected ratifying conventions rather than by state legislatures.

Perhaps both aristocrats and democrats could agree with one of the noblest sentiments expressed at Philadelphia by that wise man, Benjamin Franklin: "God grant that not only the love of liberty but a thorough knowledge of the rights of man may pervade all the nations of the Earth, so that a philosopher may set his foot anywhere on its surface and say, 'This is my country.' "17

Small States vs. Large

In 1787 the three most populous states were Massachusetts, Pennsylvania, and Virginia. That meant that on a straight head count, the small states could outvote the large by nine to three at the Convention (with Rhode Island absent). The Randolph Plan from the Virginia delegation unabashedly advanced the large-state interest, basing representation in the House and Senate on either population or "tax"
contributions. The small states responded on 15 June with the Paterson Plan, which urged retention of the existing unicameral Congress, with equal representation of the states, thus favoring the small states. The contestants on this issue would be Paterson of New Jersey, Bedford of Delaware, and Martin of Maryland vs. Randolph and Madison of Virginia, King of Massachusetts, and Morris of Pennsylvania.

States Rights vs. a National Government

The Reform Caucus knew why they were in Philadelphia: to get rid of the state-dominated Confederacy and replace it with a vigorous national government, fully equipped to pass laws reaching individual citizens. Most extreme on this score was Alexander Hamilton, and close behind, James Madison. The states’ righters included George Mason (on Madison’s Virginia delegation) and Luther Martin of Maryland, both of whom in the end refused to sign, so offended were they by the powers given to the national government in the Constitution and by other grievances. The debates on this issue of new powers for the national government would nearly derail the Convention.

As if these three major issues were not enough, the Convention would also have to wrestle with issues surrounding slavery. Not abolition yet, although George Mason personally wanted the institution abolished, but rather the questions of abolishing the slave trade (that “execrable commerce” in human lives, Jefferson had called it\(^\text{18}\)) and how to count the slaves for purposes of allocating seats in the House of Representatives. Southern delegates such as Pierce Butler of South Carolina wanted to count the slaves at full value for representation purposes, but the Convention would not buy that—the “Three M’s” (Mason, Madison, and Morris) would see to that.

Then there was the debate over the necessity of a Bill of Rights. Madison said that Congress wouldn’t have the power to trample on people’s rights, but his colleague Mason disagreed (the man who had written the elegant Virginia Declaration of Rights in 1776). The issue remained unresolved all through the ratification period and on down to the First Congress, which added a Bill of Rights (largely written, interestingly enough, by James Madison).

Given the intensity of the arguments over that array of issues, is it any wonder that getting a constitution at all was something miraculous? What clearly helped was the realization on the part of almost all the delegates that, as Robert Yates of New York put it during the first week of the Convention, they were there “to take into consideration the state of the Union.”\(^\text{19}\) Most of them were convinced that the country was not in good shape and desperately needed healing. That realization was for many the mother of compromise.
THE RIVAL PLANS OF VIRGINIA AND NEW JERSEY

The large state proposals were drafted in advance by Madison and perhaps six others and were presented to the Convention by the thirty-three-year-old Governor of Virginia, Edmund Randolph. Demonstrating the old rule of “getting there firstest with the mostest” the Virginians introduced their “fifteen Resolves” on the third day of business (29 May). All would-be politicians should take a lesson from this stroke to dominate the agenda from the very start. The proposals represented the blueprint of the Reform Caucus for reconstituting the government along nationalist lines (although the states would still be retained). The small states responded with the New Jersey Plan, presented by William Paterson on 15 June. For comparative purposes, I will outline them here side by side:

The Virginia Plan (29 May)                                The New Jersey Plan (15 June)
1. Provides for a national government, dominant over the states. 1. Changes the confederacy into a federation, enabling the central government to act directly on individuals
2. Greatly enlarges powers for the national government, including taxation and interstate commerce
3. Provides for a bicameral Congress, with proportional representation in both houses, the Senate to be chosen by the House from nominees submitted by the states
4. A single executive, to be chosen by the Congress for a single term (the amended Virginia Plan, 13 June 1787)
5. A national judiciary, to be chosen by Congress for good behavior

Randolph made the intentions of the nationalists clear on 30 May, declaring, “An union of the States merely federal [we would use ‘confederate’ today], will not accomplish the objects proposed by the articles of confederation, namely ‘common defence, security of liberty
and the general welfare.’” He therefore proposed “That a national government ought to be established consisting of [a] supreme Legislative, Executive and Judiciary.”

Now the debate became truly fierce: states’ righters vs. nationalists, small states vs. large. States’ righter John Lansing (New York) called the proposed Constitution “a triple-headed monster, as deep and wicked a conspiracy as ever was invented in the darkest ages against the liberties of a free people.” A chorus of delegates was ready to join him in the denunciation of the Virginia Plan: Yates of New York, Elbridge Gerry of Massachusetts, Paterson and Brearly of New Jersey, and Luther Martin of Maryland, among others. The nationalists were equally vociferous, with George Read of Delaware as a case in point: “The state Govts. must be swept away—We had better speak out—the idea that the people will not approve perhaps is a mistake.” He had powerful friends in Madison and Hamilton, the latter of whom would have allowed the president to remove recalcitrant state governors. James Wilson of Pennsylvania would ask the Convention, “Why should a Natl. Govt. be unpopular? Has it less dignity? Will each citizen enjoy under it less liberty or protection? Will a Citizen of Delaware be degraded by becoming a Citizen of the United States?”

Some delegates were concerned about relinquishing powers over taxation, commerce, and the military to a new national government. In today’s parlance, it seemed like a zero-sum game, and the Reads, Masons, and Martins were sure the states would end up with zeros. (It was not a zero-sum game, but one in which a redistribution of power transformed thirteen brawling states into something magnificent: The United States of America.) Nevertheless, the first tentative vote, late in June, on the nationalist proposals was a convincing victory of seven to three for the Virginia Plan.

THE FIGHT OVER REPRESENTATION

Concurrently with the intense struggle over national powers vs. state powers, another issue quickly surfaced that could easily have derailed the Convention by itself: how to apportion representatives in a new Congress? Until about the second week of July, the issue was seen strictly through the glasses of large state vs. small state domination of the new government. As noted earlier, the Virginia Plan took superb care of Virginia, with a bicameral Congress based either on population or contributions. Paterson’s New Jersey Plan replied with a one-house legislature with equal representation for the states. (With ten small states and only three large ones, a three-to-one margin in Congress would probably be adequate insurance for the interests of the smaller states. Let it never be forgotten that the first lesson in politics is how to count!)
On 9 June, before the Paterson Plan had been introduced, debate raged over Virginia’s suggestion of proportional representation. Paterson called the idea “tyranny or despotism.” On 27–28 June, Luther Martin came close to ruining the whole enterprise. Those who have lived in the East know well what those miserably hot, humid days can do, both to the linens and the disposition. Martin of Maryland either forgot or did not care. In a two-day harangue, he simultaneously invented the filibuster and drove his colleagues wild. There were motions to adjourn the whole affair, at which point Dr. Franklin suggested a different course—start the sessions each day with prayer. He reminded the Convention that prayers were uttered “in this room” by the Continental Congress during the Revolutionary War. “Our prayers... were heard, and they were graciously answered. ... I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men.”

This was ticklish business, made especially so by the reverence in which Franklin was held. A delegate indicated that the strapped Convention had no money to hire a minister. And some wag later suggested that Hamilton had observed the Convention stood in no need of “foreign aid.” The delegates took the parliamentary way out of their jam and voted for adjournment instead of prayer. Somehow they would have to carry on themselves.

Now it was the turn of Gunning Bedford of Delaware. On 30 June he rebuked them all, telling them they were acting out of self-interest: “Numbers, wealth and local views, have actuated [your] determinations; and... the larger states proceed as if our eyes were already perfectly blinded.” He grumbled about three Southern states with smaller populations having joined with the three large states:

They endeavor to amuse us with the purity of their principles and the rectitude of their intentions... Their cry is, where is the danger? and they insist that altho’ the powers of the general government will be increased, yet it will be for the good of the whole; and although the three great states form nearly a majority of the people of America, they never will hurt or injure the lesser states. I do not, gentlemen, trust you.

How badly they were divided on the representation issue was dramatized on 2 July when a tie vote was cast on the proposal for an equal representation of the states in the Senate. At that juncture, Gouverneur Morris resorted to another old rule in politics: when in doubt, appoint a committee. So eleven men, one from each state minus New Hampshire, which hadn’t even appeared at the parley yet, got down to the task of resolving once and for all this month-long battle between large and small states over representation. Franklin counseled them: “When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides
must part with some of their demands, in order that they may join in some accommodating proposition."

Another new maxim was thus shaped for future politicians: “When a carpenter wants to join two boards together, he sometimes saws a little off of both ends.” The question was where to do the cutting?

Since 11 June, Roger Sherman of Connecticut had been promoting, without success, the idea of *proportional* representation in the new House of Representatives and *equal* representation of the states in the new Senate. Now it was an idea whose time had come: take the bicameral principle and proportional representation from the Virginia Plan, and equality of representation from the Paterson Plan, and put them together tongue-and-groove. Give the Senate to the small states and the House to the large. In committee, that old compromiser, Franklin, moved adoption of the “Connecticut Compromise.” It was adopted there, but five more days of wrangling would ensue before the Convention would agree. Gouverneur Morris and Bedford criticized the proposal. Madison had never liked the idea of representing the states equally. Lansing and Yates, two-thirds of the New York delegation, were now so fed up that they left the Convention for good on 10 July, leaving New York’s vote in the hands of Hamilton, who derived no joy from perfect attendance. A discouraged Washington wrote Hamilton in New York to come back to Philadelphia: “I almost despair of seeing a favorable issue to the proceedings of the Convention, and do therefore repent having had any agency in the business.”

But the healing process (or was it the *heating* process of midsummer?) now did its work. On 16 July, the Great Compromise of the Convention was accepted by a five to four vote, with the small states in the majority—probably the most important one-vote victory in our entire history. It saved the Convention, and the Constitution.

WILL THE BUCK STOP HERE? CREATING THE EXECUTIVE

In creating Congress, the delegates had a model they could relate to. Not so a chief executive or federal judiciary. Now new bottles had to be shaped for critically important new wine.

The issues surrounding the presidency were as complex as the men who would ultimately fill it. Should we have a monarch? A plural or single executive? A president with only one term or re-eligible? An officer chosen by Congress, the people, or state governors? A chief executive subject to impeachment? As a measure of the tensions on these questions, it required sixty ballots before they settled the mode of election.

Should we have a king? Washington indicated out of Convention that it was an idea he viewed with opprobrium and horror. And yet there
was a strange interplay between George III, whom Americans had recently defeated, and Washington, whom they revered. The ultimate design of article 2 providing for the presidency created the powerful office that it did because intuitively every delegate knew that George Washington would be its first occupant—and George I did not resemble George III.

Elbridge Gerry wanted the president to be a pawn of the governors, chosen by them. Hamilton proposed a lifetime president. Both the Randolph and Paterson plans proposed a plural executive, chosen by the Congress (approximating the parliamentary system that we had so recently resented while under British rule). But two forces began to alter all those designs. As the delegates steadily moved toward Montesquieu’s prescription of separated powers, election of the president by Congress had to go. And Hamilton and James Wilson pressed continuously for the concept of “energy in the Executive,” and that ruled out a presidency of three. This structural question was on its way to resolution when the Committee of the Whole adopted Wilson’s motion for a single executive by a vote of seven to three (with Madison’s journal quietly noting that “G. Washington” voted “aye”).

With election by Congress rejected, the delegates now had to address alternative sources of election. Once again, aristocrats confronted democrats, who were badly outnumbered. James Wilson boldly supported direct popular election. George Mason of Virginia replied:

It would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.

The sharp differences again demanded compromise, and this one might well have been designed by delegate Rube Goldberg. We would have a college of cardinals called the Electoral College to choose the president, a kind of “selection of the best by the wisest.” The state legislatures would determine how their electors were to be chosen, and the electors, ostensibly in a moment of great rationality, would ballot every fourth December for the president of the United States. The states, in fact, began immediately turning the choice over to the voters (with South Carolina the last to capitulate in 1860). The system is an anachronism, with the electors having been “captured” by political parties by 1800 and thus no longer “free agents” as the Founding Fathers intended; and on occasion it produces unacceptable results, as in the three instances (1824, 1876, and 1888) where the winners of the popular vote lost in the Electoral College.
But the method of election aside, the Framers created a perfectly extraordinary office, amply equipped with constitutional power for men of ability to lead the nation in very troubled times, and still be subject to a host of checks ranging from rejection by the voters to vetoes over-ridden, to the threat of impeachment and judicial review. (So much is revealed by the title of that extraordinary case in 1974, United States vs. Nixon.)

A FEDERAL JUDICIARY TO PROTECT THE CONSTITUTION

The Confederation had no court system, but the Framers knew, as Locke and Thomas Paine had pointed out before, that government consists of a three-fold process: law-making, executing, and adjudicating. What, then, should be the nature of a federal court system? On this point, both the Virginia and New Jersey plans were in agreement: there was to be a national Judiciary, including (in the New Jersey Plan) “a supreme Tribunal” whose judges would be appointed by the president for life terms (or “good behaviour”). That made it into the Constitution—a Supreme Court, appointed by the president for life, when confirmed by the Senate.

Should the Court have the power of judicial review—that is, the power to hold acts of Congress, the president, and the states unconstitutional? Happily, we have “original intent” of unmistakable clarity on this question: Alexander Hamilton’s papers in The Federalist, numbers 78 and 81 of 1788. Having mentioned the prohibitions laid down in the Constitution, such as no bills of attainder or ex post facto laws, Hamilton then said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. . . . The interpretation of the laws is the proper and peculiar province of the courts.33

While grievous to some in our present day, it thus becomes understandable why Chief Justice Charles Evans Hughes would say that “we are under a Constitution, but the Constitution is what the judges say it is.”34

SHOULD THREE-FIFTHS EQUAL ONE?

Just eleven years earlier, Thomas Jefferson and the Second Continental Congress had proclaimed to the world a dream of the new republic: that in the things that count most in life, one should equal one. Now the matter of counting would confront the delegates once again
in Philadelphia in 1787: how to count slaves for apportioning representatives in Congress. Apparently without embarrassment, one South Carolinian, Pierce Butler, asked that slaves be counted at full value. A delegate from a northern state asked if slaves were not property, and if so, then shouldn’t northern cows and horses be included in the population count as well. Butler’s proposal was rejected, three to seven.

South Carolina was not together on this issue, for the matter was ultimately resolved on the lines proposed by Rutledge of that state early in the Convention on 11 June. Rutledge suggested in Committee of the Whole that the old “federal rule of 1783” be followed, counting three-fifths of the blacks and adding that number to the white population to determine how many congressmen a state was entitled to. (That vote was nine to two in favor.)

The debate over the slave trade was as ugly here as it had been in 1776 when that Congress deleted Jefferson’s “Philippic” against this heinous importation of human beings from Africa. Southern delegates said they would be ruined if the slave trade were shut off, and that it would hurt northern merchants in whose ships they were carried. The slave trade and its related issues dogged the delegates all summer, and then a deal was apparently struck. The “3/5 Compromise” was adopted, along with General Charles Pinckney’s proposal that the slave trade be allowed until 1808. Political necessity had forced an ugly bargain. But it is to the credit of the Congress of 1808, when that “twenty-year graceless period” was up, that the slave trade was abolished.

GETTING THE DOCUMENT ON PAPER

All summer long, debate had revolved around Virginia’s fifteen resolves. By late July, many of them were thoroughly bent out of shape. A five-man committee was appointed on 26 July to pull together everything the Convention had agreed to in order to focus debate during their final month. That gave the delegates a much-needed eleven-day adjournment. It is revealing to note what the president of the Convention did during this break. He rode over to see Valley Forge, and the memories of that winter just ten years earlier flooded in on him like a torrent. Then he went fishing. Clearly the general’s heart was in place and his head was screwed on.

After the Committee of Detail finished its summary, the delegates turned to a number of critical questions: does the document need a Bill of Rights, and how should it be ratified? On 12 September, George Mason, who knew so much about telling governments what they could not do to their people, urged that a Bill of Rights be added to the new Constitution. With sound British logic, he argued that if you are going to increase
governmental powers, then you must fortify individual rights. Roger Sherman claimed that the states had their own bills of rights, but Mason saw through that: what was needed was protection against the new level of government they were creating. Madison, Wilson, and Hamilton argued that the new government was not being given any powers to trample on citizen rights, and that the checks and balances they had devised would prevent encroachment. While we now know that they were far too sanguine on the issue, nevertheless the Convention agreed with them and against Mason, rejecting the plea for a Bill of Rights, ten states to none. That led Mason five days later to refuse to sign the Constitution. Jefferson, in Paris, was deeply disappointed when he heard. And the Massachusetts ratifying convention was angered. They ratified the document on the condition that a Bill of Rights would be submitted by the first Congress for ratification by the states. That was done, with the giant oversight of the Framers being corrected on a memorable date, 15 December 1791, when the first ten amendments to the Constitution were ratified.

Now only one major question still remained: who should ratify the Constitution? The Articles of Confederation under which we then lived specified unanimous approval by the state legislatures. But Rhode Island’s obduracy would seal the fate of the new document. Furthermore, other states might easily oppose the document, since it transferred substantial powers over commerce, taxes, and the draft from their legislatures to the new Congress. To surmount both of those obstacles, very savvy heads at the Convention proposed ratification by popularly elected conventions in nine of the thirteen states.

On 31 August, Madison made one of his most important speeches to the Convention in behalf of that mode of ratification. He pointed out that the difference between a league and a federation such as that being created here is that a federation draws its power from the people. Both levels of government must then defer to their common master, the citizenry. “The people [are] in fact, the fountain of all power, and by resorting to them, all difficulties [are] got over.” George Mason agreed: “Legislators . . . are the mere creatures of the State constitutions, and cannot be greater than their creators. . . . Whither then must we resort [for ratification]? To the people. . . . It [is] of great moment . . . that this doctrine should be cherished as the basis of free Government.” On requiring nine out of thirteen states for ratification, the vote was eight to three. On popular conventions rather than state legislatures, the vote was nine to one (with Maryland alone dissenting).

On 8 September, the Committee of Style was appointed for the final drafting of the Constitution. All five members of this important group were nationalists: William Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, Rufus King of
Massachusetts, and James Madison of Virginia. Except for the absence of Franklin and Wilson of Pennsylvania, this was certainly the “first team.”

Morris was the craftsman of the final draft, reducing the twenty-three resolutions that had passed into just seven articles of the finished Constitution. Although there is some irony in this aristocrat’s having penned the opening words of the Preamble, “We, the people . . . do ordain,” there was clever strategy here: proclaim the document in the name of the people (rather than the states) as a hedge against any states that might refuse to ratify. The committee also approved a thoughtful letter to Congress, whose approval was needed before the ratification process could begin. What is at stake now, the letter suggested, is the “consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence.”

The fifteenth of September was to be their last working day, and it was full of sadness. Governor Randolph, whose name was on the plan that had dominated the agenda of the Convention, expressed his differences with the draft and moved that a second convention be called to improve the reforms. His fellow Virginian, George Mason, seconded Randolph, predicting that the new government would end either in monarchy or tyrannical aristocracy. (Imagine the extraordinary pain that must have engulfed the third Virginian, Madison, as he recorded these doubts.) Elbridge Gerry moaned through eleven disagreements that he still had with the document. This unmemorable speech convinced one delegate, however—Elbridge Gerry—that he should not sign the Constitution, and he did not. Then the Randolph motion for a second convention was unanimously defeated (Madison must have smiled as he recorded “All the states answered no.”)

With the darkness broken, the sunlight of a new day appeared. Madison recorded it this way: “On the question to agree to the Constitution, as amended, All the states Ay. The Constitution was then ordered to be engrossed. And the House adjourned” (15 September 1787).

17 SEPTEMBER 1787: THE SIGNING

Forty-two of the fifty-five delegates who had attended the Convention stayed with it to the end. They were to be well repaid, not only by their signal accomplishment, of course, but also by the drama of the final day, 17 September 1787. After the Constitution was read aloud so that delegates could actually hear what they had fought so strenuously about all summer, they got to hear something else: a final testament of wisdom from Benjamin Franklin. Franklin said that there were some parts of the draft with which he did not agree, but added, “but I am not sure I shall never approve of them.” (How that must have pierced those who were
about to express their “undying” opposition.) Then a classic Franklin touch, as he declared that he was not going to be like the French lady who said, “I don’t know what happens, Sister, but I meet with nobody but myself that’s always in the right”:

In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us.... I doubt too whether any other Convention.... may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies, who are waiting with confidence to hear that our councils are confounded like those of the Builders of Babel; and that our States are on the point of separation, only to meet hereafter for the purpose of cutting one another’s throats.

Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best.

Franklin then made two requests of the delegates—to doubt a little of their own infallibility and put their names to the document, and then to go home and fight for its ratification. On that point, he shared some fundamental political science: “Much of the strength and efficiency of any government in procuring and securing happiness to the people depends on opinion, on the general opinion of the goodness of the government, as well as of the wisdom and integrity of its governors.”

Desiring a unanimous vote, and realizing that there were some delegates who had tuned him out, Franklin, on Morris’s suggestion, moved that the adoption of the Constitution be expressed by states. On the vote on this historic day, the count was ten ayes, no noes, with South Carolina divided. Three who had stayed to the end would not sign: Gerry of Massachusetts, and Randolph and Mason of Virginia. The Constitution was too centralized and democratic for Gerry, lacked a Bill of Rights for Mason, and departed too far from Randolph’s original plan to suit him. (He did not achieve proportional representation in the Senate or election of the president by a Congress that the large states like his would control.) Those were the “good reasons” why he didn’t sign; the real reason may have been the need to trim his sails for the encounter with old “I smelled a rat” Patrick Henry in the Virginia ratifying convention. (There Randolph would startle everyone with a decision to vote for ratification on the fundamental ground that he did not want the Union to go forward without Virginia.)

If Gerry, Mason, and Randolph were the “bad sports” of the Convention, do not overlook the really good sports, such as Madison and Hamilton. After the others had explained why they could not vote for the
document, Hamilton explained why he could, reminding them all that "no man’s ideas were more remote from the plan than [mine]." Hamilton, Madison, and Jay would subsequently write *The Federalist* to persuade New York voters to elect nationalist delegates to their ratifying convention. It was not just sportsmanship—it was great sportsmanship.

Thirty-eight delegates then stepped up to Washington’s desk to sign the Constitution of the United States, representing all twelve states in attendance (with New York represented alone by Alexander Hamilton). With Washington’s letter attached, this “roll of parchment” was speeded to the Congress sitting in New York. Just eleven days later, Congress unanimously (minus Rhode Island) referred the document to the states to be ratified by popularly-elected conventions. (All one can say about Rhode Island’s absence is thank goodness an abstention was not a veto!)

Delaware ratified first, in December 1787; New Hampshire became the required ninth state on 21 June 1788. But New York and Virginia were still missing, and the federalist train could not pull out of the station without those two cars. The battles were furious and nip-and-tuck in both conventions. In Virginia, Madison and the young John Marshall took on and defeated the voice—once of the Revolution and now of reaction—of Patrick Henry, along with George Mason. On 26 June, Virginia gave its assent with only ten votes to spare. In New York, with Alexander Hamilton almost single-handedly beating down the opposition, the convention ratified on 26 July with a margin of only three votes.

The electors met in their several states, and on 4 February 1789 George Washington was elected as the first president. Muddy roads from Mt. Vernon delayed the inauguration for a month, with the new republic finally launched with Washington’s swearing in on 30 April 1789 in New York City. We were on our way.

**KEY FEATURES OF THE NEW GOVERNMENT**

First, it was *constitutional*. Congress had approved unanimously, and more than the required nine states had ratified. (On this, see *The Federalist*, number 40). Government would operate under law.

Second, it was *federal* rather than confederate, with two levels of government both deriving their power from the people and able to act directly on the people.

Third, it was a *republic*, with elected representatives drawn from the people.

Fourth, it was *democratic* in at least three features: direct election of the House of Representatives; the sentiment of the Preamble, “We the
people...do ordain and establish”; and the critically important mode of ratification by popularly elected conventions.

Fifth, it was conservative in its protection of property rights, election of senators by state legislatures rather than by voters, and the indirect election system for president. (One day, through the change processes permitted by the Constitution, senators would be directly elected [the Seventeenth Amendment] and presidents would be elected by the people after the electors had been “taken captive” by political parties beginning in 1800.)

**ANY MIRACLES IN PHILADELPHIA?**

Washington and Madison did not shy away from the word miracle in describing what had happened. Nor did that able modern historian, Catherine Drinker Bowen. What, if anything, was miraculous about the Constitutional Convention?41

It was miraculous that they got a constitution at all! When we review the agendas and self-interests the delegates brought with them and the intensity of the conflicts through that long, hot summer, survival was a triumph, and the adoption of the Constitution was miraculous. We need to understand what made it possible: the talents of truly able politicians in the best sense of the word, who brought with them what Alistair Cooke has suggested were the three key implements to form the Constitution: first, compromise; second, compromise; and third, compromise.42 In addition, the best of them also brought the good sportsmanship to approve plans far removed from their own original designs. Let us praise politicians who can live comfortably with half a loaf!

A second miracle was the device they invented at Philadelphia to break the logjam between states’ righters and centralists: federalism. The world had known many leagues, but nothing quite like what was fashioned here: significant states, a newly-empowered federal government, and the saving principle of federal supremacy in article 6 of the Constitution. A two-layered sovereignty was unique in the history of the world. That James Wilson could say, “I am both a citizen of Pennsylvania and of the United States,” was a miracle.43

A third miracle was the creative answer to the question of how governmental power should be controlled so as not to destroy the liberties of the people: let power check power; or, as Madison would put it in The Federalist, “Ambition must be made to counteract ambition.”44 The checks and balances made it possible for a president to stop an offensive Congress with a veto, a court to restrain a president who had forgotten he was under the law, and a Congress to “veto” a terrible Supreme Court decision such as Dred Scott in 1857 by adding the
Fourteenth Amendment in 1868. Power as the antidote to power? That was miraculous.

A fourth miracle was the design of a constitution that would serve us for ages to come. Imagine what our development would have been like if left to the Luther Martins of that day or the Edwin Meeses of ours. Said Martin: “I wished to have been present at the conclusion [of the Convention], to have then given it my solemn negative. . . . It is my highest ambition that my name may also be recorded as one who considered the system injurious to my country, and as such opposed it.”45 Thank goodness, men of vision were in the driver’s seat at Philadelphia, and the “aints and complaints” such as Martin and Gerry were relegated to the back seat. The Madisons did not approach their task looking through the rearview mirror. Hear him: “In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce.”46

And so they wrote the Constitution as a constitution should be written. Catherine Bowen summarizes an important memorandum of Edmund Randolph on the matter:

First of all . . . only essential principles should be inserted, lest the government be clogged by permanent, unalterable, provisions, which ought to be shaped to later times and events. Simple, precise language should be used and none but general propositions stated, “for the construction of a Constitution of necessity differs from that of [statutory] law.”47

Hamilton instructed the New York ratifying convention in the same way: “Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible change of things.”48

These Framers have something to say to those modern advocates of “original intent” who contend that if you cannot find words in the document authorizing federal aid to highways or education then such programs must be unconstitutional. The intent of the Founding Fathers is to be sensed in their phrasing, which addresses broad constitutional principles, not the minutia of a codex: “provide for the general welfare”; “regulate interstate commerce”; “make all laws which shall be necessary and proper.” They fully expected future generations to adapt the principles to changing circumstances. How the Founding Fathers would have endorsed the life-giving quality of the opinion of Chief Justice John Marshall (who sat in the Virginia ratifying convention), in McCulloch vs. Maryland (1819): “Let us never forget it is a Constitution we are expounding.”

These achievements seem miraculous to me. Or, if you prefer a different view, I commend Archibald MacLeish’s: “Man turned into men in Philadelphia.”49
I have saved for the end the Convention’s most elegant moment, a moment far beyond any Hollywood scriptwriter’s fondest prose. It was on the day of the signing, 17 September 1787. While other members were affixing their signatures to the Constitution, Ben Franklin took note of the sun painted on the crest of Washington’s chair:

Often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, [I have] looked at that [sun] behind the President without being able to tell whether it was rising or setting. But now at length I have the happiness to know that it is a rising and not a setting sun.29

Happy birthday, America!

NOTES


5Solberg, Formation of the Union, 63.

6Quoted in Catherine Drinker Bowen, The Miracle at Philadelphia (Boston: Little, Brown, 1966), 73.

7Walton Hamilton, as quoted in Roche, Reform Caucus, 801.


11Bowen, Miracle at Philadelphia, 72.

12Benjamin Franklin to the Convention, 10 August 1787, in Records 2:249.

13Elbridge Gerry to the Convention, 7 June 1787, in Records 1:152, 154–55.

14Elbridge Gerry to the Convention, 31 May 1787, in Records 1:48.


16James Wilson to the Convention, 6 June 1787, in Records 1:132.

17Benjamin Franklin to an English friend, cited in Bowen, Miracle at Philadelphia, 17 (emphasis added).

18The phrase appeared in Jefferson’s philippic against the slave trade which was deleted from the final draft of the Declaration of Independence (see Carl L. Becker, The Declaration of Independence: A Study in the History of Political Ideas [New York: Random House, 1958], 212).

19Robert Yates’s minutes of the Convention, 29 May 1787, in Records 1:24.

20Edmund Randolph’s Resolution to the Convention, 30 May 1787, in Records 1:30.

21Bowen, Miracle at Philadelphia, 106.

22George Read to the Convention, 6 June 1787, in Records 1:143.

23James Wilson to the Convention, 16 June 1787, in Records 1:253.

24William Patterson to the Convention, 9 June 1787, in Records 1:183.

25Benjamin Franklin to the Convention, 28 June 1787, in Records 1:451–52 (emphasis in original).
Getting a Constitution

38See Records 3:472; and Bowen, Miracle at Philadelphia, 127.
39Gunning Bedford to the Convention, 30 June 1787, in Records 1:500.
38Benjamin Franklin to the Convention, 30 June 1787, in Records 1:488.
39Washington to Hamilton, 10 July 1787, in Records 3:56.
39George Mason to the Convention, 17 July 1787, in Records 2:211.
39Alexander Hamilton, no. 78 of The Federalist, 524 (emphasis added).
39James Madison to the Convention, 31 August 1787, in Records 2:476.
39George Mason to the Convention, 23 July 1787, in Records 2:88.
39Letter from the Constitutional Convention (George Washington, Presiding) to the Congress of the United States (Sitting in New York), 17 September 1787, in Records 2:667.
38Benjamin Franklin to the Convention, 17 September 1787, in Records 2:642–43.
49Benjamin, Miracle at Philadelphia, 213.
49Bowen, Miracle at Philadelphia, 33.
49James Madison, no. 51 of The Federalist, 349.
49Luther Martin to the Landholder, 19 March 1788, in Records 3:295.
49James Madison to the Convention, 26 June 1787, in Records 1:422.
49Bowen, Miracle at Philadelphia, 197.
49Archibald MacLeish, America Was Promises (New York: Duell, Sloan and Pearce, 1939), 12.
49Benjamin Franklin’s peroration at the Convention, 17 September 1787, in Records 2:648.
Excavation

The little boy kneels
At the sun dried mound of soil
Left from the digging of a trench.
He excavates roads to the summit
For his toy trucks,
Digging with a small shovel
Whittled from a shingle.
But frustrated by the dryness of the dirt—
Too powdery to pack into walls
Or hold the bank of a dugway
Or make a proper tunnel—
Like the good damp dirt down deep—
He scrapes away the surface
Repeating the desert child’s litany:
Dry dirt you go away. Wet dirt you come here.
Dry dirt you go away. Wet dirt you come here.

—John Sterling Harris

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The Judicial Campaign against Polygamy and the Enduring Legal Questions

Edwin B. Firmage

For lay people the chief virtue of our Constitution is not in its distribution of power or in its guarantees of participation in governmental processes but in the protections it affords individual liberties, not least of which is freedom of conscience. Yet ratification of the Bill of Rights did not fix in stone the content of constitutional guarantees. Instead, it was left to the judiciary to interpret the simple phrases of the first eight amendments in concrete cases, illuminated by evidence of the framers’ intent and changing social values. Perhaps no provision of the Bill of Rights better exemplifies this process of judicial interpretation than the First Amendment’s free exercise clause.

Unfortunately for nineteenth-century Mormons, the seminal case interpreting the free exercise clause—Reynolds vs. United States—came early in the process. Reynolds upheld antipolygamy legislation against the Mormons’ free exercise claims, effectively ending the Mormons’ efforts to obey both the laws of God and the laws of man and stunting the growth of free exercise protections for generations. In the years since Reynolds, the Supreme Court has gradually evolved a more civil-libertarian view of the free exercise clause, balancing free exercise claims against the government’s interest in regulating the particular conduct in question. But it has never completely abandoned Reynolds or its rationale, and in its most recent decisions the Court has shown signs that it may be retreating to an earlier, more restrictive view of First Amendment protections.

EARLY JUDICIAL ATTACKS ON POLYGAMY

Officially acknowledged as part of LDS church doctrine in 1852, polygamy soon became a national issue. But weak laws, tenuous federal control in Utah Territory, and national distraction with other issues

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prevented effective enforcement of the antipolygamy laws until the 1880s. Congress’s first attempt to deal with polygamy was the Morrill Act. It was not passed until 1862, ten years after the Church first announced its practice of polygamy, and then went largely unenforced for the next thirteen years. At least four reasons explain why the Mormons were left in relative peace for so long. First, when polygamy became an issue, the nation’s energies were distracted by more pressing problems—the Civil War and Reconstruction. The fight for national survival forced the Mormon problem to wait. Second, the handful of federal officials in Utah during the 1860s did not believe they possessed the means to enforce compliance with the unpopular polygamy act. This attitude was not unfounded. In 1863 the mere rumor that Brigham Young was about to be arrested for polygamy provoked two thousand armed Mormons to assemble at his home to resist the arrest. Third, the feeble federal control over Utah’s population was matched by nearly as feeble control over the territorial government. The governor and supreme court justices were appointed by the President, but the territorial legislature and the bulk of the judiciary lay in Mormon hands. The legislature expanded the powers of the judiciary by giving Utah’s probate courts general jurisdiction over all civil and criminal cases, allowing probate judges to draw up jury lists, and establishing a territorial marshal and attorney with powers paralleling those of their federal counterparts. This rival Mormon-controlled judicial system, with powers concurrent with the federal judiciary, tended to frustrate enforcement of the antipolygamy laws. Finally, the prosecution of polygamy was delayed by defects in the statute itself. Polygamy under the Morrill Act was subject to a three-year statute of limitations, so polygamists who eluded prosecution for three years were free from peril. Furthermore, the Morrill Act required proof of multiple marriages, creating almost insuperable evidentiary problems.

Because of these problems, the first attempts to prosecute polygamists were not brought under the Morrill Act at all. In 1871 one Thomas Hawkins was indicted for and convicted of having adulterous relations with his polygamous wife. Indictments immediately followed against a number of leading Church officials (including Brigham Young) under a Utah statute prohibiting lewd and lascivious cohabitation. By indicting the Church’s leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church’s leadership, and cow the Mormon populace into submission to federal policy. During the proceedings against Brigham Young, Judge McKeen, a rabid anti-Mormon, declared:

> While the case at the bar is called ‘The People versus Brigham Young, its other and real title is Federal Authority versus Polygamic Theocracy.’ . . . The one government arrests the other in the person of its chief, and arraigns
Campaign against Polygamy

it at the bar. A system is on trial in the person of Brigham Young. Let all
concerned keep this fact steadily in view; and let that government rule
without a rival which shall prove to be in the right.\textsuperscript{8}

Young's trial was thus meant to crush at one blow the practice of
polygamy and the power of the church that rivaled federal authority.
Mckean's plan was not to be realized, however. In Clinton \textit{vs.}
Englebrecht, the United States Supreme Court ruled that in his efforts to
purge juries of Mormons and secure the conviction of polygamists Judge
Mckean had improperly ignored Utah's jury selection procedures.\textsuperscript{9} As
a result of the decision in Englebrecht, Hawkins's conviction for adultery
was overturned, and the indictments against Young and the others were
dismissed.\textsuperscript{10} The prosecution of polygamy was thus halted until 1875 and
the Reynolds case. Even after the Reynolds decision upheld the Morrill
Act, that statute remained "constitutionally pure, but practically worth-
less," and only two Morrill Act cases ever reached the Supreme Court.\textsuperscript{11}

THE REYNOLDS DECISION

George Reynolds was an English immigrant, private secretary to
Brigham Young, and a polygamist.\textsuperscript{12} In October 1874 he was indicted
under the Morrill Act.\textsuperscript{13} Church historians maintain that Reynolds began
as a test case designed to determine the constitutionality of the anti-
polygamy statute and that Reynolds volunteered to test the statute and
cooperate in his prosecution in return for the government's agreement
not to seek a harsh punishment in his case.\textsuperscript{14} Non-Mormon historians
assert that no deal was ever struck.\textsuperscript{15} Reynolds was duly convicted of
polygamy on the testimony of his polygamous wife, but the case swiftly
became caught up in the sort of procedural pitfalls that had become
commonplace in Utah's judicial system. On appeal to the Utah Supreme
Court, Reynolds argued that the grand jury that had indicted him had
been improperly constituted.\textsuperscript{16} The jury had been selected in accordance
with the newly enacted Poland Act, which had limited the power of the
Mormon-controlled probate courts by changing the procedures for
selecting juries but which had not changed the number of jurors
required.\textsuperscript{17} The trial court empaneled twenty-three grand jurors in accord-
dance with federal practice. Utah law provided that a grand jury was to
be composed of fifteen jurors. The Utah Supreme Court reversed
Reynolds's conviction because the trial court had followed federal rather
than territorial law in fixing the size of the grand jury.

In October 1875 Reynolds was again indicted for violating the
Morrill Act. This time, in accordance with Utah law, the indictment was
handed down by a grand jury of fifteen men, seven Mormons and eight
non-Mormons.\textsuperscript{18} However, Reynolds declined to cooperate with his own
prosecution, and his polygamous wife could not be found to testify
against him. The polygamous wife not being available, the trial court admitted her testimony from the previous trial into evidence.\textsuperscript{19} Again, Reynolds was convicted and sentenced to two years' hard labor and a five hundred dollar fine. The Utah Supreme Court sustained his conviction.\textsuperscript{20}

This time Reynolds argued that the trial court should have followed federal law in setting the size of the grand jury since he had been indicted under a federal statute. The Utah Supreme Court had little patience for this change of tack and easily rejected the argument. Reynolds next argued that potential jurors had been questioned improperly about their personal attitudes toward polygamy. But the court held that persons who believed in or practiced polygamy could not be impartial jurors and thus could properly be excluded. (The court ruled that prospective jurors’ invocation of the Fifth Amendment privilege against self-incrimination was equivalent to an admission of guilt and eviscerated that amendment’s protection.) The admission of the testimony of Reynolds’s polygamous wife at the first trial was likewise deemed proper.\textsuperscript{21} Finally, the trial court’s instruction to the jury that it “should consider what are to be the consequences to the innocent victims of this delusion” was held not to be prejudicial.\textsuperscript{22} The court likened the instruction to a mere admonition that jurors should heed the law.

With but one avenue of appeal remaining, Reynolds turned to the United States Supreme Court.\textsuperscript{23} The Supreme Court affirmed the territorial court’s rejection of Reynolds’s challenges to the grand jury’s size, improprieties in jury selection, admission of his polygamous wife’s prior testimony, and prejudicial jury instruction. But the bulk of the Court’s opinion was devoted to Reynolds’s claim that the trial court improperly failed to instruct the jury that a finding that Reynolds engaged in polygamy as a result of a sincere religious conviction would justify his acquittal. Reynolds argued that the First Amendment’s guarantee of the freedom of religion can excuse conduct that would otherwise be criminal. The Court’s analysis of that issue made Reynolds a landmark case.

The Court first attempted to decide what sense of the word religion fell within the ambit of the constitutional provision that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Finding no guide to the definition of the term religion in the Constitution itself, the Court turned to the writings of Madison and Jefferson, sources contemporary with the adoption of the First Amendment. The Court quoted from Jefferson to the effect that “religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinions.”\textsuperscript{24} Adopting this demarcation, the Court concluded that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”\textsuperscript{25}
In arriving at the conclusion that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices," the Court grasped one-half of a profound dilemma posed by the First Amendment's protection of religion. The Court recognized that the First Amendment could not be read so broadly that any conduct asserted to be an exercise of religion would be immune from state regulation.

But the Court wrongly concluded that, because not all religious conduct could reasonably be exempted from civil control, no religious conduct was protected by the First Amendment. By so concluding, the Court ignored the express terms of the Constitution, which protect the "free exercise" of religion. Moreover, the Court overlooked the other side of the First Amendment dilemma. Religion is as much conduct as it is belief. The two cannot be disentangled. It is with regard to those religious practices offensive to the majority of a community that the issue of freedom of religion arises. In a democracy, laws are most certain to accord with the values of the majority's religion. It is the religious practice of unpopular minorities that are most likely to be restricted by the state and are thus most in need of protection. The free speech clause of the First Amendment fully protects freedom of belief. Thus, unless the free exercise clause protects at least some practices that are offensive to the majority, that provision is devoid of any practical content. Yet the Reynolds decision forecloses such an application of the First Amendment.

Having established the belief-conduct distinction and determined that the First Amendment was no bar to outlawing religiously inspired conduct, the Court next concluded that polygamy was sufficiently "subversive of good order" as to be properly made a crime. This second conclusion is also troublesome. As Linford notes, "the Court never quite explained why plural marriage was a threat to the public well-being." Laurence Tribe suggests that Reynolds was wrongly decided because the Court overrode core personal rights of privacy and religious expression for the sake of diffuse social goals. No victims of Reynolds's conduct were produced, it was conceded that polygamous sects might be well-ordered, and the Court never examined whether polygamy degraded women. Instead, the Court found subversion of the social order on the basis of an abstract syllogism that polygamy meant patriarchy, which meant despotism. To avoid this amorphous social evil, the Court invaded the right to religious freedom and limited the right to marry, a core element of personhood. In Tribe's words, "Few decisions better illustrate how amorphous goals may serve to mask religious persecution." Nevertheless, Reynolds's conviction was unanimously affirmed.
THE PROSECUTION OF COHABITATION
UNDER THE EDMUNDS ACT

Although the Reynolds decision was a saddening blow to the Mormons, the immediate impact of the decision was limited. Reynolds established that Congress had the power to punish polygamy, but the Morrill Act was a cumbersome weapon with which to do so. However, the period in which the Mormons would effectively resist Washington’s mandate was rapidly ending. By 1880, the tone of congressional debate indicated that the government not only had the power to outlaw polygamy but also had the will to act. The Mormons could no longer depend on isolation to ensure their neglect by Washington. Mining, commerce, migration, and the transcontinental railroad all brought the nation to Utah. While Utah was far enough from the seat of government that Congress’s knowledge of Mormon society was mostly second-hand, garbled, and derived from biased sources, it was near enough to be a constant and growing irritation to a nation that was rapidly spanning the continent and that was now largely undistracted by more serious problems. In a sorry cycle, Congress began considering a series of more severe anti-Mormon bills, in reaction not so much to the offense of polygamy as to prior Mormon resistance. Because polygamy was supported by the Mormon church, attempts to stamp out polygamy became attacks on the institution of the Church and Mormons in general.

In 1882 Congress adopted the Edmunds Act, which gave federal officials an efficient weapon for the prosecution of polygamists. 33 It created the new offense of unlawful cohabitation (relieving prosecutors of the burden of proving polygamous marriages), allowed joinder of polygamy and cohabitation charges, and effectively eliminated all Mormons as jurors in polygamy cases. The new law proved an effective tool in the hands of the Church’s opponents. Convictions of polygamists went from one in 1875 to 220 in 1887. 34 By 1893, after the Church had renounced polygamy and prosecutions largely ceased, there had been 1,004 convictions for unlawful cohabitation and thirty-one for polygamy. 35 The mere number of polygamy and cohabitation convictions, however, understates the impact of “the raid” on Mormon society. Not just any Mormon male was allowed to practice polygamy; only those who were morally worthy and financially able were permitted to take plural wives. Thus, by and large, the polygamists were also the Mormons’ leaders. 36 The conviction and imprisonment of polygamists served, then, to paralyze Mormon society by removing its leadership. Moreover, many polygamists who were not convicted were forced to go into hiding or flee the United States.
To simplify polygamy prosecution, the Edmunds Act provided that men who "cohabit with more than one woman" would be guilty of a misdemeanor. The act, however, did not say what conduct constituted cohabitation, nor does the Congressional Record offer any evidence that Congress considered the question. The Mormons argued that the benchmark of "cohabitation" should be sexual intercourse. But such a definition of "cohabit" would have been undesirable in at least two respects. First, proving sexual intercourse would be difficult. If the Morrill Act had proven ineffective because of the difficulties entailed in proving the fact of marriage, the Edmunds Act would be even more useless if proof of cohabitation required proof of intercourse. Second, to require Mormons to parade the details of their most intimate family life before the courts would be an unendurable invasion of privacy. But to accept less intimate evidence as establishing "cohabitation" could remove all standards for the determination of guilt.

The courts first confronted the issue of what constituted cohabitation in United States vs. Cannon. Angus Cannon, president of the Salt Lake Stake, had married three wives prior to passage of the Edmunds Act. Two of these wives, Clara and Amanda, lived with him in separate quarters in the same home. The third lived in a house nearby. Cannon was indicted for cohabiting with Amanda and Clara after passage of the Edmunds Act. At trial, Cannon offered to prove that, after Congress had passed the Edmunds Act, he had told Clara, Amanda, and their families that he did not intend to violate the law and thereafter "did not occupy the rooms or bed of or have any sexual intercourse with" Clara but could not afford to provide a separate house for Clara and her family. The court excluded the evidence as irrelevant, and Cannon was convicted. Adhering to the Church's direction to fight polygamy prosecutions to the utmost, Cannon appealed to the Utah Supreme Court. His main objections were that "all cohabitation which the law deals with is sexual cohabitation," of which he was innocent, and that his proffered evidence was wrongly excluded. The court, however, rejected this interpretation of the Edmunds Act. It concluded that Congress's intent was to eliminate problems attending proof of polygamous marriages and that "the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife—a holding out of that relationship to the world, were the evils sought to be eradicated." Proof of sexual intercourse was not necessary to make out such an offense because the aim of the act was not "to punish mere sexual crimes." Indeed, the court reasoned that to construe the statute as Cannon urged would render the cohabitation offense superfluous since other statutes already covered sexual offenses. The
court concluded that “cohabitation” meant dwelling together and not sexual intercourse.44 The United States Supreme Court affirmed the decision.45 Adopting much of the reasoning of the Utah court, the Supreme Court concluded that cohabitation was established if Cannon “held [the two women] out to the world, by his language or conduct, or both, as his wives.” Cannon’s agreement to abstain from sexual relations with his plural wives was dismissed with the comment that “compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist . . . [are] not a lawful substitute for the monogamous family which alone the statute tolerates.”46

On the whole, the judicial refusal to make sexual intercourse the test for cohabitation was sensible. It is now an axiomatic standard for the irreducible minimum of personal privacy that government has no power to place spies in the bedroom.47 By construing the Edmunds Act to avoid that nightmare, the judiciary at least spared the Mormons an intolerable indignity and assault on their rights.48 The consequence, however, was that proving cohabitation became ridiculously easy for federal prosecutors. As one scholar concluded, “To be tried was, in effect, to be convicted.”449

The law’s directive to Mormon men to cease cohabitation meant, then, that they must abandon their plural wives. Wives who had been married decades before and who were now aged and infirm were to be abandoned.50 Younger wives were often to be left to support and raise large families alone. Thus, the moral posture of courts enforcing the Edmunds Act was dramatically altered. No longer did courts command Mormons to abandon a life of presumed debauchery, since the sexual activities of polygamists were legally irrelevant. Instead, in the name of amorphous social policies, the Mormons were called on to ignore the moral obligations to support aging wives and raise innocent children.

The judicial interpretation of the Edmunds Act simply failed to provide the Mormons with any guidance as to how far obligations toward plural wives and children could be honored without violating the Edmunds Act.51 Polygamous Mormons were thus presented with a difficult decision: morally they were obligated to associate with their polygamous families to the extent necessary to provide for their welfare, but because the boundaries of legally permissible conduct had been left undefined any contact potentially left polygamists open to prosecution. The facts of Cannon indicate that Cannon had genuinely attempted to comply with the law. Yet after the court decisions, it remained unclear what he might have done differently to have avoided violating the law. It is a constitutional maxim that the terms of the law must be sufficiently clear that citizens may order their conduct in conformity with it.52 As construed by the courts, the offense of cohabitation was not so much one of conduct as of appearance. Of course, the Mormons could not comply
with a statute that made their conduct largely irrelevant and considered only what they appeared to be, or were reputed to be, doing. To make matters worse, under subsequent decisions Mormons could not even avoid prosecution by keeping the connections with their plural families discrete. A polygamist was required to "separate himself entirely from his polygamous women."53

As the pace of polygamy prosecutions accelerated, the thought occurred to some eager prosecutor that the cohabitation statute would be more fearsome if every defendant faced not one cohabitation charge but many. Such would be the case if each year, month, or day that a man cohabited illegally could be the basis of a separate offense. Periods of cohabitation could thus be divided into units as small as the prosecutor wished, allowing him to tailor the potential punishment to be meted out to individual defendants solely at his discretion.

A judicial test of this theory was attempted in the case of Lorenzo Snow. Snow was charged with cohabitation in three separate indictments, each one charging the same offense with the same women, only for different years. In separate trials, Snow was convicted on each indictment and given the maximum sentence for each conviction. Thus, by segregating the charges against Snow, the prosecution was able to triple his punishment. The Utah Supreme Court affirmed the convictions.54 The only justification it advanced for allowing the prosecution to segregate offenses according to time was a single Massachusetts case, Commonwealth vs. Connors, which held that the maintenance of a tenement for the sale of illegal liquor could be the basis for separate convictions based on different periods of time.55 The United States Supreme Court dismissed Snow's appeal on the ground that it did not have jurisdiction to hear it, since Snow did not question the validity of the statute but only its application.56 The Utah Supreme Court's decision dramatically raised the stakes in polygamy prosecutions by making the penalty for cohabitation convictions far more severe. Moreover, no one knew how far the principle would be extended. Since the basis for segregation was arbitrary, in theory unlimited segregation was possible. With sufficient segregation, cohabitation could become punishable by lifetime imprisonment.

With the principle of segregation having been approved by the Utah Supreme Court and the possibility of further review seemingly precluded by the United States Supreme Court's decision in Snow, federal prosecutors swiftly began expanding their use of the segregation of offenses, testing how far the principle could be pushed. In United States vs. Groesbeck, the prosecution cut in half the period of each offense, charging the defendant with two counts of cohabitation, one for each of two six-month periods. Unlike the Snow case, the trial of the two charges was consolidated. On appeal, the Utah Supreme Court sustained both
these innovations. The court dismissed the argument that a single trial of the defendant on both charges allowed the jury improperly to consider Groesbeck’s first conviction in determining his guilt on the second charge. The court noted that consolidation of offenses into a single trial saved the state the burden and expenses, and the defendant the harassment, of multiple litigation. In justifying the segregation of offenses, the court reasoned that to allow Groesbeck to be charged with only one count of cohabitation for his period of continuous cohabitation would be unfair. Such a rule could allow more serious offenders to be treated more leniently than lesser offenders. For example, a polygamist who ceased cohabiting with his wives a year after the Edmunds Act was adopted but renewed cohabitation after a year would be liable for two charges of cohabitation, whereas someone who cohabited with his wives throughout the same period would face only one charge. Similarly, a rule that allowed only one charge of cohabitation to be raised, however long the period of cohabitation had been, provided polygamists with no incentive to conform to the law, for an individual’s liability was not increased by his continuing to cohabit nor limited by his ceasing to do so.

The court’s reasoning is flawed at several points. First, under the segregation rule there was no necessary relation between the length of an offender’s offense and the number of charges raised against him. Because the basis of segregation was inherently arbitrary, any offense, no matter how long or short its duration, could be divided into as many separate offenses as was desired. Snow, for example, had engaged in polygamy for a period of forty years and was charged with three offenses. Groesbeck, on the other hand, was assigned two-thirds the punishment given Snow, for a period of cohabitation of one year. Conversely, if cohabitation were treated as a continuous offense, under the principles governing the treatment of continuous offenses, lapses in cohabitation would not necessarily require separate offenses.

Meanwhile, Lorenzo Snow had served his first six-month sentence. He then applied to the United States Supreme Court for a writ of habeas corpus, claiming that his further detention was unlawful since the two remaining sentences were the result of an unlawful segregation of a single offense. As before, the government contended that the Court lacked jurisdiction, but this time the Court held that it had jurisdiction:

> Not only had the court which tried [Snow] no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on habeas corpus, when the sentence on more than one of the convictions is sought to be enforced.

The Court’s opinion constituted a mild but clear rebuke to Utah’s judicial officers for attempting to impose so patently offensive a device
as the segregation of offenses. Cohabitation was, the Court stated, "inherently, a continuous offence, having duration; and not an offence consisting of an isolated act." Indeed, as the courts had defined cohabitation, it was an offense of reputation and appearance that made the identification of individual acts of cohabiting all but impossible. Any division of the offense into separate charges must be "wholly arbitrary," leaving open to as many or as few divisions as the prosecution chose to make. It is to prevent such arbitrary conduct that the law provides that inherently continuous offenses can be committed only once before prosecution. In short, the Court swiftly demolished the legal reasoning of the Utah Supreme Court in adopting the segregation principle.

Utah courts grudgingly bowed to the Supreme Court's decision but implied that cohabitation offenses might still be divided where there had been some breaks in the periods of cohabitation or where an accused had more than two wives. Even after *In re Snow*, courts could still impose multiple punishments for what was in reality but one offense. The Edmunds Act specifically allowed polygamy and cohabitation charges to be combined. Because the definitions of the offenses were different, a man could be convicted of marrying a polygamous wife and then convicted again for living with her. The Supreme Court set limits on the combination of different offenses in *Hans Nielsen*. Nielsen was indicted for adultery and cohabitation. Both charges were directed at his conduct with his polygamous wife, Caroline. Nielsen pleaded guilty to the charge of cohabitation and was sentenced to three months imprisonment. When arraigned on the adultery charge, Nielsen claimed his conviction for cohabitation barred his further prosecution. After serving his sentence for cohabitation, Nielsen was tried and convicted for adultery and sentenced to an additional 125 days' imprisonment. The United States Supreme Court granted Nielsen's petition for a writ of habeas corpus.

In real terms, Nielsen's convictions for both cohabitation and adultery were manifestly improper, for he was being punished for but one offense—having a polygamous wife. Legally, though, the elements of the offenses differed, so convictions for both offenses on the basis of the same activity appeared permissible. The Court managed to arrive at a sensible result. It reasoned that proof that Nielsen and Caroline lived together as husband and wife carried with it the assumption of intercourse that was the essential element of the adultery charge. Thus, when Nielsen was convicted of cohabitation, he was convicted of all the elements of adultery and could not be separately punished for that offense. With *Hans Nielsen*, attempts to make the polygamy laws more savage by piling offenses together or fractioning a single act into many separate offenses ceased.
The Evidence of Cohabitation

The Edmunds Act prosecutions saw a distortion of the rules of evidence, in part due to the same vindictive spirit that animated the harsh application of the polygamy laws, but in part the result of that same vagueness and emphasis on appearance that afflicted the substantive provisions of the Edmunds Act. Since the offense of cohabitation consisted of appearing to consort with two or more women, proof that the accused had married either or both women was not necessary. On the other hand, so long as a man cohabited with only one woman, he would seem to be in compliance with the law, regardless of whether that woman was the man’s lawful wife. Thus, a polygamist seemingly could abandon his legally recognized wife, live exclusively with a later plural wife, and not be guilty of cohabitation. However, a construction of the Edmunds Act that allowed a polygamist to retain whichever one of his wives he wished so long as he retained only one was, of course, not well received by the courts. The judicial solution to this problem was a presumption, first announced in United States vs. Snow, that a man cohabited with his legal wife.

To comply with the law, Lorenzo Snow had set each of his older wives up in a separate household and refrained from almost all contact with them. He lived solely with his last wife, who still had infant children to raise. Nevertheless, he was convicted of cohabitation. The Utah Supreme Court upheld the conviction, not because he was cohabiting with more than one wife, but because he was with the wrong wife. The court reasoned that the Edmunds Act was intended, like prior acts, to protect the institution of monogamous marriage and should be liberally construed to achieve that intent. To adopt a construction of the act that allowed a polygamist to choose freely between his legal and his plural wives was clearly offensive to the act’s spirit. Thus, the court presumed that a man cohabited with his lawful wife. At first this was offered as a rebuttable presumption, justified by society’s policy of encouraging marital fidelity and by common experience as a factual generalization. The Snow court still appeared to require at least some evidence of actual cohabitation. Clever polygamists were able to get around the presumption by demonstrating that in their case it was incorrect. Thus, courts very quickly deemphasized the factual rationale for the presumption and instead emphasized its legal and social policy rationale. As they did, the strength of the presumption increased, and the extent to which it could be refuted by contrary evidence diminished.

Finally, in 1888 the Utah Supreme Court so diluted the amount of evidence required to render the presumption of cohabitation with a legal wife conclusive that, in effect, the presumption became a conclusive presumption of law. In United States vs. Harris, the court approved
jury instructions to the effect that if "the legal wife of the defendant lives in the same vicinity with him, bearing his name, in a household maintained in part by him; that is . . . absolutely and conclusively cohabitation with his legal wife."67 Under such a standard, it seemed unlikely that any polygamist could insulate himself from all contact with his lawful wife sufficiently to avoid a finding of cohabitation. Certainly, the presumption of cohabitation created a strong disincentive for polygamists to attempt to support and care for the women they had married. Conversely, Harris provided some measure of relief to polygamists. If cohabitation with one's lawful wife was strongly presumed, "when you come to cohabitation with the illegal wife, then the presumptions are all against it."68

The presumption of cohabitation effectively shifted the burden of proof in criminal trials. In essence, a polygamist was presumed guilty of cohabitation unless he could prove his innocence.

The ease of the prosecutor's task in proving cohabitation was further enhanced by judicial rulings on the type of evidence that could be admitted to establish cohabitation. In United States vs. Snow, the court, noting the strong legislative policy of stamping out all vestiges and appearances of polygamy, concluded that to achieve Congress's goal loose evidentiary standards were required:

In these polygamic relations there never is and cannot be that intimate association, and habitual attention given by the man to the various women, as exist between a husband and his wife in the monogamic state. Consequently, in the very nature of things, the proof of cohabitation cannot be made as clear as in the case of a monogamic marriage, simply because the facts of which proof is to be made do not as abundantly exist.69

Circumstantial evidence, such as "language, and conduct, and appearances, and expressions," could serve as evidence of cohabitation.70 The fact that a man was seen watering his horses at a plural wife's well or taking her provisions suggested an unlawful cohabitation.71 A birthday party given for an aging polygamist and attended by his plural families similarly indicated cohabitation.72 The net of circumstantial evidence was spread even wider to include evidence of reputation.73 A few cautionary voices, however, were raised. The Arizona Supreme Court warned that evidence of reputation "standing alone, would amount to nothing in such a case," but in conjunction with "all the other proof and circumstances," reputation could be considered by a jury.74 The Idaho Supreme Court went further and excluded evidence of reputation altogether: "To assume the guilt without proof of the acts would be manifestly improper."75

Similarly, evidence that the defendant had fled to avoid arrest was deemed admissible as circumstantial evidence of guilt.76 For example, in
Snow it was held that "the jury, in ascertaining whether the appellant was guilty or not, had the right to take into consideration his concealment at the time of arrest, and also the manner of concealment."77

If a defendant's guilt could be established by a presumption that he cohabited with his wives, lawful and polygamous, prosecutors first had to prove that the defendant had married those women. The same reasons that made the Morrill Act nearly useless also made it difficult to prove a marriage sufficiently to raise a presumption of cohabitation. Consequently, courts lowered evidentiary standards, allowing marriages to be proved by circumstantial evidence: "Proof that two parties have treated each other as husband and wife, have lived together as such, and have held each other out to the world as such, is sufficient to enable a court or jury to find that at some previous time the parties did, as a fact, consent to be married."78 In effect, then, the offenses of polygamy and cohabitation became identical in terms of the proof required for each; each could be proven by evidence that a couple associated so as to appear to be married. Statements by a defendant that a woman was his wife, made out of court and before any charges had been made against him, could be introduced at trial to prove his marriage79 or to prove cohabitation.80 For example, in United States vs. Smith the defendant was convicted on testimony that he had "said 'we' or 'they' (not positive which) 'would never give [polygamy] up; that the law against it was unconstitutional; and that he had just as good a right to decide on it as the supreme court.' "81 Thus, a rash criticism of Supreme Court decisions was transformed into an admission of guilt of cohabitation.

Finally, cohabitation trials raised the issue of what time periods of cohabitation could be shown to establish the offense. Conduct of a defendant before enactment of the Edmunds Act in 1882 did not constitute an offense and therefore should have been irrelevant in cohabitation cases. But courts admitted evidence of such conduct on two theories. The first rested on certain presumptions: If a lawful relationship was formed, then subsequently made unlawful, the law would presume that the parties had terminated the relationship unless the contrary was proved.82 But polygamy had been unlawful, the court pointed out, since the Morrill Act in 1862 and for more than a generation under common law in the Territory. If an individual entered into an unlawful relationship at any point in time, the law would presume that the relationship continued, in the absence of evidence that it had ceased.83

The other rationale for allowing evidence of a defendant's prior conduct was less ambitious. Just as in a murder case, evidence of how the defendant behaved toward and felt about the victim before the murder might be admitted, evidence of how the defendant regarded his plural wives before 1882 could be admitted to show how he regarded them at the time of the offense.84 Evidence of prior conduct was admissible, not
to show liability but "merely to illustrate and explain the evidence as to what took place during the time laid in the indictment." A defendant's cohabitation prior to passage of the Edmunds Act was evidence of his propensity to violate the law and of his evil intentions. As such, the evidence could be thrown in, along with all the other circumstantial evidence, for the jury's consideration. However, while evidence of prior conduct, as in a murder trial, may be admitted to establish the defendant's motive or knowledge, the evidence of prior conduct admitted in the polygamy trials was not evidence of cohabitation, precisely the offense charged. Such evidence could only have prejudiced or confused a jury, making it likely that a defendant would be improperly convicted on the basis of his prior conduct or that the jury would improperly conclude that because the defendant had previously cohabited he must have been guilty of cohabitation as charged.

In loosening the rules of evidence to serve Congress's policy of ensuring the punishment of polygamy, the courts undermined the elemental bases of judicial procedure and due process of law. The most basic assumptions that an accused is presumed innocent and must be found guilty beyond a reasonable doubt by competent evidence were sapped of all strength. The courts were indeed accurate when they identified cohabitation as an offense of appearance or reputation, for under such evidentiary standards an accused's actual conduct seemed largely irrelevant. Mormons widely reputed to be polygamists, through the use of strings of presumptions and the testimony of what people thought their marital relations to be, could be quickly convicted whatever they tried to do.

Witnesses to Cohabitation

To convict Mormon men of polygamy offenses, certainly no more effective and knowledgeable witnesses could be found than their wives. Two obstacles, however, appeared to bar use of this pool of witnesses. First, many—if not most—Mormon wives were unwilling to testify against their husbands. Second, even if they were willing to testify, at common law a person could not testify against his or her spouse. Polygamy prosecutions raised perplexing problems. For example, did this spousal disability apply to illegal, polygamous wives? If so, what if it could not be determined which was the lawful and which were the plural wives? The issues were first confronted in United States vs. Miles, the only other Morrill Act case to reach the United States Supreme Court besides Reynolds.

From the evidence at trial, it appeared that John Miles had married three women on the same day. Because Miles was charged with bigamy, under the Morrill Act, it was necessary to prove his marriages to the three
women, and therein lay the difficulty, for the marriage ceremony was shrouded in secrecy. Miles's wife Caroline, however, was willing to testify against him. Miles conceded his marriage to Caroline but denied his marriage to his first wife. Caroline's testimony was essential to the state's case, but if Caroline was Miles's lawful wife under the common law rule her testimony was inadmissible. But her testimony helped establish that at the time Miles married her he already had a lawful wife. And if Miles had a wife when he married Caroline, his marriage to her was invalid, and she was a competent witness.

The trial court resolved this perplexing question by throwing the whole matter to the jury. Caroline was allowed to testify. At the end of the trial, the jury was instructed that only if they found that Miles was already married when he married Caroline could they then consider Caroline's testimony in determining whether Miles was guilty of bigamy. The instruction, of course, was useless because tautological. In determining whether Caroline's testimony on the issue of Miles's guilt was admissible, the jury necessarily had to determine the issue of his guilt.

On appeal, the United States Supreme Court rejected the trial court's ingenious labor-saving device. It concluded that a defendant's witness-wife must be treated prima facie as his lawful wife: "as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it." The principle behind this ruling was the old rule that a witness that is "prima facie incompetent" cannot give evidence "to establish his competency, and at the same time prove the issue." The Court reached this ruling with apparent regret, for in doing so it recognized that it was disabling almost all witnesses to polygamous unions. However, the Court recommended two escapes from this predicament. First, eyewitnesses to a marriage were not necessary. Polygamous marriages could be proven like any other fact, by admissions of the defendant or by circumstantial evidence. Second, if under existing laws it was too difficult to prove polygamy Congress could always change the law. Because it was based on the testimony of an incompetent witness, Miles's conviction was reversed.

Miles did not end the issue of a wife's competency to testify against her husband. The general rule that a wife was not a competent witness against her husband was subject, under common law and the Utah statute, to several exceptions. A Utah statute, for example, provided that a wife could testify against her husband in a civil action by one spouse against the other or in a criminal action for a crime committed by one against the other. In United States vs. Basnett, the Utah Supreme Court concluded that polygamy was, in fact, an offense by the husband against his lawful wife, "more injurious" to her than bodily injury. Thus, the rule of spousal disability did not apply, and the wife was a competent witness.
Again, however, the United States Supreme Court rejected the territorial court’s analysis. First, the Court concluded that the Utah courts had applied the wrong statute. They had applied a statute found in Utah’s code of civil procedure, which adopted the common law rule of spousal disability but expressly provided that the rule did not apply to criminal actions for offenses committed by one spouse against the other. A second, older statute, contained in Utah’s criminal code, provided that a spouse might testify only in cases of “criminal violence” upon one spouse by the other. The Court concluded that although the section of the civil code was more recently adopted and would thus otherwise take priority, in fact the criminal code provision should have been applied because Bassett was a criminal case and polygamy could not rationally be construed as an act of criminal violence. Less technically, the Court concluded that even under the statute employed by the Utah courts, polygamy could not be properly viewed as an offense against the wife:

Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common law rule.

Nearly seven years after the United States Supreme Court decision in Miles excluded the testimony of polygamous wives in polygamy trials, Congress, in the Edmunds-Tucker Act, provided that a wife was a competent witness in polygamy, bigamy, and cohabitation trials and required that records be kept of weddings in the territories. These provisions still retained one restraint on spousal testimony, however; they provided only that a willing wife would be allowed to testify. The act specifically forbade attempts by the judiciary to compel wives to testify against their husbands. Utah’s judges did not always follow the law, however. A number of Mormon women were required to testify against their husbands or face contempt charges. The power of contempt could be a fearful weapon. On the basis of the most sketchy or nonexistent hearings, Mormon wives who refused to testify against their husbands could be sent to prison for indefinite periods. In 1888 Representative Burnes read to the House of Representatives a report by a visitor to Utah’s prison:

I found in one cell (meaning a cell of the penitentiary in Utah) 10 by 13 1/2 feet, without a floor, six women, three of whom had babies under six months of age, who were incarcerated for contempt of court in refusing to acknowledge the paternity of their children. When I plead with them to answer the court and be released, they said: “If we do, there are many wives and children to suffer the loss of a father.”

Judicial use of the contempt power in the polygamy cases thus presented many Mormon families with a cruel dilemma. If the wife called
as a witness submitted and testified, her husband would almost surely be convicted and imprisoned. If she refused, her husband might escape conviction, but the wife would be imprisoned. At least one Mormon husband, Rudger Clawson, directed his wife to testify at his trial after she had spent a night in the penitentiary for refusing to do so.101

In retrospect it is difficult to offer any explanation for this judicial conduct toward Mormon wives other than a spirit of vindictiveness. The polygamy laws, which were being vigorously enforced in the latter part of the 1880s, imposed ample punishment for the women who stubbornly clung to polygamy. The imposition of contempt sentences on wives who refused to testify introduced a sort of random sexual equality in the federal punishment of polygamy that was being imposed on Utah’s Mormons. Courts had reduced the quantum of evidence required to establish polygamy or cohabitation to such a low level that in almost any case ample alternate sources of proof must have been available. So Utah’s courts could not have believed that they needed to compel Mormon women to testify in order to convict their polygamous husbands. The cohabitation cases produced heartrending stories of suffering and pathos. Men were forbidden to associate with their children or provide for their former wives. Women were denied care and association with former husbands. Moreover, the law, not limited to prohibiting future polygamous marriages, fell with all its severity upon people whose relationships had most often been established when the law did not unambiguously forbid them.

THE VITALITY OF REYNOLDS TODAY

The legislative and judicial war on polygamy was ultimately successful. The Church officially abandoned the practice in 1890. However, the war was not without its casualties. The Court’s decision in Reynolds was a good example of “a situation where the social import of the issue outstrips the political and legal resources of the time.”102 The Court’s overly restrictive view of the free exercise clause virtually read it out of the Constitution for over sixty years.

Reynolds continues to be cited as binding precedent today.103 But beginning in 1940, in Cantwell vs. Connecticut, the Court began to qualify the belief-action distinction that Reynolds had established and to redefine the scope of the free exercise clause.104 The Cantwell family, Jehovah’s Witnesses, had been going door-to-door playing an anti-Catholic recording. They were convicted of soliciting religious contributions without a state certificate and of breaking the peace. While maintaining the belief-action distinction, the Cantwell Court rejected the implication of Reynolds that religious conduct was completely outside the protection of the First Amendment. The Court
stated that free exercise "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Yet the Court recognized that the power to regulate religious conduct could not be so exercised as to infringe unduly upon the freedom of religious conscience. Cantwell required that statutes regulating religious conduct be "narrowly drawn" so as to punish only specific conduct that was a clear and present danger to the state. The Court reversed the convictions.

In Sherbert vs. Verner, the Supreme Court followed Cantwell's lead and further solidified the protection of conduct under the free exercise clause. Sherbert, a Seventh-Day Adventist, was discharged by her employer and was unable to obtain other employment because she would not work on Saturday. Her claim for state unemployment compensation was denied. The Court reversed, extending free exercise protection to a government's withholding of an economic benefit as opposed to the government's imposition of a direct burden on religious conscience.

Finally, in Wisconsin vs. Yoder, the Supreme Court abandoned the belief-action distinction for a test that balanced the competing interests surrounding the free exercise clause. In Yoder, Amish parents objected to the compulsory high school education of their children on the grounds that exposure to modern values and advanced education would destroy the insular society and simple life-style that were essential to the Amish religion. In upholding the right of Amish children not to attend high school, the Court expressly rejected Reynolds's proposition that the First Amendment was concerned solely with matters of belief. Suggesting that matters of religious belief and conduct could not be meaningfully separated into watertight categories, the Court recognized that its subsequent decisions had "rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause." To be sure, only conduct that is genuinely religious practice qualifies for First Amendment protection, but genuinely religious conduct must be afforded great deference by the state. For a law restricting religious conduct to stand, there must be an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." To determine whether a particular exercise is protected by the First Amendment, the Court balances the competing interests. Applying this test, the Court conceded that the state interest in universal education was compelling but concluded that compulsory education beyond the eighth grade was an infringement of the free exercise of the parents' religious beliefs.

Of course, it is a matter of speculation whether Reynolds would have been convicted had the Court used a Yoder-type balancing test. But
had the government been required to show a compelling interest, it would have had to produce evidence of the social injury caused by polygamy. The evidence available today suggests that "Mormon polygamy neither caused or could cause the degradation of women and children or the subversion of democracy." Even in the hard cases where the First Amendment has been invoked on behalf of unpopular religions and practices, such as People vs. Woody, modern courts have generally accorded substantial deference to religious values. In Woody, a group of Navajos asserted that the First Amendment protected their use of the hallucinogen peyote as a part of their religious services. After a careful assessment of the use of peyote in the defendants' religious life, the California Supreme Court concluded that the state's interest in controlling drug use did not outweigh the claims of religious freedom. The so-called compelling state interest in protecting the Navajo from the deleterious effects of the drug was dismissed with the comment, "We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition.'" 

The fair-minded and tolerant attitude toward strange and unpopular religions expressed by the court in Woody is perhaps as important a change from Reynolds as is the new judicial doctrine expressed in Yoder. The Reynolds Court directed much polemic against polygamy but made no attempt to assess the religious significance of polygamy to Mormon doctrine and society or to weigh that practice against the state's interests. The state interests invoked to justify its elimination appear untenable in light of the analysis in Yoder and Woody. The diffuse social interest in preventing patriarchal family structures to preserve democracy, based on sociological theories, is precisely the sort of general state interest that was rejected in Yoder. And the paternalistic state interest in freeing Mormon women from their supposed domination is precisely the sort of state interest that was rejected in Woody. Thus, the developments of the twentieth century have undermined the Reynolds rationale.

Nevertheless, the modern Court has at times shown signs of backtracking from the Sherbert-Yoder line of cases. The vitality of Yoder was questioned just ten years after Yoder, in United States vs. Lee. Lee—like Yoder, an Amish—employed several other Amish. He objected on religious grounds to paying the social security tax imposed on employers. The Court purported to apply the Yoder balancing test but reached a different result from that in Yoder. In rejecting Lee's claim to an exemption from the law, the Court tried to distinguish Yoder on the grounds that a tax system could not function if exemptions were too easily granted on the basis of religious belief, whereas an educational system could presumably tolerate religious
exemptions. Justice Stevens, concurring in the judgment, found Yoder indistinguishable. The same religious interest was implicated in each case, and the state interest in Yoder was no less compelling than the federal interest in Lee. Justice Stevens argued that the Court's decisions rested on a different constitutional standard, namely, that a person who objects to a valid, neutral law of general applicability on religious grounds should have "an almost insurmountable burden" of demonstrating "that there is a unique reason for allowing him a special exemption." He found Yoder the "principal exception" to this rule. The majority's conclusion in Lee, he argued, suggested that the Court in fact placed a heavier burden on the party challenging the law than Yoder would warrant.

Free exercise decisions since Lee give credence to Justice Stevens's interpretation of Supreme Court precedents and suggest that the Court is dissatisfied with the Sherbert-Yoder balancing test or at least to the relative weights of the individual and governmental interests involved. Sherbert and Yoder would suggest that "the thumb [should be] on the religious freedom side of the balance." But while professing to apply the Sherbert-Yoder test, the modern Court has at times shown unusual deference to the government's purported interests. As a result, the Court has reached some questionable results and has demonstrated an inconsistency in its free exercise jurisprudence that threatens to undermine the civil libertarian approach of the Sherbert-Yoder line of cases.

In Jensen vs. Quaring, the Court considered a free exercise challenge to Nebraska's requirement that drivers' licenses include a photograph of the licensee. Mrs. Quaring objected to the requirement as it was applied to her on the grounds that her religious beliefs prohibited the use of her photograph. The state failed to provide any evidence that its interests would be harmed if it provided an exemption for those opposed to photographs on religious grounds, as Yoder would seem to require. In fact, the state provided some nonreligious exemptions. Yet the Court barely upheld Mrs. Quaring's free exercise challenge, affirming by a four-to-four vote the Eighth Circuit's conclusion that Nebraska had to provide her a photoless driver's license.

The Court was faced with a similar question in Bowen vs. Roy. The parents of a Native American brought an action challenging on First Amendment grounds the requirement that recipients of certain welfare benefits provide a social security number. The parents claimed that use of a social security number for their daughter would violate their religious beliefs. They sought and obtained in the lower court an injunction preventing the government from (1) making any use of their daughter's social security number, and (2) denying their daughter welfare benefits because of the parents' refusal to "furnish" her social security number to the state agency administering the welfare plan.
When the case reached the Supreme Court, it generated five separate opinions. The Court, in an opinion by Chief Justice Burger, easily rejected the first provision of the injunction. The Court stated that the free exercise clause was meant to protect individuals from certain forms of governmental compulsion: "it does not afford an individual a right to dictate the conduct of the Government's internal procedures." Eight justices agreed that once the government had the number it could use it as it wished in conducting "its own internal affairs." Because the government already had the daughter's social security number and could use it however it saw fit, Justices Blackmun and Stevens saw no reason to reach the constitutional questions presented by the second part of the injunction. Six of the remaining justices, however, reached the issue of whether the government could withhold welfare benefits to someone who refused to furnish a social security number for religious reasons, with very different results. The Chief Justice (joined by Justices Rehnquist and Powell) drew a distinction between "governmental compulsion and conditions relating to governmental benefits." The Chief Justice expressly rejected a Yoder-type balancing test where the challenged governmental action did not "inescapably compel conduct that some find objectionable for religious reasons." In the absence of proof of a discriminatory intent, he would uphold a neutral and uniform requirement for governmental benefits if it was merely "a reasonable means of promoting a legitimate public interest." Under that standard, the Chief Justice would have upheld the entire statutory scheme in Roy. On the other hand, Justice O'Connor (dissenting in part and joined by Justices Brennan and Marshall) found that the Chief Justice's proposed test had "no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." Justice O'Connor would have applied "our long line of precedents to hold that the Government must [accommodate] a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means." Under this Yoder type of analysis, she would have upheld the second part of the injunction.

Despite indications in Lee and Roy that at least some members of the Court were ready to abandon the Sherbert-Yoder balancing test, in Hobbie vs. Unemployment Appeals Comm'n, the first free exercise case to reach the Rehnquist Court, the Court strongly reaffirmed Sherbert (only Chief Justice Rehnquist dissented). Ms. Hobbie, like Ms. Sherbert, was a Seventh-Day Adventist who was denied unemployment compensation when she lost her job for refusing to work on Saturdays. The state tried to distinguish Sherbert on the grounds that Hobbie had recently converted to her religion and expected her employer to accommodate this change, whereas Sherbert had not—a distinction, Justice Scalia suggested, that one would only make "if one did not like
Sherbert to begin with." The Court rejected the distinction, pointing out that it would "single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment." The state also argued for the less rigorous free exercise test that Chief Justice Burger had suggested in Roy, but the Court firmly rejected the argument. The Court reaffirmed that, when the state denies an important benefit because of conduct mandated by religious belief, the denial "must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest." The belief-conduct distinction of Reynolds has been jettisoned by later cases. Substantial protection of religious practice as well as belief is now accepted under the free exercise clause. Because belief has long been protected under the speech clause, this development is logical, historically correct, and beneficial to society. To avoid redundancy, the free exercise clause must be interpreted as protecting religious conduct as well as belief. Nevertheless, it would be unrealistic to expect a Supreme Court as socially conservative as this, or for that matter any Court likely to exist in the near future, formally to overturn Reynolds and sanction the practice of polygamy. (Nor, for that matter, would it be likely that the Mormon church would ever again enter into that practice even if the law permitted it.) What should be expected, however, is that the emergence of the free exercise clause as a vibrant base for civil libertarian protection of rights of conscience under Sherbert and Yoder will be strengthened and expanded. Any tendency toward erosion of the free-exercise protection should be stoutly resisted.

NOTES

2See Ray Jay Davis, "The Polygamous Prelude," American Journal of Legal History 6 (1962): 6. Having signed the Morrill Act, President Lincoln is reported to have told T. B. H. Stenhouse, "You go back and tell Brigham Young that if he will let me alone, I will let him alone" (quoted in Gustive O. Larson, The "Americanization" of Utah for Statehood (San Marino, Calif.: Huntington Library, 1971), 60 n. 61).
3See B. H. Roberts, A Comprehensive History of The Church of Jesus Christ of Latter-day Saints. 6 vols. (Salt Lake City: Deseret News Press, 1930), 5:28–29. Conflict was avoided by the lodging of a friendly complaint against Young that was later dismissed when tempers had cooled.
41851 Utah Laws 43, 30; ibid. at 56, 1–3.
5Marriage records were not kept in Utah until 1887. Mormon weddings were often performed in temple ceremonies open only to faithful Mormons, so witnesses were scarce, and what witnesses there were often preferred to face contempt of court rather than reveal information related to temple ordinances (see Davis, "Polygamous Prelude," 10 n. 42). Moreover, under Utah law, a wife could not testify against her husband.
6Orma Linford, "The Mormons and the Law: The Polygamy Cases," Utah Law Review 9 (1964): 308, 330. Adultery charges could be brought only by an accused's spouse. Hawkins's lawful wife was apparently unhappy at his having taken a plural wife and brought charges against him. Perhaps the prosecution proceeded against Hawkins under Utah's adultery law rather than the Morrill Act because his wife was willing to cooperate with the prosecution.
7See Roberts, Comprehensive History 5:395.
"Deseret News, 18 October 1871.
80 U.S. (13 Wall.) 434 (1871).
See Roberts, Comprehensive History 5:469.
Robert J. Dywer, The Gentle Comes to Utah: A Study in Religious and Social Conflict (1892–1890), 2d ed. rev. (Salt Lake City: Western Epics, 1971), 112–13. That Mormon witnesses, including Reynolds’s polygamous wife, willingly testified at Reynolds’s first trial but refused to testify at his second trial suggests that the Mormons believed the government had broken an agreement to treat the case as a test.
United States vs. Reynolds, 1 Utah 226 (1875).
United States vs. Reynolds, 1 Utah 319 (1876), aff’d, 98 U.S. 145 (1878).
The admission of testimony given at a prior trial under oath where that witness had been subject to cross-examination and was no longer available would also have been proper under the modern rules of evidence (see Federal Rules of Evidence 804 [b] [1]).
Utah at 323.
Reynolds vs. United States, 98 U.S. 145 (1878).
Ibid.
Ibid., 166.
"To permit this," the Court reasoned, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances" (ibid., 167). To illustrate this point, the Court produced a parade of horrors, examples of religiously inspired conduct that no civilized society could abide, such as human sacrifice.
In the face of this language, the Court’s attempt to define constitutionally protected religion as belief is, as one constitutional scholar concludes, “peculiar” (Laurence H. Tribe, American Constitutional Law [Mineola, N.Y.: Foundation Press, 1978], 838 n. 1; see also Harrop A. Freeman, "A Remonstrance for Conscience," University of Pennsylvania Law Review 106 (1958): 806, 826).
Tribe, American Constitutional Law, 838 and n. 15.
Ibid., 854. But see Davis, “Plural Marriage,” 305–6 (the state interest in prohibiting polygamy was at the time considered compelling, and no less restrictive alternative was available).
On a petition for rehearing, it was pointed out that Reynolds’s sentence to hard labor had been improper because the statute provided only for imprisonment. The Court, therefore, reversed the lower court’s judgment in this respect and remanded the case so that the district court could impose proper punishment (98 U.S. at 168–69). Reynolds was resentenced to two years in prison and was released five months early for good behavior. He was received as “living martyr” and ultimately became a General Authority of the Church (Davis, “Plural Marriage,” 291 and n. 24).
19 Cong. Rec. 9231 (1888).
During this period, no General Authority and few bishops, stake presidents, or their counselors were monogamists (Leonard J. Arrington and Davis Bitton, The Mormon Experience [New York: Alfred A. Knopf, 1979], 204).
Section 3, 22 Stat. 30, 31 (1882).
Utah 122, 7 P. 369 (Utah), aff’d, 116 U.S. 55 (1885), vacated, 118 U.S. 355 (1886).
In May 1885 instructions came from the underground headquarters of the Church to defend every case “with all the zeal and energy possible” (see Larson, Americanization, 133–34).
7 P. at 374, 381.
Ibid. at 381.
A companion case to Cannon reaffirmed that evidence of sexual conduct was irrelevant (United States vs. Musser, 4 Utah 151, 7 P. 389 [1885]). Musser was a stronger case for a finding of no cohabitation since the defendant had established each of his plural wives in a separate house. In sustaining Musser’s conviction, the Utah court noted that one of Congress’s purposes in passing the Edmunds Act was to reach prominent Church leaders who had escaped prosecution under the Morrill Act’s three year statute of limitations (4 Utah at 157–58, 7 P. at 391).
Campaign against Polygamy

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41116 U.S. 74 (1885), vacated, 118 U.S. 355 (1886).
42Ibid. at 71–72. Justices Field and Miller dissented, arguing that the prohibition of cohabitation should be interpreted to mean “unlawful habitual sexual intercourse.” The dissent termed the majority’s holding “a strained construction of a highly penal statute” (ibid. at 79–80).
43See, for example, Griswold vs. Connecticut, 381 U.S. 479, 485–86 (1965).
44Indeed, the Mormon prosecutions of the 1880s saw more than a few incidents of bedroom raids and window peeping without judicial approval of such conduct (see 17 Cong. Rec. 3137–38 [1886] citing instances of outrageous prosecutorial conduct).

Frequently, a polygamous wife would be “a homeless immigrant, a spinster, or the wife of a deceased relative with a family to support” (Arrington, Great Basin Kingdom, 239). Whatever polygamy’s faults were, in destroying it the federal government also destroyed what had been an effective social welfare system (Arrington and Bilton, Mormon Experience, 200–201).

In Musser, Justice Powers tried to offer some general guidelines. He suggested that a polygamist with children by two or more wives could escape prosecution if he treated his polygamous families as if he had been divorced from those wives (7 P. at 399).

See, for example, Connally vs. General Constr. Co., 269 U.S. 385, 391 (1926). See, generally, Tribe, American Constitutional Law, 718 (an indefinite statute violates due process by not giving a person fair notice that his conduct is proscribed by law and by allowing law enforcement officials too much discretion, which they could exercise in an arbitrary and discriminatory manner).

United States vs. Peay, 5 Utah 263, 14 P. 342, 344 (1887).
47116 Mass. 35 (1874).

Snow vs. United States, 118 U.S. 346 (1886). Realizing that it had already decided one other cohabitation case, Cannon vs. United States, 116 U.S. 55 (1885), the Court vacated its decision in that case as having been issued without jurisdiction (118 U.S. 355 [1886]). Other courts continued to cite Cannon as an authoritative interpretation of the Edmunds Act, even though it no longer was binding precedent (see, for example, United States vs. Clark, 6 Utah 120, 125, 21 P. 463 [1889]; United States vs. Kuntze, 2 Idaho 446, 21 P. 407 [1889]; United States vs. Peay, 5 Utah 263, 14 P. 342, 345 [1887]).
48Utah 487, 11 P. 542 (1886).
49In re Snow, 120 U.S. 274, 285 (1887).
50Ibid., 281.

See United States vs. Eldredge, 5 Utah 161, 189, 13 P. 673, 680, 14 P. 42, 43 (1887), appeals dismissed, 145 U.S. 636 (1892).
51Section 4, 22 Stat. 30, 31 (1882).

For example, in Clawson vs. United States, 113 U.S. 143 (1885), the defendant was convicted of polygamy for marrying a second wife and sentenced to three and one-half years imprisonment and a five hundred dollar fine. He was also convicted of cohabiting with that wife and sentenced to six months and a three hundred dollar fine.
52131 U.S. 176 (1889).

The Utah Supreme Court suggested that if the act were to have that effect it should have been entitled “An act to enable a man to forsake his lawful wife, and fly to the arms of his concubine” (United States vs. Snow, 4 Utah 313, 9 P. 697, 701, appeal dismissed, 118 U.S. 346 [1886]).
53Utah 280, 9 P. 301, 504, appeal dismissed, 118 U.S. 346 (1886).
54See, for example, United States vs. Snow, 4 Utah 295, 9 P. 686, 689, appeal dismissed, 118 U.S. 346 (1886); United States vs. Clark, 5 Utah 226, 14 P. 288, 291 (1887).
555 Utah 436, 17 P. 75 (1888).

17 P. at 76. Earlier, however, the court had suggested that both legal and illegal marriages raised presumptions of cohabitation (United States vs. Smith, 5 Utah 232, 14 P. 291 [1887]).
56Utah 295, 9 P. 686, 687, appeal dismissed, 118 U.S. 346 (1886).
57United States vs. Musser, 4 Utah 153, 7 P. 389, 394 (1885).
58United States vs. Harris, 5 Utah 436, 17 P. 75, 78 (1888).
61United States vs. Tenney, 2 Ariz. 29, P. 295, 296–97, aff’d, 2 Ariz. 127, 11 P. 472 (1886).
62United States vs. Langford, 2 Idaho 561, 21 P. 409, 409 (1889).
63United States vs. Kuntze, 2 Idaho 480, 21 P. 407 (1889). By itself, however, the court warned, such evidence could not warrant a conviction (21 P. at 408).
649 P. at 691.
65United States vs. Simpson, 4 Utah 227, 229, 7 P. 257 (1885).
66Ibid. at 228.
67United States vs. Schow, 6 Utah 381, 24 P. 30 (1890).
685 Utah 226, 14 P. 291, 292 (1887).
69United States vs. Musser, 4 Utah 153, 7 P. 389, 396 (1885).
70United States vs. Cannon, 4 Utah 122, 7 P. 369, 379, aff’d, 116 U.S. 55 (1885), vacated, 118 U.S. 355 (1886).
8United States vs. Musser, 4 Utah 153, 7 P. 389, 395–96 (1885).
9United States vs. Peay, 5 Utah 263, 267, 14 P. 342, 344 (1887). See also United States vs. Smith, 4 Utah 232, 273, 14 P. 291, 293 (1887).
8United States vs. Musser, 4 Utah 153, 7 P. 389, 395–96 (1885). The reasoning of the court is almost directly antithetical to modern rules of evidence. Under modern rules, a defendant must be convicted on evidence that he committed the offense charged, rather than on evidence of some general propensity to violate the law or on the basis of his prior conduct (see, for example, Federal Rules of Evidence 404, 609).
7103 U.S. 304 (1880), rev’d, 2 Utah 19.
8Apparently Caroline had consented to enter the polygamous marriage only if Miles married her first. Church authorities, however, directed Miles to marry the eldest woman first. When Caroline discovered, after the wedding, that Miles had already married one of the women, she angrily went to a United States marshal with her story (Linford, “Mormons and the Law,” 342).
9103 U.S. at 315.
10Ibid. at 314.
11Ibid. at 311.
12Ibid. at 315–16.
13See United States vs. Bassett, 5 Utah 131, 13 P. 237, 240 (1887), rev’d, 137 U.S. 496 (1890).
14For other early efforts by the Utah Supreme Court to deal with the problem of polygamous wives’ testimony, see United States vs. Kershaw, 5 Utah 618, 19 P. 194 (1888); United States vs. Cutter, 5 Utah 608, 19 P. 145 (1888) (reaffirming Bassett); and United States vs. White, 4 Utah 499, 11 P. 570 (1886).
15137 U.S. 496 (1890).
16Ibid. at 506.
17Sections 1, 9, 24 Stat. 635, 636 (1887).
18Perhaps the most egregious case of judicial conduct in this regard was that of Belle Harris (in re Harris, 4 Utah 4, 5 P. 129 [1884]). Mrs. Harris and her infant son ultimately spent three and one-half months in prison for her refusal to testify before a grand jury investigating polygamy charges against her husband.
19In 1886 Mormon women directed a petition to Congress calling the legislature’s attention to the plight of Mormon wives and itemizing their victimization by Utah’s judiciary (see 17 Cong. Rec. 3137–38 [1886]).
21Larson, Americanization, 108.
23See, for example, Potter vs. Murray City, 585 F. Supp. 1126, 1134–35, 1141–42 (D. Utah 1984) (holding that the free-exercise clause did not prevent a city from dismissing a police officer who practiced polygamy), aff’d as modified, 760 F.2d 1065 (10th Cir.), cert. denied, 106 S. Ct. 145 (1985); 760 F.2d at 1069–70.
24130 U.S. 296 (1940).
25Ibid. at 303–4.
26Ibid. at 311.
28406 U.S. 205 (1972).
29Ibid. at 219–20.
30Ibid. at 214. Compare Tribe, American Constitutional Law, 837 (suggesting that the Court’s differentiation of belief and action should more properly be seen as an effort to articulate a “secular purpose requirement,” a requirement that government regulation of religious activity be directed to some secular purpose).
31Davis, “Plural Marriage,” 301.
3261 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
33394 P.2d at 818.
35Compare Stephen Pepper, “Taking the Free Exercise Clause Seriously,” BYU Law Review (1986): 299, 325–26 (suggesting that the difference between Yoder and Lee may be the greater likelihood of fraudulent claims by those seeking to escape taxes than by those seeking to escape compulsory education).
36See 455 U.S. at 262, 263 and n. 3 (Stevens, J., concurring).
40106 S. Ct. 2147 (1986).
41Originally Mr. Roy objected only to obtaining a social security number for his daughter. The state’s use of social security numbers became an issue when it was discovered that Mr. Roy’s daughter had in fact been issued a social security number (106 S. Ct. at 2150–51).
42Ibid. at 2152.
44Ibid. at 2155.
In a second case decided in the Court's 1985 Term—Goldman vs. Weinberger, 106 S. Ct. 1310 (1986)—the Court held that a serviceman who was also an Orthodox Jew and an ordained rabbi could constitutionally be prohibited from wearing a yarmulke while in duty and in uniform. The case may best be explained by its context and the Court’s traditional deference to the military and its unique needs (see 106 S. Ct. at 1313 ["Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"]).

10Hobbie, slip op. at 5.
12Hobbie, slip op. at 7.
Imprint: Fragment from a Childhood

Elegy for Lee Henderson

Nearly three the time the thresher came,
I followed its deep ruts through the gateyard,
Watched giant gears churn
To the pull of seven horse-teams:

From my fence post, I pretend
To be the teamster on his platform;
Round and round I pace the teams
In toasting sun. Father pitches bundles.

Through cold days in October
I play in the thresher tracks,
Then they are gone with winter
And I forget them.

One day, not Sunday, we go to church.
Father isn’t there; I sit in front with Mama.
I look for him at home, crowded
Among neighbors and people I don’t know.

A morning next spring, I walk
Into the gateyard streaked with thaw,
And there are the ruts, solid as ever.

I set my foot into a track, step
Carefully to keep the pattern
Until it disappears
Under leftover crusts of snow.

Each day with the thaw
I watch the ruts come back
As if they never went away.

—Dixie Partridge
for my father

Dixie Partridge is a widely published poet living in Richland, Washington. Some of her poems have won William Stafford Awards in recent years, and her first book of poetry, *Deer in the Haystacks*, was published in 1984.
Mormonism, Philosophical Liberalism, and the Constitution

R. Collin Mangrum

Why should a Mormon celebrate the bicentennial of a secular constitution? Wouldn’t any such reverence contradict the injunction against idolatry? Doesn’t the first commandment’s demand that we give our complete fidelity to God rule out our allegiance to any other nomos? What about our constitutional history as a persecuted religious minority? The Constitution provided no solace when vigilantes expelled the Saints from Missouri and Nauvoo in the 1830s and 1840s. Similarly, constitutional pleas went unheeded when the nineteenth-century Mormons in the Great Basin were disfranchised, denied naturalization, refused statehood, prevented from serving on the bench or on juries, and refused governmental appointments to high political offices despite their majoritarian status. Polygamy, a practice Mormons in the nineteenth century associated with exaltation but others found abhorrent, received no constitutional protection. The Supreme Court held that the First Amendment protected beliefs, not practices. More recently, the Constitution has been interpreted as protecting the practice of abortion despite belief by many of its immorality. Why then Mormon hoopla over what could be characterized as political degeneracy?

Mormons have traditionally expressed allegiance to the Constitution, even while they have condemned abuses suffered in consequence of its misinterpretation. In part, this allegiance derives from the providential history view that the Lord prepared this land for the restoration of the gospel and inspired the Founding Fathers so that the gospel might roll forth. Yet surely this view would not justify constitutional flag waving in the face of manifest injustice. Ultimately any justification for the celebration rests upon the compatibility of Mormon theology with the liberal foundations of constitutional government.

Liberalism is a word charged with emotional meaning. For many Mormons, the word serves as a pejorative epithet symbolizing ungodliness. This mischaracterization, however, confuses the relative roles served by “world-maintaining,” as compared with “world-creating,” normative universes. The Constitution deserves the fidelity

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of Mormons because as a world-maintaining nomos it protects the world-creating nomos of the gospel of Jesus Christ.

World-creating normative universes, such as Christian communities, cohere around shared commitments, ritual, common meaning, and close interpersonal relationships. Their psychological motif is unity. Unswerving adherence to tradition, orthodox readings of sacral texts, or the inspiration of priestly directives provides the centripetal force that keeps such communities from fragmenting into disparate groups. Diversity, on the other hand, serves as the motivating theme for a world-maintaining nomos, such as the civil community. The centrifugal force generated by legitimizing diversity always threatens the very existence of such communities. Karl Barth, comparing unfavorably the civil to the Christian community, observes, “The civil community as such is spiritually blind and ignorant. It has neither faith nor love nor hope. It has no creed and no gospel. Prayer is not part of its life, and its members are not brothers and sisters.” Coherence and stability are preserved by either coercion or rational principles delineating minimal obligations. Classical liberalism, historically and philosophically, seeks to ensure that the world-maintaining nomos of the state prefers rational principles over coercion. Briefly stated, each individual is entitled to pursue whatever his or her individual nomos requires, subject to the equal right of others to do the same. An understanding of the historical and philosophical foundations of this liberal thesis and its relation to Mormon theology may provide insight into a justification of the Mormon celebration of the bicentennial of the Constitution.

LIBERALISM AND THE CONSTITUTION

Liberalism’s claim that each individual possesses basic human rights that even the public interest of society cannot morally override is a battle cry from the eighteenth-century Enlightenment. The Enlightenment was no friend to organized religion; nonetheless important antecedents in the history of religion bear on the question at hand.

The Reformation contributed significantly to embryonic liberal theory. The medieval church by the sixteenth century had seemingly implanted strict orthodoxy in religious belief and conduct. Common liturgy, ritual, language, and canon law had removed any hint of choice in religious affairs. The world-creating nomos of the church had thrown its tent over politics, as expressed in the theory of ecclesiastical and secular swords. Obedience to the prince who had been given the imprimatur of ecclesiastical investiture received clerical affirmation with few exceptions. The priesthood legitimized even those political acts that seemingly conflicted with religious norms. Believers had no more right to dissent from political than from religious directives. While
John of Salisbury in the twelfth century wrote of a right of tyrannicide whenever a prince commands contrary to the religious obligations of his subjects, and Thomas Aquinas in the thirteenth century suggested, following Aristotle, that the obedience required by positive law was conditional upon its correspondence with natural law, the overwhelming tenor of the Medieval church favored patience, long-suffering, and obedience to political authority.

The priesthood shouldered the burden of reforming the prince. As long as the Augustinian belief that political society constituted “divinely ordained order imposed on fallen men as a remedy for their sins” refused to give way for the more Aristotelian view (noted by Aquinas) of the “polis as a purely human creation, designed to fulfill mundane ends,” liberal belief systems were unlikely to take hold. The Reformation, however, shattered the unity of the world-creating nomos of the Medieval church, bringing both skepticism of priestly directives in spiritual affairs, and an end to unquestioned deference to the prince in political affairs. With the disintegration of the Medieval nomos, the search was launched for a world-maintaining nomos that would allow disparate views to coexist.

Reformation leaders increasingly recognized political responsibility as a Christian calling. Calvinists everywhere, taking Calvin’s reformist Geneva as their model, sought to reform politics as well as religion. Covenant theology justified the church’s organization along politically independent congregational lines; a democracy of the visible saints thereby replaced priestly authoritarianism. Seventeenth-century England and New England witnessed Calvinists seeking to replicate the reformed ecclesiastical institution in politics. In England, Calvinistic Puritans resisted the Elizabethan Settlement, which had imposed the Book of Common Prayer, Anglican episcopacy, and excessive ritualism on the established Church of England. They also followed radical Whig politics that cost Charles I his head in 1646 and the Catholic James II a throne in 1688 when Protestantism was constitutionalized with the Glorious Revolution. John Locke transferred Calvin’s covenant theology to social contract theory in politics: individuals are entitled to consensual government and the rule of law as God-given rights.

On the American side of the Atlantic, Puritanism also heavily influenced religious and political development. Calvin’s politically independent congregationalism was the norm in New England from the very beginning. The Mayflower Compact, the Massachusetts Bay Charter, and distance from king and Parliament all furthered the cause of consensual government. The Puritan colonies in New England, however, were anything but liberal. Calvinistic belief in the depravity of man, predestination, and prevenient grace called for strict conformity to puritanical standards that were incorporated into the “blue laws” of every
Calvinist-influenced colony. A new world-creating nomos of the visible saints had simply replaced the degenerate medieval alternative. Governors such as John Winthrop and ministers such as John Cotton justified on biblical grounds the right and obligation of the community to banish seditious radicals such as Roger Williams who pled the cause of liberty of conscience. Freedom of religion rightfully existed for these Puritans who had left England to avoid the persecution of Archbishop Laud; others who refused to accept true religion's sway over church and state, however, could not be tolerated. Christian civil magistrates, in their capacity as members of the General Court, were to promote the cause of civic harmony as well as avoid the wrath of God, and were empowered to punish or remove any and all dissenters.

The suffering of dissenters prepared the way for the religious liberty that would a century later provide the foundation for the religious clauses of the Constitution. Roger Williams established Rhode Island in 1636 as a haven for Baptists, Quakers, and other malcontents. There Williams stressed religious diversity while preserving the garden of true religion unspoiled by compromises to the state. Williams's religious radicalism, rather than Cotton's strict Calvinism, became the Enlightenment norm a century and a half later for a number of reasons. First, the multiplicity of established and disestablished religions in America (Congregationalism in New England, Catholicism in Maryland, Quakerism in Pennsylvania, Anglicanism in the southern colonies, and Presbyterianism in the middle colonies) made problematic any national establishment of religion; second, the Great Awakening of the mid-eighteenth century had emphasized spiritual fervor over orthodox beliefs; third, Arminian influence over such important ministers as Jonathan Mayhew in New England emphasized human potentiality over pessimistic Calvinism; fourth, Deistic teachings of Enlightenment thinkers labeled sectarian beliefs as mere opinions that detracted from the social usefulness of religion; fifth, oppressive parliamentary acts, such as the Stamp Act of 1765, highlighted the oppressive potential of nonconsensual government; and finally, the natural rights rhetoric of the religious John Locke—and later the godless Thomas Paine—became fashionable as a defense for revolutionary causes.

Thus, when Jefferson penned the Declaration of Independence he brought into national prominence the embryonic natural rights tradition (a world-maintaining nomos) that all men are created equal and endowed by their creator with certain inalienable rights, including the rights to life, liberty, and the pursuit of happiness. This Calvinistic-premised and Lockean-inspired pronouncement repudiated the notion of an all-encompassing nomos. It followed English radical Whig history of the seventeenth century, when religious zealots inspired by Calvin had denounced government by royal prerogative, but went even beyond
Locke’s defense of the Glorious Revolution and the notion of parliamentary supremacy. The individual’s normative entitlement was seen as being protected by natural rights, common law, or constitutional rights. No political organization, not even a religiously inspired democratic state, could justifiably violate the natural rights man brings with him as he leaves the state of nature and enters society: individual rights preexist, both temporally and logically, the state. Indeed, the state receives its legitimacy and purpose in the rational accommodation of the rights of its inhabitants. Each individual, in effect, creates his own normative world subject only to the minimal constraints necessary to maintain society. Whenever the state presumes more extensive authority, civil disobedience and revolution, if necessary, become morally justifiable. This liberal paradigm, opposing normative absolutism on the part of the state, became the thesis of the Declaration of Independence and the underlying rationale of the American Constitution.13

While the Protestant Reformation, radical Whig history, and Lockeian natural rights reasoning may be properly characterized as the historical antecedents of the liberal constitutional perspective, eighteenth-century Enlightenment ideas furthered the rationalistic notion that the state’s coercive authority ought to be exercised only upon the basis of rational principles. Kant, writing during the same age that produced the Declaration of Independence and the United States Constitution, explained that a priori moral principles are capable of providing rational constraints for man in his interrelationships with other autonomous beings.14 The beginning idea for Kant is that men are free and equal rational beings. This natural equality in moral capacity enables each to pursue his or her own particular sense of the good, subject only to the limiting principle of the right: “Freedom (independence from the constraint of another’s will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.”15 What is often overlooked in Kantian analysis is that individuals, after seeing that they do no moral wrong to others, are free to select their own final ends or their own life plans. Developing one’s own conception of the good (creating one’s own nomos) is the object of freedom; allowing others to pursue their own particular sense of good is required by the moral constraint of the right. This deontological approach to ethics exhibits a strong commitment to equal respect and the autonomy of the individual over and above any utilitarian calculus of the public interest.

The extent to which the framers adopted as their explanatory paradigm of the Constitution a liberal notion of government limited by rational principles is a controversial historical and theoretical issue.
Madison’s *Federalist* number ten discusses the world-maintaining role of the state as the arbiter of ever-changing factions. Federalism, separation of powers, checks and balances all reflect the theory of limited government. Perhaps most importantly, the Bill of Rights, especially the First Amendment, preserves individual rights of speech, conscience, religion, and association even above the clamor of factions. These foundational limitations evidence a clear choice of a world-maintaining over a world-creating nomos. At a minimum, the founders recognized that diversity would persist regardless of our efforts. Thus government’s role in providing centripetal constraints against centrifugal forces must be affirmed in government’s coercive structure.

The working out of the world-maintaining normative rule of the state has since become the interpretivist responsibility of not only the Supreme Court but all freedom-loving people. Whether rational principles can reasonably circumscribe the state’s normative limits is a matter of much dispute. John Stuart Mill, writing during the mid-nineteenth century, and with the Mormon polygamy issue clearly in mind, announced the “harm-to-others” limiting principle:

That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.16

This principle, which has since, for good or ill, had a pervasive influence on American constitutional legal thought, is supportive of the liberal-inspired ethical premise that equal respect ought to be afforded each person in his or her pursuit of particular life plans: individual freedom ought to be limited only by a coequal right of others to be free. Although Mill may have advanced this liberal principle for utilitarian and teleological reasons (social progress), liberals find intrinsic value in the underlying autonomy emanating from the principle. On the liberal view, a world-maintaining nomos not only furthers the public interest but is morally required as a matter of our very humanity.

Several utilitarian justifications for state intervention, however, have since challenged the simplicity or coherence of the Millian harm principle. Lord Devlin, responding to the 1957 Wolfenden Report recommending that self-regarding acts such as homosexual practices be decriminalized in England, claimed that the sovereign has a right to enforce common morality as a matter of self-preservation to prevent social disintegration.17 This “disintegration thesis” challenges the very notion of self-regarding acts. In a reply to Devlin, H. L. A. Hart suggested further paternalistic qualification of the Millian principle, arguing that the state may intervene paternalistically to protect the individual against
himself, in terms of the norms the individual already has or would likely upon detached reflection come to recognize. Thus the state may clearly protect the young and the mentally infirm against their temporary or inherent irrationality. In other cases where overwhelming evidence exists that rational beings commonly act contrary to their own self-interest (for example, by not wearing seat belts or motorcycle helmets), the state may justifiably enact paternalistic legislation. Of course these qualifications, if accepted, make the enforcement of the Millian principle problematic. Who bears the burden of proving that a nonconformist normative perspective threatens the very existence of the society? How do we know that the individual, upon calm reflection, really would choose to act rationally? Under our constitutional government, the courts, having history and philosophy in mind, adjudicate the boundaries of the state’s world-maintaining nomos. Each person, however, retains some interpretivist responsibility. Each exercising his or her democratic preferences should take great care that his or her expressed preferences do not infringe the basic rights of others. Each must also monitor the state’s intrusions on personal choice.

If the state’s infringement of rights becomes persistent, then those whose creative nomos suffers as a result are faced with various prudential alternatives. The Founding Fathers, taking Locke, English constitutional history, and Enlightenment reasoning as their guide, justified revolution as a legitimate moral reaction to any state’s systematic deprivation of inalienable rights. Where the state accommodates most of the rights of its citizens, on the other hand, isolated infringements of specific rights may authorize and require more restrained responses. The contemporary liberal writer Ronald Dworkin argues that civil disobedience may be morally as well as legally justified where particular laws do not afford the citizens the equal concern and respect called for by the political morality of the regime. John Rawls, another contemporary liberal advocate, similarly characterizes civil disobedience as morally permissible when it aims to move the society to an increased appreciation of individual rights. He defines civil disobedience as

a public, nonviolent conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one’s considered opinion the principles of social cooperation among free and equal men are not being respected.

Rawls also identifies conscientious refusal as morally acceptable in those instances where the law requires an act that offends one’s conscience. Simply refusing to comply is different from civil disobedience in that it need not be addressed to the public for the purpose of causing change.
This brief sketch of the intellectual foundation of constitutional liberalism viewed as a world-maintaining nomos suggests the following principles:

(1) Individuals have natural rights arising out of their shared humanity.

(2) Although the reach and range of rights are somewhat problematic, the state must at least respect freedom of conscience, speech, religion, and association. Although other rights, including property and juridical rights, are frequently mentioned, they are more controversial. The European emphasis on the right to equal property is supportive of welfare liberalism favoring the regulatory state. This form of liberalism is what most modern readers identify as “liberalism.” The laissez-faire alternative of what has become fashionable to characterize as libertarian thought stresses property rights over welfare rights. Thus libertarians object to taxation for welfare purposes on the grounds that property rights are fundamental, not conventional.

(3) The principle of individual freedom can only be properly constrained by the equal freedom of others. Stated differently, public interest (utilitarian) arguments cannot morally override individual rights.

(4) Once the individual has taken care not to infringe the rights of others, he or she ought to be free to pursue a personal sense of the good. People ought to be free to create or adopt a normative system stronger than liberalism so long as they respect the minimalist constraints required by a nomos of individual rights.

(5) Whenever the state presumes to hold basic human rights in abeyance, moral obligations to obey its laws diminish, raising the moral possibility of civil disobedience, conscientious refusal, and perhaps revolution.

Each of these postulates, taken individually, is somewhat controversial, but as a package they fairly capture the essence of philosophical liberalism, which, it is argued herein, provides the intellectual foundation for American constitutionalism. What needs to be emphasized is that liberalism (American constitutionalism) offers principled restrictions on the coercive authority of the state but says nothing about the ends that individuals within the state ought to be preoccupied with after they have taken care not to violate the rights of others. It is a world-maintaining, not a world-creating nomos.

Critics of liberalism often misunderstand or mischaracterize the liberal posture of neutrality towards ends. A common mistake is to link liberalism with the radical skepticism of Hume and the debate over moral relativism. The priority given by liberalism to certain values (human rights) belies this conclusion. Although the charge seems more apropos when liberals discuss the domain of the good, liberals could nonetheless honestly plead not guilty. There is substantial difference between knowing what theory of the good corresponds to truth, and being willing to coerce others to follow it. A liberal convinced that he or she has found truth may attempt to persuade others where to dig in search of pay dirt; however, the principle of equal respect forbids any coercive measures
that would demand others work the diggings for a share of the gold, or, for that matter, any obligation that others should accept the intrinsic value of gold.

Another point of confusion requires clarification. Although oriented around the autonomy of the individual, a liberal society need not be purely atomistic. If members of society freely choose a collectivistic social order as an expression of their theory of the good, there is nothing in liberalism that would compel fragmentation and dissolution.\(^{22}\) The Puritan's city on the hill is possible if freely chosen. Rawls, for example, acknowledges that communitarian values would possibly flourish in a liberal society:

There is no reason why a well-ordered society should encourage primarily individualistic values if this means ways of life that lead individuals to pursue their own way and to have no concern for the interest of others (although respecting their rights and liberties). Normally one would expect most people to belong to one or more associations and to have at least some collective ends in this sense. The basic liberties are not intended to keep persons in isolation from one another, or to persuade them to live private lives, even though some no doubt will, but to secure the right of free movement between associations and smaller communities.\(^{23}\)

Liberal theory thus demands only maintenance of the conditions of free choice for those individuals participating within the group and restrictions on the ability of the group to violate the equal rights of nonparticipants. While the collectivistic impulse seems to run counter to the individualism pervading liberal thought, it is only because collectivism is so often closely associated with authoritarian tendencies. As long as the communitarian view limits its nomos to those voluntarily choosing its strictures, no necessary conflict with the liberal state need occur. Liberalism would allow freely chosen strong normative universes to coexist in the pluralistic state so long as each respected the priority of the right (the "weak" liberal nomos) to the good (the "strong" religious nomos). Priority used in this sense does not relate to importance but to the lexical ordering of moral duties. We are first obligated to respect the rights of others; once we have taken care to do that, we can freely choose a distinctive life plan, or religious community.

**THE RELATIONSHIP OF MORMON THEOLOGY**

**TO LIBERAL CONSTITUTIONALISM**

With a working model of liberalism in hand and some familiarity with supportive religious history in mind, a comparison of Mormon theology, liberalism, and constitutionalism is possible. First, the doctrine of individual rights finds theological support in the Mormon concept of
free agency, the belief in eternal progression, and the affirmation of human perfectibility. The problem of free will occupies center stage in the play of Mormon theology. Against the tenets that propelled the Calvinists of the seventeenth century—predestination, original sin, salvation by grace, and denial of free will—looms Mormon belief in free agency. This doctrine, of course, was not original with Mormonism. The Dutch theologian Jacobus Arminius (1560–1609) had opposed the Calvinist doctrine of predestination at the turn of the seventeenth century. His teachings, later adopted by John Wesley, influenced American theologians such as Jonathan Mayhew and found their way into the Methodist movement. The transformation in this country of Puritan Calvinism into Evangelical Protestantism created the intellectual climate out of which Mormon perfectionism emerged. Whereas Protestant political radicalism, burdened with the Calvinistic views of original sin, had to back into the notion of moral responsibility, Mormonism as a non-Protestant, restored church could announce the true gospel unfettered by the intellectual baggage of the Reformation.

The Mormon “Articles of Faith” succinctly state a radical theological perspective grounded on belief in free will and denial of original sin. The second article denies the doctrine of original sin: “We believe that men will be punished for their own sins, and not for Adam’s transgression.” The third article, while accepting the necessity of the atonement, adds that salvation (exaltation) is not strictly a free gift of God but is conditional upon obedience to gospel principles: “We believe that through the Atonement of Christ, all mankind may be saved, by obedience to the laws and ordinances of the Gospel.” With moral responsibility affirmed, the conditions of freedom become critical. That is, if man is basically perverse and his salvation or damnation determined irrespective of any personal conduct, then a coercive state would pose no theological barrier and may even be required in a Hobbesian sense to make society possible.

Calvinists, historically troubled over this dilemma, eventually justified consensual government under the hands of visible saints. These “elect” individuals were to act as responsible lesser magistrates as a matter of religious calling on the reasoning that by multiplying the sources of responsibility individual depravity could better be held in check. Where, on the other hand, man’s salvation is partially dependent on obedience to God’s laws, natural rights, especially religious liberty, become not only preferable but critical. Man must be allowed to act in accordance with the dictates of God. If the state asserts too strong a normative claim, jeopardizing obedience to God, then civil disobedience or conscientious refusal become necessary. The eleventh article of faith proclaims Mormon justification for both free exercise and disestablishment: “We claim the privilege of worshipping
Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may.” Finally, a distinctively non-Calvinistic faith in the nobility of man is expressed in the thirteenth article’s bold assertion: “We believe in being honest, true, chaste, benevolent, virtuous, and in doing good to all men.”

If we are to capture the essence of Mormon theological radicalism, however, we must go beyond the Articles of Faith. For Mormons it has become idiomatic that “As man is God once was; as God is man may become.” This couplet expresses the Mormon notion of eternal progression, or the perfectibility of man. The narrative begins with an account of premortal existence and the coeternity of God and man. God did not create man ex nihilo, out of nothing. Man existed forever as an intelligence possessing identity and free will or agency. It was Satan’s willful effort to destroy the agency of man that merited his expulsion from God’s presence and the termination of his eternal progression. Satan, in effect, proposed a dictatorial normative universe in which human choice was totally eliminated. Mormon theological narrative, therefore, teaches against coercion and in favor of freedom. Man chose to retain his agency and accept full responsibility for his actions, upon condition that his elder brother, Christ, offer himself as an atonement for man’s sins. Through faith and willful obedience, we become, with Christ’s nurturing aid, increasingly like God. Freedom, therefore, is the foundational right originating temporally and logically independent of the state’s recognition.

Moreover, Mormonism proclaims that “governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them” (D&C 134:1). Of course, consensual government provides the norm. The Prophet Joseph Smith expressed his confidence in the principle of self-governance when he stated that man, if taught correct principles, would govern himself.27

With the religious necessity of moral freedom established and the principal of consensual government affirmed, the rights of conscience, expression, and association, even where contrary to majoritarian preferences, become paramount. The early Saints advanced the cause of freedom of conscience against coerced religious orthodoxy. The Mormon declaration of political beliefs clearly identifies “the free exercise of conscience” as one of the preeminent “inherent and inalienable rights” (D&C 134:2, 5). The same section of the Doctrine and Covenants argues it would be unjust to “mingle religious influence with the civil government, whereby one religious society is fostered and another proscribed in its spiritual privileges” (D&C 134:9).28 This is a sharp break from Calvin’s Geneva experiences that the New England Puritans tried to replicate. Indeed the repeated references by various
Church leaders, including every prophet since Joseph Smith, to the inspiration reflected in the United States Constitution largely focuses on the Constitution’s rights orientation, especially the right of religious freedom. It was with impassioned appeal, in the face of religious persecution, that Joseph Smith announced, “I am the greatest advocate of the Constitution of the United States there is on the earth.”

Mormon commitment to religious freedom made American constitutional history in the Reynolds case, the first free exercise pronouncement made by the United States Supreme Court. The Court in dicta in Reynolds agreed with the liberal Mormon position that with the First Amendment “Congress was deprived of all legislative power over mere opinion.” The Court, however, had a different perspective as to where the lines of protected religious practices ought to be drawn. Whereas the liberal view held by Mormons placed the religious practice of polygamy within the protected sphere, the Court adopted a narrow belief-conduct dichotomy that has troubled legal scholars ever since, concluding that the practice of polygamy could be made illegal.

The Court’s reasoning process followed a shallow syllogistic analysis: all religious conduct (unlike beliefs) cannot be immune from civil control (human sacrifice has to be impermissible by any standard); the practice of polygamy represents conduct rather than belief; therefore, the state can legitimately proscribe the practice of (even if not the belief in) polygamy. The Court’s “strange” reading of the First Amendment largely eviscerates the essence of “free exercise.” Nearly a century later the Court recognized that they had painted themselves into a corner with the belief-conduct dichotomy: “[T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct . . . beyond the power of the State to control. . . . [I]n this context belief and action cannot be neatly confined in logic-tight compartments.”

The question then is not whether some religious conduct is beyond public regulation; it is how do we draw meaningful lines when a religion erects “Keep Out, No Trespassing” signs around their religious activities? The Court in Yoder recognized religious-community rights: the Amish were permitted to refuse to send their children to high school so they could remain distinctive.

Mormon theology offers a liberal answer to the where-do-you-draw-the-line question: the free exercise of religion ought to be limited only where religious activities infringe upon the equal rights of others. Majoritarian preferences by themselves cannot outweigh rights associated with religious freedom. Again, the declaration of political belief published by the Saints in 1835 adopts this liberal principle:
We believe that religion is instituted of God; and that men are amenable to him, and to him only, for the exercise of it, unless their religious opinions prompt them to infringe upon the rights and liberties of others; but we do not believe that human law has the right to interfere in prescribing rules of worship to bind the consciences of men, nor dictate forms for public or private devotion; that the civil magistrate should restrain crime, but never control conscience, should punish guilt, but never suppress the freedom of the soul. (D&C 134:4)

According to this perspective, religiously inspired practices are exempt from the state’s regulatory power unless they violate the “rights and liberties of others”; whereupon they potentially become legitimate crimes (fall within the world-maintaining nomos of the state), which religion cannot protect. Unless we are to fall into circular reasoning, the concepts of “rights and liberties” must be given some workable meaning. Although the boundaries of individual moral rights are complex and controversial, as we have seen, vague notions of public interest cannot be relied upon in a utilitarian sense to extinguish individual rights.

It is difficult to find, for example, the “rights and liberties” of others threatened by the Mormon practice of polygamy. Assuming fully voluntary involvement on the part of all parties, marriage and personal family relationships seem to fit into the zone of privacy necessary for the dignity of the individual. (Mill even used the Mormon polygamy example to argue the cause of liberty in his essay On Liberty.) While the majority of the community may find polygamous marriage relationships repugnant, repugnancy unassociated with entitlement claims cannot invalidate the rights of believers to practice polygamy, if liberalism has any validity. Mormons have expressed no sympathy for either a “social disintegration” or a “paternalism” argument favoring restrictions on such religious practices.

Mormon theology teaches that once the Saints have taken care not to infringe the rights of others, they are free to pursue their own normative perspective: believers, though in the world, are entitled to act as if they were not of the world so long as they avoid infringing the rights of others. Mormon attempts to realize Zion during the nineteenth century represent their pursuit of the good within the constraint of the right. Thus nineteenth-century efforts to implement the law of consecration in economic affairs, the law of polygamy in domestic relations, theo-democracy in political activities representing the group, and exclusive reliance on ecclesiastical courts in resolving conflicts within the group, all constituted protected religious conduct because each activity emanated from religious belief and jeopardized no one’s rights. In brief, Mormon commitment to religious freedom defends a liberal civil government despite the theocratic nature of the Church. The legitimacy of Mormonism’s world-creating nomos within Zion is affirmed by
Mormon disinterest in coercively imposing that nomos outside the community.

Whenever the state illegitimately prescribes religious belief or protected conduct, Mormon theology speaks of moral, religious, and, in some instances, constitutional rights of its members to either civilly disobey or conscientiously refuse compliance with the laws of man. The declaration, “We believe that no government can exist in peace, except such laws are framed and held inviolate as will secure to each individual the free exercise of conscience, the right and control of property, and the protection of life” (D&C 134:2), is not merely a descriptive statement of political realities. The parallels in wording and implication with the Declaration of Independence are not purely coincidental. Mormon teachings give priority to religious (world-creating) over civil (world-maintaining) obligations, and expect the moral (inspired) state to accommodate that preference.

The polygamy era provides an example of the priority given by Mormons to God’s laws over civil obligation. Many polygamists went to prison rather than abandon their commitment to the practice of polygamy. At the same time, the Saints continued to claim that anti-polygamy statutes were immoral and unconstitutional. Elder Nicholson, for example, speaking “for himself” in 1881, succinctly stated the orthodox Mormon view: “I lay it down as a proposition that any law that infringes upon my religious rights cannot be a constitutional law, if all the courts in the world decide that it is of that character.”\(^{35}\) Moses Thatcher went even further in suggesting that Mormon civil disobedience or conscientious refusal would ultimately inure to the benefit of all freedom-seeking people. In justifying the Mormons’ continuing to practice polygamy despite its illegality, Elder Thatcher noted the logical weakness of the Court’s belief-conduct dichotomy:

I am not so blind that I cannot see that anything which you or I may do may be made contrary to law, and may be called unconstitutional. . . . [I]f Congress has a right to enact a law in relation to marriage, it might just as consistently make a law affecting baptism, or prescribing the manner, if allowed at all, the sacrament of the Lord’s supper should be administered. “What will you do about it?” says one. I do not pretend to give advice . . . but . . . we will continue to love our country, defend its interests, and be free men in these mountains. If we were ought else, if we could be bound hand and foot as abject slaves, we should be unworthy to be citizens of so great a Republic. . . . [T]he very acts of persecution and unfairness that will be directed against us, will bring out and develop the elements of excellency that will make them lovers and defenders of right and liberty, until, in due time of the Lord, there will grow up in these mountains a race of people that will not only defend the Constitution, but defend the flag of the nation, and at the same time be willing to extend the principles of freedom to all who desire to receive them. . . . We expect to defend our rights as American Citizens, and to do less than this would be unworthy of free people.\(^{36}\)
Although the Church eventually capitulated, the principle remains the same: religious obligations that respect the rights of others and yet are made illegal are the proper subject of civil disobedience or conscientious refusal.

Thus, Mormon theological views of the rights of man follow the tradition of radical Protestantism, track quite closely the tenets of philosophical liberalism, and are supportive of American constitutionalism. Man is entitled to basic human rights that cannot be overridden by the public interest of society. Preeminent among these are the rights pertaining to religious freedom. While not absolute, religious liberty ought to be circumscribed only by the equal rights of others. After taking care not to infringe the equal rights of others, religious communities (individuals) ought to be afforded the right to pursue their sense of the good. And whenever the state interferes with its citizens’ religious freedoms, civil disobedience or conscientious refusal may be morally justified.

**TENSION IN MAINTAINING NORMATIVE BOUNDARIES**

The boundaries between the world-maintaining nomos of the state and the world-creating nomos of the gospel are not always apparent. Tension persists despite analytical distinctiveness. Christ offered direction in his personal response to the problem. When the Pharisees “took counsel how they might entangle him in his talk” (Matt. 22:15), they hit upon the tax conundrum: “Is it lawful to give tribute unto Caesar, or not?” (Matt. 22:17). Of course if the religious nomos is exhaustive, no outside allegiances are appropriate. The Pharisees suggested this seditious, but preferred, religious position to Christ in their prefatory remarks: “We know that thou art true, and teachest the way of God in truth, neither carest thou for any man: for thou regardest not the person of men” (Matt. 22:16). They evidently expected Christ to deny the responsibility of Jews to pay taxes, which would have made him an open enemy of Rome. Instead, Christ affirmed a limited jurisdiction for the state while remaining ultimately committed to God: “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s” (Matt. 22:21).

Understanding those things that are properly under Caesar’s jurisdiction is our religious as well as political responsibility. Prayer, for example, is part of our religious nomos. The scriptures teach us to “pray always, that [we] may be accounted worthy to escape all these things that shall come to pass, and to stand before the Son of man” (Luke 21:36). Does this admonition extend to public school prayers? What about our belief that it would be inappropriate to “mingle religious influence with civil government, whereby one religious society is fostered and another
proscribed in its spiritual privileges” (D&C 134:9)? It could be argued that while we insist on the right to pray with our children in the morning before school, as well as the right of our children to pray personally while in school, the state’s world-maintaining normative responsibilities preclude a state-required prayer in school.37 Even though we believe a prayer would benefit the nonbeliever, our religious nomos may properly be circumscribed by world-maintaining rights of others. At a minimum, we must address the strong moral claims of others that by imposing a prayer in a public educational setting we are undermining their creative nomos.

Conversely, religious participation in politics cannot always be proscribed under a world-maintaining normative argument. Thus, religious beliefs regarding feeding the poor and clothing the naked provide a basis for democratic preferences in legislation unless a libertarian property right argument is persuasive. So, too, religious views may properly inform us regarding the sanctity of life when the propriety of abortion is at issue. Against arguments of privacy rights, the immorality of killing the unborn can be argued with religious fervor. Notice that the antiabortion argument cannot be predicated on public interest grounds if we acknowledge a right of privacy, but rather on the rights of the unborn, which we understand more clearly because of our religious perspective.

Of course, whenever religious views are introduced into the political forum there exists the possibility of violating the Third Commandment’s prohibition against taking the Lord’s name in vain.38 That is, religious leaders or members may inappropriately speak for God. This is the real threat to the purity of religion that Roger Williams feared when he urged the separation of church and state. If religion becomes too politicized, it will less likely serve as a garden in the wilderness. The possibility of misspeaking for God, however, cannot vitiate our right and responsibility to engage in political dialogue over the proper boundaries of our rights.

This raises a final problem for those who would maintain the integrity of the two-normative-universe theory. Each system contains the seeds of erosion if not absorption of the competing system. Liberalism legitimizes, if it does not enshrine, diversity. Once religion acknowledges a proper role for a world-maintaining nomos, the possibility of it taking on world-creating attributes looms large. If choice is the appropriate paradigm in politics, why not politicize religion? If the Constitution is embraced as properly capturing the proper nomos for political affairs, why should undemocratic tendencies prevail within the gospel? Why should women, for example, be denied the priesthood? Why not elect bishops, or any other priesthood leader, by popular vote? Why not choose, some suggest by majoritarian preferences, those
commandments members feel are appropriate for a religious creed? Why not, in effect, do away with the world-creating nomos of the church in favor of the philosophies of men? On the other extreme, others urge the projection of the world-creating nomos of the church upon the state in a puritanical tradition. Why not make all political decisions issues of faith? Mormonism, instead, coherently embraces the unity, oneness, and togetherness of a revealed Zion while cherishing a constitutional heritage that preserves the right of others to choose Babylon.

While Mormon social radicalism has largely dissipated and Mormon communities have come to embrace traditional values and institutions, in this the bicentennial year of the Constitution we need to rekindle our awareness of human rights. As religious people with political clout, we ought to repress the tendency to rely on our increasingly majoritarian status to trample the rights of others in the name of public interest. This is not to offer glib answers—nor necessarily politically liberal answers—to difficult moral issues, but to reawaken the need for principled dialogue and analysis of political decisions that threaten to affect the rights of others. Even as we claim entitlement to the right to choose Zion, we must cultivate our sensitivities to the rights of others; even as we attempt to persuade others of the beauty, warmth, and peace found within Zion, we need to remember that coercion is inimical to the Zion we would build.

NOTES

1See Edwin B. Firmage and R. Collin Mangrum, Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-day Saints, 1830–1900, forthcoming.

For an account of liberalism that confuses the roles of these two normative universes, see Hyrum Andrus, Descriptions of Zion: Liberalism, Conservatism, and Mormonism (Salt Lake City: Haukes Publications, 1972).
9For an account of the separatist controversy between Roger Williams and John Cotton as expressed in their published responses to one another and resulting in Williams’s forced exile from Massachusetts, see William Lee Miller, The First Liberty (New York: Alfred A. Knopf, 1986), 161–64.

Seventeenth-century English Whig history generally stood for parliamentary power against royal prerogative. The Whigs during this century were radicals, as evidenced by their part in the English Civil War and the Glorious Revolution. Most Whigs were placated by the Act of Settlement, which firmly established parliamentary supremacy in England. In subsequent centuries, the majority of Whigs became more conservative. Radical Whigs, nonetheless, continued to express their concerns over political despotism (even parliamentary absolutism) in favor of English liberties. These radical Whigs inspired the American revolutionaries who believed that their English (natural) rights were being trampled by parliamentary fiat. For a discussion of seventeenth-century English Whig rationalism and its contribution to American revolutionary thought, see Bailyn, Ideological Origins, 34–54.

Hartz argues that the “master assumption of American political thought” is “the reality of” the Lockean notion of “atomistic social freedom” in this century. He suggests that it is “instinctive to the American mind, as in a sense the concept of the polis was instinctive to Platonic Athens or the concept of the church to the mind of the middle ages” (Hartz, Liberal Tradition, 62).

Whereas Locke grounds his social contract theory on the laws of nature and inalienable rights bestowed on man by God, Kant appeals to idealist metaphysics. According to Kant’s deontological ethics, the principle of the right comes not from nature but from pure reason. Thus Locke’s natural law liberalism is often characterized as a precursor of Kant’s deontological liberalism. For a historical account of the liberal tradition that is largely unfavorable to the possibility or desirability of rationally ordering society along liberal principles, see Michael J. Sandel, Liberalism and the Principles of Justice (Cambridge: Cambridge University Press, 1982), 117–19.

Immanuel Kant, “The Metaphysical Elements of Justice,” pt. 1 of Metaphysics of Morals [1797], trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), 43. Kant is concerned with moral, not political, freedom, but his deontological ethics have become the foundation of liberal political arguments.


For a discussion of Mormon theological ideas on free will, see Sterling W. McMurrin, The Theological Foundations of the Mormon Religion (Salt Lake City: University of Utah Press, 1965), 77–82.

For an account of how Charles Grandison Finney’s revivalism of the Second Great Awakening contributed to transformation of Calvinistic pessimism into “the Arminianized Calvinism called evangelicalism” with an emphasis on human perfectibility, see Klaus Hansen, Mormonism and the American Experience (Chicago: University of Chicago Press, 1981), 54–68.

More than half of Hobbes’s Leviathan (1651) is devoted to justifying sovereign control over religious matters.


Thomas O’Dea argues that the Mormon position on church and state was Lockean in orientation even as it was theocratic internally. O’Dea claims that even though Mormon leaders were “permeated by the democratic notion of government characteristic of their time and place,” they “never worked out consistently the political implication of their religious philosophy” (The Mormons [Chicago: University of Chicago Press, 1957], 168–71). I believe O’Dea’s transferred confusion comes from the seeming paradox of reconciling a theocratic community within, with a liberal society without. If the reach and limits of these different normative systems is understood, apparent antinomies, although difficult, become resolvable. For a related discussion of the problem of congruity between utopian thinking and liberal traditions, with Joseph Smith viewed as an example of a leader faced with this dilemma, see Crane Brinton, “Utopia and Democracy,” Daedalus 94 (Spring 1965), 348–66.


History of the Church 6:57.


33 Ibid. 22:115.
34 See Wallace vs. Jaffree, 472 U.S. 381 (1985) as the most recent of a long line of school prayer (moment of silence) cases.
Fires

Yesterday for the first time mist hazed the hills but no, Rob said, it was California burning. I wouldn’t have known. From a thousand miles, hoarse forest-eaters were breathing blackmail on three States so hills were sour, shrunken not veiled as if cowering for once. Eyes ached at them. Thumps crumpled—the military base spoke up for the baffled sun.

Back home last year, singed air overloaded dropped from Russia. Earth spoiled; new fears grew. Today though a river following our road like a dolphin dived past poles shouldering telegraph wire and small towns flag us down, streets broad as open hands. The parks have pioneer relics, a grindstone, hoisted bell. On a grass square, ranked streets at Payson wear the flag’s colors, paths slip a world in edgewise. Trees spurt sun. Between For Sale signs old as prayers and the highway murmuring Go, what survives seems so entire of itself it could last forever. Called to, the mind starts drawling.

Haze lasts too. From the edge of things keeps coming in. With the first crackle of autumn rubbing green edges red, bushes along the road are ghosts.

—John Davies
Constitutional Interpretation and the American Tradition of Individual Rights

Thomas B. McAffee

One of the most distinctive features of American constitutionalism is the idea that the Constitution is law.\(^1\) It is fairly clear that the founders viewed the Constitution as a rather ordinary species of written law, albeit the supreme law of the land.\(^2\) In fact, when the Supreme Court set forth its claim to arbitrate the meaning of the Constitution in the famous case of *Marbury vs. Madison*, the Court’s central premises were that the Constitution is the law and that the courts are competent to interpret the Constitution in a case presenting a constitutional issue.\(^3\) While the great Chief Justice John Marshall relied on some specific texts to support the jurisdiction of the Court, the heart of the matter was that the point of a written constitution was to bind the government, and judges were therefore bound to give effect to the Constitution over conflicting legislative or executive acts.

Early proponents of the Supreme Court’s interpretive role believed that rules of legal construction and the doctrine of precedent defined and limited the Court’s power. Alexander Hamilton wrote, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”\(^4\) Hamilton’s reference to the “rules” or canons of construction used as guides in the interpretation of written law reflected a widely held faith in a sharp distinction between the lawmaking performed by legislators and the judicial role of “interpretation.”\(^5\) Hamilton thus expressed confidence that in fulfilling their duty to “declare the sense of the law” courts must always exercise “Judgment” and never “Will,” lest they substitute “their pleasure to that of the legislative body.”\(^6\) As long as judges stayed within their prescribed role of exercising judgment, rather than mere will, their role would be justified because they were following the superior will of the sovereign people to the inferior will of their governmental agents.\(^7\) One of the central issues in modern constitutional

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\(^{1}\) Thomas B. McAffee is an associate professor of law at Southern Illinois University. Parts of this article are adapted from his article “Constitutional Interpretation: The Uses and Limitations of Original Intent,” *University of Dayton Law Review* 12 (Winter 1986): 275–95, a condensed version of which appeared in the January 1987 issue of the *Illinois Bar Journal*. 

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thought concerns whether (and, if so, to what extent) Hamilton’s interpretive model can aid us in defining and justifying the Court’s role today. Stated most generally, the question has come down to whether there is any set of objective principles of interpretation that is capable of limiting the role of courts in our constitutional scheme to any significant extent.

The greatest number of modern theorists agree that Hamilton’s model limiting the judicial role to interpretation, as sharply distinguished from lawmaker, does not accurately reflect the realities of making and interpreting law. Lawmakers not only state and define rules for courts to apply; they also, by design as well as by inadvertence, provide courts with the task of filling out the implications of a general design or of confronting questions that the lawmaker did not address (or did not address clearly). For some theorists, however, the skepticism runs deeper yet. They view the distinction between lawmakers and interpretation as completely illusory and see judges as political actors who are virtually always imposing their will.8

Even among those who find neither extreme view acceptable, there is considerable debate. On the one hand are those who contend for a significant role for evidence of “original intent”—or, perhaps more broadly, “original context”—in any proper approach to the interpretive process.9 This call for a return to a jurisprudence of original intent has, in turn, been met with a chorus of criticism from those who see it as a threat to the progress of the living constitution.10 Unfortunately, the debate has frequently been approached from an either/or perspective, as though the intent of the framers must either control all constitutional questions or be used as mere window dressing.11 While some advocates of original intent may overstate the extent to which historical evidence can aid constitutional construction, a commitment to the principle that evidence extrinsic to the text can clarify meaning in ways that bind decision makers does not entail seeing historical evidence as a grand key that will remove all difficulties in constitutional interpretation or entirely resolve the riddle of determining the proper role for courts in a democratic society. It will hardly do to launch a broad-scale attack on the use of original context on the grounds that claims as to its potential have been inflated.

Some seeming opponents of original intent have been somewhat obscure as to whether they are opposed to seeing original intent as a panacea or are staking out the much stronger claim that, based on theoretical or practical objections, original intent can never raise binding obligations.12 Some have argued that the search for original intent will not provide answers to the difficult issues of contemporary application of constitutional provisions, but have not clarified whether text read in context might resolve ambiguities or establish outside boundaries or, at least, some core applications of a particular provision.13 Those most
emphatic about the total poverty of original context seem in general to be committed either to the view that the search for binding intent is practically impossible or even theoretically incoherent, so that only the text (if anything) binds us, or to the view that the framers lacked authority to bind us.

In this essay, I will offer grounds for doubting the correctness of the first of these views. As to the second, it would require a separate article to fully defend the traditional assumptions that the Constitution binds us until it is amended and that we are bound by the ascertainable meaning of the document where it is clear from text and context. These were the premises of Marbury vs. Madison, and I consider them to be woven into the fabric of our law. At a more practical level, the view that we are not bound by the clear meaning of the text would not be sustained by the American public for a month if the Supreme Court were to announce it as the basis for a “constitutional” judgment. And advocates of such positions would have a difficult time persuading presidents and legislators that they should consider themselves bound by Supreme Court decisions if the Court viewed itself as empowered to amend clear text by ascribing a meaning of its own. If courts are bound by clear text, as most have supposed, it is difficult to see why they should not be equally bound by context fully capable of clarifying the meaning of text.

In the second part of the essay, I will suggest some of the limits of original context in determining the meaning of constitutional language, and try to identify the senses in which the metaphor of a living constitution accurately describes our constitutional order, as well as the ways in which it might be misleading or unhelpful. The key to the analysis, as we shall see, is the distinction between the search for meaning and the role courts inevitably play in applying constitutional language when the search for meaning has ended. When the court’s role shifts from discovering meaning to effectuating generally worded norms, the debate over the role of context becomes, in important ways, a discussion of institutional and constitutional philosophy.

Finally, I will take up a central debate in modern constitutional theory—the debate over whether, or to what extent, the protection of individual rights is properly limited to some number of rights enumerated in the text of the Constitution. Applying insights developed in earlier parts of the essay, I will examine the questions raised by the American tradition of discovering some rights as implicit in the concept of limited government embodied in the social contract we call the Constitution, and will explore the possibilities and problems for both sides of the debate over the judicial articulation of unenumerated individual rights. That debate, however, as we shall see, need not implicate the straightforward duty of courts to apply the Constitution when its meaning is ascertainable from text and context.
THE POSSIBILITY OF FINDING ORIGINAL INTENT

Perhaps the most common argument against the use of original intent is that it is simply impossible to find.\textsuperscript{16} Opponents present a host of theoretical difficulties, including problems involved in deciding whose intentions should count as well as in determining and counting the intentions of relevant collective bodies (congresses or state ratifying bodies).\textsuperscript{17} The objections are formidable as well as complex, and even Monaghan, perhaps the most articulate proponent of original intent, has acknowledged that the possibility of a stable theory of constitutional interpretation may depend on the ability of scholars with like views to confront the problems raised.\textsuperscript{18} Moreover, some objections are embraced not only by those opposed to the very notion that the meaning of the Constitution could or should ever be fixed, but also by some who defend the notion of a binding constitutional text.\textsuperscript{19}

No detailed response to these various objections will be attempted in this essay. Instead, I will offer some general skepticism about the more extreme forms of interpretive skepticism, followed by two illustrative examples designed to provide confirmation of these general observations.

It seems apparent that the most powerful and cogent objections to discovering the original intent underlying constitutional provisions apply equally well to the attempt to discover the ordinary legislative intent underlying any statute. The common problems include the difficulty of ascribing intent to any individual, complexities associated with counting intentions and determining the intent of large numbers of people, and problems presented by the distorting effects of group decision making. The constitutional context does present the unique problem of determining whose intentions count, whether ratifiers or framers, and how the intentions of many ratifiers could reliably be determined.\textsuperscript{20} Virtually all of the skeptical literature, however, treats the remaining problems associated with determining intent as being sufficient to justify a skeptical position. While there exists a parallel controversy in the world of statutory interpretation as to the role that extrinsic evidence of intent should play,\textsuperscript{21} it is noteworthy that the trend among modern courts has been in the direction of increased use of relevant context, including legislative history, to shed light on the meaning of statutes.\textsuperscript{22} Theoretical objections to our ability to discover the collective intent of large groups of individuals have given way to the practical experience of most judges that original context can shed light on statutory meaning.

Some skeptics, such as Justice William J. Brennan, are capable on the one hand of debunking the notion of discovering original intent
while on the other praising "the vision of the individual embodied in the Constitution" and "the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure."23 Perhaps this sort of appeal to a basic "vision" or "design" is simply a device for linking modern value choices to the most general formulation of the weight of our political tradition.24 Perhaps—but it has a peculiar ring to it, suggesting that the speaker is claiming fidelity to what is most basic about our constitutional system itself, to the framers' own commitment to freedom and dignity.

But why should we think we can discern what is central to the constitutional design if we cannot possibly divine what was intended by any particular provision? The most thoughtful commentators on statutory interpretation have observed that one of the ironies of the attack on the concept of legislative intent is the frequent substitution of talk about legislative "purposes," "policies," and "objectives" without any attempt to show "that arguments leading to the rejection of talk about legislative intent have no force against these new expressions."25 Such observations seem equally applicable to appeals to the purpose of the Constitution.

As with many forms of skepticism, when proponents of skeptical views about original intent complete their arguments, they frequently turn (in other writings or sections) to familiar discourse about the purposes and intentions of those responsible for the Constitution or one of its important amendments—as though it were possible to discover them and to find them relevant at least in interpreting constitutional provisions.26 This points up that no matter what real difficulties may be presented by constitutional text and history for the discovery of a usable original intent, those difficulties frequently enough seem surmountable with respect to at least some issues.

Now for the illustrations.

In the Slaughter-House Cases,27 the Supreme Court adopted a reading of the "privileges or immunities" clause of section 1 of the post—Civil War Fourteenth Amendment that ran against the grain of the purposes of the clause as revealed by the legislative history of Congress's deliberations. There are overwhelming grounds for rejecting the reading adopted by Justice Miller, writing for the majority, even though the arguments for the opposing view are neither overwhelming nor even conclusive on textual grounds alone.

In the Slaughter-House Cases, New Orleans butchers challenged the constitutionality of a state legislative grant of a monopoly on butchering. They contended that the granting of a monopoly constituted an abridgment of their right to pursue a professional calling, which fell within the scope of the "privileges or immunities" protected by the clause. The butchers argued that the Fourteenth Amendment "privileges
or immunities” clause was essentially derived from the “privileges and immunities” clause of article 4, section 2, and was designed to give federal protection to the basic civil rights protected in the earlier provision.

Justice Miller, however, found that the article 4 clause was an antidiscrimination provision to protect nonresidents in the exercise of rights otherwise within the exclusive regulatory domain of the states.\(^\text{28}\) He concluded that an “article 4” reading of the Fourteenth Amendment clause would entail a revolutionary enlargement of the powers of Congress and the federal courts over state-law rights that were traditionally within the exclusive domain of the states—enlargement beyond what he was willing to acknowledge animated the framers of the amendment.\(^\text{29}\) As an alternative, Justice Miller relied on the explicit distinction in section 1 between state and national citizenship to buttress his conclusion that the “privileges or immunities of citizens of the United States” more fully secured rights already protected by the Constitution, explicitly or implicitly, which were bestowed upon individuals by virtue of their national citizenship.\(^\text{30}\) He listed as rights dependent on national citizenship the right to travel to the seat of government, to assemble and petition, the writ of habeas corpus, and rights guaranteed by virtue of treaties and other national enactments.\(^\text{31}\)

There is only one significant problem with Justice Miller’s reading of the privileges or immunities clause—it is clearly wrong. There is no question that article 4 was the antecedent provision that inspired the privileges or immunities clause of the Fourteenth Amendment. Congress enacted the Civil Rights Act of 1866 and sent forth the Fourteenth Amendment in response to the enactment of the so-called Black Codes by the slave states of the South.\(^\text{32}\) The Black Codes were designed to effectively undercut the Thirteenth Amendment prohibition on slavery by denying basic civil rights to the former slaves, rights such as the right to contract, to own property, to testify in court, and to sue and be sued.\(^\text{33}\) In justifying the view that Congress should act to enforce these civil rights belonging to individuals because of their United States citizenship, congressional leaders invoked the privileges and immunities clause of article 4.\(^\text{34}\)

In defense of both the civil rights act and the proposed amendment, proponents relied on the case of *Corfield vs. Coryell*.\(^\text{35}\) In that early decision construing the scope of the article 4 privileges and immunities clause, Justice Washington found that the rights protected by that provision included all the basic civil rights that individuals enjoy in true republics.\(^\text{36}\) These rights included the same rights enumerated in the civil rights act, as was observed by its House and Senate sponsors.\(^\text{37}\) While the *Corfield* case itself concerned the limits of state power to discriminate against nonresidents as to the relevant privileges and immunities,
proponents of post–Civil War provisions for civil rights used the broad language in *Corfield* to support the argument that all American citizens held such federally-protected civil rights even against their own state governments.

There is room for significant doubt as to whether congressional leaders correctly interpreted *Corfield* and article 4.\(^{38}\) There is no doubt, however, that Congressman John Bingham, the principal draftsman of section 1 of the Fourteenth Amendment, interpreted article 4 broadly and drafted the Fourteenth Amendment clause to ensure the rights listed in *Corfield*.\(^{39}\) By contrast, Justice Miller’s interpretation of the provision not only finds no support in the legislative history of section 1, but is actually undercut by that history.

It is tempting to believe that the text alone is sufficient to prove that *Slaughter-House* misconstrued the provision. The phrase “privileges or immunities” in section 1 certainly suggests a possible connection to the antecedent article 4 provision. But the language as easily points in Justice Miller’s direction. The language in section 1 refers to the “privileges or immunities of citizens of the United States” as opposed to article 4’s “privileges and immunities of Citizens in the several States.” Considering that the first sentence of section 1 specifically distinguishes state and national citizenship, it is quite plausible to construe the clause as recognizing a second, distinguishable set of rights.

It has been further argued that Justice Miller’s construction renders the clause superfluous or trivial.\(^{40}\) It is thought to be superfluous because, by Miller’s own formulation, it is referring to rights that already receive protection under the Constitution, either implicitly or explicitly. But there are other constitutional provisions that are merely “declaratory” of what many thought was already understood. For example, the Tenth Amendment states the principle, already implicit in the Constitution, that powers not delegated to the national government are reserved to the states or to the people. Moreover, providing greater security for several of the rights listed by Justice Miller, by giving them textual recognition and empowering Congress to enforce them, looks trivial to us only because we know from extrinsic evidence that the Fourteenth Amendment was really enacted to protect the freeman against hostile state action.\(^{41}\)

One might question how significant these conclusions are, particularly since there remains controversy over the intended breadth of the privileges or immunities clause.\(^{42}\) The practical implication of modern skepticism about the search for intended meaning is that many provisions in the Constitution will be reduced to a debate about “constitutional policy.” Should we construe the clause broadly so as to maximize the protection given to individuals against the state? Or are we more properly concerned about the potential impact on our federal system, or on the
exercise of judicial power, of the broader reading of the clause? The most absolute skeptics about intent frequently seem to believe that they have the best answers to these sorts of questions, better than any the framers intended to embody in the text.\textsuperscript{43}

As for myself, I am much more certain that Justice Miller acted illegitimately in construing the clause contrary to the overwhelming evidence of its intended meaning than I ever could be that his concerns about the erosion of state power and the enlargement of judicial power were illegitimate or lacking in judicial statesmanship. However, for those interested in preserving individual rights, the battle against original understanding could in the long run work to undercut our commitment to abiding by the rights recognized in the text, properly read. The privileges or immunities example points up that such questions are not all of the same order of magnitude. Particularly where basic questions as to the essential thrust of a provision are presented by an ambiguous text, the possibilities for discovering a determinative intent are quite genuine. One additional example must suffice.

The historical evidence is overwhelming that article 1’s grant to Congress of the power “to declare war” means, when read in context, that Congress holds the exclusive power to change the status of the nation from peace to war to advance foreign policy objectives (as opposed to defending against sudden attack).\textsuperscript{44} When contemporaneous evidence extrinsic to the text is combined with the understanding reflected in the nation’s experiences, it is clear that the President may wage war only when it is thrust upon the nation by an enemy.\textsuperscript{45} Some commentators have raised legitimate issues as to the modern reach of the President’s emergency power in a world in which we are committed as a nation to the idea that an attack on Western Europe, for example, is an attack on the United States.\textsuperscript{46} But such questions, reflecting the vagueness of the framers’ concept of a “sudden attack” that warrants executive dispatch, cannot obscure completely the distinction between a policy decision to wage war and war that is thrust upon us. As Wormuth and Firmaج point out, the framers “did not give [the President] the right to choose between war and peace, or the right to make a judgment concerning the security of the United States”; instead, they “provided for the President to act in the defense of the country.”\textsuperscript{47} The commitment of half a million troops to Vietnam or the mining of harbors in Nicaragua can hardly be justified by any notion of emergency power unless we simply ignore the mandate of the Constitution itself. Once again, however, it is much easier to say what the text requires, in the light of original context and confirming history, than what modern conditions require of constitutional “statesmen.”\textsuperscript{48}
REFLECTIONS ON THE IDEA OF A LIVING CONSTITUTION

There is a conventional wisdom that the Constitution is sui generis and requires an entirely different interpretive method than a statute. This view is frequently expressed with the metaphor of a “living constitution” or by reference to Justice Marshall’s famous reminder “that it is a Constitution we are expounding.” It is not easy to separate the senses in which these ways of speaking tell us something accurate and important from the ways in which they can become dangerously misleading. For one thing, while the Constitution is obviously not a code, it unquestionably contains provisions that are as specific and unambiguous as those found in any statute. If the notion of a living constitution is to be applied to these provisions, then we truly have no written constitution, for we have turned it into a blank check. Moreover, as we have seen, some questions presented by ambiguous or vague texts can also be resolved with the aid of original context. To ignore what that context tells us is quite simply to amend the Constitution by construction, something that Justice Marshall would not have countenanced.

Occasionally, even thoughtful scholars have suggested that the Constitution must change in meaning to confront technological changes that the framers could not foresee, such as home invasions through electronic eavesdropping. While our changing world can create difficult choices for constitutional interpreters, many such examples (including new methods of invading privacy) can readily be seen as falling within the original meaning and intent of relevant provisions. No one has doubted that Congress’s power to regulate commerce includes—and was intended to include—not only commercial shipping but railroads and air transportation as well, though neither existed in 1787. Lon Fuller long ago pointed out the conceptual confusion involved in the assumption that we think in particulars rather than in general concepts—a view that he called “the pointer theory of meaning.” To insist that electronically stored data receives no protection under the Fourth Amendment because the framers did not know of it would make as little sense as contending that a 1920 statute dealing with “motor cars” could not be read as covering Volkswagens.

It does not require a special theory of constitutional interpretation to acknowledge that the meaning of constitutional provisions is not necessarily circumscribed by the immediate purposes of the framers. Experts on language and statutory interpretation have long recognized that meaning can outstrip intent, for “an author inevitably encompasses in what he says more than he has specifically in mind and often encompasses even more than he has generally in mind.” Furthermore, there may be constitutional provisions that are sufficiently vague and general as to require supplementation and whose meanings can hardly be
equated with the expectations held for them.\textsuperscript{56} This problem, too, is not unique to constitutional construction, as modern antitrust legislation provides a classic example.\textsuperscript{57} These clauses will require constitutional decision makers (and in particular courts) to develop the provision’s contours. This is not to say that such provisions are meaningless but only that the language alone—even when read in relevant context—will not resolve a large number of contemporary issues.\textsuperscript{58} The result is that we inevitably will have a living constitution to some extent. Yet even with vague, open-textured provisions, there remains the issue of the meaning to be ascribed to them. Simply because the constitutional language read in context is not dispositive, it does not follow that the Supreme Court is free to go directly to moral theory or societal consensus to supplement the provision’s meaning.\textsuperscript{59}

In the analogous field of statutory interpretation, it is usually thought that the court should create a rule that is at least not inconsistent with what extrinsic evidence shows were the purposes and intentions of the legislature. Lacking any such clear evidence, courts are expected to make their decisions cohere with what is already settled by the legal order.\textsuperscript{60} Even if these basic assumptions were transferred to the constitutional arena, courts would be required to make some basic value choices because the history is frequently quite unclear and the vague text invites consideration of whether contemporary problems are sufficiently like those confronting the framers to warrant inclusion within the scope of the provision.

The larger issue is whether courts ought to seek authoritative guidance from the reasonably knowable intentions and purposes of the framers in these circumstances. Many contend that changing conditions and moral conceptions make it inevitable that modern courts will basically go it alone in filling out the meaning of the Constitution’s open-textured provisions, with due regard for the outside limits suggested by a text, continuity, and the lessons of history.\textsuperscript{61} There is certainly reason to doubt whether modern decision makers ought to feel compelled by the “original understanding” of broadly worded provisions where it appears that the framers themselves were essentially involved in the same process we are—engaging in a contest of opinion over the appropriate implications of the principle being invoked.\textsuperscript{62}

Finally, even if we agree that many constitutional issues are left unresolved by text and history, it does not necessarily follow that this indeterminacy should lead to a continually expanding judicial role.\textsuperscript{63} As Neil Komesar has recently observed, these coexist with a constitutional system that assumes, on almost any current reading, that the lion’s share of society’s decision-making load will be carried by the political branches. No matter how vague and general the text, advocates of an activist judicial role must explain why, in a world of imperfect
decision-makers, a given set of questions are best resolved by the institution we know as courts. One prominent commentator, Terence Sandalow, has observed that although an independent judiciary may be better suited than other government actors to dispassionately apply governing principles despite competing pressures, it is more debatable whether the judiciary is especially suited to discern or generate society’s fundamental values.

The most important contemporary challenge to this traditional caution about the role of courts comes from individual rights theorists who contend that the Supreme Court needs a broader, rather than a narrower, vision of its role. For them the key to the open-textured provisions of the Constitution is to be sought in the natural rights heritage that served as a backdrop to the Constitution’s recognition of individual rights. It is to the question of the relevance of our natural rights heritage to the contemporary debate over individual rights that we now turn.

THE UNWRITTEN CONSTITUTION

The debate over the interpretation of the written constitution is complicated in the area of individual rights by the existence of a tradition that sees the text as suggestive, rather than exhaustive, of the rights protected by the Constitution. The idea of an “unwritten constitution” has its roots in the natural law tradition that influenced the founding period through the writings of John Locke and others. Resting on the social contract political theory, the premise was that men bring rights with them to civil society and that government’s role and justification is to protect those natural rights. From the viewpoint of this tradition, the written constitution embodies this underlying moral and political model but is not a substitute for it.

Early in the nation’s history, Justice Chase reached beyond the specific textual issues presented in Cedar vs. Bull to clarify his view that state power is not “without controul” even though “its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.” According to Chase, “The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.” Chase was not alone in this view. The leading judges of the nation prior to 1830, including Justices Marshall and Story, rested decisions in whole or in part on a natural law ground in protecting contract and property rights against retroactive or otherwise arbitrary legislative acts.

Even so, the tension between this strain of thought and the justification of judicial review in Marbury vs. Madison is apparent. Marbury’s rationale is that there is a judicial duty to fulfill the purpose
of a written constitution by giving effect to the “supreme law of the land.” Justice Marshall relied on the Constitution’s explicit grant to the Supreme Court of jurisdiction over cases “arising under this Constitution.” It is not obvious how the Constitution empowers the Court to strike down laws because they run afoul of proscriptions of natural law that are not expressed in the constitutional text. It is not surprising, then, that Justice Chase’s natural rights theory in *Calder* was strenuously opposed in a separate opinion by Justice Iredell.

A constitutional founder, Iredell contended that the purpose of the written constitution was “to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.” While any legislative act that violates those constitutional prohibitions would thus be void, courts may not pronounce as void legislation “within the general scope of [the legislature’s] constitutional power” merely because it is deemed “contrary to the principles of natural justice.” Iredell saw not only a conflict with the concept of a written constitution, but also a danger to republican government. Since “ideas of natural justice are regulated by no fixed standard” and are the subject of disagreement by reasonable men, Iredell could see no basis for courts to use their own views of the proper application of “abstract principles of natural justice” to nullify the acts of the people speaking through their elected representatives.

In the long run, the perceived tension between the natural rights tradition and the written constitution drove the natural rights doctrine underground, where it found a home in the due process clauses of state constitutions and in the federal Bill of Rights and the Fourteenth Amendment. Such provisions generally provided that no person could “be deprived of life, liberty, or property, without due process of law.” The agreed-upon core meaning of these clauses was that individuals must have notice and an opportunity for a hearing to contest the legal justification of the state for any of the enumerated deprivations. Courts reasoned further that this right to adjudication belonged in the courts and that laws that applied new standards retroactively or that effectively adjudicated particular cases, rather than establishing general rules to govern future conduct, equally denied individuals the opportunity to show that the deprivation of their interests was not justified by preexisting legal standards.

The doctrine that legislatures must proceed by “general” rules became the wedge that opened the door to broader arguments that validly enacted laws might partake of the “form” of law only, without being substantially valid “law” sufficient to justify a deprivation of liberty and property. Courts thus saw themselves as empowered to determine that legislatures had acted arbitrarily and had therefore denied due process of law. The transplanted natural rights tradition thrived, and due process
became the container into which the Supreme Court poured its own vision of implied limits on government. During the first third of this century, the Court poured into that container a laissez-faire vision rooted in nineteenth-century liberal political theory as it struck down social reform legislation that it perceived as being in conflict with the nation’s heritage of private rights.\textsuperscript{78}

With the paradigm shift that was called the New Deal, the Supreme Court repudiated a good deal of its interventionist, laissez-faire case law.\textsuperscript{79} But the concept of implied rights was never entirely rejected, and more recently the Court has harked back to the laissez-faire era in protecting rights of access to contraception and abortion while elaborating the newly-fashioned right of privacy—a fundamental right of gradually unfolding but still largely uncertain dimension.\textsuperscript{80}

As with Justice Chase’s pure natural law theory, of course, the due process–natural rights tradition has always had its critics. Scholars have contended that the implied rights reading of the due process clause is an unwarranted gloss that lacks adequate textual and historical roots.\textsuperscript{81} The research to date seems at least to bear out Corwin’s historical thesis that the doctrine owes more to the natural rights premise that there are implicit limits on government power than to any attempt to explicate the historical meaning of “due process of law.”\textsuperscript{82} While some judges and scholars would thus reject the doctrine entirely, others have been satisfied to caution judges to exercise restraint as they consider the practical implications of a nonmajoritarian institution imposing a natural rights agenda on a pluralistic society.\textsuperscript{83}

Since the 1950s, the natural rights debate has been rekindled by the rediscovery of a text that seems more naturally suited to accommodate such a reading of our constitutional system: the Ninth Amendment, which reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” A number of scholars have found in this textual reference to unenumerated rights a reflection of the social contract and natural rights framework out of which our constitutional system developed.\textsuperscript{84} It is possible that this is the text that undergirds Justice Chase’s thesis that some enforceable constitutional rights are implicit in the nature and purpose of government, whether or not they are spelled out in any text.\textsuperscript{85}

This Ninth Amendment argument found its way to the Supreme Court for the first time in 1965, when the Court decided \textit{Griswold vs. Connecticut}. In a concurring opinion, Justice Goldberg relied on the Ninth Amendment to undergird the Court’s decision establishing a constitutional right to privacy and striking down a Connecticut statute that prohibited the use of artificial birth control by married couples.\textsuperscript{86} Since the \textit{Griswold} decision, the Supreme Court has relied on the Ninth Amendment only sparingly, but an increasing number of lower federal
court decisions have cited the Ninth Amendment in support of broad holdings in favor of individual rights.87

As one might expect, however, there is no consensus that the Ninth Amendment is properly read as empowering courts to enforce unenumerated rights. The Ninth Amendment emerged from the debate at the state ratifying conventions as to the necessity and risks of including a bill of rights in the Constitution.88 While many ratifiers objected to the framers’ failure to include a bill of rights in the Constitution, fearing that a powerful central government would pose a threat to liberty, opponents of a bill of rights contended that the rights of the people were not at risk because the national government had been granted only limited, and enumerated, powers.89 The underlying premise of this argument was that under the Constitution’s scheme of limited government the sovereign people retained as rights all the powers not specifically delegated to the national government.90

Even while constructing the case for the necessity of a bill of rights, James Madison acknowledged the force of the argument that “the Constitution is a bill of powers, the great residuum being the rights of the people.” Madison went on, however, to observe that the national government “has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent.”91 A bill of rights was therefore needed.

More fundamentally, opponents of a bill of rights objected that the listing of specific rights might actually undercut the original design for protecting rights by raising the inference that the national government was empowered to invade those spheres of private rights not included. James Wilson set forth this argument in its plainest terms before the Pennsylvania ratifying convention:

A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.92

Madison, who had once opposed inclusion of a bill of rights, wrote to Jefferson in 1788 that he would support a bill of rights “provided it be so formed as not to imply powers not to be included in the enumeration.”93 The Ninth Amendment’s “rights retained by the people,” then, might be simply the “great residuum” of rights and powers that Madison alluded to even while defending the necessity of a bill of rights. On this reading, the Ninth Amendment is a rule of construction that prohibits the inference of new or enlarged governmental power from the enumeration of specific rights. This “residual rights” reading is the one adopted by the two dissenting opinions in *Griswold vs. Connecticut*.94
The legislative history of the Ninth Amendment lends support to this "residual rights" reading. Prior to the work of the first Congress, New York and Virginia addressed the "implied powers" concern in their proposed amendments to the new constitution, both of which stated that the clauses which limited Congress's powers should not be construed to imply that Congress may exercise any powers not given in the Constitution. Indeed, both also provided that the rights provisions should be construed either as "exceptions to the specified powers" or "as inserted merely for greater caution," thereby acknowledging the continuing significance of the framers' structural protection of the residuum of rights.\textsuperscript{95}

It is obvious that Madison drafted the resolution that became the Ninth Amendment from these state proposals. He included additional language, however, as shown by the italics in the text of his resolution reprinted below:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.\textsuperscript{96}

The basic question is whether the italicized language was intended only to emphasize the protection of "residual" (or "retained") rights of the people, or whether it was intended instead—or also—to refer decision makers to legally enforceable unenumerated rights that might limit the power of Congress acting generally within its enumerated powers.

Madison explained the resolution in these terms:

It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.\textsuperscript{97}

Given the entire context, a surprising number of commentators have taken this statement as a straightforward articulation of the "enforceable rights" construction of Madison's resolution.\textsuperscript{98} But the "enforceable rights" construction is anything but straightforward.

For one thing, the language of the statement easily lends itself to the more restrictive "residual rights" reading. Madison says that the disparagement of retained rights that stems from "enumerating particular exceptions to the grant of power" occurs when it is inferred that the rights are "assigned into the hands of the General Government." Madison's fear seems to be that "particular exceptions" to power will be read to infer enlarged powers that disparage the rights that otherwise would have been
“retained” by the device of enumerated governmental powers. Rather than being retained by the people, they will be “assigned into the hands of the General Government.” Additional considerations lend plausibility to this equally straightforward reading. Since Madison’s resolution clearly speaks to the feared enlargement of powers construction that had prompted the New York and Virginia proposals he drew upon, it would have been odd for him to introduce so casually a quite separate approach to providing greater security to the people’s rights.

It is true that the final text of the Ninth Amendment omits the language referring to a feared enlargement of powers construction and refers only to the concern that retained rights not be denied or disparaged. While the drafting history is unavailable, it seems plausible to think that language forbidding a construction that disparaged rights and implied enlarged powers was considered redundant and that the language of the amendment was therefore purified toward an emphasis on the goal of preserving residual rights. The alternative is that the drafters at some point decided to pursue exclusively the separate strategy of referring to unenumerated, enforceable rights as the most effective means of maximizing the protection of rights, in the place of seeking to avoid the inference of expanded governmental powers.109

The historical evidence suggests that Madison did not see the refined version as operationally different from his original proposal. During the ratification debate in Virginia, Edmund Randolph objected to the language employed, contending that the provision “should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.”110 But Madison, in a letter to President Washington, called Randolph’s argument “fanciful,” contending, “If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”111 Madison appears to have expressly adopted the “residual rights” construction of the amendment and to have rejected Randolph’s suggestion that the proposed language declared an alternative strategy.112

It may be another matter, of course, to say that the history forecloses reliance on the Ninth Amendment in support of an implied rights approach to the Constitution.113 Considering that Madison accepted the need for a bill of rights, despite the Constitution’s implicit recognition of residual rights, it is conceivable that he or others came to prefer the strategy of referring to additional, unenumerated limitations to one of merely avoiding a construction of enlarged powers. Moreover, there is no conclusive evidence that members of Congress, or the legislatures that ratified the Bill of Rights, understood this language as in effect precluding only implied grants of power to Congress.114 Whether its
adopters intended it or not, early in the nineteenth century state constitutions adopted essentially identical language, even though, given the absence of the device of enumerated powers, the only purpose of such language would be to refer to additional limitations.\textsuperscript{105}

At the least, however, the historical evidence belies the modern assertion that the Ninth Amendment is the key to construing the individual rights provisions of the Constitution.\textsuperscript{106} Rather, it is a symbol of the debate over the search for rights going beyond the text. Most constitutional law scholars agree, for example, that the Ninth Amendment, like the Bill of Rights generally, initially served only to limit the national government.\textsuperscript{107}

The Fourteenth Amendment, enacted after the Civil War, is the Constitution’s primary source of limitation on state power. But our most pressing individual rights controversies arise most frequently in challenges to state law. While one historical claim is that the Fourteenth Amendment was intended to incorporate all of the Bill of Rights (which would presumably include the Ninth Amendment), that claim remains controversial and has never been embraced by a majority of the Supreme Court.\textsuperscript{108} Modern invocation of the Ninth Amendment is best seen as a way of appealing to the natural rights tradition as a source for informing our judgment in giving effect to the generally worded provisions of the Fourteenth Amendment.

A growing number of contemporary theorists see the task of constitutional decision makers as that of drawing out the modern implications of the social contract and natural rights tradition that characterizes our constitutional origins and development. At least one set of such commentators perceive in these traditions a commitment to human rights and individual dignity. The key to giving effect to the Constitution’s generally worded provisions, in their view, is the explication of our moral commitment to the dignity and autonomy of individuals, and the interpretation of individual rights becomes essentially an attempt to explicate the principles of liberal moral and political philosophy.\textsuperscript{109} Indeed, in one prominent formulation, the Supreme Court is seen as a kind of moral prophet that speaks on behalf of the essentially religious commitment of Americans to the possibility of moral decision making and moral progress.\textsuperscript{110} Whatever the formulation, the role of courts in human rights cases is conceived as discerning moral truths rather than pursuing some legal norm rooted in text, history, tradition, or consensus.

Many would agree that the existence of the implied rights tradition, the interpretive freedom provided by the generality and vagueness of central texts, or simply the long-standing nature of some governing precedent, make it unthinkable that we will cease to find some individual rights to be implicit in the text or design of the Constitution. Many,
however, question whether this leads to the ideal of the courts as ultimate arbiters of human rights in general. It is important to realize that there are other ways of understanding our origins and traditions, other voices to be heard beyond the modern theorists who think they have discovered the origins of liberal theory and the tradition of natural rights.

In the first place, even though the natural rights tradition has roots in currents of thought during the founding period, it is by no means clear that the founding generation as a whole equated natural and constitutional rights. If social contract thinking leads naturally to a written constitution, it does not follow that the founding generation embraced the political philosophy of John Locke, let alone that Lockean political philosophy is especially congenial with modern versions of Contractarian moral and political theory. Indeed, a leading scholar on the “unwritten constitution” acknowledges that the notion of an enforceable fundamental law underlying the written norms was identified during the founding period with conservative political forces that were concerned with ensuring common law rights that they identified with British traditions and the art of legal reasoning. Modern moral theories of human rights have come a long distance from the thinking of the founding generation.

Moreover, the founding period was characterized by a preoccupation with public virtue as a prerequisite to republican forms of government. While these republican thinkers did not necessarily conceive of government as charged with inculcating the qualities of virtue, their political thought presumed the existence of public values (a “civil religion”) embodying the basic principles of the Christian life. Modern commentators have observed that the republican political theory of the founding period did not rest on liberal foundations, and legal historians increasingly see liberalism as rising to dominance in American thought only at a later period. While the Constitution has been seen as embodying more skeptical attitudes about human nature than the more optimistic versions of republicanism, the founding generation was in general more republican than liberal. If the republican ideal of community and its commitment to the search for the common good provide a historical link to the modern positive state’s rejection of some of the individualistic postulates of nineteenth-century liberal theory, it is equally in tension with modern liberalism’s preoccupation with individual autonomy.

Judged by their characteristic thinking, the delegates to the Great Convention seem an unlikely group to have founded a government based on overarching liberal principle with the Supreme Court as moral prophet. For one thing, despite the support for judicial power to interpret the Constitution, there was a good deal of skepticism about judicial power generally during the founding period. More broadly, the most
important roles at the convention, as well as in the new government, were played by men of affairs who relied upon experience and history and were skeptical of high theory in political matters. As M. E. Bradford points out elsewhere in this issue of BYU Studies, the framers as a group were more impressed with the traditions embodied in the British constitution than with any abstract political theory.

Modern theorists have contended that liberal political theory nevertheless does the best service to the framers’ general intentions because it most adequately explicates the rights they recognized in the light of the background principles they relied upon. To the extent that these contentions involve any sort of historical claim, Terrance Sandalow has provided an effective critique:

By wrenching the framers’ “larger purposes” from the particular judgments that revealed them, we incur a loss of perspective, a perspective that might better enable us to see that the particular judgments they made were not imperfect expressions of a larger purpose but a particular accommodation of competing purposes. In freeing ourselves from those judgments we are not serving larger ends determined by the framers but making room for the introduction of contemporary values.

The argument from the framers’ “general intentions” is probably more accurately viewed as a normative theory aimed at making sense of the framers’ choices as we attempt to build a just and coherent body of constitutional law. But even when viewed in this light, it remains passing strange that the “best” interpretation of the framers’ choices, and of our individual rights tradition, would call on courts to engage in a systematic explication of a complete moral theory of rights contrary to the role courts have played in our constitutional system from the earliest days of the republic. Even with the implied rights theory taken into account, American courts have never seen themselves as charged with the duty of explicating and enforcing a general theory of human dignity and autonomy.

As for our constitutional development, the judicial recognition of implied limitations on government grew up in tension with a growing judicial recognition of the power of the state to regulate—what courts called the “police power.” In traditional formulations, the police power enabled the state to legislate to promote the public health, safety, welfare, and morals. In general, courts historically presumed that, except for the violation of specific constitutional prohibitions, states were limited only by the duty to legislate in the public interest—a standard that of itself suggests rather limited constraints on government power, precluding only legislation that irrationally confers benefits or imposes costs on a group (or groups) of citizens. While various liberal premises can be (and on occasion have been) worked into the requirement of pursuing the general or public interest, there is little question
that the traditional understanding of the nature and scope of the police power cuts against the imposition of a general liberal theory. To use a single example, the modern liberal critique of morals legislation involving so-called victimless crimes conflicts with the competing police power tradition.

At a somewhat more philosophical level, an important strand of the American judicial tradition—embodied by Justices Holmes, Frankfurter, Harlan, and others—has given voice to the concerns about the prospects for objectivity in moral and judicial decision making first expressed by Justice Iredell in *Calder vs. Bull*. This tradition sees the Constitution, including its potentially open-ended provisions, as providing room for a wide variety of views about the proper ends of government. To the extent that constitutional text and context provide no clear answers, these judges have sought fundamental rights only as revealed in long-standing traditions and have advocated judicial self-restraint as the guiding virtue for judges.

Perhaps not surprisingly, in light of these competing elements of our heritage, although the modern Supreme Court has resurrected the implied rights tradition, its decisions appear based more nearly on its own perception of tradition, consensus, and policy than on any overarching moral theory of individual rights. While this may partially reflect the difficulties of institutional decision making, it also reflects a basic dichotomy in thinking about individual rights that has its roots in the founding period. As described by the great legal theorist Alexander Bickel, the “Contractarian” tradition sees individual rights as a set of preexisting moral standards by which political society is judged. This is the tradition of natural rights or God-given rights—rights that predate the written Constitution and are embodied in it. The other tradition, which Bickel calls the “Whig” model, sees rights as rooted in, and limited by, an unfolding human culture and the values of a particular society. As a political or constitutional theory, the Whig view does not completely eschew value choices in an evolving world, but it is inclined to be “flexible, pragmatic, slow-moving, highly political” as well as “relativistic.” Applied to judicial decision making, the Whig model evokes the image of the traditional common law role of courts as the discerner of gradually evolving societal values rather than the image of reformer or platonic guardian.

The significance of these two models can, of course, be overdrawn, for we are dealing with a spectrum of views rather than a mere dichotomy. Many modern thinkers, for example, embrace neither the optimism of some modern Contractarians nor the degree of “mature skepticism” exhibited by Bickel and the judicial tradition beginning with Holmes. Some of these theorists see a fairly broad scope for a constructive judicial role in an imperfectly democratic society, but
nevertheless contend for the need to distinguish moral and legal issues and for the importance of questions of relative institutional competence in assessing the nature and extent of the judicial role. In general terms, however, these theorists share the Whig assumption that individual rights arise from a society and its values and that the implied rights tradition does not of itself charge judges with the task of searching for the holy grail of moral and natural rights.

It may not be possible, or even fruitful, to resolve the question as to which vision of our constitutional order best comports with our constitutional origins and tradition. For one thing, the general tension has been with us from the beginning. Moreover, it can equally be contended that (at least some) modern exponents of Bickel’s Whig model reflect twentieth-century skepticism and pluralism that fail to do justice to the “higher law” background of the Constitution, or that modern Contractarians pursue a substantive agenda foreign to the founders’ thinking while advocating a judicial role that would have been unthinkable in eighteenth-century America. There are elements of truth in both of these critiques, but each misses the point that if the framers did not enumerate all the rights that might be recognized, they also did not define an underlying theory of rights or prescribe a particular judicial role in giving them effect.

For the thoughtful Latter-day Saint, this continuing debate is bound to prompt careful reflection. On the one hand, we have been assured that the freedoms guaranteed by the Constitution are divinely inspired to promote human agency. President Ezra Taft Benson recently stated his conviction that one of the Constitution’s “eternal principles” is the idea that our rights are “God-given as part of the divine plan” rather than “granted by government as part of the political plan.” Latter-day Saints therefore have reasons for preferring a Contractarian model of preexisting rights that earthly government is bound to respect. Arguably, the corollary is that we are obligated to fill out, to the best of our ability, a complete theory of our God-given liberty rather than relying to any degree on the relativistic assumptions of the Whig model. As Edwin B. Firmage’s article in this issue of BYU Studies illustrates, the relativistic thinking suggested by the Whig model can lend itself to decision making undergirded by little more than society’s conventional morality—which in one well-known historical instance, at least, led to oppression of Mormon religious thought and practice.

For Latter-day Saints, the natural rights tradition might also seem to warrant (to use prominent examples) modern Supreme Court decisions recognizing the right of parents to send their children to private schools and suggesting that legal restrictions on parental decision making as to the size of their families could be constitutionally justified only by a compelling government interest. It might therefore be
doubted whether any nonliberal constitutional theory will be sufficiently robust to ensure the degree of personal liberty that our religious commitment to freedom requires. This is essentially the position taken by R. Collin Mangrum in his article in this issue of BYU Studies.

On the other hand, the founding era’s republican themes underscoring the connection between virtue and democratic government are also likely to strike responsive chords within Latter-day Saints. For example, many thoughtful people continue to see the potential of law as a teacher of moral standards that, if lived by, arguably enhance personal autonomy and capacity. Within liberal theory, the debate over the legitimacy of laws prohibiting suicide and access to obscene materials, drugs, and prostitution, to use representative examples, would turn on the question of whether the conduct threatens direct and immediate harm to others. By contrast, nonliberal theory would justify the prohibition of such conduct because of its impact on the individuals participating as well as on the moral climate of society.

It is doubtful whether the Mormon concept of the inspired Constitution—and the inspired nature of its relationship to human freedom—is a sufficient basis for preferring liberal to nonliberal conceptions of the proper scope of political liberty. That the freedom of religion and conscience were inspired elements of the Constitution does not tell us whether to embrace social contract moral theory or any other particular conception of those rights. That God is the source of the protection of liberty does not necessarily imply that political freedom is the ultimate priority or that there is not a broader balance to be struck between liberty and competing values than the one embodied in liberal theory. Freedom of religion and conscience, defined in some fairly robust way, are required so that individuals might meaningfully choose among competing claims of ultimate truth and then act upon those choices. Obviously, for example, the creation of an official state church, particularly if backed by legal restrictions on religious liberty, could significantly impede the ability of individuals to exercise their agency as to life’s central questions. But while it can be plausibly argued that an underlying principle of respect for individual moral autonomy requires protection of a much broader range of life-style choices than the courts have protected historically, we have no more definitive grounds for determining the scope of the inspired principle than we do for concluding that the framers intended the concept of constitutional rights to be so extended.

It seems clear, in any event, that morals laws do not pose the kind of irreconcilable conflict with a meaningful ideal of human freedom presented by the actions of totalitarian regimes around the world. Indeed, such laws frequently involve close trade-offs between competing values that relate to freedom. For example, although drug
laws restrict freedom of choice, the problems of tolerance and physical and psychological dependence on drugs raise a serious question whether we act to prevent individuals from in effect alienating their freedom—a choice we do not authorize in the case of slavery because we consider personal freedom to be an inalienable right.\textsuperscript{139}

Moreover, in a society in which the pressures to use drugs are frequently intense, legal prohibitions may be needed simply to keep in equilibrium the forces impacting on individual choice. While the notion of "authentic" choice as a principle for limiting freedom may carry seeds of abuse, I remain skeptical of a "tolerance" for competing conceptions of the good life that would require government to stand by while thousands of young people (some of them legally adults) stumble into heroin and cocaine habits that will cost them dearly, body and soul.

Many would therefore question whether Contractarian models, based on the inspired Constitution or not, ought to govern our resolution of particular questions about the reach of liberty. It might be contended, for example, that the proper decisions with respect to regulating morals ought to come from democratic debate and a delicate legislative balancing of the benefits and harms that flow from such laws as well as from their repeal. Some would contend that in a world in which laws have served a standard-setting function, the repeal of morals legislation might be taken as a moral sanction of the previously prohibited conduct. To the extent that we may doubt whether the Constitution should be read as preempting this political debate, particularly in view of the long-standing nature of many such laws, it is perhaps the Whig view that is speaking.

Skeptics of the Contractarian approach might also hold the view that commitment to the existence of moral rights does not in itself resolve the institutional question as to who ought to put them into effect. The Constitution expressly provides for freedom of religion and speech and implicitly recognizes the power of courts to scrutinize laws for their constitutionality. But, as we have seen, it is far less clear that the Constitution embodies liberal theory or contemplates judicial enforcement of far-ranging rights. The Supreme Court's laissez-faire era demonstrated that the preservation of rights of some can come at the cost of the legitimate rights and interests of others. Many contend that the Supreme Court's decision legalizing abortion similarly rejects the claims offered on behalf of unborn life in favor of other claimed rights.\textsuperscript{140} As a society, in any event, we have concluded that the judicial impositions of the laissez-faire era did more harm than good.

The notion of an open-ended charge to the judiciary to articulate a total theory of rights is, to say the least, in tension with the concept of checks and balances, a doctrine that had its roots in skepticism about untrammeled power anywhere.\textsuperscript{141} While there are important formal and informal checks on the Supreme Court—including the appointment
power, amendment of the Constitution, and the possibility of impeachment—none may be sufficient to prevent abuse of power by a Court that considers itself the moral prophet to the nation. The most important check is the Court’s willingness to question its own exercise of power.\textsuperscript{142} As a people who have been warned of the tendency of almost all men to exercise power inappropriately (D\&C 121:37), we are likely to appreciate Justice Jackson’s reminder to his colleagues on the Court that “we are not final because we are infallible; we are infallible only because we are final.”\textsuperscript{143}

This debate over our individual rights tradition and the role of courts in a democratic society is bound to divide even those of us who see the divine spark within the Constitution. It may even prompt a degree of internal tension. That portion of ourselves that feels commitment to the abstract ideals of liberty and justice and the concept of natural, or basic moral, rights may be drawn to a broad, Contractarian model for constitutional decision making. That portion that doubts our own wisdom, recalls the debatable historical underpinnings of the unenumerated rights tradition, and perceives the risks of abuse of power by any branch of government may feel less at ease about the broadest views of the judicial role being marketed today. Where we fall on the spectrum of views about the Supreme Court and the Constitution will be determined by the relative strength of these competing impulses within us.

The unenumerated rights debate need not, however, radically alter our conclusions about constitutional interpretation in general. If the unenumerated rights tradition is justified, it is precisely because the text in context points us beyond the text, or at least does not preclude such a reading. (Alternatively, we may have concluded that the text contemplates that judicial decisions might under certain circumstances become the authoritative construction of the constitutional text.) If this tradition potentially gives a degree of freedom and power to the courts in the area of individual rights, this does not imply that there are no limits on the Court or that every area of constitutional decision making is equally indeterminate. In at least one important area, of course, acceptance of this tradition will make constitutional interpretation, in any narrow sense, less central to the debate over the proper direction of constitutional decision making. It does not, however, work any general repeal of the duty of decision makers to abide by the terms of our written compact.
NOTES


3 U.S. (1 Cranch) 137 (1803), 176–80.

4 Alexander Hamilton, no. 78 of The Federalist, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1982), 529 (hereafter referred to as The Federalist).


6 Alexander Hamilton, no. 78 of The Federalist, 526.

7 Ibid., 525.


9 The debate has been framed around the search for “original intent,” which for many implies combing legislative (or convention) debates in search of actual or subjective intent. By “original context” I mean the Constitution or amendment read as a whole, extrinsic evidence as to the concerns leading up to the enactment, legislative history, and evidence of relationship to other enactments that might bear on meaning. While the debate over original intent had been waged for years in the law journals, it broke free of the academic setting and entered the public domain because of the advocacy of Attorney General Edwin Meese and the opposition of two Supreme Court justices. For addresses by Meese and Justices Brennan and Stevens, see “Addresses—Construing the Constitution,” University of California at Davis Law Review 19 (1986): 1. For the views of the current chief justice, see William H. Rehnquist, “The Notion of a Living Constitution,” Texas Law Review 54 (May 1975): 693–706.


13 Robert Bennett and John Ely, in particular, offer various objections to original intent but focus their concern on broadly worded, vague constitutional provisions.


15 This essay will not address the difficult questions presented by the doctrine that courts are bound by prior judicial decisions in determining what is authoritative in constitutional law. At least some who see original intent as generally binding on constitutional interpreters nonetheless find room for stare decisis (the doctrine of following precedent) to shield even some incorrect decisions (see Henry P. Monaghan, “Taking Supreme Court Decisions Seriously,” Maryland Law Review 39, no. 1 [1979]: 1, 7–10).

16 Even scholars who criticized resort to original intent as “a fileo-pietistic notion that has no place in the jurisprudence of the twentieth century” and contended that “the framers should not rule us from their graves” have nevertheless acknowledged that clear text is binding (Arthur S. Miller and Ronald F. Howell, “The Myth of Neutrality in Constitutional Law,” University of Chicago Law Review 27 [1960]: 661, 683).

17 See, for example, Bennett, “Objectivity,” 474; Saphire, “Judicial Review,” 774–75; and Brest, “Misconceived Quest.”


3For an argument that framers’ intent should generally count as the ratifiers’ intent, see Monaghan, “Our Perfect Constitution,” 375 n. 130.


5See, for example, Brest, “Misconceived Quest,” 211.

6Brennan, “ Construing the Constitution,” 8, 10.


9At the end of an important skeptical piece, for example, Paul Brest acknowledges that text and original understanding create a defeasible presumption that would “exert the strongest claims when they are contemporary and thus likely to reflect current values and beliefs” (Brest, “Misconceived Quest,” 229). To exert even a strong claim, original understanding must be knowable.

10Slaughterhouse, 83 U.S. (16 Wall.) 36, 77 (1873).

11Ibid. at 77.

12Ibid. at 78.

13Ibid. at 77, 80.

14Ibid. at 79. Miller’s conclusion was no coincidence. He had been the author of Crandall vs. Nevada, 73 U.S. (6 Wall.) 35 (1867), in which the Court struck down a Nevada head tax because it interfered with the right to travel to the nation’s capital that the Court found was derivable from the relationship between United States citizens and their national government. He was thus the logical person to perceive the possibility that the amendment’s protection of the privileges or immunities of national citizenship was designed primarily to provide an explicit textual foundation (and a certain federal remedy) to rights already implicit in the structure and relationships created by the Constitution.

15See, for example, Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge: Harvard University Press, 1977), 25–26 (quoting the Senate sponsor of the Civil Rights Act, Senator Trumbull, and citing references in the Black Codes throughout the congressional debates).


17It was explicitly invoked by Senators Lyman Trumbull and William Howard and Congressman James Wilson, the Civil Rights Bill’s House sponsor (see Congressional Globe, 39th Cong., 1st sess. 600 (1866) (Senator Trumbull); ibid., 1118 (Congressman Wilson); ibid., 2765 (Senator Howard).


19Corfield, 6 F. Cas. at 551–52.

20See, for example, Congressional Globe, 39th Cong., 1st sess. 474–75, 600 (1866) (statements of Senator Trumbull).

21See, for example, Fairman, “Bill of Rights,” 9–12.

22Michael Kent Curtis, “The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger,” Wake Forest Law Review 16 (February 1980): 45, 59, 67–68. When Congressman Bingham introduced a resolution proposing an amendment that evolved into section 1 of the Fourteenth Amendment, he pointed out that he had intentionally drawn the language from the fourth article of the Constitution (Congressional Globe, 39th Cong., 1st sess. 1033–34 [1866]).

23Ely, Democracy and Distrust, 22–24 (superfluous). Justice Field in dissent said the majority opinion made it a “vain and idle enactment” (173 U.S. at 96).

24Ely, Democracy and Distrust, 22.

25For the broadest and narrowest readings, respectively, see Ely, Democracy and Distrust, 22–30, and Berger, Government by Judiciary, 20–51.

26Prominent examples are Michael J. Perry, The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary (New Haven: Yale University Press, 1982); and Simon, “Authority of the Constitution.”


28Typical of the statements of the framers is James Madison’s assertion that “the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature” (James Madison, Letters and Other Writings [New York: R. Worthington, 1884]: 2:642–43). Pronouncements by all three branches throughout the nation’s history support the traditional understanding. It was not until the Korean War that a president claimed that his powers as commander-in-chief fully authorized him to initiate war without the consent of Congress (Firmage and Wormuth, To Chain the Dog of War, vii, 17–160). Interestingly,
David Richards, a scholar known as a forceful critic of “originalism” as a general methodology, has acknowledged that the weight of text, context, and history makes a compelling case that Congress has in recent decades abdicated its constitutional power and duty over war (David A. J. Richards, “Interpretation and Historiography,” Southern California Law Review 58 [1985]: 490, 519).

46 See, for example, Laurence H. Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1978), 174 (contending that the framers’ narrow view of the power to repel sudden attacks was in proportion to the military needs of their day, attack on “a strategically important ally” might require similar dispatch today). The issue raised is probably not a critical one, in that Congress would undoubtedly concur in presidential action in the contexts in which the principle would clearly be applicable, as in Western Europe.

47 Wormuth and Firmage, To Chain the Dog of War, 29.

48 Some would make the President’s emergency power the wedge that would reverse the original implications of the war clause. In 1966, for example, Leonard Meeker, the legal adviser to the State Department, contended that the executive’s emergency power could justify the war in Vietnam because in modern times we recognize that “an armed attack against Vietnam would endanger the peace and safety of the United States” (Leonard Meeker, “The Legality of the United States Participation in the Defense of Vietnam,” Department of State Bulletin 54 [1966]: 484). But surely that is precisely the sort of question that the framers left to Congress. For additional perspectives on these issues, compare J. William Fulbright, “American Foreign Policy in the 20th Century under an 18th-Century Constitution,” Cornell Law Quarterly 47 (Fall 1961): 1–13 (expressing Senator Fulbright’s early view that presidents must have full responsibility for military decisions in a shrinking world, and questioning whether we can afford the luxury of eighteenth-century procedures), with Wormuth and Firmage, To Chain the Dog of War, 267–77 (arguing that need for deliberation and consensus is even greater in the nuclear age with so much at stake).


51 Consider, for example, Laurence H. Tribe, “On Our Constitution, Meese Is True Radical,” USA Today, 17 October 1985: “Madison didn’t even have a telephone; why try to imagine how he would feel about wiretapping?”

52 See Perry, The Constitution, the Courts, and Human Rights, 32–33.


54 The example is from Dickerson, Interpretation and Application, 129.


56 For a brief treatment see Thomas B. McAffee, “Berger vs. the Supreme Court,” 268–71.

57 Dickerson, Interpretation and Application, 240.


60 Dickerson, Interpretation and Application, 243, 246–47.

61 See, for example, Sandalow, “Constitutional Interpretation.”

62 A good example is Madison’s flip-flop on the constitutionality of legislative prayer. See Marah vs. Chambers, 463 U.S. 783, 807, 815 (1983) (Brennan, J., dissenting). It is difficult to believe his original position represented a view of the “meaning” of the establishment clause so much as a position on the appropriate scope and application of a principle whose contours awaited defining.


66 3 U.S. (3 Dall.) 386, 388 (1798).


68 This tension was first brought to my attention by Grey, “Unwritten Constitution?” 708–9.

69 Marbury vs. Madison, 5 U. S. (1 Cranch) at 179.

70 See U.S. Constitution, article 3, section 2, clause 1 (emphasis added).

71 Calder vs. Bull, 3 U.S. (3 Dall.) at 399 (Iredell, J.). Iredell had been a delegate to the North Carolina ratifying convention and an ardent defender of the power of judicial review from that period forward (see Berger, Congress vs. the Supreme Court, 20).

72 Corwin, Liberty against Government, 89.

73 See, for example, the Fifth Amendment of the U.S. Constitution.
37See, for example, Rex E. Lee, A Lawyer Looks at the Constitution (Provo: Brigham Young University Press, 1980), 163; and Corwin, Liberty against Government, 91.

38Thus, in Hurtado v. California, 110 U.S. 516 (1884), the Supreme Court reasoned, “Law is something more than mere will exerted as an act of power,” and therefore enacted law must “not be a special rule for a particular person or a particular case, but . . . the ‘general law’ . . . so that ‘every citizen shall hold his life, liberty, property and immunities under the protection of the general rules that govern society,’ and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation” (535–36).

39For a brief account of this development, see Tribe, American Constitutional Law, 427–36.

40It has been estimated that 197 state or federal regulations were stricken by the Supreme Court between 1899 and 1937 (Tribe, American Constitutional Law, 435 n. 2).

41Ibid., 450–55.

42For a general treatment of the right of privacy, see ibid., 886–990.


45Justice Black opposed application of substantive due process in every context (see Griswold vs. Connecticut, 381 U.S. 479, 511–13 [1965] [Black, J., dissenting]). Justice Harlan, by contrast, relied on the doctrine but appealed for judicial restraint in its application (ibid. at 501–2 [Harlan, J., concurring]).

46Tribe, American Constitutional Law, 716; and Corwin, Liberty against Government, 152–53. Grey, however, acknowledges that there is room for doubt as to whether the Ninth Amendment was intended to embody the principle of the unwritten constitution.

47See, for example, David A. J. Richards, Toleration and the Constitution (New York: Oxford University Press, 1986), 256; Tribe, American Constitutional Law, 570–71; Bennett B. Patterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights under Social Condition of Today (Indianapolis: Bobbs-Merrill, 1955); and Norman Redlich, “Are There ‘Certain Rights . . . Retained by the People?’” New York University Law Review 37 (1962): 787–812. John Ely goes even further, asserting, “In fact, the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond the rights specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support” (Ely, Democracy and Distrust, 38).


49As long ago as 1980, more than a thousand cases were found in which state courts and lower federal courts cited the Ninth Amendment (Raoul Berger, “The Ninth Amendment,” Cornell Law Review 66 [1980]: 1 n. 2).


51See, for example, Berger, “The Ninth Amendment,” 3–6.

52Washington wrote to Lafayette that the convention decided not to include a bill of rights because “the people evidently retained every thing which they did not in express terms give up” (The Writings of George Washington from the Original Sources, ed. John C. Fitzpatrick, 9 vols. [Washington, D.C.: United States Printing Office, 1931–1944], 29:478; also quoted in Berger, “The Ninth Amendment,” 6). Hamilton wrote that “in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations” (no. 84 of The Federalist, 578).

53Madison was speaking before the first Congress as he presented resolutions that became the Bill of Rights (quoted in Patterson, The Forgotten Ninth Amendment, 114).


56381 U.S. at 507 (Black, J., dissenting); ibid. at 527 (Stewart, J., dissenting).

57These proposed amendments are reprinted in Dunbar, “James Madison,” 631–32.

58Quoted in Patterson, The Forgotten Ninth Amendment, 111 (emphasis added).

59Ibid., 115.

60Richards, Tribe, Patterson, Redlich, and Ely all take this view (see n. 85).

61At least one commentator, John Ely, has contended that the clause was designed to preclude a construction of enlarged powers as well as denying additional rights (Ely, Democracy and Distrust, 36. Compare Joseph H. Story et al., Commentaries on the Constitution of the United States, ed. E. S. Arthur, 3 vols. [1833; reprint, New York: Da Capo Press, 1970], 3:752 [ambiguous statement arguably supporting a dual purpose reading]).

62Randolph’s argument was summarized in these words in a letter to Madison from Burnley, a member of the Virginia legislature (see Documentary History of the Constitution of the United States, 1787–1870, 5 vols. [1905; reprint, New York: Johnson, 1965], 5:219).

63Ibid., 221.

64It may be significant, then, that Madison’s single allusion to the judicial role in enforcing rights observed that the courts “will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights” (quoted in Patterson, The Forgotten Ninth Amendment, 116; see also Berger, “The Ninth Amendment,” 8–9).
Some commentators, for example, have pointed to expressions of concern by Madison that basic rights might not be drafted or construed with sufficient latitude (Writings of James Madison 5:271–72). Compare Redlich, "Are There ‘Certain Rights,’" 805 and n. 86 (relying on Madison’s assertion in no. 37 of The Federalist) that words are incapable of expressing complex ideas with complete accuracy. The suggestion is that the Ninth Amendment serves the purpose of avoiding limiting constructions. The only problem is that no such statements were made in the context of debate over the Ninth Amendment itself.

At the state level, the device of actually declaring the existence of inherent and inalienable rights as part of a declaration of rights was already established prior to ratification of the federal constitution (see Patterson, The Forgotten Ninth Amendment, 22).

See Ely, Democracy and Distrust, 203 n. 87.


The “incorporation” theory is associated with Justice Black, Adamson vs. California, 332 U.S. 68 (1947) (Black, J., dissenting), but a number of other justices have held to this view. I say presumably this incorporation view would include the Ninth Amendment because one of the speeches from the legislative history of the Fourteenth Amendment relied on this view states only that “the personal rights guaranteed and secured by the first eight amendments” would be included (Congressional Globe, 39th Cong., 1st sess. 2765 [1866] (statement of Senator Howard)). An alternative route to the same end is the argument that the “privileges or immunities” clause of the Fourteenth Amendment is properly read as delegating authority to elaborate a broad set of rights not described within the text (see, for example, Ely, Democracy and Distrust, 22–30). This claim is also controversial, however, but the arguments are too involved to go into here. The best summary may be Timothy S. Bishop, "The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent," Northwestern University Law Review 79 (March 1984): 142–90.

See, for example, Richards, Toleration and the Constitution: R. Dworkin, Taking Rights Seriously (1977); and Grey, “Unwritten Constitution?” Richards and Dworkin are the names most closely associated with the view of a moral and political theory as immanent in the Contractarian underpinnings of the Constitution. Others who endorse the premises of the Constitution’s antijurisdictional individual rights provisions necessarily rest in moral theory, but are not necessarily committed to any sort of historical explication or to the nonutilitarian versions of liberalism defended by Richards and Dworkin (see, for example, Michael S. Moore, "A Natural Law Theory of Interpretation," Southern California Law Review 58 [1985]: 27; and Michael D. Bayles, "Morality and the Constitution," Arizona State Law Journal [1978], 561–71).

See Perry, The Constitution, the Courts, and Human Rights.

Robert M. Cover has observed that, notwithstanding the social contract and natural rights thinking of the founding period, the most important figures of the period “were seldom, if ever, guilty of confusing law with natural right” (Robert M. Cover, Justice Accused: Antislavery and the Judicial Process [New Haven: Yale University Press, 1975], 27). The sources of thinking about rights during the revolutionary and founding period included the British constitution, colonial charters, and “immemorial usage,” as well as natural law thinking (Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution [Lawrence: University Press of Kansas, 1985], 12–13, 36–39, 152–53). Many who embraced natural law moral and political theory would not have inferred that natural law was a source of authority for enforceable rights in a duly-constituted legal system.


See, for example, Richard Vetterli and Gary Bryner, “Public Virtue and the Roots of American Government,” in this issue of Brigham Young University Studies, 29–49.

McDonald distinguishes "agrarian" and "puritanical" strands of republicanism. Of the latter form he writes: “Almost nothing was outside the purview of a puritanical republican government, for every matter that might in any way contribute to strengthening or weakening the virtue of the public was a thing of concern to the public—a res publica—and was subject to regulation by the public.” While agrarian republicanism saw institutional arrangements rather than direct regulation as the key to ensuring development of virtue, its populist and egalitarian tendencies did not preclude it from having a religious bent or from sanctioning state regulation of morals (McDonald, Novus Ordo Seclorum, 16 and n. 9, 71, 73–77, 89–90, 160).

During the last twenty years, revisionist historians have rediscovered and given renewed emphasis to the elements of classical republicanism in the founding period (see, for example, J. G. A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition [Princeton: Princeton University Press, 1975]; and Gordon S. Wood, The Creation of the American Republic, 1776–1787 [Chapel Hill: University of North Carolina Press, 1969]). While some historians have contended that this new emphasis on classical republicanism gives insufficient attention to the growth of new forms of republicanism based on premises of liberal individualism (see, for example, Joyce Appleby, "Republicanism in Old and New Contexts," William and Mary Quarterly 43 [1986]: 20), my own review of the literature uncovered nothing to refute Lance Banning’s claim that the new history at least establishes “that nineteenth-century America did not begin with and may never have achieved a liberal consensus” (Lance Banning, "Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic," William and Mary Quarterly 43 [1986]: 3, 13).
Morton J. Horwitz, “Republicanism and Liberalism in American Constitutional Thought,” *William and Mary Law Review* 28 (1987): 57. Almost all the modern commentators place human autonomy—the liberty to make fundamental decisions about one’s life plan or style—as central in our constitutional scheme. Contrast the Pennsylvania constitution’s prescriptions that “laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force” (McDonald, *Novus Ordo Seclorum*, 90). McDonald cites five state constitutions that contained provisions giving explicit foundation for “sumptuary” (or morals regulating) laws. For the general view that modern autonomy-based constitutional theories cannot be squared with the Constitution as conceived by the framers, see Monaghan, “Our Perfect Constitution.”

See, for example, McDonald, *Novus Ordo Seclorum*, 85; and Raoul Berger, *Death Penalties: The Supreme Court’s Obstacle Course* (Cambridge: Harvard University Press, 1982), 164. The framers’ skepticism, of course, went to the granting of power to all branches and levels of government.


See Dworkin, *A Matter of Principle*, 38–57 (as to abstract or general intention); Richards, *Toleration and the Constitution*, 35–38 (as to abstract intention), and 52–63 (as to Contractarian moral theory as the best way to interpret the abstract intentions of the framers).

Sandolaw, “Constitutional Interpretation,” 1046. A number of scholars have been critical of any historical claim that the framers intended for us to elaborate moral theories of individual rights as they evolved over time. See, for example, Perry, *The Constitution, the Courts, and Human Rights*, 70–72; and Henry P. Monaghan, “Professor Jones and the Constitution,” *Vermont Law Review* 4 (Spring 1979): 87, 91.

Judge Bork is clearly correct in his assertion that the argument that courts should go directly to moral theory to develop a complete system of human rights, with or without reliance on specific constitutional texts, is a view not expressed by courts or theorists until the last thirty years (Robert H. Bork, “Styles in Constitutional Theory,” *South Texas Law Review* 26 [Fall 1985]: 383–84).

See, for example, Corwin, *Liberty against Government*, 81–82, 87–89.

See, for example, Mugler vs. Kansas, 123 U.S. 623, 661 (1887); and McDonald, *Novus Ordo Seclorum*, 288.

During the Supreme Court’s laissez-faire era, for example, the Court defined the “public interest” that a state might pursue through its police power by reference to a liberal theory of government that assumed that the common law rights of property and contract represented a baseline of neutrality and fairness, departure from which would be suspect (Cass R. Sunstein, “Lockner’s Legacy,” *Columbia Law Review* 87, no. 5 [1987]: 873, 877–79). This view that freedom of contract is “the general view and restraint the exception” (Adkins vs. Children’s Hospital, 261 U.S. 525, 546 [1923]) has been criticized because in practice it amounted to recognition of a superprotected right and frequently precluded serious consideration of the argument that the interests of society as a whole are promoted by labor-protective and other types of social legislation (Gerald Gunther, *Constitutional Law* [Mineola, N.Y.: Foundation Press, 1985], 458).

When the modern Supreme Court, for example, required a “compelling state interest” to justify any regulation of the “fundamental” right to choose abortion (*Roe vs. Wade*, 410 U.S. 113, 154–56 [1973]), it implicitly acknowledged that the state’s justifications of protecting fetal life and maternal health could be seen as meeting the traditional rationality standard of promoting the general interest and that only the special force of the “right of privacy” excluded it from falling within the scope of the police power. As a modern version of the doctrine of substantive due process, *Roe* has thus been criticized as a departure even from the traditional understanding of that doctrine as a device for ensuring that legislatures enact “general” rules to promote the public interest rather than as a source for super-protected fundamental rights (see John Hart Ely, “The Wages of Crying Wolf: A Comment on *Roe vs. Wade*,” *Yale Law Journal* 82 [1973]: 920, 940–43; and Thomas B. McAffee, “Constitutional Interpretation: The Uses and Limitations of Original Intent,” *University of Dayton Law Review* 12 [1986]: 275, 292–93).


Even in *Roe vs. Wade*, 410 U.S. 113 (1973), for example, the Court’s opinion can be read either as recognizing a specially protected fundamental right, rooted in liberal political theory, or as essentially a judicial act of balancing interests on some utilitarian scales (see Donald H. Regan, “Rewriting *Roe vs. Wade*,” *Michigan Law Review* 77 [August 1979]: 1569, 1641). Considering the Court’s own unwillingness to extend the decision to consensual adult sexual activity, one prominent scholar has suggested that the decision more likely rests on premises of enlightened conservatism than on liberal theory (Thomas C. Grey, “Eros, Civilization and the Burger Court,” *Law and Contemporary Problems* 43 [Summer 1980]: 83–100).


Ibid., 4.

Individual Rights

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Pierce vs. Society of Sisters, 268 U.S. 510 (1925); Griswold vs. Connecticut, 381 U.S. 479, 497 (Goldberg, J., concurring): “Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. If upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid.” A Latter-day Saint critic of unenumerated fundamental rights, Rex E. Lee, has acknowledged that the right to privacy could serve as a bulwark against invasion of traditional family rights (Lee, A Lawyer Looks, 188–89).


For persuasive statements of skepticism as to whether the Constitution as an inspired document can become the authoritative source for resolving our basic political disputes, see Noel B. Reynolds, “The Doctrine of an Inspired Constitution”; and Rex E. Lee “The Enduring Constitution: A Document for All Ages,” both in Hillam, By the Hands of Wise Men, 1, 99.

Latter-day Saint scripture emphasizes the connection between political freedom and free agency, but this connection is somewhat problematic, for our agency need not always be seriously threatened by the existence of consequences, such as the threat of punishment, eternal or temporal. Totalitarian regimes probably threaten meaningful agency most directly by denying access to understanding a range of truth systems, including perhaps (in the minds of Mormons) knowledge of the restored gospel, and somewhat less directly by imposing immediate and serious threats to personal security for the exercise of free choice. Obviously, the more certain, immediate, and severe the risk of punishment, the more such threats become sufficiently coercive to meaningfully interfere with human agency. On the other hand, the existence of legal norms may frequently do little more than provide a counter-weight to the temptation—sometimes in the form of countervailing social pressure—to violate traditional moral norms.


See, for example, Lynn D. Wardle, The Abortion Privacy Doctrine: A Compendium and Critique of Federal Court Abortion Cases (Buffalo: W. Hein, 1980). For the view that the abortion decision can be squared with traditional liberal premises, see Regan, “Rewriting Roe vs. Wade.”


Hymn

I
A cold sun traces
a Tyburn Tree
on snow gone crisp
with age.

II
He comes as spray on the wind,
gray as the snow
and as old
as the will of his ancestors.
He comes to sit at Tyburn.

III
Consumate predator:
he leaves only feathers—
dead as leaves
beneath the shawl—
and drops of red.

IV
He is this morning’s sky.
He calls to redeem
the coldness
of earth and sky.

V
I bow upon the shadow Tree,
Kneel on the brittle snow
melting from the
risen sun
at Tyburn.

—Dianna M. Black

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Bicentennial Reflections on the Media and the First Amendment

Bruce C. Hafen

The general theory underlying the First Amendment to the Constitution draws on the same wellsprings of thought that give rise to the central place of free agency in the restored gospel. I wish to sketch briefly some of those common ideas, remembering President Marion G. Romney's counsel that the law school at BYU should explore the laws of man in light of the laws of God. With that basic perspective in place, I would then like to consider a few recent examples drawn from the context of today's media-oriented world to illustrate the role played by self-restraint in nurturing the values of free expression.

The Constitution as originally drafted contained none of the protections for individual liberties now embodied in the first ten amendments as the Bill of Rights. The framers at the Constitutional Convention believed it unnecessary to mention personal rights in the text because they viewed the federal government as having only the powers spelled out in the Constitution—which automatically left all other rights and powers in the people who created the government. Indeed, some felt that if certain personal rights were given explicit protection the rights they did not think to mention might be left unprotected. But in order to help win ratification in the state conventions, the Bill of Rights amendments were added, modeled after existing state charters and drawing on the inspired writings of European natural rights philosophers.

I consider it no accident that the very first of these amendments boldly guaranteed religious freedom and free expression. The First Amendment is "first" for reasons so important as to be at the very heart of why I believe the Constitution was inspired of God. Among the most glorious of all ideas is the truth that each personality is unique, free, and eternal. Thus the Doctrine and Covenants declares that "human law . . . should restrain crime, but never control conscience; should punish guilt, but never suppress the freedom of the soul" (134:4). The "just and holy principles" maintained by the Constitution are, said the Lord,

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“according to the moral agency which I have given unto [every man]” (D&C 101:77–78). This freedom of the intellect and freedom of conscience form the common root from which grow both religious freedom and freedom of expression.

The fundamental right of each person to define the meaning of his or her own life within the light of available truth was made fully meaningful by the restoration of the gospel and the organization of the Church, actions that would not have been possible without the protections of the First Amendment and the constitutional form of American government. No other nation had laws that would have allowed the Restoration. This land was kept hidden from the postapostasy world to become the host nation in the fulness of times—the strong, free foundation from which the kingdom of God would be taken to all the world.

No one was more grateful for the Constitution than Joseph Smith, who said, “I am the greatest advocate of the Constitution of the United States there is on earth. In my feelings, I am always ready to die for the protection of the weak and oppressed in their just rights.” Yet the Prophet had learned firsthand about the denial of First Amendment liberties at the hands of state governments in Missouri and elsewhere. When he went to President Van Buren to ask for federal protection, he was told that although his cause was just, the President could do nothing for him. In addition to political concerns he may have had, Van Buren was obviously expressing the weakness of the federal government in attempting to enforce civil rights against the states. The Constitution’s concept of personal rights was not binding on the states until after the Civil War. Indeed, that war began over the issue of states’ rights.

Joseph Smith saw the same weakness in the Constitution that Abraham Lincoln later saw. Said the Prophet, “The only fault I find with the Constitution is . . . it provides no means of enforcing [its sentiments].” This very issue was central to his decision to run for president of the United States in 1844. He was convinced the other candidates were wrong on the issue of federal supremacy. I believe Joseph Smith would have voted for the post-Civil War amendments to the Constitution. I also believe he would have favored the process by which the Supreme Court made the First Amendment binding on the states, even though that action did not take place until well into the twentieth century. These developments solved the problem he had identified. They were possible because the Constitution was designed with the flexibility to repair over time its own limitations. Just as continuous revelation is essential to the governance of the Church, so I believe this nation, when it is worthy, may receive continuous inspiration to apply the Constitution to new problems. Our courts, our national leaders, and our people may not draw often on that inspiration, but the possibility exists for them to do so.
The First Amendment insures freedom of expression by declaring, "Congress shall make no law . . . abridging the freedom of speech, or of the press." These twin freedoms rest on theoretical foundations that had been only recently formulated when the Bill of Rights was drafted. Democracy was such a stunning new idea that legally protected free expression had few direct legal antecedents. In England, Parliament had adopted the idea of free speech for its own members to protect them from attack by those outside the parliamentary body. However, English citizens, including the private press, long required a governmentally approved license before issuing any publication. The first objective of a free press guarantee in the American nation, then, was to eliminate this form of prior restraint and censorship.

It was less clear whether the First Amendment protected the people or the press in publicly criticizing the government in a more general sense. However, experience resolved that question resoundingly in favor of public criticism on the grounds that the people were themselves the source of the government's authority. The Declaration of Independence, the theory of which was expressly embodied in the Constitution, had turned some traditional ideas about governmental authority on their heads. The Constitution's theory began with the premise that the people were endowed by their Creator with natural rights, predating the creation of the government. The people then entered into a social contract among themselves to create a government to which they delegated only the power necessary to govern. Note the direct contrast between this idea and the long prevailing idea of the European royalty that kings received their divine rights from God, and the people enjoyed only the rights given them by the king. Freedom of expression thus embodied the accountability of the nation's leaders to the people who elected them. As stated by the Supreme Court in 1971, "The Government's power to censor the press was abolished so that the press would remain forever free to censure the government."5

Another way of describing our attitude toward free expression is captured in the metaphor of the marketplace of ideas. In the words of Justice Holmes, "The best test of truth is the power of the thought to get itself accepted in the competition of the market."6 The marketplace theory assumes that even false or dangerous ideas should be given wide latitude in the competition for truth, both to avoid excluding important new ideas and to sharpen thought about the ideas the public does select. This marketplace idea drew heavily on the convictions of the European Enlightenment about the ultimate value of human reason, not only as the source of the best society but as the highest aspiration of individual life.

I find strong similarities between this commitment to intellectual freedom and the concern of the gospel with freedom of conscience. The teachings of the scriptures and the prophets make clear that "God will
force no man to heav’n.” When God rejected Satan’s plan to remove individual agency and guarantee our return, I believe the rejection came not only because Satan shouldn’t deliver on his promise, but because he couldn’t deliver. His promise was, as his promises usually are, a lie. The liberty and fulfillment made possible by the gospel cannot be ours unless we participate freely in the process of growth and internalization embodied in the very idea of increasing our understanding and our skill. The spirit of dogmatism and the Inquisition are wrong, then, not only because they may seem offensive, but because they don’t work. No student can learn to read a book, play the piano, or understand mathematics without voluntary involvement of some important degree. You can lead a child to a book, but you can’t make him read it. Even less can you make him understand it, if that is against his will.

At the same time, a certain amount of leadership, and even pressure, must often be involved in the educational processes that prepare children to participate in the marketplace of ideas as adults. John Stuart Mill, one of the leading philosophers of personal liberty and free expression, wrote that his doctrine of autonomous liberty and independent participation in the political and intellectual marketplace

is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. . . . But as soon as [they] have attained the capacity of being guided to their own improvement . . . compulsion . . . is justifiable only for the security of others.6

Mill’s statement suggests the need for boundaries around the marketplace of ideas. Only those should be admitted who have previously developed rational capacities. Otherwise, they may injure themselves or impair the functions of the market itself. The most obvious response to this need in our society is our commitment to public education, the process by which the young are prepared for responsible citizenship. I will return to this theme shortly to consider illustrations of our need for limits in our approach to free expression.

Most of the Supreme Court’s applications of First Amendment principles have occurred in our own century. The first cases arose after World War I when free speech guarantees were invoked to protect anarchists and socialists, whose views were unpopular at a time of heightened American nationalism. After World War II, a similar situation arose in which free expression and its concomitant right of free association were extended to protect Americans accused of involvement with communism. The right of associational expression was also called upon to protect the political activities of some involved in the civil rights movement. In general, these cases relied on the First Amendment to
protect political minorities by including them in the marketplace of legitimate political expression, often against the will of majorities in particular states or cities.

In the 1960s and 1970s, new uses were found for free expression theory as it became a source to protect those who challenged governmental actions and, eventually, those who also challenged our cultural and social orthodoxies. As the range of protected expression widened, it came to have greater political significance. For example, public protests against President Johnson's conduct of the war in Vietnam probably played the determinative role in terminating American involvement in the war. Moreover, without the firmly established independence of the national media and the sense of public duty involved in the emerging field of investigative reporting, it is likely that the abuses of the Watergate era would have remained uncovered. During this same era, the Supreme Court also clarified and strengthened the right of the media to constitutional protection against suits for defamation by public figures, citing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." 39

It is worth noting that all of these free-expression theories—the idea of political sovereignty in the people, the marketplace of ideas, and the idea of checking governmental abuse through informing the public—are based largely on the public interest, even though they also protect the personal civil liberty of individuals. This distinction between social and individual interests is important in considering the matter of limits on expression. It also helps us understand both what is behind and what is at stake in the significant role the media have come to play in the constitutional and democratic structure in this age of the megasociety.

The media now act as something of a mediating institution in our urbanized culture, playing a role that was less necessary in rural nineteenth-century America. This mediation occurs between the government and the people, moving both ways, as government officials regard the media as a barometer of public opinion and as the public regards the media as a window upon not only the nature, but the meaning, of governmental action. Today's media even facilitates a good deal of mediation between branches and levels of government, as the contemporary complexities make it less likely that the left hand of government knows what the right hand is doing.

Ironically, this development has occurred at a time when some observers believe the public is becoming increasingly passive and at times even cynical about its role as the ultimate political sovereign. Some of the public's cynicism about its place in the modern democratic structure may be traced to implicit doubts that the marketplace of ideas is really functioning when media appeal and marketing strategies seem
to outweigh the importance of really substantive ideas. The public may also be less open-minded than our First Amendment theories suggest about the need for a broad and robust marketplace. Perhaps there is a need for ways to protect the public interest against its own short term views of itself. Both the media and the courts have come to play a helpful role in this regard.

The media and the concept of free expression are now so important to the democratic structure that it is appropriate to consider how our constitutional doctrines of limited power and checks and balances apply to the way we think about the First Amendment. Our system disperses power among many significant entities, often with accountability systems that are difficult to enforce. The judicial branch of government, for instance, has come to wield enormous power, but federal judges are appointed for life and are thus not in fact very accountable to the people or to any other branch of government. The concept of judicial restraint is therefore very important, even if only as a self-imposed limit. Rex Lee once remarked that the highest manifestation of respect for power is the willingness of those who possess the power to refrain on certain occasions from using it. Although it may not be possible ultimately to enforce judicial restraint of this kind, there is a form of accountability awaiting judges who undermine public confidence in the legitimacy of the judicial process; namely, their realization that public trust is essential to the continued power of the rule of law.

The same sense of restraint applies to the executive branch of government, as illustrated by recent events relating to the Iran-Contra investigations. The public realizes that much of the business of the American presidency must be conducted under conditions of confidentiality and, at times, secrecy. We have known the value of nonpublic deliberations ever since the Constitutional Convention itself met in secret. That group feared that the task of writing a new constitution would be impossible if their deliberations were subject to ongoing public scrutiny while the necessary but fragile national consensus was being forged. Their official charge was to rewrite the Articles of Confederation, but they soon saw the need for far bolder—yet secretly determined—measures, until their product was ready to be unveiled.

The ability of the modern presidency to sustain the public’s confidence in the need for and the legitimacy of governmental secrecy is currently being tested. I genuinely hope for a restoration of confidence, not just for the sake of the current President, but for the sake of the presidency as a crucial American institution. If sufficient doubts are raised about the ability of the executive branch to discipline itself, outside forces will find ways to impose the discipline from without—even if that means a reduction in the power of the presidency to serve the nation.
This is not the time for a complete exposition, but I wish now to mention briefly three recent developments affecting our understanding of First Amendment theory. Each illustrates the need for a sense of restraint on expression in the public media as an important means of sustaining the conditions that foster the underlying values of free expression over the long term. I will consider the debate over student expression in the public schools, advocacy journalism, and obscenity.

Sometime during its 1987–88 term, the Supreme Court will issue its first opinion regarding the constitutional right of public school students to control the content of an official high school newspaper. The Tinker vs. Des Moines School District, the Court upheld the basic concept of constitutionally protected student expression; however, the limits and purposes of that protection have remained relatively unclear. The students in the Tinker case wore black arm bands to school in a peaceful protest against the government’s conduct of the war in Vietnam. The Court held that school officials may not prevent such expression unless it would cause a serious disruption or harm the rights of others.

The lower courts have had a difficult time applying this standard to arguments about the right of administrators or faculty to determine the content of such extracurricular media channels as student newspapers, assemblies, and school plays. Some courts have believed that student expression in these channels can be limited only when there is a serious threat of disorder. Other courts have read the Tinker standard more narrowly, holding that extracurricular activities are part of a school’s mission and therefore the same educational policies that allow administra tors and school boards to control the public school curriculum should give them control of the extracurriculum.

The Supreme Court sided with school administrators in a 1986 case, Bethel School District vs. Fraser, allowing them to discipline a student for making a vulgar (but not legally obscene) speech in a student assembly. In the Fraser case, the Court stressed the schools’ obligation to teach principles of courtesy and decency—traditional forms of restraint—as prerequisites to responsible participation in matters of public debate. The rationale for the Court’s opinion was not entirely clear, however. One might view Fraser as a simple vulgarity case because the Court has upheld in other cases the public interest in protecting underage children from hearing vulgar language in the public media. Yet Fraser could also mean that the educational function of extracurricular activities dictates that student expression in such official school channels can be controlled for the purpose of teaching young people how to express themselves in a broader sense.

The high school newspaper case is likely to clarify how Fraser and Tinker should be interpreted, which could also clarify the authority of
school administrators and teachers in dealing with the expression of their students in school media channels. This case, *Kuhlmeier vs. Hazelwood School District*, arose when a school principal pulled from the school newspaper two stories dealing with teenage pregnancy and divorce in ways that seemed to him inappropriate and possibly harmful. The student authors filed suit in federal court and eventually won on appeal, the appellate court holding that administrators must defer to the publication decisions of student editors unless the publication would materially disrupt the school or subject it to damage suits.

I believe the Supreme Court should overrule the appellate court in *Kuhlmeier* and sustain the school’s control over the student newspaper because that outcome represents a better long-range view about the best way to develop the underlying values of the First Amendment for the benefit of students in American schools.

"Freedom of expression" has two meanings: (1) freedom from restraints upon expression, and (2) freedom for expression—that is, having the capacity for self-expression. Public schools are especially concerned with the second meaning, interacting with their students in ways unique among all interaction between individuals and the state. As I noted above in discussing the ideas of John Stuart Mill, adolescents (both those who write for school papers and those who read them) lack the rational capacity that is prerequisite to all free expression theory. The First Amendment interests of young people should thus assure them of the constitutional right to be taught the skills necessary to develop their freedom for expression in preparation for entering the adult marketplace. Toward that end, public education seeks affirmatively to mediate between ignorance and educated expression. This process invites intrusion, requires paternalism, and depends upon the exercise of a teacher’s discretion. Some students may need the temporary repression of discipline to develop their capacity, while others should be left free (perhaps even pushed to break free) to try their creative wings. Such decisions involve pedagogical judgments more than they involve constitutional law. Of course students need legal protection at the extremes against the abuse of this flexibility, but without a basic commitment to the value of adult teaching authority we place our children in an educational vacuum, essentially abandoning them to their "rights."

Traditional First Amendment jurisprudence was never designed to deal with the subtle and affirmative process of education. That jurisprudence originated in cases involving adults and was concerned only with when to limit governmental action, not with how to encourage it toward such complex ends as educational development. It is precisely because children are unable to judge the meaning of expression in the school marketplace that important constitutional rules against the establishment of religion (also guaranteed by the First Amendment) prohibit formal
prayer in public schools while allowing formal prayer in the meetings of a state legislature. Yet the lower court that ruled for the students in the Kuhlmeier case thought it relevant that the school paper included a statement each year that the paper did not necessarily reflect the views of the administration or faculty. Would that same reasoning allow group prayer or the posting of the Ten Commandments on high school walls (both practices that have been forbidden by other Supreme Court cases) so long as something like a footnote explains that the school does not necessarily endorse religion? Of course not—because school-age young people lack the capacity to know when public prayer (or the school paper) does or does not carry official endorsement.

A child who desires to enjoy “freedom of expression” at the piano must submit to the discipline of the authoritarian rules of music and the demanding expectations of a music teacher over many years. If his teacher’s role consists primarily in not restraining him, his freedom to express himself will be little more than idle noise-making. It is the place of education to find the right balance between too much direction and not enough in this developmental process, according to each student’s needs. It is the place of constitutional interpretation to avoid actual harm at the utter extremes of that process.

Much of what has happened in the American educational system since the 1960s has violated this common-sense proposition as the removal of authority and restraint became ultimate goals. The empirical studies of James Coleman and others have now documented, however, that the antiauthoritarianism of the past generation is clearly linked to the widespread declines in academic achievement that were documented in such studies as A Nation at Risk. Diane Ravitch’s history of American education since 1945 also documents in persuasive detail how the “guiding principle” since the 1960s—“to give the students what they wanted”—led to the consequences described in these recent calls for educational reform.¹⁵

Just as the 1960s asked for reassurance that students are people too, the 1980s ask for reassurance that public schools can be more seriously devoted to meaningful education in the curricular and extracurricular dimensions of the learning environment. Twenty years of treating schools as if they were adult public forums has to some degree undermined what could be the most fundamental interest of young people in the values of the First Amendment—the right to receive a serious education as part of their freedom for expression. As this experience in our recent educational history illustrates, certain forms of restraint and discipline are essential prerequisites in developing and maintaining a complete system of freedom of expression over the long term.

My second concern is with advocacy journalism, a subject I am not qualified to develop fully, but I do have an impression about it. The
Watergate era gave birth to an approach to media reporting that was simply different from what had occurred before. The interest of reporters became focused not just on investigation but on the injection of personal views and causes into the reporting process. The expression of personal opinion began to spill from the editorial pages into the news stories, in everything from sports to national news and life-style pages.

I said earlier that our national urbanization has cast the media into the role of mediator between the public and agencies of government. This framework places a heavy responsibility on the media to convey information and ideas without themselves becoming too much of a party in the political process. To the extent that the media act as just another player on the political stage, they develop conflicts of interest that are bound to be perceived by the public. When that happens, they lose credibility as mediators, and the public’s ability to rely on media sources is undermined.

There are other reasons why the advocacy model does not fit the public media very well. For one thing, an advocacy approach to truth assumes the presence of advocates on the opposing side who have comparable access to information channels in dealing with the public (since it is presumably the public that is to decide the truth between competing positions of advocacy). This is our approach to the solution of disputes through an advocacy-based legal system. But when a media source takes an adversary role, where is the recourse by those having opposing views who have no ongoing access to the same public forum? Letters to the editor are no match for the full power of the press. I think also of the cartoon showing a masked man wearing a burglar cap, seated eagerly in front of a TV microphone holding his script as the announcer says, “And now a response to last night’s law and order editorial.”

These observations are by no means intended to question the importance of the editorial function by which a media source acting as an institution plays the time-honored and significant role of taking a forthright and rational stand on matters of public significance. It is in part to strengthen public confidence in that needed role that we should discourage the blurring of lines between editorial and reporting functions. I recall a conversation with a friend who was the publisher of an established and important regional newspaper in another state. He said, telling me that the newspaper business isn’t as satisfying as it used to be because his cub reporters all come to him these days trained in what they call advocacy journalism. And when he tries to discourage them from blurring the line between editorial and reporting functions, they object that he is treading on their First Amendment rights. At that point he said, “Who do they think pays the bills, anyway?”

Media institutions as institutions should enjoy their own forms of First Amendment protection within which the expression rights of
associated individuals are likely to function better, not worse. The declining influence of private and public institutions of all kinds in this day of anti-institutionalism is detrimental to the stable development of First Amendment theory.

Now, finally, a word about obscenity. Ever since the first fist was raised just twenty-three years ago in an obscene gesture at Berkeley, we have been confused about the proper relationship between free expression and vulgarity. The Supreme Court has actually had less trouble than other groups in deciding that obscene expression is not entitled to constitutional protection under the First Amendment or elsewhere. In fact, the Court’s treatment of this problem instructively illuminates our understanding of free expression theory. In 1973 the Court defined obscenity as sexually-related expression so offensive, so appealing to prurient interests, and so lacking in social value that it is beyond the purpose of the First Amendment. Said the Court, “to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.” And in the words of Justice Stevens in another case, “Few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theatre of our choice.” Thus, to say, as the Court once did, that obscenity “is utterly without redeeming social importance” is not only a way of defining obscenity; it is also a way of saying that constitutional freedoms promote matters having value to society as well as promoting individual liberty.

These and other cases make clear that different kinds of speech have different levels of protection. Most protected is speech related to political and other public issues. Academic or intellectual freedom is also at the top of the scale because of its connection to the search for truth described earlier as central to the marketplace metaphor. Commercial speech, such as that contained in advertising, is less protected because business interests are less important in our hierarchy of constitutional values. Well down the line is indecent or vulgar expression, which under certain circumstances may be prohibited in the public schools. Then, totally beyond the reach of the First Amendment, is obscenity, which receives no protection—not because it isn’t speech, but because it is speech beyond the purpose of the constitutional guarantee.

I realize that obscenity is difficult to define objectively, but the Court’s refusal as a matter of principle to protect obscene material reaffirms an extremely important fact about First Amendment theory: some forms of censorship are deemed desirable to sustain the rational climate of the free marketplace and the democratic system. For this reason I am troubled by the insistence of commercial interests who have
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exploited the moral momentum of the individual-rights movement to claim that society has no interest in limiting the range of publicly viewed material. These claims do not accurately represent the Supreme Court's First Amendment jurisprudence. But they have influenced the perceptions considered topical in the media, giving the public an inaccurate impression not only of what the law allows, but also of what the First Amendment is all about. Thus, in a large sense, these impressions undermine the nature and expectations of public discourse in the free marketplace of ideas, implying that vulgar self-gratification enjoys the same noble purpose as the search for political, scientific, or religious meaning.

Despite the claims of obscenity advocates that unrestrained expression is a cardinal principle in the quest for knowledge, our culture has an older, more distinguished tradition. The ancient Greeks believed that the peculiar weakness of man was his propensity to exceed limits. To the Greeks the worst crime of all was "hubris," which originally meant "unlimited appetite." The Greek pursuit of knowledge sought to be guided by some moderating concept of limits. The writers of the Renaissance and the Enlightenment had a similar fear of man's unrestrained curiosity, symbolized by Faust, who refused to check his intellectual appetite, and later by Frankenstein, the doctor whose unbounded thirst for knowledge created a monster that later destroyed him. "Are you mad, my friend," warns Dr. Frankenstein at the end of his story, "Or whither does your senseless curiosity lead you?" The justices of the Supreme Court have understood what the ancients understood: some sense of restraint is essential to maintaining a free, democratic society over the long term. In that sense, the concept of limits is the friend, not the enemy, of individual liberty.

But despite these and a few other isolated areas of potential abuse, the First Amendment towers over our intellectual and political landscape today as it did two hundred years ago, when James Madison described it as "one of the greatest bulwarks of liberty." I salute Madison and his inspired associates as we celebrate the beginning of the third century under the First Amendment.
NOTES

3History of the Church 6:56–57.
4Ibid.
7"Know This That Every Soul Is Free," in Hymns of The Church of Jesus Christ of Latter-day Saints (Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 1985), no. 240; see also Hel. 14:30–31, 2 Ne. 10:23–24.
11After this issue of Brigham Young University Studies was into the production process, the Supreme Court decided the case discussed in the text. The Court upheld the right of school officials to regulate the content of all "school sponsored expressive activities." For a discussion of the Court’s opinion, see Bruce C. Hafen, "Commentary—Hazelwood Reaffirms First Amendment Values," Education Week 7 (13 April 1988), 36, which is based on a more complete article that will be printed in the summer 1988 issue of Duke Law Journal.
13106 S. Ct. 3159 (1986).
15I cite the work of Coleman and Ravitch as part of an extended discussion of the application of the First Amendment to public school students in my article, "Developing Student Expression through Institutional Authority: Public Schools as Mediating Institutions," Ohio State Law Journal 48 (1987): 663.
20Ibid., 32.
21Ibid., 39.
Laie Nights

Hawaiian nights draw creatures forth
Along the north shore by moon or streetlight.
Huge toads hump across pavement to wet grass
Oblivious of unseeing feet or the whir of tires.
Roof rats glide from daytime darkness
Snaking from corner to corner.
Geckos dart across walls,
Spearing gnats and unwary mosquitoes,
Chortling their prizes to the world
Like insecure comedians.

But strangest are nightwalkers, some in groups
Like Samoan boys strutting the streets
Shouting and laughing at two A.M.
Or couples, leaning into each other like invalids,
Beachbound, itching for the grist of sand on their backs.

And the thief—slipping through late night
Solitary as a rainbow, sliding bush to tree
Down darkened streets, feeling for
An open door, loose jalousies.
Adventure chills his fingers on the glass
Amid snores from heavy sleepers.

Fixing all, the shriek from a passing ambulance
Freezes feet and faces while the red flash
Flicks flared warnings into blackness.

—Jim Walker

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One Moment, Please: Private Devotion in the Public Schools

Richard G. Wilkins

Twenty-five years ago, in the celebrated case of Engle vs. Vitale, the United States Supreme Court held that the establishment clause of the First Amendment precluded the board of education of Union Free School District Number 9, Hyde Park, New York, from causing the following prayer to be said aloud at the beginning of the school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”¹ The Court, through Justice Black, concluded that the practice was unconstitutional because it was “part of a governmental program to further religious beliefs” that “breach[ed] the constitutional wall of separation between Church and State.”² In Karcher vs. May (no. 85–1551), the Court recently faced, but ultimately did not decide, whether the New Jersey legislature violated Engel’s constitutional strictures by providing a moment of silence at the start of each school day during which students could ponder, daydream, meditate, plan a date, or—if they chose—pray.³

The question of private devotion in the public schools has been a contentious one since the Engel decision. Persons opposed to any official recognition of divinity have used the decision to argue for the extirpation of all reference to deity from public life.⁴ On the other hand, the decision has been used as emotional fodder by radicals of another ilk to whip devotees into furious indignation over the banishment of God from the classroom.⁵ Whatever the perspective, the decision simply resists receding quietly into the constitutional background.

The continuing debate over private devotion in the public schools has many facets. The problem can be approached on a historical basis. Those who favor a “strict” or “original intent” construction of the Constitution insist that Engel and other establishment clause decisions are flatly inconsistent with the goals originally animating the First Amendment.⁶ Alternatively, the controversy can be analyzed somewhat more pragmatically by focusing not on what the Founding Fathers thought or intended but rather on whether prayer or moments of

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silence in the public schools threaten principles that have come to be fundamental to American democracy. This has been the approach taken by the Court during the past several decades. But whatever the analytical approach, it is my contention that providing public schoolchildren with a moment of silence during which they can ponder, meditate, or pray does not transgress the proscriptions of the First Amendment’s establishment clause.

A MOMENT OF SILENCE IN HISTORICAL PERSPECTIVE

Recently, it has been somewhat in vogue for conservative legal scholars to attack the historical foundation for the Court’s religion clause cases. The “wall of separation between Church and State,” upon which Engel and other establishment clause decisions are based, has been decried by Chief Justice Rehnquist, for one, as a “metaphor based on bad history . . . which has proved useless as a guide to judging.” Indeed, the problems with the church-state “wall” become apparent upon even cursory examination.

In the first place, Thomas Jefferson—the first person to use the “wall” construct—was out of the country at the time the First Amendment was debated and adopted. He is, accordingly, a “less than ideal source of contemporary history as to the meaning of the Religion Clauses.” Moreover, the records of the debates surrounding the drafting of the First Amendment suggest that the primary concerns of the Founding Fathers were to prevent establishment of a national church and the preference of one religious sect over another. They did not set out to construct a “wall” that would preclude any government acknowledgment of or even generalized aid to religion. Indeed, it is quite clear that the drafters of the First Amendment did not even intend to prohibit limited governmental endorsement of religion. One day after the House of Representatives voted to adopt the form of the First Amendment that was ultimately ratified, it passed a resolution asking George Washington to issue a Thanksgiving Day proclamation.

Thus the men who drafted and adopted the establishment clause of the First Amendment almost certainly did not perceive in it a “wall” that would prohibit schoolchildren from voluntarily acknowledging their “dependence” upon God or begging his “blessings upon us, our parents, our teachers and our Country.” It follows a fortiori that they would not have considered a moment of silence statute, which merely provides a moment for meditation or prayer by those who want to pray, unconstitutional. A moment of silence ceremony (or even a voluntary, nondenominational prayer, such as that involved in Engel) that does not seriously threaten creation of a state church or evidence hostility to any particular creed seems fairly far removed from the core concerns that prompted
enactment of the First Amendment. From a historical or “original intent” viewpoint, therefore, the constitutionality of a moment of silence provision such as that enacted by the New Jersey legislature should be unquestionable.

It is, however, quite unlikely that the moment of silence debate will be settled by pointing out the faulty historical footing of Engel. Two terms ago, in Wallace vs. Jaffree, the Supreme Court expressly rejected a strict historical approach to the establishment clause. The United States District Court for the District of Alabama had upheld the constitutionality of a statute that explicitly returned prayer to the public schools on the grounds that the Supreme Court had erred in Engel and other cases by applying the strictures of the First Amendment to the states. From a historical point of view, the district court was probably correct: the Founding Fathers did not intend the religion clauses to apply to the states, as evidenced by the persistence of state-established churches in Massachusetts, New Hampshire, Maryland, and Rhode Island well into the nineteenth century. Nevertheless, the Supreme Court summarily affirmed the Court of Appeals’ reversal of the lower court’s holding.

The writers of the establishment clause may well have never dreamed that preventing the federal government from establishing a national church would in turn hobble the states, but “original intent” is no longer controlling in this sensitive area of constitutional law. The Supreme Court began applying various provisions of the Bill of Rights to the states in the late nineteenth century, and it is simply too late in the day to abandon that course. Indeed, most ordinary citizens would be shocked at the mere suggestion that, although the federal government could not establish a church, their state legislatures could. The current controversy over moments of silence in the public schools likely will not be resolved by pointing out to the Supreme Court that its decision in Engel would receive a flunking grade if submitted as a paper in a constitutional history course.

A MOMENT OF SILENCE IN THE MODERN COURT

Rather than take a strictly historical approach to establishment clause issues, the modern Court has analyzed several factors to determine whether particular government actions unduly involve the church or state in the affairs of the other. Indeed, only one case decided during the past twenty years, Marsh vs. Chambers, has utilized a strict historical analysis of an establishment clause issue. Instead, beginning with its 1971 decision in Lemon vs. Kurtzman, the Court has quite regularly applied a three-pronged test to determine the constitutionality of governmental activities ranging from the provision of bus transportation to parochial
school students to the erection of a Christmas crèche in a city park. Under that test, government actions challenged under the establishment clause must meet the following criteria: "First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.' "

The Court's application of the Lemon factors has been fairly consistent. However, because state action must meet all three criteria in order to pass constitutional muster, and because the proper application of the three factors to concrete fact is almost always debatable, the results obtained from the Lemon test can only be described as spotty and inconsistent. But despite the difficulties of the Lemon test, no majority of the Court has shown an inclination to abandon it.

Application of the Lemon test to a moment of silence statute is problematic. Depending on the predilections of individual jurists, a simple moment of silence can be viewed as violating all or none of the Lemon factors. The district court in Karcher vs. May, for example, concluded that the New Jersey moment of silence statute violated all three prongs of the test. Even though the state urged before the trial court that a moment of silence had the secular purpose of providing a "transition" between nonschool and school activities—and supported that assertion with significant testimony by experienced educators and other experts—the trial court rejected that proffered purpose as an "after the fact rationalization." The district court made this finding despite its recognition that "a brief period of silence serves a transition purpose." It further found that a moment of silence had the "effect" of advancing religion by "mandat[ing] a period at the start of each school day when all students would have an opportunity to engage in prayer." Finally, the court found that the statute was unduly "entangling" because a "required minute of silence would put children and parents who believed in prayer in the public schools against children and parents who do not."

The United States Court of Appeals for the Third Circuit, applying the same legal test, disagreed with virtually all of the district court's reasoning. The court of appeals rejected the holding that the statute violated the "effects" test simply by "designating a time and place when children and teachers may pray," reasoning that the state "equally injects itself into religious matters when it designates a time and place when children and teachers may not pray." It similarly rejected the notion that the statute was impermissibly "entangling" because of its potential for divisiveness. Noting the reality that any governmental action to accommodate religious belief will upset someone, the court of appeals wrote, "If political divisiveness were the test for entanglement, no governmental accommodation of religion would survive Establishment Clause scrutiny." But despite its well-reasoned conclusion that the
moment of silence statute did not violate the “effects” and “entangle-
ment” prongs of Lemon, the court of appeals affirmed the district court
on the grounds that the asserted secular purpose for the statute was
“pretextual.”35

The question whether the New Jersey moment of silence statute has
a secular “purpose” is not readily answered. In a lengthy concurring
opinion to a decision invalidating Bible reading in the public schools,
handed down the year after Engel, Justice Brennan suggested that states
could avoid violating the establishment clause but still accommodate the
desires of those students who want to pray by providing for a brief
moment of silence at the start of each school day. Such a ceremony, he
suggested, would serve the “solely secular ends” of “fostering harmony
and tolerance among the pupils, enhancing the authority of the teacher,
and inspiring better discipline.”36

By making the apparently sensible suggestion that a state could
serve a secular purpose and still accommodate the religious needs of its
students by adopting a moment of silence ceremony, Justice Brennan set
up a subtle “Catch-22” that was seized upon by the district court in
Karcher to invalidate the New Jersey statute. Yes, the district court
acknowledged, a moment of silence may have a secular purpose. How-
ever, because it is also adopted to facilitate religious practice, to provide
a “period at the start of each school day when all students would have an
opportunity to engage in prayer,” the secular purpose ipso facto converts
to a sectarian purpose: the accommodation of prayer.37 The court of
appeals in Karcher failed to find its way out of this box. Indeed, the court
explicitly noted that the New Jersey statute did not endorse or encourage
prayer and that the only possible sectarian “purpose” for the moment of
silence was to accommodate the desires of those who wanted to pray.
Nevertheless, the court of appeals refused to let the state out of the logical
conundrum created by the trial court. A moment of silence may have a
secular purpose, but because it also has the purpose of accommodating
religious belief, it is constitutionally infirm.38

The “heads you lose, tails I win” reasoning of the lower courts in
Karcher could have been easily rectified by the Supreme Court. The
Court’s prior cases applying the “purpose” prong of Lemon established
that a statute need not have “exclusively secular” objectives to pass
constitutional muster.39 It need only have “a secular purpose.”40 The fact
that a moment of silence accommodates religious belief in addition to
providing a secular transition period from nonschool to school life
should be constitutionally irrelevant.

But while this approach to the “purpose” prong avoids the logical
traps of the lower courts’ analysis, it too is troubling. If indeed all that is
needed under Lemon’s “purpose” test is a plausible secular purpose, and
if any such purpose will do, there is very little substance left to the
inquiry. Human ingenuity being what it is, state or national legislatures will have little difficulty articulating some plausible secular goal for almost any undertaking—no matter how entwined with matters of religion. Although most such actions would probably run afoul of one of the other *Lemon* prongs—effect or entanglement—the fact remains that merely requiring “a” secular purpose renders the “purpose” test a virtual dead letter.\(^41\) Yet the alternative, exemplified by the logical juggernaut created by the lower courts in *Karcher*, where any plausible sectarian purpose is fatal, is equally unacceptable.

Faced with these legal realities, I have concluded that the *Lemon* test does not promote thoughtful constitutional analysis of moment of silence statutes. Such statutes, as the court of appeals in *Karcher* noted, should be acceptable under the “effect” and “entanglement” tests.\(^42\) But the ease with which those factors can be manipulated to support the contrary result—as exemplified by the district court’s opinion in *Karcher*—is troublesome. And the question whether such statutes have a “secular purpose” may not be worth asking. The answer will always depend upon the point from which the questioner begins, and the selection of that starting point will always be little more than an ipse dixit.

**THE CORE CONCERNS: COERCION AND DEBILITATION OF GOVERNMENT AND RELIGION**

Because of the difficulties inherent in the consistent and reasoned application of the *Lemon* test, the validity of a moment of silence statute should not depend, in the final analysis, upon a rote inquiry into purpose, effect, and entanglement. Rather, the constitutional question should turn on whether such a statute transgresses the fundamental concerns that led the Court to invalidate the recitation of a school prayer in *Engel*. In that case, the Court was troubled primarily by a prescribed prayer’s coercion of the individual right of conscience and its concomitant debilitation of both government and religion. Legislative enactments which accommodate religious expression but which do not coerce individual conscience or debilitate religious expression should pass constitutional muster.

In striking down state-prescribed prayers, the Court wrote, “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” The Court further noted that “a union of government and religion tends to destroy government and to degrade religion.”\(^43\) A neutral moment of silence provision, however, does not pose any serious threat to individual conscience or the essential autonomy of church and state.\(^44\) Perhaps more importantly, the provision of an opportunity for private contemplation or introspection facilitates the exercise of individual
rights. The establishment clause should not preclude governmental accommodation of the felt need of many persons for voluntary religious expression.

As noted earlier, the Supreme Court in Jaffree summarily invalidated a statute that provided for the recitation of a state-sponsored prayer. It also invalidated a moment of silence provision enacted by the state of Alabama. It did so, however, only because the legislative history of that statute demonstrated that the provision’s sole purpose was to return prayer to the public schools. For example, the principal legislative sponsor of the Alabama statute testified that he had no other purpose for the statute other “than returning voluntary prayer to the public schools.” Moreover, the statute invalidated in Jaffree, which provided a moment of silence for “meditation or voluntary prayer,” was enacted despite the presence of an earlier statute that authorized a moment of silence for “meditation.” In such circumstances, the Court concluded that the statute was “enacted to convey a message of State endorsement and promotion of prayer.” Because such an “endorsement” could have the effect of intimidating or coercing those who chose not to pray, the statute suffered the defect found fatal in Engel.

Other moment of silence statutes, so long as they neither encourage nor discourage prayer, should not suffer the same constitutional infirmities. The New Jersey statute, for example, provided:

Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before opening exercise of each school day for quiet and private contemplation or introspection.

Such statutes do not create the same dangers as the recitation of a state-prescribed prayer. Unlike the established prayer in Engel, neutral moment of silence statutes protect “both the right to speak freely and the right to refrain from speaking at all”; they plainly are not “an instrument for fostering public adherence to an ideological point of view [an individual] finds unacceptable.” Moreover, such statutes do not disrupt the essential autonomy of church and state. First, neutral moment of silence statutes are permissive only. They do not require students to do anything other than remain silent—students need not close their eyes, bow their heads, or assume any posture suggestive of religion or irreligion. Second, the language of such statutes is absolutely neutral as to religion. Prayer is not even mentioned. Third, in contrast to the Alabama moment of silence statute, a truly neutral statute is not enacted exclusively to promote prayer. Several New Jersey legislators, for example, suggested that a moment of silence is provided “to help restore order in the classroom.” Finally, unlike the prayer at issue in Engel,
a moment of silence does not involve the state—or the church—in religious indoctrination of any kind. Thus, on the surface, such statutes do not run afoul of the evils identified in *Engel*: they cannot coerce individual conscience because they do not require any particular thought; they do not interfere with church-state autonomy because they do not contemplate the involvement of either entity in the affairs of the other.\(^{51}\)

Moreover, unlike the situation in *Engel*, there is good reason to conclude that a moment of silence facilitates rather than inhibits the exercise and enjoyment of precious individual liberties. The argument has occasionally been made that, because compulsory attendance at public school effectively precludes many opportunities for personal prayer, a moment of silence to accommodate such activity is not only permissible but is in fact constitutionally required by the free exercise clause (which, of course, prohibits government from interfering with the free exercise of religion). The Court in *Jaffree* suggested that such an argument is weak.\(^{52}\) But even though the state may be under no constitutional command to provide an opportunity for private prayer, the “free exercise” argument cannot be ignored. The provision of a moment of silence in the context of a public school—a structured, compulsory state institution where contemplative opportunities are limited—necessarily furthers values protected by the free exercise clause.\(^{53}\) As Justice Brennan has noted, “even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion.”\(^{54}\)

State efforts to facilitate opportunities for voluntary private devotion in the public schools should be sustained so long as they do not—as in *Engel*—infringe upon “the individual’s freedom to choose his own creed.”\(^{55}\) A statute which simply “permits” a moment for “quiet and private contemplation or introspection” at the sole “discretion of the individual student,” is neutral among religions and between religion and nonreligion. Such a statute neither favors one religion over another nor “conveys a message of endorsement or disapproval of religion.”\(^{56}\) As with the released-time religious study program upheld thirty-five years ago in *Zorach vs. Clauson*, a simple moment of silence leaves students to their “own desires as to ... [their] religious devotions, if any.”\(^{57}\)

The Court in *Jaffree* noted that an attempt “to return prayer to the public schools is, of course, quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.”\(^{58}\) The Court has also noted that “in our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic.”\(^{59}\) The fundamental goal of the religion clauses of the First
Amendment should not become the removal of all traces of religion from public life. On the contrary, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” By providing its schoolchildren with the opportunity for voluntary, private introspection at the start of each schoolday, state legislatures do not transgress constitutional limits. Rather, as the Supreme Court noted in Zorach, by “adjusting the schedule of public events to sectarian needs” they “follow the best of our traditions.”

NOTES

1370 U.S. at 425.
1The Court disposed of Karcher on technical grounds, concluding that the named appellant (the former speaker of the New Jersey General Assembly) lacked “standing” to pursue the appeal (Karcher vs. May, 108 S. Ct. 388 [1987]). The Court thus did not express any opinion on the merits of the suit, although the decision left standing two lower court decisions invalidating the New Jersey moment of silence statute (ibid., 8–10).
1See, for example, Douglass Laycock, “Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,” Northwestern University Law Review 81 (1986): 1, 7: asserting, “It is generally the religious right that demands government support for religion.”
1See, for example, Wallace vs. Jaffree, 472 U.S. 38, 91–107 (Rehnquist, J., dissenting).
1See, for example, Engel vs. Vitale, 370 U.S. at 425–33.
1See, for example, Abington School District vs. Schempp, 374 U.S. 203 (1963); and Epperson vs. Arkansas, 393 U.S. 97 (1968).
1Laycock labels such scholars as the “religious right” (Laycock, “Equal Access,” 7).
1Wallace vs. Jaffree, 472 U.S. at 107 (Rehnquist, J., dissenting).
1The “wall of separation” is generally credited to Jefferson, who used the phrase in a ceremonial letter to the Danbury Baptist Association (Wallace vs. Jaffree, 472 U.S. at 91 [Rehnquist, J., dissenting]).
1Ibid. at 92.
1Ibid. at 98.
1Elias Boudinot, the congressman who proposed the resolution, stood on the floor of the House that he “could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them” (Annals of Congress 1 [1789]: 914, cited in 472 U.S. at 101 [Rehnquist, J., dissenting]).
1Engle, 370 U.S. at 422.
1Compare Michael W. McConnell, “Neutrality under the Religion Clauses,” Northwestern Law Review 81 (1986): 146, 163: suggesting that even the nondenominational prayer in Engel favors “one religion or group of religions—probably the majority’s—over the others.”
1472 U.S. at 99 n. 4 (Rehnquist, J., dissenting).
1Wallace vs. Jaffree, 472 U.S. at 48–49.
1Ibid. at 81 (O’Connor, J., concurring; she asserts that the Court “must employ both history and reason in [its] analysis”).
1The Jaffree Court emphasized “how firmly embedded in our constitutional jurisprudence is the proposition that the several states have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States” (472 U.S. at 48–49).
1See McConnell, “Neutrality,” 163: arguing why, even from the perspective of a scholar who supports government accommodation of religious practice, “there should be no government-sponsored religious exercises [vocal prayers, Bible study as scripture] in the public schools.”
3463 U.S. 783 (1983). There, on the basis of long acceptance and the similar practice of the first national Congress, the Court upheld the constitutionality of Nebraska’s practice of paying a chaplain to open each state legislative session with prayer.


3Even that description may be overly charitable. The conflicting and seemingly unprincipled results of Lemon are made apparent by Chief Justice Rehnquist in the following synopsis (Wallace vs. Jaffree, 472 U.S. at 38, 111 [Rehnquist, J., dissenting]) of the Court’s establishment clause cases:

A State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or a natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing “services” conducted by the State inside the sectarian school are forbidden . . . but [not] . . . diagnostic testing. . . . A State may give cash to a parochial school to pay for the administration of State-written tests and State-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.

Such results are hard to justify on anything other than an ad hoc basis.


3Ibid. at 1571.

3Ibid. at 1570.

3Ibid. at 1571.

3Ibid. at 1575.

3780 F. 2d 240 (3d. Cir. 1985).

3Ibid. at 249.

3Ibid. at 247.

3Ibid. at 251–52.


3572 F.Supp. at 1570–71. See also 1572–73.

3Cooperman, 780 F. 2d at 252.

3See, for example, Lynch vs. Donnelly, 465 U.S. at 680–81 and n. 6 (citing numerous cases).

3Ibid. at 680 (emphasis added).

3See Wallace vs. Jaffree, 472 U.S. at 108 (Rehnquist, J., dissenting): “If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about religion.”

3780 F. 2d at 247–49.

370 U.S. at 431. As a matter of philosophy and personal belief, I agree with both assertions. Reading the establishment clause to prevent official coercion of religious belief seems sound both in theory and practice. It is certainly a construction of the Constitution that comports with the doctrine of The Church of Jesus Christ of Latter-day Saints as reflected in the eleventh Article of Faith. Even a brief comparison of the vitality of religion in American life with the sometimes near irrelevancy of religion in nations with state-supported churches (such as England and Italy, to name two obvious examples) bears out the apparent correctness of the Court’s assertion that government support “degrade[s] religion.”


3Ibid., 151, 161–67.

3Wallace vs. Jaffree, 472 U.S. at 57.

3Ibid. at 59, 61.


3Wallace vs. Jaffree, 472 U.S. at 51.


3See McConnell. “Neutrality,” 154, 163; governmental provisions accommodating the religious practices of students should be constitutional so long as “they involve no pressure upon unwilling students to participate . . . if they are genuinely neutral among the beliefs present in the school population” and do not “interfere with the autonomy of religious life.”
472 U.S. at 59 n. 45.
Justice O'Connor, for one, has recognized that in some circumstances, the free exercise clause requires some modification of "the standard Establishment Clause test" (Wallace v. Jaffree, 472 U.S. at 83 [O'Connor, J., concurring]). McConnell has forcefully argued that free exercise values must be given some scope in determining the constitutionality of moment of silence provisions because, in the context of a public school, "there can be no religious element in the absence of government accommodation" (McConnell, "Neutrality," 166).

Wallace v. Jaffree, 472 U.S. at 52.
Ibid. at 61.

Unfortunately, we are rather close to that goal at the present time. See McConnell, "Neutrality," 162 and n. 70; "references to religion have been removed systematically from public school education" (citing Religion and Society Report 3, no. 11 [1986]: & C. Haynes, Teaching about Religious Freedom [1985]; P. Vitz, Religion and Traditional Values in Public School Textbooks: An Empirical Study [1985]).

Zorach v. Clauson, 543 U.S. at 314.
Going to Grandmother’s

My dream blew away the twelve years’ dust
Of your death. Father (dead for eight years) drove
The car to Cedar Rapids. I held my infant sister,
Coaxing her to take a bottle while Michele and I,
Both enchanted, argued over who would hold her.
Iowa hills swelled gently with the gift of corn.
We pulled into the driveway I have not walked
Since your death.

As always, I was first to your door,
Flung it open, saw you coming down the steps
From your bright kitchen of antique bottles
And blue gingham curtains. The scent of flour
And bread dough clung to the folds of your cotton apron.
You enfolded me in your arms, and I thought,
I must tell you of my joy that could crush us both,
For the glory of it and the devastation
It could wreak if it leaves me.

I woke up before I told you,
Before I knew what it was.

—Cara M. Bullinger
Terrorism and the Constitution

Christopher L. Blakesley

In September 1982, innocent men, women, and children were slaughtered in the refugee camps at Sabra and Shatila, Lebanon, by Lebanese-Christian forces dependent on Israel. On 15 June 1985, Robert Stethem was shot and killed aboard the hijacked TWA flight 847. On 7 October 1985, the Italian cruise-liner Achille Lauro was hijacked, and Leon Klinghofer was killed and thrown overboard. On 2 July 1986, Rodrigo Rojas was mortally wounded when he was doused with gasoline and set afire while walking with protestors in Santiago, Chile. The Soviets are alleged to leave booby-trapped dolls for Afghan Mujahadeen children. The United States government has given both direct and indirect support to the Nicaraguan Contras, who allegedly have killed innocent Nicaraguans in conjunction with their guerilla warfare. It is also alleged that the Sandinistas have killed innocents in maintaining their power. These tragic episodes continue the ugly saga of terrorism, this modern mal du siecle.

At the closing of the Iran-Contra hearings session with Lieutenant Colonel Oliver North, Senator Inouye addressed the issue of illegal superior orders and a soldier’s legal and moral obligation to disobey them. Senator Inouye alluded to the Nuremberg trials and appeared to suggest that we, through that tribunal, made it abundantly clear that failure to disobey illegal superior orders may be criminal and, if so, should incur punishment. Brandon Sullivan, Colonel North’s attorney, objected vociferously to the allusion to the Nuremberg trials and noted that he found the allusion personally and professionally distasteful. The objection succeeded in diverting Senator Inouye from his tack.

The line of questioning and the allusion, however distasteful, appears apt. The evidence suggests that orders may have been given which a reasonable soldier would have known were illegal. They related to possible illegal funding of groups that were known to have committed

violence against innocent noncombatants in Nicaragua—conduct that, when committed by other, “less acceptable” groups, is condemned as terrorism. If the groups were known to have been committing criminal acts, those supporting them may be considered guilty as aiders and abettors. It is ironic that funds to support the allegedly terroristic acts of the Contras should have been raised by the sale of weapons to Iran, which is alleged to have connections to those who attacked the U.S. Marine barracks in Lebanon as well as to the perpetrators of many of the acts of terrorism noted at the beginning of this article. These orders were apparently given and obeyed in secrecy, allegedly to save lives. The line of questioning and the conduct that gave rise to it raise significant issues of international and domestic criminal law, which, in turn, prompt serious questions of constitutional law in relation to the international arena. The conduct of the Reagan administration in this and other instances also poses serious questions about the constitutional separation of powers and checks and balances, when questions of important foreign policy are concerned. These events and our reaction to terrorism provide a vehicle for studying the role and relationship of Congress, the executive, and the judiciary in matters of war and foreign affairs at a point where constitutional, international, and criminal law converge.

How do terrorism and the Iran-Contra hearings relate to the Constitution? My thesis is that there is a tendency for the executive of this or any nation to eschew even constitutionally mandated avenues of problem-solving considered to be cumbersome, inefficient, or inimical to the executive’s vision of the national interest in foreign affairs. There is also a tendency to consider one’s own conduct and the conduct of one’s allies and friends to be justified when it is directed at goals deemed by the executive branch to be good. Constitutional provisions based on the checks and balances and separation of powers are sometimes cumbersome and inefficient for resolving some pressing problems. Sometimes Congress disagrees with executive policy. Sometimes the judiciary must consider whether conduct in foreign affairs has met legal or constitutional muster.

Today, there appear to be few more pressing problems than terrorism. Because combating terrorism is so important, there is a tendency for the executive branch to eschew the Constitution and constitutional procedures when they get in the way of policy objectives. This tendency is exacerbated when the battle against terrorism is coupled with other pressing and important policies, such as “keeping communism from gaining another foothold in our hemisphere.” But we must ask whether, in the name of antiterrorism, we have become terrorists; whether, in the name of anticommunism and antitotalitarianism, we have allowed erosion of antitotalitarian protections in our Constitution and constitutional order.
WHAT IS TERRORISM?

We have all heard the simple aphorism, “One person’s terrorist is another’s freedom fighter.” The aphorism, sometimes taken seriously, misses the point. The issue is whether certain conduct, perpetrated by government officials, soldiers, police, freedom fighters, insurgents in a civil war, or dissidents, is criminal. Wars of national liberation—wars of any kind—are, by definition, violent—murderously so. They are akin to murder and probably turn many of the participants on both sides into victims, executioners, or both. Sartre was correct, but incomplete, in aphorizing that “once begun, it [a war of national liberation] is a war that gives no quarter.”

Today, no war does. Killing in war, sadly, is deemed by nations and other groups to be justifiable or acceptable.

Some conduct, however, even within war, and thus, a fortiori, during times of relative peace is not justifiable or acceptable. A fight for gaining or retaining power—or even for survival—may cause people to do unspeakable things, but we do not have to justify or even accommodate such behavior. This has long been recognized. For example, in 634 A.D., Caliph Abu Bakr charged the Moslem Arab army invading Christian Syria: “Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman.” Killing of babes in arms, for example, is not acceptable; it is murder. Perpetrators of such murder are prosecutable and have been prosecuted.

Substantive criminal law and customary international law consider certain kinds of conduct criminal, as is evidenced by, among other things, the complex of international treaties on such subjects as hijacking, hostage taking, human rights, and the laws of war. We may call such crimes terrorism, but it is not necessary to do so. What makes this conduct different from straightforward domestic criminal law is that the conduct is perpetrated in pursuit of some political, military, ideological, or religiose end, including anarchy or nihilism as well as rebellion or oppression, and the fact that it has an international impact or has been condemned by international customary or positive law. The political, military, religiose, or ideological purpose is not necessary to render the conduct criminal, but it is helpful in determining conduct that may be considered an international crime and that should therefore trigger universal jurisdiction. If the child of a head of state or a tribal leader were murdered in order to intimidate the leader or gain some other advantage, the crime would not only be murder but a crime triggering universal jurisdiction. The same would be true of governmental conduct such as kidnapping, torture, and murder of the population in order to intimidate and quell dissent. It should not matter whether such conduct transcended international boundaries.
Wantonly reckless or intentional killing of noncombatants during war is a war crime. When there is no declared war, the wanton or intentional killing of peacetime analogues to noncombatants (we’ll call them “innocents”) is also a crime. To add that it is an international crime should not cause confusion. The conduct becomes internationally or universally prosecutable when it is perpetrated pursuant to political, military, ideological, or religiose aims or when it is otherwise in violation of international customary law, including that protecting human rights.

Affirmative defenses may obtain, but the motive or purpose behind the conduct is not one of them. It may be a defense, however, if a combatant is killed during war or an equivalent during nondeclared hostilities. In international law, as in criminal law, it is justifiable to kill one’s attacker. It is also justifiable to attack or kill opponent combatants or their equivalent in a rebellion, insurrection, or other uprising or guerilla war. What is not justifiable is the use of noncombatants or their equivalent as targets, no matter how lofty the goal. Self-defense is sometimes asserted as a justification, but it is never self-defense to attack an innocent, even if killing the innocent would preserve the life of the defendant. Self-preservation is not self-defense.13

Some have suggested that it is inappropriate to determine what international conduct is criminal by focusing on the object or purpose of the conduct. They argue that, generally, crime is defined by an act, not by motive or object, and that we should delineate a crime by what is done, not why it is done or to whom. However, a crime requires a mens rea as well as an actus reus. Culpability is based on the defendant’s mental state. One’s motive may not be relevant, but one’s knowledge or intent regarding the object will be. For example, if someone knows he is killing a person, rather than a deer, he has a mental state that will establish criminal homicide. On the other hand, if someone kills a deer sincerely believing it is a person, he may not be convicted of criminal homicide. Similarly, a war crime is committed when violence is perpetrated, intentionally or wantonly, against noncombatants, even though the same conduct is not criminal if committed against combatants. A homicide will be justified if committed against a person attacking with deadly force, but the killing will be murder if intentionally or knowingly committed against an “innocent” (one who is not attacking with deadly force), even if the killing is to save one’s own life. Thus it is substantively necessary to take into account the object of the allegedly criminal conduct to determine whether it is criminal. Culpability is often based on the object of the conduct in conjunction with the perpetrator’s mental state regarding that object. Therefore, it is perfectly appropriate, even necessary, to define criminal terrorism by taking the object and the mental state about that object into account.
The term *innocent* will be used in this article to mean noncombatants or their peacetime equivalents. There is no justification for killing individuals hors de combat. Oppression may be analogized to an attack, allowing for justified revolutions based on a theory of self-defense. The “self-defense” attacks, however, must be directed against individuals holding the status of combatants or their peacetime equivalents. The determination of whether an individual is a “combatant” may be difficult in a given case, but drawing such lines is the job of the judiciary in all nations.

The Reagan administration has argued that it is justifiable self-defense to abduct “terrorists” from abroad and to attack and bomb nations harboring “terrorists.” The administration has further argued that a decision to take such measures is per se legal in that no other nation or institution may question it. One danger of this position, of course, is that other nations or groups may use it as well. Could the Soviet Union “justify” a preemptive strike against the United States? Could any group that considers itself violated by U.S. policies “justify” similar conduct? Why not? If self-justification is elevated to the level of legality, there is no rule of law in any crucial context. If one has the power to succeed, one is justified.

One danger in such a self-defining vision of self-defense lies in what it might cause one to do or to become. The old German notion of *das Recht* combined with that of “necessary defense” (*Notwehr*) and the Soviet version of the same notions (*neobkhodimaya oborona*) are very similar to the current U.S. administration’s view of self-defense. These notions hold that any right or defendable interest, from life to personal honor, is entitled to the same degree of protection and privilege. The only question is whether a right or interest is threatened. If so, whatever force is required to prevent the invasion of the right or interest is justified. In both the German and the Soviet conceptualization of “necessary defense,” the notions of legal order (*die Rechtsordnung*) and social danger (*protivopravnyi*) identify necessary defense with protection of the legal order itself. Thus the Germans justified attacks on the Sudetenland and Poland at the beginning of World War II and the elimination of such “threats” to the legal order as Jews, deviates, the insane or other “mental deficient,” and the Stalinist USSR justified the liquidation of enemies of the state in the name of “necessary defense.”

Even if killing innocents is deemed effective to promote an end considered by the actors to be good—even if it actually is an efficient means to intimidate a government or dissident group, or to render a population insecure—it does not need to be accepted as morally justified or legal. The claim of the oppressed that a child is the enemy because she will inherit the benefits of the oppressors is unacceptable, just as it is unacceptable to oppress or to allow other governments or other groups
to oppress. It is not acceptable for combatant forces to hole themselves up and use innocent noncombatant civilians as shields. This is a form of oppression or terrorism. Similarly, however, it is not acceptable to bomb villages because one wishes to prompt a coup d’etat or because one believes that some enemy or “terrorist” forces may be hiding or interspersed therein.

We and our real or perceived enemies are in the habit of justifying conduct that, if it were perpetrated against us, would be considered criminal. We all seem to be caught up, as Albert Camus said, in some “infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violence by the opponent’s violence. The eternal question as to who was first responsible loses all meaning then.” But Camus goes on to say, “We can at least . . . refrain from what makes it unforgivable—the murder of the innocent.” 18 I trust that Camus was right when he said that humanity generally does not want to be victim or executioner. 19 When we participate in or accept oppression or the slaughter of innocents, however, no matter how lofty the articulated end, we simply become oppressors or slaughterers of innocents. There is a common core of values that condemns this oppression and slaughter.

It is easy to slip into Camus’s “infernal dialectic.” From the perspective of those who are oppressed, it is easy to believe that all law, including that prohibiting violence against innocents, works to continue the oppression. Children of the oppressors can be seen as enemies, as they will inherit the fruit of oppression. Jean-Paul Sartre put the argument well:

> A fine sight they are too, the believers in non-violence, saying that they are neither executioners nor victims. Very well then; if you’re not victims when the government which you’ve voted for, when the army in which your younger brothers are serving without hesitation or remorse have undertaken race murder, you are, without a shadow of doubt, executioners. . . . Try to understand this at any rate: if violence began this very evening and if exploitation and oppression had never existed on the earth, perhaps the slogans of non-violence might end the quarrel. But if the whole regime, even your non-violent ideas, are conditioned by a thousand year-old oppression, your passivity serves only to place you in the ranks of the oppressors. 20

Thus, the oppressed perceive international law as fostering and promoting their oppression. 21 They argue accurately that the oppression is a form of violence against innocents—theirself. The violence and oppression against them began ages ago and still continues, so they determine to strike out with similar violence against the oppressors through those who will inherit the fruits of the oppression. Alternatively, they argue that since the rules of today’s international society foster oppression—terror-violence against the oppressed—the oppressed are not bound to obey the rules. Thus, as a means to break the yoke of
oppression and terror, they sometimes opt for violence. Violence is justified under certain circumstances, but sometimes the oppressed group will opt to reject the rule prohibiting violence against noncombatants or their equivalent as a means to break the yoke of oppression. Why, they argue, should we abide by rules that provide for others at our expense, that function to oppress and do violence to us?

However valid the arguments of the oppressed in today’s world, any violence they direct against noncombatants works only to allow the oppressors to feel justified in their oppression, or at least to sell to their constituents the view that they are justified in using violence to maintain their power. When innocent civilians are attacked by those claiming to represent the oppressed citizens of the opposing power, they naturally side with their government. The government, feeling the support of the people, tends to increase its own oppression or counterviolence against the originally oppressed. Oppression and counterviolence both increase, rather than decrease, in a frightening cycle.

Thus, we seem to have slipped quite easily into the ancient mentality of the blood feud. *Lex talionis,* “an eye for an eye,” calls the victims or the victims’ proxies to carry out the sanction against the victimizers.\(^2\) Retaliation is aimed at the collective of the actual or perceived oppressors. Any member of the opposing group (call it the family, clan, tribe, people, state) is fairly subject to retaliation. The retaliator is not viewed by his or her own group as a criminal or terrorist because he or she is an instrument of the group’s need to avenge itself. Once this occurs, the other group feels justified in a counterreprisal, and the vendetta rages.

We must escape this cycle. No end justifies oppression or violence against innocents. We must condemn it. It violates domestic and international law. The best way to combat terrorism is to work at eliminating the oppression and depredation—forms of terrorism themselves—that are at its root. Domestic and international law provide a means to combat both aspects of terrorism; they provide a means to keep pressure on perpetrators of oppression and to prosecute and punish all violence against innocents, whether committed for intimidation or other military, political, ideological, or religious ends. Attempts to circumvent the rule of law only lend impetus to the cycle of violence and terror. When these attempts are combined with efforts to avoid congressional participation in policy-making or oversight, or to prevent the judiciary from reviewing conduct that might be in violation of law or constitutional provisions, they also pose a serious threat to our constitutional republic, no matter what justification is claimed.

If our government, by its policy and action, promotes or condones terroristic conduct by the Contras in Nicaragua (or other groups elsewhere) in the name of democracy, it is rejecting the rule of law.
Unfortunately, some ideologues believe that terrorism is inevitable and that the rule of law must be pushed aside to combat it. These people are also likely to argue that, just as there is no law when it comes to international relations, there is no appropriate legal definition of terrorism: "One person’s terrorist is another’s freedom fighter."

To be sure, difficulties arise in trying to combat terrorism by means of international law. States often refuse to extradite or prosecute perpetrators of terror-violence when it is committed for a cause they deem good.\textsuperscript{23} While such failures are unfortunate, they do not affect the legal definition of terrorism. Violation of the law or failure to enforce it does not negate the law itself.\textsuperscript{24} If consistent enforcement is the essence of law or is necessary for law to exist, there is no law at all.\textsuperscript{25} International law has been and will continue to be a means among others that are effectual in combating terrorism. The point is, however, that to eliminate the rule of law in order to combat terrorism more efficiently may be more dangerous than terrorism itself. Without the rule of law, power alone becomes the keystone of relations. Substantive and procedural constitutional protections are left aside.

In order to establish a consistent policy and means to protect humanity against terror-violence, it is necessary to provide a legal definition of the crime or crimes that we condemn as terrorism. To do this, we must distinguish "justifiable" violence, perpetrated against an enemy in war or insurgency, from acts of terrorism. It is necessary to determine who constitutes "an enemy" and who, among "the enemy," may be subject to legal violence. Given the rhetoric of the day, this may not be an easy task. It may be that because the law condones violence in certain circumstances, the key to objectively identifying terrorism will be the law of war and substantive criminal law.

The late Professor Richard Baxter articulated the commonly felt sense of futility in trying to define terrorism: "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose." In fact, however, no legal definition of anything makes any sense, except in terms of the purpose for which it is applied. If we can decide what our purpose is in preventing the violence most people fear and call terrorism, we will have the working definition we need.

I agree with what I believe is the sense of Baxter's statement of regret and frustration. It is not good to have a legal definition of terrorism, or even to use the term, if it is to be used for legalistic quibbling and obfuscation or as a rhetorical device to achieve ulterior ends or to justify one's own counterconduct which may, in itself, be criminal or violative of civil liberties or other aspects of the Constitution or international law. For example, consider the so-called Shultz Doctrine to apply military force to preempt terrorism or to retaliate against terrorists or states
supporting, harboring, or training terrorists. Caspar Weinberger, as Secretary of Defense, opposed such responsive military strikes because they “kill women and children.” In addition, one can agree with Baxter in another sense. The term terrorism is, perhaps, not necessary if the conduct that constitutes it falls within a common core of criminality that is universally condemned anyway.

Without participating extensively in the debate over what the properly complete legal definition of terrorism might be, it is appropriate to determine what sort of conduct clearly is terrorism. There may be no need for an abstract, all-encompassing definition, but there is a need to establish the elements of the offense(s) we consider as terrorism, or whatever else we may wish to call it. To convict, an actus reus and mens rea must be proved. For the purpose of this article, at least, I will adopt a very limited definition: Terrorism is the application of violence against innocent individuals for the purpose of obtaining some military, political, ideological, or religiose end. Terrorism is conduct wherein the perpetrators do violence to innocents, including taking them hostage, in order to intimidate a nation or population or to reap some other political, ideological, or military advantage or benefit. An innocent is a person who is not an attacker or an aider and abettor of an attacker. To be an aider or abettor, one must have the same intent or criminal mental state as the attacker. In this sense, terrorism can be committed by the military even during a war when the state allows, or ignores, purposeful or reckless killing of innocents. A crime against humanity, such as genocide, torture, or apartheid, is a form of terrorism. What we call it does not really matter. It is all illegal and immoral terror-violence.

Violence is justified in self-defense or when it occurs in revolution or breaking the yoke of oppression. Some ideologues would extend this justification to violence against innocent civilians when it is committed for a just cause. But violence against innocents is never justified. Self-defense does not comprehend the killing of innocents (those not in a mode of attack upon us) or the use of innocents as a means to self-preservation. One is not justified in slitting a weaker person’s throat and drinking his blood or eating his flesh because one will starve otherwise. A nation may not justifiably starve, or attack and destroy, or otherwise oppress a group or nation, inside or outside its borders, to benefit the majority of the population or the power elite. Any group that adopts such a tactic—that oppresses or commits terror-violence, or promotes or condones its use, whether in the name of God, or in the name of communism, or democracy, or any other piety—has no room to complain about the other side doing the same. Condemnation of terrorism by those who use it or condone its use by other states or its favorite freedom fighters is hollow. Terrorism committed by a group against a nation or its nationals should not be an excuse to commit the
same against innocents of that group. We should be beyond the blood-feud mentality of using innocent, noncombatant members of our enemies’ population as proxies for our vengeance or expiation or as tools for promoting our interests through intimidation.

Whether the terror-violence occurs in a setting where it should be called a war crime, a crime against humanity, or state or group terrorism, it is condemnable terror-violence. Terrorism from this point of view is simply violent crime, and so it has traditionally been considered by Anglo-American, Continental, Islamic, and other systems of jurisprudence. International law condemns this conduct and provides for jurisdiction to be asserted over each of these types of terrorism on the basis of at least three legal theories: the universality theory, which would allow the state obtaining jurisdiction over the person to prosecute; the protective principle; and the territorial theory. Prosecution is called for and appropriate. Perhaps this presents a phenomenological vision of law. It is submitted that most, if not all, peoples consider violence against their own noncombatants, whether done by powers that are over them or by outsiders, to be evil and illegal. Violence against innocents triggers the justification for revolution and for violence, but not for violence by proxy against the evildoers’ noncombatants. If a thing is evil or illegal when committed against one’s own, it is illegal when done against others, even against the original evildoers. Such conduct should be, and is, a crime, whether committed by a government, by a soldier during a war or civil insurrection, or by a member of a political or guerilla group. A United States District Court noted in the Letelier murder case:

there is no discretion to commit, or to have one’s officers or agents commit an illegal act. . . . Whatever policy options may exist for a foreign country, it has no “discretion” to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.

International and domestic law equip us to extricate ourselves from the “infernal dialectic” of violence; they provide the means whereby we may avoid accepting or participating in, even by acquiescence, oppression or the slaughter of innocents. For this means to be effective, however, we must accept the rule of law at every level and not be misled by public relations techniques designed to obfuscate or to justify conduct when no justification is appropriate. It is the responsibility of our executive and legislative branches to ensure that no policies promoting violence against innocents to advance goals of any kind are adopted. It is the responsibility of us all not to acquiesce in the perpetration or support of terrorism and to subject its perpetrators to appropriate prosecution. It is the responsibility of the Justice Department to prosecute other members of the executive branch just as it must prosecute other
individuals who commit terrorism. If the Justice Department fails to prosecute or if there is significant conflict of interest, it is necessary to appoint a special prosecutor. It is the responsibility of our judiciary not to hide behind the political question doctrine and to decide when illegal and unconstitutional conduct occurs.

TERRORISM, COMMUNISM, CABALS, AND THE CONSTITUTION

The framers of the Constitution left no doubt about their intention to protect our liberty by scrupulous separation of powers and significant checks and balances. Alexander Hamilton, for example, declared, “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” 36 The Constitution is clear that policy development in foreign affairs is to be a joint effort. The executive and legislative branches make the policy for the people, and the judiciary decides whether the policy, even though it relates to foreign affairs, is constitutional. The executive branch, even with the advice and consent of the Senate, cannot constitutionally enter into a treaty with another nation that would, for example, promote slavery or apartheid, or that would eliminate due process for those found in the United States and charged with terrorism. Clearly, the judiciary has a role to play in matters of foreign relations.

The executive branch has had a tendency to want to rid itself of the inconvenience of having to deal with Congress and the judiciary in matters of grave importance in international relations. Some have argued, in defense of this policy, that Congress only has the power to “declare war.” 37 Congress seems often to have acquiesced in executive arrogation of power in matters of foreign affairs and especially in the area of war powers. Moreover, the Senate has recently acquiesced in elimination of the judicial role in a matter quintessentially and traditionally judicial—of deciding questions of law and fact relating to human liberty, at least when one of our close allies charges that a person has committed a terrorist act. The executive branch negotiated a treaty with the United Kingdom, whereby requests for extradition based on specified terrorist conduct will allow only the executive branch to consider the legal and factual issues of whether the conduct constituted a “political offense” and is, therefore, not extraditable. 38

Extradition is the means by which one nation may seek the return of fugitives who have escaped to another country. 39 Extradition treaties provide for extradition on a showing of probable cause that the fugitive committed an extraditable offense. This means that a decision must be made as to whether the treaty applies to the circumstances alleged to have occurred and whether the evidence suggests that there is probable cause
to believe the person accused committed the prohibited acts. Thus, it is a question of law, the application of the treaty, and of fact. Because the decision to extradite deprives an individual of basic liberties, it is, as a matter of due process and separation of powers, a question for the judiciary to decide.\textsuperscript{40}

The political offense exception developed from principles of asylum and sovereignty.\textsuperscript{41} It allows one nation to refuse to extradite a fugitive if the offense charged in the extradition request is of a political nature. It is designed for those situations wherein the fugitive is a defeated partisan in an insurrection or civil war or for those individuals charged with crimes after having been defeated in an attempted revolution or war for self-determination. It recognizes the right to revolt and to use violence to escape oppression and applies to those situations in which a person or group commits violence against the military or combatant political forces that have imposed the yoke of oppression on them.\textsuperscript{42} Although the political offense exception recognizes that violence is justified in certain circumstances, it does not include violence and terror against innocents. These, no matter how they may be glorified, are immoral and criminal, even when perpetrated by those claiming to defend democracy or by those claiming to fend off oppression. The political offense exception does not apply to this criminal terrorism.

The political offense exception has been part of our extradition law since the beginning of modern extradition practice in the mid-nineteenth century. It is part of the extradition law of virtually all nations except those in the Soviet orbit.\textsuperscript{43} The exception presents issues of mixed law and fact (was there an insurrection? was violence used against innocents or noncombatants?) and issues of law (were the people attacked noncombatants? what is an insurrection for purposes of the political offense exception?). Its resolution impacts on human liberty. Thus, the Constitution calls for this determination to be made by the judiciary. Even though one may infer from article 3, section 1, that the Constitution allows the legislative branch to determine the jurisdiction of the judiciary, it is fair to say that the legislature may not define jurisdiction so as to eliminate the judiciary from deciding questions at the intersection of due process and human liberty.\textsuperscript{44} Article 3, section 2, provides that "trial of all crimes... shall be by jury," implying that some sort of court will consider such matters.

The current administration has claimed that the political offense exception promotes terrorism. It does not. While courts have made, and will make in the future, some errors, most of the time they correctly decide political offense cases.\textsuperscript{45} Congress could draft legislation that could provide sufficiently clear guidelines and standards for application of the political offense exception to eliminate most of what is left of the
possibility for judicial error. Indeed, the State and Justice departments had drafted such legislation and presented it to Congress. Then the Reagan administration found it expedient to withdraw their support of this legislation because they found it preferable to remove the issue from the realm of law and the courts altogether. 46

The Supplementary Convention on Extradition between the United States and the United Kingdom was ratified, effectively removing the judiciary from the process of deciding whether conduct fits the political offense exception to extradition. Since terrorism as defined in this article would not fit the political offense exception anyway, the only impact the Supplementary Convention has is to eliminate the judiciary from considering the issue and applying the exception in situations in which it ought to apply. The Supplementary Treaty with Great Britain effectively eliminates the political offense exception, except for the offenses of sedition, treason, and espionage. It is another example of the executive branch, this time with the advice and consent of the Senate, attempting to arrogate power to itself in the arena of foreign affairs, especially when terrorism or war is involved.

There has been a tendency for the Congress and even the judiciary to accept the erroneous proposition that the arena of foreign affairs ought to be exclusively within the executive prerogative. 47 The so-called political question doctrine has allowed the Supreme Court to eschew decision making in the arena of foreign affairs. It would seem, however, that the Court ought not evade its responsibility to decide a case wherein constitutional values are at issue. Just because the issues are also related to foreign affairs and have been the subject of a treaty provision ratified by the Senate, it does not follow that the courts cannot hear them. Agreement in a treaty coupled with the advice and consent of the Senate is not a mechanism for avoiding constitutional scrutiny or removing the judiciary from its constitutional mandate to decide questions of fact and law relating to human liberty. The Supplementary Convention on Extradition is an attempt to do just that. The creation of a secret cabal to sell arms to Iran and to finance the Contras without legislative input or oversight is an even more ominous attempt to evade the constitutional separation of powers.

The Constitution reflects the concern of the Founding Fathers about the tendency of the executive to try to consolidate power and to weaken checks on its pursuance of its goals. James Madison warned against attempts by the executive branch to appropriate Congress’s war powers, for example:

Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively
vested in the legislature; that the executive has no right, in any case, to
decide the question, whether there is or is not a cause for declaring war; that
the right of convening and informing Congress, whenever such a question
seems to call for a decision, is all the right which the Constitution has
deemed requisite or proper; and that for such, more than for any other
contingency, this right was specially given to the executive.\footnote{48}

Abraham Lincoln understood the wisdom of the founders in
providing constitutional checks on the war powers of the executive:

Kings had always been involving and impoverishing their people in wars,
pretending generally, if not always, that the good of the people was the
object. This our [delegates to the constitutional] convention understood to
be the most oppressive of all kingly oppressions, and they resolved to so
frame the Constitution that no one man should hold the power of bringing
oppression upon us.\footnote{49}

Henry Clay noted that this aspect of the United States Constitution was
unique: “Everywhere else the power of declaring war resided with the
Executive. Here it was deposited with the Legislature.”\footnote{50}

The executive branch has a tendency to suggest that since matters
of foreign affairs, such as the war powers, for example, are subject to the
power of the executive in other nations, they should belong exclusively
to the executive in the United States, as well. Article 1, section 8, of the
United States Constitution provides unambiguously that “Congress shall
have power . . . to declare war.” Only Congress has the authority to
establish a state of war or to approve or ratify an act of war.\footnote{51} Today,
however, declaration of war virtually never occurs.\footnote{52} Some have argued
that Congress only has power to declare war, leaving the executive with
discretion over the use of military forces in any situation where a
formal declaration of war has not been made.\footnote{53} Rostow argues that the
term \textit{to declare war} is unique to international law and that it must be
understood pursuant to international law. He further asserts:

The international powers of the United States are conferred and defined by
international law. Internationally, the government of the United States pos-
sesses all the powers possessed by any other state under international law,
including the sovereign power to violate international law. The Constitution
confers these powers to the political discretion of Congress and the
President in accordance with the principle of functional necessity.\footnote{54}

Rostow argues that functional necessity requires that the president
alone sometimes have the power to make war, that is, to commit acts of
war.\footnote{55}

It is a strange view of law to consider it as sanctioning the notion
that one may violate it at will if one has the power. No doubt, the power
to do so sometimes exists, but does power equal law? It seems more
accurate to say that although nations in the international arena, like
individuals in a domestic arena, sometimes have the power or the luck to avoid sanction when they violate a law, this does not mean that the law validates its own violation. What Germany did during World War II was arguably “legal” under Germany’s domestic positive law, but it was not legal under international law. This would have been true whether Germany “got away with it” or not. Furthermore, just because some Allied nations and their officials committed war crimes during World War II or other wars and were not prosecuted or punished, it does not follow that there was no international law in operation.

Behind this notion of sovereignty and functional necessity, there lies the assumption that there is no international law except that based on consent. Moreover, this functional necessity view of international law is also thought sufficient to overcome constitutional mandates or, at least, to control the definition and application of constitutional principles and terminology, when foreign affairs are concerned. Thus, according to this school of thought, we are to read our Constitution in accordance with notions of functional necessity and in the same fashion that other nations would read theirs. And since the sovereign power in the international sphere is generally controlled by the executive, it follows for the functional necessity advocates that the president alone must have this power and constitutional authority. This is really nothing more than the reductionistic view that the power of sovereignty includes unbridled freedom to act, even in violation of norms recognized by all peoples and nations, and even against the thrust of constitutional language and history. It is a view that the executive branch can function with impunity in the realm of war, fighting terrorism, and perhaps even generally in the arena of foreign relations. This argument from sovereignty and functional necessity in foreign affairs rings suspiciously like that totalitarian executive power about which so many of the Founding Fathers and President Lincoln warned.

There is no doubt that when the nation is attacked, the president may call out the troops and may commit our forces in self-defense. Even this, however, must be ratified by Congress.  Not only must Congress ratify acts of war, it also has the power to establish basic policy goals and strategies relating to war and foreign affairs. It has the power to provide for the common defense, to regulate commerce among nations, to declare war, to grant letters of marque and reprisal, to provide and maintain a navy, to raise and support armies, and to provide for organizing and calling out the militia. Congress also has the power to make all laws necessary and proper to accomplish these constitutional objectives. These powers explicitly provided Congress by the Constitution demonstrate the speciousness of the “functional necessity” argument.

The functional necessity argument denigrates the Constitution by placing it on the same plane as international law, even though the
constitutional division of powers is the superior norm in our constitutional republic. Moreover, the international law described by the notion of functional necessity is not international law at all but merely the rule of superior power. Ironically, then, the “functional necessity” view posits a lawless international order to warrant adoption of a construction of the Constitution that eviscerates traditional limitations—all to the proclaimed end of furthering goals perceived to be required by a dangerous world. But a dangerous world is not rendered less dangerous if we adopt totalitarian practices in order to fight totalitarianism, or when we use terrorist means to fight terrorism. Indeed, the constitutional checks and balances provide the wherewithal to ensure that we do not violate international law or destroy our constitutional republic through precipitous executive action.

The conduct I have described as terrorism poses a vicious threat to human dignity. It must be condemned whether it emanates from states against inhabitants of their own territory, in violation of human rights law, or against noncombatants extraterritorially. It is criminal whether perpetrated by groups of insurgents or those struggling for independence or freedom from oppression. Its criminality can be determined by customary international law and domestic substantive criminal law.

The greatest danger posed by terrorism to our democracy and constitutional republic may be our executive branch’s overreaction to it and use of terrorism as an excuse to erode the constitutionally mandated sharing of powers in the realm of foreign affairs, war powers, and combating international crime. If we are to avoid manifest hypocrisy, the destruction of the rule of law, and erosion of our primary democratic and constitutional values, we must be vigilant and avoid participating in criminal conduct, either directly or as aiders and abettors. We must not allow hysteria to cause us to accept an arrogation of power by the executive branch at the expense of the other two branches. Although Congress is sometimes cumbersome and the judiciary may make mistakes, these institutions are set in the Constitution as checks and balances for our domestic protection against autocracy. Whether combating terrorism is accomplished by means of extradition and prosecution of alleged perpetrators or by a decision to initiate acts of war, the constitutional order must be preserved.
NOTES


3New York Times, 12 October 1985. When U.S. fighter planes intercepted an Egyptian jetliner carrying the later-to-be-convicted (by the Italian judicial system) hijackers of the Achille Lauro, they either committed kidnapping or hijacking of their own, or they have a claim of justification. The only justification would be that the Egyptian government or the jetliner pilot consented to the taking, or that the Egyptian government or jetliner pilot were participating in the escape of the alleged hijackers (see Gerald P. McGinley, "The Achille Lauro Affair—Implications for International Law," Tennessee Law Review 52 [Summer 1985]: 691; also see Letelier vs. Republic of Chile, 488 F. Supp. 6654, 673 [D.D.C. 1980]; and Eric H. Singer, "Terrorism, Extradition, and FSIA Relief: The Letelier Case," Vanderbilt Journal of Transnational Law 19 [Winter 1986]: 57, 69.


6See, for example, Aryeh Neter, 'There’s a Contra-diction,’ Sacramento Bee, 5 April 1987.

7Ibid.


10See Telford Taylor, Nuremberg and Vietnam: An American Tragedy (New York: Bantam Books, 1971); United States vs. Calley, U.S. Court of Military Appeals, 1973, 22 U.S.M.C.A. 534, 48 C.M.R. 19 (1973); Calley, unfortunately, was not tried as a war criminal, but for violation of domestic laws. Unfortunately, the United States military has participated in terrorism in the past. Atrocities in Vietnam turned out not to be sporadic but endemic to the atrocious military situation there. For example, D’Amato notes under "By 1969, American aircraft had engaged in thirty-round, distinct bombing attacks on the internationally renowned leper sanatorium in Quyuh Lap, North Vietnam. The roofs of the buildings in the sanatorium were painted with the Red Cross. Nevertheless, this humanitarian, non-military target was a favorite among United States pilots." (Anthony A. D’Amato, "Public International Law as a Career," American University Journal of International Law and Policy 1 [Spring 1986]: 5, 13; see also Anthony A. D’Amato, Harvey L. Gould, and Larry D. Woods, "War Crimes and Vietnam: The Nuremberg Defense ‘and the Military Service Register," California Law Review 57 [June 1969]: 1055, 1086. D’Amato cites an interview with one of the pilots at the time, which indicates and explains the "psychology" of this kind of bombing mission: "When you hit school buildings, or hospitals, or especially dams, you have a feeling of accomplishment. You see the effects below in terms of scattering adults and children, or water bursting and knocking down houses, or buildings caving in." Indeed, when one adopts as a tactic or strategy the slaughter of innocents for whatever end, one truly becomes simply a slaughterer of innocents. Others have also participated in the same kind of slaughter. Note the atrocities of the Soviet Union in Afghanistan, cited in n. 5. It is no excuse for one side to say the other side participated in such conduct. That just means that both were slaughterers of innocents.


12I use the term religioso advisedly to distinguish it from religious.


14See, for example, the New York Times, 19 January and 28 January 1986 (wherein Abraham Sofaer, legal adviser to the Department of State, defends the legality of abducting terrorists). For a different point of view, see John F. Murphy, "The Future of Multilateralism and Efforts to Combat International Terrorism," Columbia Journal of Transnational Law 25, no. 1 (1988): 83–84 (suggesting that except for rare occasions of anarchy abductions would be illegal).


Ibid., 140.


Albert Camus, Neither Victims nor Executioners, trans. Dwight MacDonald (Berkeley: World without War Council, 1968), 27; see also Robert Friedlander, “Terrorism and National Liberation Movements,” 281, 282 n. 3. But we must still try to overcome, by rectifying wrongs done in the past or currently being perpetrated, the tendency to allow inertia to make executioners or victims of us all.

Sartre, preface to The Wretched of the Earth, 25.

And it is true that some oppressing nations justify their conduct by claiming it is consistent with international law. Others simply suggest by their actions and their cynical excuses that there is no international law. But the reality is that oppression violates international law, no matter what the excuse given and no matter whether some nations “get away with it” for a time.


Task Force,” Houston Post.


This “rough and ready” definition may not stand up under sustained critical scrutiny, but it is useful for the purpose of establishing jurisdiction and providing for extradition and prosecution (see Baxter, “A Skeptical Look,” 380–81). Note that the definition is broad enough to include conduct that would be a war crime during armed conflict or common criminal violence if perpetrated domestically. It is certainly appropriate to differentiate these types of violence and to recognize that they may belong in separate categories. Nevertheless, the core concept of my definition is that it is criminal to use innocents (noncombatant, civilian population) as a means to achieving a political, military, or religious end. This principle holds in any context: whether in wartime or during a period of relative peace, whether perpetrated by a state government against persons within its borders or by persons within a state’s borders against other persons within a state’s borders, or whether perpetrated across national boundaries. In any case, it is criminal. See, generally, Leslie C. Green, “War Crimes, Extradition and Command Responsibility,” and “The Law of Armed Conflict and the Enforcement of International Criminal Law,” chaps. 10 and 11 of Essays (Dobbs Ferry, N.Y.: Transnational Publishers, 1985). For further discussion of the definition of terrorism, see Ali Khan, “A Legal Theory of International Terrorism,” Connecticut Law Review 19 (Summer 1987): 945–72.

See Taylor, Nuremberg and Vietnam; United States vs. Calley.

See Blakesley, “Jurisdiction as Legal Protection,” and accompanying text, for extensive analysis of this issue and several pages of authority, including treaties, cases, doctrinal writings, and other evidence that such conduct is universally condemned.

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Robert Friedlander, “Mere Rhetoric Is Not Enough,” Harvard International Review 7, no. 6 (1985): 4, 6, noting that the acts that go into what is called terrorism are crimes and have been recognized and punished as such in Anglo-American and Continental jurisprudence; Abu Bakr, quoted in Khadduri, War and Peace, 102–7; compare Deut. 20:17–19; 1 Sam. 14:3, 33 and 18:27; Friedlander, “Enforcement,” 88; chap. 204 of Title 18, United States Code, provides for rewards for information concerning terrorist acts, and 18 U.S.C. 3077 defines an act of terrorism as an activity that:

(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and (B) appears to be intended—

(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by assassination or kidnapping.

For an extensive analysis of these theories, see Blakesley, “Jurisdiction as legal Protection,” 895.


Yugoslavia, not really within the “Soviet orbit,” although sometimes considered to be, does have a political offense exception in its extradition treaties. The other Warsaw Pact nations sometimes allow for such an exception although it is not found in any of their extradition treaties. The exception is not allowed, however, when the conduct has been perpetrated against socialist or “friendly” states (see Lech Gardocki, “The Socialist System,” in International Criminal Law: A Guide to U.S. Practice and Procedure, ed. Ved P. Nanda and M. Cherif Bassiouni [New York: Practicing Law Institute, 1987], 133, 140–41).

Perhaps this “double standard” for political offenses was seen as appealing by the Reagan administration, as it is strikingly the position taken in the United States–United Kingdom Supplementary Extradition Treaty (see Abraham D. Sofaer, United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99–8 before the Senate Comm. on Foreign Relations, 99th Cong., 1st sess. 2–6 [1985], statement of Abraham D. Sofaer, legal adviser, Department of State; Abraham D. Sofaer, “The Political Offense Exception and Terrorism,” Denver Journal of International Law and Policy 15 [Summer 1986]: 125, 132, arguing that the political offense exception should not apply to extradition requests by democratic allies but should remain applicable to those made by “unstable” and “undemocratic” regimes). This convention allows the executive and legislative branches to use treaties to choose which alleged terrorists will be “protected” and which will not). While this may be a common occurrence in the practice of international affairs, it is unfortunate and unwise to allow our law to promote the notion that terrorism is a political, not a legal, issue.

United States Constitution, article 3, section 1; Brotherhood of Railroad Trainmen vs. Toledo, P. & W. R. Col., 321 U.S. 50, 63–64 (1944), U.S. Supreme Court clearly recognizing congressional “plenary control over the jurisdiction of the federal courts”; but see Telford Taylor, “The Unconstitutionality of Current Legislative Proposals,” Judicature 65 (October 1981): 198–200, arguing that though Congress may have the power and right to restrict federal court jurisdiction it cannot use that power to abrogate fundamental constitutional rights.


"U.S. vs. Barrigan, 238 F. Supp. 336 (D. Md. 1968), aff'd 417 F. 2d 1009 (4th Cir. 1969), cert. denied 397 U.S. 909, 90 S. Ct. 907, 25 L. Ed. 2d 90 (1970), "Certain clearly defined areas have traditionally and necessarily been left to other departments of the government, free from interference by the judiciary. One such area is foreign relations" (citing Baker vs. Carr, 369 U.S. 186, at 211, 82 So. Ct. 691 [1962]); U.S. vs. Sisson, 294 F. Supp. 515, 517 (D. Mass. 1968), "a domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case"; Switkes vs. Laird, 316 F. Supp. 358, 365 (S.D.N.Y. 1970), quoting Judge Wyzansky's above-noted statement. But see Reid vs. Covert, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed 2d 1148 (1957), constitutional questions related to foreign affairs will be heard by the Court; Blakesley, "Eviscerate"; and Wormuth and Firmage, To Chain the Dog of War.


5Annals of Congress 1500 (1818). William Patterson, delegate to the Constitutional Convention and later an associate justice of the Supreme Court, noted: "It is the exclusive province of Congress to change a state of peace into a state of war" (United States vs. Smith, 27 F. Cas. 1192,1230 [C.C.N.Y. 1806] [No. 16, 342]).

5In over two hundred years, Congress has declared war only eleven times unconditionally and only four times conditionally (Wormuth and Firmage, To Chain the Dog of War, 53, 56).

5See Reveley, "War Powers of the President and Congress," 32, 140–41, 144, 171; E. Rostow, "Once More into the Breach," 5. See also Thach, Creation of the Presidency.


5Rostow, "Once More into the Breach."

5See Wormuth and Firmage, To Chain the Dog of War, 12–31.

5U.S. Constitution, article 1, section 8.

5Ibid.
Manifest

I watched horizons for a sign,
any sign to show that solid truth:
  a flash of light,
an image dreamed,
a visitation holy asked—
  not much.
Not for a God,
to show
that solid beam
to found the rest.

    I cried
I need to know,

    an echo
of former voices along
some unremembered line;
and strained my eyes to see
more than heated fantasies
within the fading clouds

    —while you
stood behind me, whispering
beyond what could not be.
I knew poets—miglior fabro—
who had been denied that face before.

    Why not me?
As I looked out on empty skies
A gentler breeze than trumpet blasts
called me to look in.

Had I turned
  and heard the voice
  behind the thunder,
  what then would I have seen,
I wonder?

    —Virginia E. Baker

Virginia E. Baker is director of the Odyssey Poetry Contest and lives in Provo, Utah.
Constitution: Ben Franklin

June

God is listening, gentlemen, so be careful with his name.
A bit more reverence, please, when you speak of his weather.
I know it’s hot. Don’t you think I’m still alive enough to feel it?
We are here, if you recall, to try to build a nation.
What’s that, Rhode Island? No, ’76 was not enough, though if you care to abstain no one will probably notice.
What we accomplished twelve years ago was a war.
Yes, Virginia, I know it was necessary.
But a divorce does not a new marriage make.
We are Americans, but most of this country can’t see that yet.
So we are here. And though we may argue and bicker, there had better be something feasible come out of this.
History, as well as many a frightened, rebellious, would-be democracy, is taking note of what we do here.
So bicker all you like, gentlemen, but get something done.

July

Now, Carolina, you speak of the common man so disparagingly. I wouldn’t, were I you.
Have you ever actually met one? I didn’t think so.
Just remember, and this goes as well for you, New York, that the common man’s blood soaked the virgin soil of this land.
They, not you with your money and false aristocracy, died for the freedom we all enjoy.
Besides, they outnumber you greatly.
It really is their nation, and I’m pretty sure they did not ask you to run it.
August

I can see that we are at an impasse.
To have a strong government or many small ones—
that is, as I perceive it, the question.
I have no perfect answer—don’t look so shocked,
Georgia—but I know enough to see that any
nation which cannot even tax its citizens for the common good
will soon be destroyed.
Remember how small and weak we are,
and how very close England and France are—God bless their war!
We must be strong!
We must also be just.
The man who solves that dilemma should be sainted.

September

Gentlemen, it is late,
and I am more tired of your shouting than I am of life,
and I’ve put up with life far longer.
How I wish Tom Jefferson were here!
Still, what we have come up with must do.
I admit I do not like all of it—yes, New York,
I know you don’t like any of it—
but I’m not sure that I shall not like it better at a later point.
I believe this document, indeed, this nation as a whole,
God inspired and, somehow, God guided.
He does work in mysterious ways does he not?
And I have learned that questioning the divine will of the Lord
is ridiculous as well as dangerous.
I, gentlemen, shall sign.

—Jani Sue Muhlestein

Jani Sue Muhlestein is a graduate student in history at Brigham Young University.
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