

FOUNDING HABITS*

by

W. B. ALLEN

The Constitution our god; the judges our priests! My first intention toward this talk was to entitle it thus. The thought was ironic, and my purpose was to show why the Constitution displays itself best and most, not in the officers of the government nor in what James Madison called “parchment barriers” but rather in the conduct and character of free and virtuous citizens. It occurred to me, however, that this occasion honors a distinguished jurist, who can in no way be confused with those idol-makers who use the Constitution to hollow out the God sphere in our public life. The Honorable Robert Henderson initiated this series of talks several years ago with an important question, namely, “What makes a nation great?” His answer, “Men,” in whom moral foundations well established are the condition without which a nation can not be great, no matter what its government. In honor and deference to Judge Henderson, therefore, I have instead titled these remarks, “founding habits,” taking my cue from one of the dimensions of the book Carol Allen and I have recently completed.

In that work we take note of the analysis of Alexis de Tocqueville, who spoke of “habits of mind” as having supplanted “habits of the heart” in shaping human moral experience. Despite his very clear formulation, commentators since have seized upon the expression, “habits of the heart,” as though Tocqueville had meant to recommend feelings as a paradigm for social interpretation. In fact, though, Tocqueville meant to describe a phenomenon that emerged with the democratic and anti-religious revolutions of the late eighteenth century—the emergence of the “intellectual” as the moral arbiter of society. Edward Shils, a fine reader of Tocqueville, conveyed the message as late as 1990:

* “Robert E. Henderson Constitution Day Lecture,” delivered at the John M. Ashbrook Center for Public Affairs, Ashland University, Ashland, OH on September 17, 2002.

The status of universities in society has also changed markedly and that has occurred partly in consequence of the triumphs of the Humboldtian idea of the university in the creation of new knowledge and the education of young persons. From having been wards of a particular church, the universities have to a large extent supplanted the churches.¹

They were mainly the “intellectuals” who spawned the revolution in France in 1789, and they were the intellectuals in the nineteenth and twentieth centuries, increasingly and eventually almost exclusively operating from universities, who became the standards of moral and political judgment in a way that clergymen once had been.²

Tocqueville, however, sought to convey by “habits of mind” a new and advanced understanding of terms of analysis central to our evolved political and moral universe. What this means for *any* analysis of higher education is that, in order to be appropriate to the task, such an analysis must undertake to identify the broader responsibilities of higher education, including its moral responsibilities, and not merely the personal opportunities it affords to students. For habits of mind will constitute our most decisive collective possession. This, we believe, is the deeper meaning of Maritain’s observation that “the man of our civilization *is* the Christian man, more or less secularized”(original emphasis).³

James Madison characterized such habits in the context of the founding of the United States in reference to the role of the people in that process. He noted in a 1789 House of Representatives debate over a proposal for the right to give instructions to representatives, that,

¹ Edward Shils, “The Idea of the University: Obstacles and Opportunities in Contemporary Society” in *The Calling of Education*, 237-38 [reprinted from *Minerva* XXX/2 (Summer 1992), Kluwer Academic Publishers].

² Tocqueville undertook usefully to define the extraordinary French term, *moeurs*. That word has so many and varied meanings that it has for nearly the whole of the nineteenth and twentieth centuries baffled commentators. Tocqueville, however, cut through the bafflement with an explicit definition of the term at the outset of his chapter, “Concerning the influence of morals in the preservation of the democratic republic in the United States.” The definition Tocqueville provided was “habits of mind,” which he specifically contrasted with those “habits of the heart” that might most characteristically be thought to be the meaning of *moeurs*. Tocqueville’s point was to demonstrate what had happened to the world that had been altered by the *écrivains*—the intellectuals—who had transformed the world in the eighteenth century by a revolution that altered not politics only but also the “entire moral and intellectual condition of a people.” [Alexis de Tocqueville, *De la démocratie en Amérique*, vol. I, chapter IX, sec. 4 (Paris: Garnier-Flammarion, 1981)].

³ Jacques Maritain, *Education at the Crossroads* (New Haven: Yale University Press, 1943 [1978]), 6.

My idea of the sovereignty of the people is that the people can change the Constitution if they please, but while the Constitution exists they must conform themselves to its dictates.

I emphasize his choice of the words, “conform themselves” rather than “be ruled by,” indicating that Madison saw the people’s power as complete. The difficulty, however, is to get the people voluntarily to cease looking at their power in that light, to get them voluntarily to adopt the habit of not recognizing how full and extensive their power is. If the Constitution is to persevere on a sound and stable foundation, an act of great national self-discipline is required.

At the same time, we can observe additional concerns of the founders—Jefferson’s in this case—to assure a continuing capacity for self-government. Thus, in planning the University of Virginia, Jefferson enunciated a standard beyond national self-discipline. In the “Rock-Fish Gap” report he identified a goal “to form the Statesmen, Legislators, and Judges on whom public prosperity and individual happiness are so much to depend.” Students educated to this higher level were to “expound the principles and structure of government, the laws which regulate the intercourse of nations, those formed municipally for our own government, and a sound spirit of Legislation.” People so educated would “harmonize and promote the interests of agriculture, manufactures, and commerce.” They would, moreover, “develop the reasoning faculties of our youth, enlarge their minds, cultivate their morals.” They would “enlighten them with mathematical and physical science, which advance the arts, and administer to the health, the subsistence, and comforts of life” and “generally, to form them to the habits of reflection and correct action, rendering them examples of virtue to others, and of happiness within themselves.”⁴ Such educational aims will assure the development of able republican citizens who will act with intelligence and faithfulness.

⁴ *Report of the Commissioners for the University of Virginia, Assembled at Rock-Fish Gap, in the County of Augusta, August 1, 1818* (Charlottesville: C. P. McKennie, 1824), 5.

Tocqueville's View of the Americans

This portrait of the constitutional necessities of the United States gained reinforcement in Alexis de Tocqueville's *Democracy in America*. Tocqueville had seen in America the entire evolution of a society from its origins, and he portrayed that evolution as one centered upon equality as its moral and political foundation. But that left the question, How to maintain good morals in a democracy? The Americans undertook initially to follow holy writ in matters of morality, which led to the union of the extremes of narrow sectarianism and political liberty. Thus what was needed was a source of limitation on the power of the majority.

The error was essential, not incidental. "*L'infériorité de notre nature [est] incapable de saisir fermement le vrai et le juste,*" even in the most favorable circumstances at the founding of a utopia (in New England there existed in the beginning an almost "perfect" democracy.) We cannot question the honest intentions of the Puritans but only the outcome of their appeal to natural or divine laws as a conclusion of reason.

Nevertheless the defect of Puritan piety contained the means of its own correction, for it left open the way to rational inquiry. "*C'est la religion qui mène aux lumières.*" Piety gives authority to Babel, where before it had been denied. This results from the strict separation of religion and politics, and the necessity to encourage good morals independent of politics. The Puritans became "*d'ardents sectataires et des novateurs exaltés*" at the same time.

Further, Tocqueville distinguished a people's social condition and its political condition; for the latter we look to the political law, for the former "*faits*" and "*des lois réunies.*" The Americans previously allowed a natural aristocracy to prevail in their politics. In the society at large, however, "*un certain niveau mitoyen,*" a middling level, came to prevail and, soon or late, that social condition conforms the political law to its own measure. Equality, arising outside of politics, becomes the very soul of politics.

Now it was amidst such observations as these that the Bill of Rights replaced expectations of personal restraint and emerged as the instrument of political restraint, built upon a foundation of social freedom. Yet, it is oft too easy to neglect the broader, more important foundation in the Constitution itself for the operation of the Bill of Rights. Our founding habits are the necessary platform for understanding the relevance of the Bill of Rights. It is rather the Constitutional provisions and institutional arrangements that provide the American way of life.

In the minds of some people the Bill of Rights is an excess, which perhaps by now we ought to have had enough of and done away with, while, in the minds of others, it is the heart of the matter. You might say the tail has become the body. When talking about the Bill of Rights, we must talk about the question of where it comes from, but we find in most presentations today far more focus on what it has become.

I take it as my duty, therefore, to explain to you why it is that we, by the late twentieth century, spoke more about what the Bill of Rights has become than about where it came from. This has led me to describe it as a “constitutional tail,” invoking the image of a caudal appendage to describe our Bill of Rights, not only by way of indicating its position in the Constitution, following after the main body of the Constitution, but also to raise in our minds some questions of what is the relation of the tail to the main body, and particularly to our founding habits. If we have forgotten anything in our time it is precisely that relationship. In order, then, to discuss the fit appreciation of our Constitution, I want to make a series of observations designed to place the Bill of Rights in perspective.

The Bill of Rights has spawned traditions of interpretation, analysis, and claims that exceed the memory of any of us, though all this development has taken place within memory, that is, through the twentieth century. In the first century under the Constitution, the Bill of Rights was rarely adverted to and never actually called upon as the final arbiter in any critical question. We owe to the twentieth century, in a very special way, our concern with the Bill of Rights today. We need to recover from the eighteenth century the sources of the Bill of Rights in order that we

might begin to understand why we developed so peculiar an affection for the Bill of Rights in the twentieth century, an affection that has continued into the twenty-first century.

We know the Bill of Rights, in particular, and the Constitution, in general, have come to be what we call “lawyer’s documents” in our time—that is to say, less the stuff of habitual interaction among citizens than the subject matter of frequent and numerous contentions in courts of law or in legislatures. All focus on the question of legal means. So, we have developed through a number of court decisions and reactions on the part of the Congress of the United States, as well as through state legislatures and state courts, an elaborate set of resources all devoted to the question of “what do the Bill of Rights promise the citizens of the United States?”

Some treat the Bill of Rights as if it were our Constitution, for that is where the citizens have their most meaningful contact with the promises of the Constitution. So very much is this the attitude today and so very much is it often the attitude of lawyers, that I discovered upon my visit to Czechoslovakia a decade ago (to consult with their experts on the development of the new Constitution for Czechoslovakia) that I had been preceded by a team of American consultants, all lawyers, who had succeeded in persuading them to adopt a Bill of Rights and a Supreme Court of constitutional adjudication long before they had ever resolved the question of what their constitution ought to look like. Before they knew what the executive should be; what the legislature should be like; what civil and criminal procedures to install; they had a Bill of Rights, and they had a Supreme Court to interpret it.

That summarizes the legacy of the twentieth century with respect to our Constitution. Nor are these kinds of attitudes and orientation limited to the ten Amendments which formerly constituted our Bill of Rights. We have had amendments to the U. S. Constitution since that time, many of which—most notably the Fourteenth Amendment—figure very largely in our evolving interpretation of the Bill of Rights.

Moreover, we find in the various states of the Union continuing interaction with this theme through their own constitutions. There are Bills of Rights in all the state constitutions. They contain numerous and sometimes interesting provisions. One in the state of Georgia for example, in its twenty-fifth paragraph, states: *The social status of a citizen shall never be the subject of legislation*

It is appropriate to wonder what on earth that means—what is the social status of a citizen—does it invoke the kind of questions raised in Minnesota by “The Minority Cultural Heritage and Preservation Act”? Is that a question of social status? And we find others no less perplexing in other constitutions and state documents. The state of Illinois says the following about individual dignity:

To promote individual dignity, communications that portray criminality, depravity, a lack of virtue in, or that incites violence, hatred, abuse, or hostility toward, a person or group of persons by reason of, or by reference to, religious, racial, ethnic, national, or regional affiliation are condemned.

What do they mean? The constitution condemns incivility? Do folk have a right to the expression of such condemnation in the state of Illinois and, if they do, why do we not have a like right in the state of Georgia, or Hawaii, or Louisiana? The state of Illinois also, interestingly, provides in the Preamble to its Constitution and Bill of Rights, the guarantee that the government, or “We the people of the State of Illinois,” to state it correctly, “will eliminate poverty and inequality.”

These are not promises that have been made lightly. They are promises that derive from the general understanding of the purposes of Bills of Rights in the twentieth century. And when we see how the general understanding reproduces itself in Illinois, Georgia, and elsewhere, we have cause to revisit the whole question of the Bill of Rights. The spare provisions that I read to you speak far more loudly about what government may not do than they speak of what we promise

one another in our continuous efforts to perfect the civil relationship. Do Bills of Rights intend to bring us to a state of perfect relationship with one another? Have they that power?

The twentieth century made that the most important question of the hour, and that creates difficulties for us. The difficulty is this: in proportion, as we enlarge our expectations of the Bill of Rights, we diminish our confidence in the effectiveness of those political arrangements contained in the balance of the constitution, in the main body. Moreover, we neglect altogether the need for those habits in the people that make founding possible and preserve the fruits of founding.

When the Constitution was ratified on June 21, 1788, and put into place the following year, March and April of 1789, it did not contain the Bill of Rights. It had been brought into being partially with an argument to the effect that the Constitution itself is a Bill of Rights, which we may elaborate as follows: *The Constitution aims to defend the rights of citizens by restricting the powers of government.*

That would mean, then, that the provisions in the first three Articles of the Constitution, particularly, establishing the Legislative, Executive, and Judicial branches, were thought by the draftsmen of the Constitution to be crucial from the perspective of defending the rights of persons. It would mean further that the other provisions of the Constitution all play their role in assuring the people's mastery and control over their government.

This was the language with which Benjamin Rush welcomed the Constitution in 1788, celebrating it as a radical departure from all prior regimes, principally because it placed the responsibility for limiting the government and determining the fate of the people in the hands of the people. It had, he said, finally shown parliamentary sovereignty to be a myth.

The Constitution's defenders were not alone in the late eighteenth century in pondering the direction of Republican government. They had to contend with the arguments of those who opposed the Constitution, those who said a constitution without a Bill of Rights is a contract without a commitment to deliver. "A constitution without a Bill of Rights leaves the people

unprotected.” No less important a critic than George Mason maintained that argument—the very George Mason who in the state of Virginia was the chief author and architect of the Virginia Declaration of Rights. They were not contemptible figures, who said of the Constitution that the lack of a Bill of Rights is a flaw in the proposal. Thomas Jefferson expressed the same reservation about the Bill of Rights. As those who defended the Constitution responded to its critics, they found increasingly that they could perhaps palliate but never quite eliminate the force of the objection of those who were opposed to the Constitution.

In consequence, the Founders agreed that they needed for the sake of conciliating public opinion to amend the Constitution sufficiently that those Americans who were adopting this form of government would feel secure in their rights. And they undertook to do this. They began the process in the Inaugural Address of George Washington. Washington himself called for the Amendments, the very George Washington whose sponsorship of the Constitution was essential to its ratification and who believed himself that the Constitution without a Bill of Rights was adequate to the purposes of republican government—indeed more than adequate. For George Washington said, as he pondered his Inaugural Address, and considered this form of government they were about to institute, that he was persuaded “better still could not be devised.” Yet, he observed in his first Inaugural that public opinion was sufficiently unsettled over the question of a Bill of Rights that it must be added to the Constitution.

Notice the drift of Washington’s message, for it is the same drift we get from James Madison when, in May, he warned the Congress that he would introduce the Amendments. Madison brought forth his proposal, saying that the integrity of Republican government is at stake. The people ratified the Constitution, yes, on the premise that steps would be taken to approve amendments to the Constitution. They did not ratify it conditionally; they accepted its authority; but they did insist that their representatives in good faith needed to come forth with amendments to the Constitution. Indeed, in the debates in the House of Representatives where the Bill of Rights first was taken up, Madison went so far as to say he did not think that Bills of Rights were

meaningful limitations upon the government, upon the branches of government. They could serve, however, to tutor majority opinion; they could serve to teach the public, to temper their expectations of their representatives. From that perspective, the effort to add them to the Constitution would not be wasted, but rather turned toward inculcating the habits of republican decency.

Something more took place in the debate. James Madison proposed his amendments to the Constitution as insertions into the text of the Constitution. Not as a list to be added at the end, not as a tail affixed to the main body, but interwoven throughout the body so that they would be invisible to history. James Madison fought hard for that because he thought it would be bad practice to tack amendments onto the end of the Constitution. He was resisted no less vigorously by many others who thought amendments belonged at the end. Mr. Sherman expressed it best when he argued that the work of the 1787 Philadelphia Convention deserved to be remembered unstained by any subsequent additions or reflections. It was to be a contribution to the heritage of the Republic, to the history of its people, which we must all be able, and all posterity ever after able, to look upon as the express will and work of those who labored in Philadelphia. To play with insertions and continue such a process thereafter would convert the Constitution into something that grows like Topsy; no one will know what was original or what wasn't original; and all respect will be gone.

The Bill of Rights became a tail to the Constitution out of respect for the original document. Added at the end, in order to preserve the priority of the main body, to keep it an item of focus for public attention. This is an ironic story, isn't it? Mr. Sherman made the Bill of Rights stand apart in order that the Constitution would stand out, but today the Bill of Rights stands out, and it is only the Constitution that stands apart. For in the name of many of the promises in the Bill of Rights, Americans showed themselves in the late twentieth century repeatedly willing to compromise the very precise formulas for the exercise of power in the main body of the

Constitution. That is, notions of individual enjoyment came to supplant expectations of civic and political responsibility.

Does the tail wag the dog? Well, that's the question we can not avoid and we can perhaps best respond to that question first by looking with some care at the kinds of principles activating our own Bill of Rights which led the Americans to think them critical to their liberty and then, finally, asking what principle or principles activate the Constitution itself.

Bills of Rights did not begin in the United States. They began in the experience of Britain. There are any number of charters and petitions transacted between barons and kings or commons and kings throughout the history of England—perhaps none was more important than the Petition of Rights sent to Charles I by those who ultimately became his mortal enemies in the early seventeenth-century struggles of English politics.

Throughout this process Britons exchanged with their monarchs various statements, charters, or petitions in which privileges were carved out for the people, and one thing was foremost in the attention of most people, namely, that unless special account was made of the privileges of the citizens, the power of the government, the power of the monarch was such it would override every human will. There was no way to restrain the power of government, save through some kind of express commitment virtually of contractual force, tying the restraint of the monarch to the happiness of the people.

This was the English history when the interactions between the British monarch and the American colonials engendered various forms of writ. The colony of Rhode Island particularly enjoyed special privileges from the Stuart kings who gave them a charter of religious freedom, extended from monarch to people.

The people of Rhode Island received this charter from the king, not so much as a promise, interestingly enough, but as a legal relationship binding colonial rulers in their dealings with colonial citizens. In that we behold a transformation taking place. It was never imagined that the leaders of the colonies had the same kind of power that the British monarch had.

In fact, very early in Massachusetts in the famous case of Robert Child the General Court of Massachusetts undertook to write out what had not been specifically written by anyone theretofore, namely, the British Constitution. Then in parallel column they laid their own alongside it. They claimed that their own was a better. Why? Because the Constitution to which they pointed as their own, the work of their own hands, had already begun the process of qualifying the unlimited power of the government. They did not acknowledge the kind of power lodged in the monarch of Britain throughout the British tradition. They said, rather, that it was a government limited in its conception, brought to be by the people and with no other source to which to trace its authority.

This was only one of a series of such events throughout the colonial period, which led all of the American states, once independence had been accomplished, to append Bills of Rights to their state constitutions. These truly remarkable documents do not simply give the brief enumeration that we find in the first ten Amendments to the United States Constitution. They give elaborate moral, and philosophical statements about the source of rights. They trace these rights to nature; they trace these rights to God; they hold governments bound to acknowledge these rights. They derive from relationships between God and nature the existence of the people as a primary source of authority. They claim all government depends upon the consent of the people, and it is because of such relationships, they say, that there follow rights, which can be enumerated and which governments may not transgress.

It is truly remarkable, to see how clearly they articulate the relationship of natural right and natural law to constitutional order, and to note that that is a deeply embedded part of the American tradition. This is what in 1774 informed the First Continental Congress, the Suffolk Resolve Congress, which wrote to the citizens of Quebec, inviting them to take part in the revolution that they knew then was going to come. They spoke to them in terms of these rights.

When those who drafted the original Constitution thought they had finished their work without adding a Bill of Rights, they were in one sense correct. They questioned, since there is no

king, since there is no parliamentary sovereignty, against whom the rights would run. Whom would one restrict by such rights when it's the people's government? Do they restrict themselves? Today, men say, of course the answer is yes. But it was by no means intuitive in 1787 and '88, for then it was thought impossible to have properly established self government—the rule of the people—without so limiting it as to make the transgression of the people's rights next to impossible. The arguments recognize of course that minorities might be exposed to the wrath of majorities, but that's only on the premise that majorities operate by mere will and without restraint. They created republican institutions to channel majorities. In other words, they sought to restrain majorities and to so provide for the expression of the majority will, that by the time it becomes law it is refined and no longer the raw will of the majority. It is a chastened will of the majority that becomes law, and that will, of course, one wants to prevail in republican government.

Nevertheless, the people's attachments to express statements of their rights was by 1787 so deeply embedded that they could never have been brought to accept the Constitution without those rights having been enumerated.

Therefore, they were enumerated, they were ratified, and for a hundred years thereafter, with one dramatic exception, the American people never once filed an action successfully claiming that their federal government was violating the rights guaranteed in the Bill of Rights!

The one exception is the 1831 case, *Barron v. Baltimore*, a case in which the Fifth Amendment was invoked against the city and county of Baltimore and received from Chief Justice John Marshall the response that the amendment was added to the Constitution to restrain the federal government, not the city, the county, or the state. And, indeed, provisions that James Madison included in his original Bill of Rights, and which did apply to the states, were none of them ratified or approved.

The issue is, then, that if the Bill of Rights only applies against the federal government and, further, in a hundred years nobody complained about the federal government, might it be the case

that the federalists were right? That the Constitution itself is a Bill of Rights? That there was no threat to America's liberties from the Constitution? It might have been so, if, in fact, that tradition of the first hundred years had continued through the second hundred years. But instead the Bill of Rights became the chief source of constitutional litigation in our time. It did so for an interesting reason; namely, through the Fourteenth Amendment, the Bill of Rights came to be applied against the states and from that generated most of the constitutional litigation we discussed earlier. In other words most of the issues that work us to fever pitch, on issues ranging from abortion to freedom of speech to pornography to prayer in school—you name it—are predicated on some exercise of state power (especially the “police power” that oversees “health, safety, and morals”), which American citizens seek to restrain through the power of the federal government.

The Fourteenth Amendment has enabled the courts to say that the Bill of Rights applies to the states. So now there is work for the Bill of Rights to do. But isn't it interesting, even in our time, that still we might conclude, because it is so rare, that most complaints of violations of our rights lodge not against the Constitution of Madison, Hamilton, and Washington but against the constitutions of our states?

Accordingly, insofar as we take the Bill of Rights as our whole constitution, and insofar as we are willing to expand the power of the federal government in a war against the states (and that's what Bill of Rights litigation has become), to that extent we treat the Bill of Rights virtually as our whole constitution. We have been willing even to change the parameters of the powers of the federal government in order to treat it so, and what was added as a caudal appendage threatens to become the main body.

It is a long story how the Bill of Rights became the Constitution⁵, how the tail came to wag the dog. The story involves the true story of the Constitution itself, and the principles underlying

⁵ **BILL OF RIGHTS:** Refers to the first ten amendments to the Constitution (ratified December 15, 1791). which guarantee civil liberties against infringement by Congress and the government. Among the rights therein assured are freedom of speech, press, religion and association (1st); the right to bear arms (2^d); guarantees against unreasonable searches and seizures (4th); grand jury indictment and guarantee of due

it. We have only hinted at it thus far. It is a story that begins with an evolution in the meaning of equality operating so as to separate that term from transcendent right (and, by extension, from every ethical principle) and which transforms the latter into an enemy contradicting the givens of equality in the form of self-love and self-preservation. Therefore, in order well to know what has become of equality and right in the contemporary world, it is absolutely necessary to reconstruct clearly what they were at the moment of the founding of the United States.

The Constitution

It is too easy to observe the legal history and to blame the Fourteenth Amendment for what has become of the United States Constitution. A proper understanding means also understanding what there is proper to the Constitution that might identify the weakness or opening by which interpretation of the Fourteenth Amendment has entered into our constitutional folkways. There must have been such formations and changes of opinions as to have enabled such a course of

process (5th); the right to a speedy trial by jury (6th); prohibition of cruel and unusual punishment and excessive bail (8th); and a guarantee that citizens and states retain rights and privileges not expressly limited in the Constitution (9th & 10th).

The amendments originally guarded only against infringement by the federal government. Since then courts have applied them against states as well, through the 14th Amendment. More precisely, until the 14th Amendment was ratified July 9, 1868, there was virtually no call on the Bill of Rights by American citizens. The first *significant* Supreme Court case to cite the Bill of Rights as a potential protection of individual rights was *Twining v. New Jersey* (1908). In the twentieth century successful appeals to the Bill of Rights mushroomed, becoming a major source of litigation, with first amendment cases outstripping all others. While the rest of the Constitution describes what government *can do* and *how* it may do it, the Bill of Rights describes what government *must not do*. Citizens enforce the Bill of Rights through appeals to the courts. In general, therefore, a bill of rights is a fundamental statement of principles governing the relations between citizens and the state, founded in ideas derived from the concept of natural rights, such as that elaborated in the Declaration of Independence.

It is important to remember that the Bill of Rights (originally drafted by James Madison) was added to the Constitution *after* it had been ratified and the government established. Opponents to the Constitution thought the document inadequate without a Bill of Rights, while proponents insisted that the Constitution itself was the main limitation on government. President George Washington, in his first inaugural address, asked the new Congress in 1789 to adopt a Bill of Rights so that all citizens would feed a part of the new nation. The debates in Congress, particularly the House of Representatives, stressed the need to “quiet the mind of the people.” Twelve amendments were sent to the states, one at first enlarging and then limiting the number of representatives in Congress, and a second, limiting the salaries of members of Congress. Only ten were ratified by the states. Two states, North Carolina and Rhode Island, had not joined the original government because they desired a Bill of Rights. As soon as the amendments were sent out these states proceeded to ratify and join the union.

development. That story imposes a journey as long as that we have already taken. But it is necessary to make the journey.

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

Basic Equality and Right

The equality that constituted the foundation of the consent of the governed was originally entirely a moral or ethical principle. It naturally reflected the concept of “self-government,” and that understood as a moral restraint. The concept of self-government, in its turn, derived from a conception of right or a way of acting according to which the conduct of every individual may be characterized either as orderly or subject to the control of another. Therefore, the original equality of the “Declaration of Independence” applied to human beings universally, no matter where; it established the limits of an ethical conduct for men in society; and it justified a transcendent right (called “the laws of nature and of nature’s God”) through which individual powers were definable as “certain unalienable rights.” The organizing principle of the

“Declaration of Independence,” that “all men are created equal,” is ultimately hierarchical and moral.

Since the era in which the “Preamble” to the American Constitution was ratified, America has become a country of several races and beliefs. Nevertheless, it remains a country with a single right for everyone, in which the rule of law profits everyone and not only certain persons at the expense of others. It is a democratic country, in which the idea of majority rule comprises the idea of “justice for all.” The majority is a sacred and republican expedient, not a caste or a class. When Americans affect to recognize in the majority, not the voice of republican liberty but, rather, one group in opposition to other groups in the society, they pervert their own heritage. The defenders of quotas by race or gender or any other criteria whatever may very well reject ideas like this as nothing but the pleadings of the majority in its own cause. But in this metaphorical and lyrical turn of phrase they risk tarnishing a sacred emblem of republicanism and converting it into a mere racial epithet. Still worse, they array race against race, man against woman, faith against faith, without any means of reuniting them.

Because the tensions at the center of contemporary American life present such challenges, and also because we see in those challenges, in the efforts to deal with them, an evolution with respect to conceptions of equality and right, we find ourselves obligated to reformulate the original conception of it.

Guided as we must be by principles, I first avow my own.⁶ I regard the government of the United States, as it was founded, as the best form of government for human beings—the best,

⁶ One of the things I often related to people in giving somewhat less formal presentations on our Constitution in the years of bicentennial anniversary is the fact that I regard our founding very much as a vineyard. And I am moved by three particular images of vineyards, which have been for me always very precious. Two of them come from the Holy Text; one is of course Naboth’s vineyard. I probably do not have to relate Naboth’s story and his refusal to sell his patrimony. He said, “God forbid.” The other is the story of the ungrateful tenants, who slew the master’s servants and finally his son. The only thing left was for the master to come in person for the rent fearing which, they exclaimed, “God forbid.” Yet a third tale was told by Aesop. In it we find a dying father who gathered his sons about his death bed and there related to them that there was a treasure buried in the vineyard. The old man died soon thereafter, and the boys did their duty. Once their father was laid away, they betook themselves to that vineyard with might and main.

simply. I use no qualifications, and I mean all that you can imagine in saying that. I maintain it in the face of very strong reservations on the part of intelligent people—criticisms long and deep. Nonetheless, I think it is true. Still, I am trained in the academy, and I do accept the obligation to honor and respect those who have worked with no less diligence than I and arrived at different conclusions than mine.

We must, therefore, review some of the problems of interpretation that may seem to call into question the conclusion that I have announced. One of the most obvious comes in the form of criticism that seeks to revise the terms of the founding charter, to opt rather for a parliamentary system than the presidential system which we now have. A few simple propositions characterize these arguments. The first is that American government would be more efficient in this modern age if we, like European states, enjoyed party discipline and coherence between the executive and the legislative branches, such that, the executive proposing a program, he could count on moving it through the Congress of the United States without “deadlock.”

Reflecting upon that proposal one might ask what it reveals about the understanding of the Constitution. Are we in fact barred from acting on the basis of the kind of efficiency the proposal envisions? Or, does the argument conceal yet a deeper criticism of the United States? In fact, there is not within the Constitution of the United States a single syllable that mandates that the president of the United States shall submit a budget to the Congress of the United States—or any other legislative program, so far as that goes—that it is, in fact, possible, within the terms of the existing Constitution, that that body which is entrusted with originating money bills could very well delegate the task of submitting the legislative program to its own speaker of the house; that

Working as one could scarcely imagine, they turned up every inch of that vineyard. They never found a trunk or other container of gems or gold or jewels. Frankly, they were somewhat disappointed; they wondered how the old-man whom they loved so dearly could have played so fine a trick on them. But they got over it; they went back to their routines, their daily work. And yet that fall, when harvest season came, they found that they had the most bountiful harvest they had every experienced in all of their lives. Then they knew what was the treasure in the vineyard. That is very much the way I regard the American founding, as a vineyard left for us to labor in. And in it there is a treasure buried. To discover that treasure requires our effort, a willingness to labor in the field a while and a willingness to wait until the harvest comes in. I wish to consider what the harvest may look like, for us and for every generation, which willingly undertakes this work.

he could be just such an executive as some would have without changing jot or tittle of the Constitution?

Critics are unhappy, not with the constitutional structure, I submit, but rather with the way in which Americans make use of the constitutional structure. They seek an alternative constitutional structure for the purpose of minimizing what they regard as the misuse of the constitutional structure. Thus, they would proscribe certain procedures—and perhaps policy options—constitutionally, because they regret to see these things worked out in the usually messy political way. One response to that kind of criticism and interpretation is that if the problem does not inhere in the terms of the constitutional charter, it is rather a problem to be resolved by political means than through the charade of constitutional reform. Let us exonerate the Founders on that score.

There are, however, criticisms far more serious and that often come rather from friends than enemies of the Constitution, even when they grow out of fundamental misconceptions about the nature of our polity. Consider a friendly case, the case of someone whose name most will recognize, Thomas Mann. Mann, of course, fled Hitler's Germany in 1933. He came to the United States and, indeed, took out citizenship within the United States. In 1940 Mann authored an essay entitled "War and Democracy." In the course of the speech Mann mused about the nature of democracy, in a way that brings us closer to the more fundamental criticism, which I must deal with in order to establish the point that the government of the United States is the best government and not merely a good government. I will quote:

The political is no longer what it was—a problem for experts and incidentally for discussion material for beer-house *dilettanti*. It is no longer a game, played according to certain, generally acknowledged rules, based on a universal agreement on its fundamentals—a game which brings only external changes and transformations which do not affect anyone to his very depths. Today, indeed, it's a matter of ultimate values, of the foundations of civilization, of the very idea of mankind, of those universal times which we call 'religion,' religion which

is in danger of destruction by a Caliban-like species of man or rather beast-men who have dedicated themselves to force and to nihilism. [p.3]⁷

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

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

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

Now, it is not hard to see the thrust of Mann’s reflections, but I submit that he is wrong in this. There is not such a contradiction as he imagines. He thinks so only because he has fastened upon those wrong freedoms and equalities. He has grafted the wrong branches onto the stock of “truth, freedom, and right,” which he saw as the foundation of legitimate political life. Though he

⁷ Thomas Mann, *War and Democracy* (Claremont, CA: The Claremont Colleges, 1940). All subsequent quotations from Mann are from this source.

began a friend to American liberty, he ended an unjust critic. We require to reformulate Mann's express purpose in order to avoid similar mistakes. He put it thus:

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

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

There are very many examples of the scholarly criticism that sees the Constitution, in the words of Vergil, as a “*monstrum horrendum, lumen ademptum, ingens at informis*”—a horrid monster, blind and misshapen. All of them, however, derive from or share affinity with a single, powerful, and classical statement of the problem. That is the work of the late Martin Diamond, considering which at some length one may ponder the difficulty. Then I will show you what I think to be the response to that argument (and in doing so discover how to correct Mann's view). Diamond began on a high note, but ultimately we will see that he descended.

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

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

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

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

We must learn to ask as they did what are the real defects with respect to the good life, of democracy [*sic*] and earn the right to ask the question by thinking through the assumptions about the good life and its knowability upon which its formulation rests. [p.29]⁸

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

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

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

⁸ Martin Diamond, “Notes on the Political Theory of the Founding Fathers,” Working Paper No. 10, Center for the Study of Federalism, January 1971 (attribution: paper prepared for delivery at the Fund for the Republic, September, 1957). All subsequent quotations from Diamond are from this source.

sense that Locke's "comfortable preservation" displaces only the harshness of the Hobbesian view. [p. 34-35]

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

Diamond accordingly demonstrated that

the theme of 'happiness' which is the most frequently occurring definition of the 'object of government' received no very thorough explanation. Publius seemed not to have in mind 'traditional philosophical or theological understandings of happiness.' [p.37; citing *Federalists* 30 & 15, pp. 186, 88]

He concluded that their vaunted "knowledge of the means" to happiness amounted to no more than "physical preservation from external and internal danger and ... the comforts afforded by a commercial society." [p.38]

This contrasts sharply with those political theories, which "rank highly" the propagation of "religion, education, military courage, civic virtue, moderation, individual excellence in the virtues, etc." About these *The Federalist* either says nothing, offers at best "pallid versions, of the originals," or even holds them in "contempt." [p. 401] They praise instead the operation of a multiplicity of interests to assure republican safety. It will be "profoundly democratic" and encourage men, who "must be free," to seek their "immediate profit." The government will not be a mixture of distinct classes but rather based on a broad invitation to all classes to scramble for the prizes of social competition, for it is "the lowliest, from whom the most is to be feared, who must feel most sanguine about the prospects of achieving immediate benefits." [p. 46]

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

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

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

The Framers read Locke, Hobbes, Smith, Hume, and Hutcheson to be sure. But they had no less available the Aristotle of John Gillies. Gillies offered trenchant criticism of the modern views on the origins of politics. Writing in the aftermath of the American and French Revolutions in his "Introduction" to the *Politics*, he defended Aristotle against "the cunning, cowardly principles of Hobbes and Mandeville" as well as "the benevolent moral affections espoused by Hutcheson and Shaftesbury."⁹ Aristotle rather built on the foundation "that both society and government are as congenial to the nature of man, as it is natural for a plant to fix its roots in the earth, to extend its branches, and to scatter its seeds." I trace the significance of this argument to the fact that, for the critics of the framing, Aristotle is the singular source of the supposed

⁹ John Gillies, editor and translator, *Aristotle's Ethics and Politics* (London: T. Cadell and W. Davies, 1804). All subsequent quotations from Gillies are from this source.

antithesis to a base America (not Plato, who, if he says anything, rather criticizes the ancient city, if he criticizes anything). Aristotle defended the city, the actual city whose end was virtue. Plato, on the other hand, never approaches an account of an actual city save through the mouths of the Thrasymachuses and Callicleses whose views, of course, are almost as thoroughly base—thus, as modern—as Hobbes’s.

Gillies rejected both Locke’s social contract and, while accepting in principle “the inalienable right to be self-governed,” the egalitarian freight of “the new inalienable right to be fairly represented.” Locke’s mistake, he held, was to settle for the hypothetical argument of a state of nature rather than to follow up the implications of Aristotle’s teaching on a “system” of civil society. In this system, it will be found that not the arbitrary assertion of universal sovereignty but the articulation of the idea of a common good—“the good of the community”—will more surely defend the “expedient” of “giving to the people at large a control in the government.” Gillies continued:

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

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

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

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

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

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

Following an identical form of analysis, Gillies proceeded to blast the conception of mere acquisitiveness of natural wealth. Not the amount of wealth, but its effect on the soul and

character of the citizen “ought to form the main object of the statesman’s case.” Here, too, he reasoned much like Madison in bringing Aristotle’s praise of the agricultural and pastoral ways of life to bear on national character. He allowed, however, the ruling power of necessity, which made “manufacturers and commerce” the necessary means of subsistence for the modern nation. Concerned primarily with Aristotle’s teaching, though, Gillies did not comment on the expedient whereby almost all men are rendered apt for self-government: namely, the opening of just avenues to ambition sufficient to foster a pursuit of wealth by just means. Insofar as an economic system predicated on expanding wealth diminishes recourse to predatory means of material aggrandizement, it, too, operates to foster the character appropriate to self-government. It enlarges the chance for the love of justice to become resident in the souls of citizens. This assumes, naturally, that passions will not increase in number or intensity in proportion as means to satisfy them expand.

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

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

Over and above the Founders’ demonstration in their new science of politics that they were unspoiled by our contemporary affectation that ancient regimes actually had virtue for their goal, Gillies’ work showed most clearly how nearly their considerations and reflections fell within range of elevated sentiments and serious moral purposes. The notion that their politics focused

exclusively on the low or base can only proceed from a fundamental misapprehension of their accomplishment.

Much of their ancient history the founders learned from Charles Rollin's *Ancient History*, in which they encountered formulas which would recur in their own work, such as, "the greatest and most noble function in the world is to be the author of the happiness of a nation."¹⁰ Could they have avoided to take them seriously? Consider that these accounts of ancient virtue always assumed a contemporary voice: "all agree, and it cannot be too often inculcated, that the end of all government and the duty of every one invested with it, be the form what it may, is to use his utmost endeavors to render those under his command happy and just, by obtaining for them, on the one side, safety and tranquility, with the advantages and conveniences of life; and on the other, *all the means and helps that may contribute to making them virtuous.*" [p. 479, x] Perhaps the Founders regarded such remarks as relics of archaism. In this case, for example, Rollin described the Cretan constitution and Cretan monarchy. Here the Founders met the figure of a king who had "absolute power to do good, but his hands are tied up from doing evil." [484] There were to be no kings in America, but the people, the true sovereign; but behold the fate of the sovereign majority in *Federalist* 51: unchecked power to express the will of the society, but checked from doing evil

In sum, the familiar conceptions from the defense of the republicanism at the time of the founding ring no less clearly with echoes of distant virtue than of nearby vice. Perhaps the peal of virtue stirred less resolve than once it had done. After all, the *areopagus* condemned to death a child who had made it his past time to put out the eyes of quails. If the critics of the founding were to make that degree of resolve their standard, however, they should first have to respond to George Washington's claim that virtue's chances had improved with advanced humanity.

¹⁰ Charles Rollin, *The Ancient History*, Two volumes in one, vol. I, Book X (New York: American Book Exchange, reprint, 1880). All subsequent quotations from Rollins are from this source.

Review but briefly James Wilson's formulation of the original vision, and judge who most resembles the founding, the critic or the ancient. Wilson vaunted wisdom, virtue, and liberty, and the organization of government had no other account. "Communicate to the operations of government as great a share as possible of the good, and as small a share as possible of the bad propensities of our nature," he urged. But this "second effort" was viable only after "first" having succeeded to provide that "the wisest and best" of citizens were established in office. [289]¹¹

Wilson himself became rhapsodic while contemplating the implications of this reflection:

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

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

Who the man so little penetrating as not to desire to live such a life in such a land? Is this a false picture of American hopes—the monstrosity that Justice Thurgood Marshall found in the founding? Were the Founders dishonest with their posterity, ignorant of the effects of their own innovations, or simply elusive to latter day critics? Grant this much: Wilson's portrait at least frees him from the imputation of knowingly "lowering the ends" of political life. Then we must inquire whether, if he misperceived modernity, we shall be able to recreate within our own souls

¹¹ James Wilson, *The Works of James Wilson*, edited by Robert Green McCloskey, vol. I, "Lectures on Law and Government" (Cambridge: Harvard University Press, 1967). All subsequent quotations from Wilson are from this source.

the actual opportunity—the pause at the crossroads between ancient and modern worlds—to make the choice which our Founders admittedly enjoyed. To do that, however, we must first rescue from the detritus of historical interpretation and accidents the habits of the founding as our proper habits.

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

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

Wilson concluded:

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

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

The most important place to direct our attention is with that one Founding Father who foremost held before himself and his fellows throughout the founding era the objective of a decent, republican life as the providential destiny of the American people. That is George Washington. When Washington was elected to the presidency, the first presidency under the new Constitution, he thought it was time to say something about what he believed America was about.

It seems to me that Washington's judgment rests on a few simple considerations, some of which are elucidated in the first inaugural and others of which are elucidated in documents prior and subsequent to that time. Most important, surely, is what he had originally set out as the objective for the founding. He expressed it in 1783 in his "Circular Address to the Governors and People" of the thirteen states. In that address Washington noted that the original attempt at a

Constitution was a failure. The Articles of Confederation did not supply the needs of the nation, not least a trustworthy defense. It was unable to legislate for itself as a nation, unable to provide for that peace and prosperity, that stability, which were conditions for the attainment of the fundamental objective. And that, said Washington, was the objective of self-government.

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

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

Washington's Farewell is truly a masterpiece in literary craftsmanship. The address carries the people from the Revolution through the time of Washington's departure. In effect, he confessed that he had asserted authority in the early years, of necessity. He did so in a self-deprecating manner, indeed rendering his authority virtually invisible, but he did so and with

the purpose in mind of attaining the very eminence from which he then spoke, the point at which the people could assume the authority of self-government and himself become superfluous. Thus, he left office declaring that he, George Washington, does not govern in the United States; the people do.

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

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

wager, not mindless of that philosophical past which lay behind them but rather convincing themselves that they had satisfied those doubts and come up with a reasonable response.

Now, the reasonable response is what the evidence of the words of the founding reveal to us. To retell secondary interpretations of the founding is no way to understand what took place in America. There is no substitute for reading the words of the Founders themselves. Let me consider very briefly Diamond's analysis of *The Federalist*, to show you how this may work.

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

Madison answered that we have to find a way to confine majority rule to principles of justice. The reasoning by which that conclusion is produced is rather straightforward. We know how to get rid of minority faction; the majority out votes the minority. How does one get rid of majority faction? Every immediate alternative poses a great problem. Each relies upon creating a will independent of the society—that is, some authority that can rule in its own name, as a monarch or

an aristocratic body. It is usually a minority of the community, which disposes of absolute authority over every one else. Nor does a supreme court interpreting a bill of rights as the “last word” on power look any different! That is unacceptable, for it is the mode that the Americans originally set out to alter. They had affirmed the priority of self-government.

The solution had to be produced in a combination of ways—looking at the structure of government, the questions of separation of powers, checks and balances, and many such things as are too familiar to excuse my rehearsing them here. More important, however, stand the considerations beyond these, as Madison elucidated them. For Madison argued, in the end, that the checks and separations are not, themselves, the salvation of self-government. They are means of keeping representatives in check, while the question which concerns us is what is the nature of these representatives.

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

without coming to terms with numerous other such interests, and then only through representatives, never directly.

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

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

I repeat, what we find throughout the founding era is the continual emphasis of one theme: namely, that the idea of building a nation within the United States turns on the prospect of being able to assure that the processes of self-government can work hand-in-hand with an expectation of virtue, without at the same time lodging somewhere within the community a specific power to form individuals in virtue. That is the key.

Consider: why would folk wish to produce virtue in human beings? The answer would be that such human beings would then become capable of conducting themselves by their own lights—self-government. What happens when one cedes to someone else the authority to compel folk to conduct themselves virtuously? Is it not the case that such folk never have occasion to conduct themselves by their own lights? The very purpose for the sake of which one makes virtue the end

is rendered impossible in the ancient regime, in the pre-American state of things. As the Founders pondered that contradiction, they argued that their gamble was necessary, consistent with the objective of virtue. That this society would succeed *if its people were decent* was the fundamental principle of the drafting and adoption of the Constitution. It was not drafted with the idea in mind that virtue no longer counted. It was not drafted for the sake of denying what had been maintained in the ancient world, that human decency was important to human society. It was designed, finally and for the first time in human life, to make possible what all had always longed for.

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

themselves in accord with virtue so long as that regime should last. How they differed from others, let James Wilson again relate:

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

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