EDWARD J. ERLER

The Political Philosophy of the Constitution

As it was more than probable we were now digesting a plan which in its operation would decide forever the fate of Republican Government we ought not only to provide every guard to liberty that its preservation could require, but be equally careful to supply the defects which our own experience had particularly pointed out.—JAMES MADISON

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.—ALEXANDER HAMILTON

ON THE OCCASION of the bicentennial of the Constitution, the nation was confronted once again with a vigorous debate about the origins of the regime. This time the debate concerned whether the origins—the intentions of the Framers—should be the authoritative touchstone of constitutional interpretation. Controversies about the meaning and significance of the Constitution are hardly surprising, since they form the most characteristic—and unique—feature of our political life. In one way or another, all our important political questions become constitutional questions, and these questions always—explicitly or implicitly—involve the character

NOTE: My epigraphs are from a speech of Madison's, June 26, 1787, at the Convention, and from *Federalist* No. 1.

of the Founding. For it is the Founding that reveals the "standard maxim" of our political life, one that did not grow from a mythical or prehistoric past but was based on the universal principle that "all men are created equal." The origins of America thus exist in the full light of day and can be subjected to the most precise scrutiny. In great measure, the character of our national politics has depended upon the way in which we have viewed the work of the Founders.

The last few years have witnessed an extraordinary public debate between the attorney general of the United States and several members of the Supreme Court. This debate invites us once again to consider the meaning of the Constitution as an expression of first principles. Attorney General Edwin Meese advocated what he called a "jurisprudence of original intention" as an antidote to increased judicial activism.[1] He described the main outlines of this approach in the following terms: "Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself."[2] This jurisprudential stance, Meese contended, is a necessary inference from the fact of a written constitution. The Constitution is organic law and thus superior in authority to any legislative enactment or interpretation by the Supreme Court.

Justice William Brennan responded to the attorney general's call for a return to the text of the Constitution by replying that it was both impossible and undesirable to attempt to interpret the Constitution in the light of the Framers' intentions: "Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of over-

[1]Edwin Meese, "Speech before the American Bar Association," July 9, 1985, reprinted in *The Great Debate: Interpreting Our Written Constitution* (Washington, D.C., 1986), p. 9.

[2]Edwin Meese, "Speech before the District of Columbia Chapter of the Federalist Society," Nov. 15, 1985, ibid., p. 36.

arching principles to changes of social circumstances."[3] The Constitution, according to Brennan, "is a sublime oration on the dignity of man, a bold commitment by a people to the idea of libertarian dignity protected through law."[4] But "the demands of human dignity will never cease to evolve."[5] Thus, the "sublime oration" on human dignity must be continually reinterpreted. And, of course, the principal role in the revision of the text belongs to the judiciary because, as Brennan notes, "judicial power resides in the authority to give meaning to the Constitution."[6]

There are some special demands of human dignity, however, that do not evolve. Being "fixed and immutable,"[7] these demands are somehow immune from social progress and evolution. The most dramatic of these, according to Brennan, relates to capital punishment. The Constitution explicitly excludes capital punishment from its proscription against "cruel and unusual punishment" by referring in the Fifth Amendment to "capital crimes" and by providing in the same amendment that "no person" can be deprived of "life, liberty, or property without due process of law." This latter provision, of course, clearly indicates that *with* due process of law, "persons" can be deprived of life. But the evolving standards of human dignity now dictate, according to Justice Brennan, that "capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."[8] The Eighth Amendment was, of course, passed contemporaneously with the Fifth Amendment and therefore cannot possibly have been intended to proscribe capital punishment. An adherence to the literal language of the Constitution, in Brennan's view, would thus

[3] William Brennan, "The Constitution of the United States: Contemporary Ratification," Text and Teaching Symposium, Georgetown University, Oct. 12, 1985, ibid., p. 15.

[4] Ibid., p. 18.

[5] Ibid., p. 23.

[6] Ibid., p. 14.

[7] Ibid., p. 23.

[8] Ibid.

deny the Constitution's potential for serving as the vehicle of social progress. Brennan does not, however, attempt to explain how it is possible for some "fixed and immutable" demands to exist in a universe of constant change and progress. Perhaps these exceptions to progress are demanded by progress itself! Justice Brennan is strangely silent on this crucial point.

In any case, for Brennan, the original Constitution, before the advent of the Bill of Rights and the Reconstruction amendments, did not address the issue of human dignity, being almost exclusively concerned with the "abilities and disabilities of government." It was only the progressive evolution of the Constitution away from its defective origins that transformed it into "a sparkling vision of the supremacy of the human dignity of every individual."[9] Justice Thurgood Marshall joined the fray on the side of Justice Brennan, noting that during the bicentennial we should not be celebrating the work of the Framers, but the work of those who refused to acquiesce in the Framers' "outdated notions of 'liberty,' 'justice,' and 'equality.'"[10] The Constitution's compromise with slavery, according to Marshall, was a fatal defect that could not be remedied within the terms of the original document. "While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws."[11] Thus, Marshall views the Fourteenth Amendment not as a completion of the principles embodied in the Constitution, but as a repudiation of the original document. For both Marshall and Brennan the origins (and the intentions of the Framers) can no longer be regarded as authoritative.

This contemporary debate necessarily impels us to a consideration of first principles. For it is only through a proper

[9] Ibid., p. 18.

[10] Thurgood Marshall, "Speech to the San Francisco Patent and Trademark Law Association," Maui, Hawaii, May 6, 1987.

[11] Ibid.

understanding of the origins of the regime that we can understand the character of this controversy about the principles of constitutional interpretation. If we find that somehow the origins are defective or outmoded, then the jurisprudence that looks upon the Constitution merely as a procedural instrument to facilitate social progress would certainly make more sense than the jurisprudence of original intent. If, on the other hand, the Founding has more theoretical and principled substance than Brennan and Marshall are willing to admit, then some version of an original intent jurisprudence is demanded by political prudence.

During the course of the debate in the Massachusetts ratifying convention in 1788, Fisher Ames, a leading Federalist, remarked in his defense of the new Constitution that "legislators have at length condescended to speak the language of philosophy; and if we adopt it, we shall demonstrate to the sneering world, who deride liberty because they have lost it, that the principles of our government are as free as the spirit of our people."[12] It seems rather curious to us today that Ames would refer to the Constitution as a philosophic document. One does not ordinarily speak of "the philosophy of the Constitution," because we know that constitutions are political, not philosophic, documents. We are more apt to view the Framers as pragmatists rather than philosophers. Indeed, we pride ourselves on being realists, able to see through what has been called "the lost language of the Enlightenment,"[13] a language replete with references to such concepts as natural rights and natural law. Our conceit is that we can understand the work of the Framers better than the Framers understood it themselves. After all, their reference to "the laws of nature and nature's God" as the ground of political right is symbolic not only of their own "romantic" self-delusions, but of the self-delusions of their age as well. Scientific realism has taught us that the eighteenth-century idea of

[12] Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution,* 2d ed., 5 vols. (Philadelphia, 1937), 2:155.

[13] Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York, 1978), p. xiv.

"nature" cannot provide the standard of political justice because—in the terms of one contemporary philosopher—nature is merely a "lottery," arbitrarily dispensing benefits and disadvantages. From this point of view, the ground of justice is not, as the Framers believed, "the laws of nature," but positive laws which have as their explicit purpose the correction of the arbitrariness of nature.[14]

The most thorough and vigorous academic attempt to expose the defects of the origins was undertaken by Charles A. Beard in his *Economic Interpretation of the Constitution of the United States* (1913). Beard's contribution was to portray the Framers as unprincipled men who created an undemocratic government designed to further their own class interests. Douglass Adair wrote that it was Beard's purpose "to expose the nature of [the] Constitution, to unmask its hidden features in order to show that it deserved no veneration, no respect, and should carry no authority to democratic Americans of the twentieth century."[15] What Beard seemed to reveal about the proceedings of the Constitutional Convention was that under the thin veneer of public-spiritedness affected by the delegates was a sinister and self-conscious aggrandizement of their own class interests. The Constitution, while masquerading as a democratic document, is really an economic document embodying the dominant class relations of the day. This interpretation, Beard remarked, is not to be gleaned from the language of the Constitution itself; rather, "the true inwardness of the Constitution" is revealed in the examination of the class interests of those who framed it.[16] The Constitution, therefore, is not to be viewed as a document with any theoretical or principled integrity. But as Adair cogently pointed out, this "economic interpretation" excludes the possibility of any theoretical interpretation *a*

[14]John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), p. 74.

[15]Douglass Adair, "The Tenth Federalist Revisited," in Trevor Colbourn, ed., *Fame and the Founding Fathers: Essays by Douglass Adair* (New York, 1974), p. 85.

[16]Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913; reprint ed., New York, 1965), p. 152.

priori. After all, from the point of view of class analysis, theory or principle is only an epiphenomenon of the more basic (and more revealing) economic relationships.

> The Fathers, as pictured by Beard, were "practical" men who, knowing exactly what they wanted in the way of concrete economic privileges, were willing to stage a "coup d'état" to gain their ends. Collectively they were exhibited as being adepts in the use of force, fraud, and false propaganda. Beard gives no hint, however, that political theory played any consequential role in creating the Constitution; speculation there was in plenty in the Convention, but it was land and debt speculation, not speculative thought. Indeed, if it is possible to determine an individual's political motives by cataloguing his property, the irrelevance of theory should be apparent.[17]

While the details of Beard's economic interpretation were refuted long ago, the main thrust of his argument survives—the Framers were pragmatists who had little use for theory or principle except insofar as it was necessary to provide a gloss upon their interest-group brokering.

In 1961 John Roche published an essay entitled "The Founding Fathers: A Reform Caucus in Action."[18] In the intervening years this article has taken on the status of a minor classic.

[17] Adair, "Tenth Federalist Revisited," pp. 87–88. The same point of view is taken by Stanley Elkins and Eric McKitrick, "Youth and the Continental Vision," in Leonard W. Levy, ed., *Essays on the Making of the Constitution,* 2d ed. (New York, 1987), pp. 224–26 (originally published as "The Founding Fathers: Young Men of the Revolution," *Political Science Quarterly* 76 [1961]:181–216). In an early critique of Beard, Charles Warren, in his *The Making of the Constitution* (Boston, 1928), pp. 77–78, wrote that "an alignment of men as for or against a new Constitution, on the basis of property or non-property credits or debts, is an attempted simplification of the political situation in 1787, which facts and human nature do not support. It is impossible to draw a hard and fast economic line with reference to the attitude of classes of men towards the Constitution, and omit all consideration of their political faiths, ideals, inherited sentiments, personal antagonisms, past experience and patriotic desires. . . . It is faulty history to describe the subjects of division in 1787 in terms of class consciousness, for such a social phenomena did not then exist."

[18] John P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political Science Review* 55 (1961):799–816.

Roche's thesis was straightforward and simple: "While the shades of Locke and Montesquieu *may* have been hovering in the background, and the delegates *may* have been unconscious instruments of a transcendent *telos,* the careful observer of the day-to-day work of the Convention finds no over-arching principles."[19] The concerns of the Framers, Roche continues, "were highly practical . . . they spent little time canvassing abstractions."[20] Their real business, instead, "was to hammer out a pragmatic compromise which would both bolster the 'National interest' and be acceptable to the people. What inspiration they got came from their collective experience as professional politicians in a democratic society."[21] The Constitution was therefore a "makeshift affair."[22] Roche's concern, unlike Beard's, is not that the Constitution was undemocratic, but that it established an unprincipled or pragmatic democracy. From this point of view—the view that has come to dominate scholarship—the Constitution is nothing more than a "bundle of compromises," a pragmatic accommodation of the various competing interests that were represented at the Convention. And, like all pragmatists, the Framers valued practice above principle—indeed, principle was no part of their practical calculations.

In Roche's view it was later generations—following the lead of the authors of *The Federalist*—who falsely imported into the Constitution "a high theoretical content."[23] Later interpreters sought to give the Convention proceedings some theoretical dignity in order to endow the Framers with the public-spirited motives they so conspicuously lacked. Perhaps those who seek a principled interpretation of the Founding are merely engaged in the necessary task of obscuring the origins of the regime by disguising the pragmatic machinations of the Framers. The Framers were hard-headed realists; it is the benefactors of their work who indulge in romantic theorizing.

[19] Ibid., p. 816.

[20] Ibid., p. 809.

[21] Ibid., p. 799.

[22] Ibid., p. 812.

[23] Ibid., p. 811.

According to Roche, the best example of the Framers' willingness to engage in pragmatic compromise is the "Rube Goldberg mechanism" of the electoral college: "It was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content."[24] During the course of the Convention, the mode of electing the president (as well as the other branches) was dominated by considerations drawn from the *principle* of the separation of powers. James Madison adumbrated that principle at the Convention to the general approbation of the members: "If it had been a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised."[25] It was no simple task to provide for the independence of the various branches in a government that was intended to be "wholly popular." As Montesquieu had pointed out, it was easier to establish a constitutional separation of powers in a mixed regime because the different (and independent) interests of the classes in society would be reflected in the government itself.[26] There had been proposals in the Convention to have the president elected by Congress. But it was quickly recognized that this would compromise the independence of the executive and vitiate his role in the separation of powers. All proposals to have the president elected directly by the people were also rejected. Although direct election did not receive much support, it would also have tended to lessen the effectiveness of the separation of powers. To serve as a proper counterweight to the legislative branch, the president would have to have a *different* connection to the people, since it would be necessary on occasion for the president to serve the people "at the peril of their displeasure."[27] Thus, the mech-

[24] Ibid.

[25] Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed. 4 vols. (1937; reprint ed., New Haven, 1966), 2:56.

[26] See Edward J. Erler, "The Constitution and the Separation of Powers," in Leonard W. Levy and Dennis J. Mahoney, eds., *The Framing and Ratification of the Constitution* (New York, 1987), pp. 151–66.

[27] *Federalist* No. 71, in Clinton Rossiter, ed., *The Federalist Papers* (New York, 1961), p. 432. See Gouveneur Morris's speech in Farrand, ed., *Records of the Convention*, 2:500; Harvey C. Mansfield, Jr., "Republicanizing

anism of the electoral college was designed specifically to produce not only an independent executive, but an energetic one as well. This mode of election—described by Alexander Hamilton as "if not perfect, at least excellent"—was dictated exclusively by considerations derived from the principle of the separation of powers. It appears jerry-built only from the perspective that presupposes that considerations of principle played no role in the Convention's deliberations.

Yet it is only too obvious that the Framers were not philosophers engaged in theoretical speculation—they were indeed practical politicians and only agitated questions of principle insofar as it was necessary to make prudential judgments. In other words, they were engaged in statesmanship—the accommodation of principle to particular circumstances. Even though the debates may have been tinged from time to time with the spirit of partisanship, the Framers did not regard the crucial compromises of the Convention as unprincipled accommodations. Instead, they saw themselves as statesmen adapting principle to meet the "exigencies of Government and the preservation of the Union." As Martin Diamond rightly noted, "The mere fact of compromise is not proof that principle, theory, and consistency were abandoned. Rather, the Framers successfully balanced the rival claims of theory and practical necessity. Despite the compromises which produced it, the Constitution is an essentially logical and consistent document resting upon a political philosophy. . . . Men of principle may properly make compromises when the compromises adequately preserve fundamental principle."[28] The crucial ingredient that is missing from

---

the Executive," in Charles Kessler, ed., *Saving the Revolution: The Federalist Papers and the American Founding* (New York, 1987), pp. 175–78; and Morton J. Frisch, "The Constitutional Convention and the Study of the American Founding," *Benchmark* 3 (1987):105.

[28] Martin Diamond, *The Founding of the Democratic Republic* (Itasca, Ill., 1981), p. 35. Winston Churchill, surely one of the greatest statesmen of the twentieth century, characterized the role of statesmanship in his essay "Consistency in Politics," published in 1932. "[A] Statesman in contact with the moving current of events and anxious to keep the ship on an even keel and steer a steady course may lean all his weight now on one side and now on the other. His arguments in each case when contrasted can be shown

Roche's account of the Convention is the element of political statesmanship. For Roche, there is no middle ground between a conclave of philosophers and an assemblage of democratic politicians who are unabashedly aggrandizing their own self-interest. In the political universe created by Roche, every compromise is ipso facto a departure from principle. But as Diamond seems to suggest, every compromise implies an agreement in principle—otherwise no compromise would be possible. It may be true that most of the delegates to the Convention "were impatient with speculations about government that were unconnected with a particular time and place."[29] But it is not true, as Roche insists, that the Framers were merely "practical politicians in a democratic society," inspired exclusively by "their own political futures."[30] Roche's view does not understand the statesmanship—the genuine politics—that was the real achievement of the delegates to the Convention. This is the reason he insists upon ludicrously characterizing it as "a reform caucus" when the delegates themselves knew (and stated) that they were recurring to "first principles."

Roche rightly notes that the Framers "*made* history and did it within the limits of consensus."[31] Consensus, of course, defines the necessary limits of statesmanship in a regime that rests upon the consent of the governed. But Roche has an extremely narrow view of the limits of consensus in 1787 and the capacity of the people to respond to democratic leadership. Roche's view, however, did find some expression in the

---

to be not only very different in character, but contradictory in spirit and opposite in direction: yet his object will throughout have remained the same. His resolves, his wishes, his outlook may have been unchanged; his methods may be verbally irreconcilable. We cannot call this inconsistency. In fact it may be claimed to be the truest consistency. The only way a man can remain consistent amid changing circumstances is to change with them while preserving the same dominating purpose" (*Amid These Storms: Thoughts and Adventures* [New York, 1932], p. 39).

[29] Herbert J. Storing, "The Constitutional Convention," in Morton J. Frisch and Richard Stevens, eds., *American Political Thought: The Philosophic Dimension of American Statesmanship,* 2d ed. (Itasca, Ill., 1983), p. 67.

[30] Roche, "Founding Fathers," p. 805.

[31] Ibid., p. 799.

Convention—*but it was far from the prevailing opinion.* Pierce Butler, for example, warned that "we must follow the example of Solon who gave the Athenians not the best Govt. he could devise; but the best they wd. receive."[32] William Paterson—the principal author of the New Jersey Plan—expressed a similar concern, but one which also stemmed from his skepticism about the legitimacy of the Convention's power to devise a constitution that was not strictly federal in character. "Our object," he said, "is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve."[33]

Madison's answer to these expressions of reticence was emphatic:

> If the opinions of the people were to be our guide, it wd. be difficult to say what course we ought to take. No member of the Convention could say what the opinions of his Constituents were at this time; much less could he say what they would think if possessed of the information & lights possessed by the members here; & still less what would be their way of thinking 6 or 12 months hence. We ought to consider what was right & necessary in itself for the attainment of a proper Governmt. A plan adjusted to this idea will recommend itself.[34]

Madison, of course, was not insensitive to the role of opinion in popular government.[35] Writing in *The Federalist,* he agreed

[32] Farrand, ed., *Records of the Convention,* 1:125; Gunning Bedford made nearly the same statement on June 30: "We must like Solon make such a Governt. as the people will approve" (ibid., p. 491).

[33] Ibid., 2:250.

[34] Ibid., 1:215.

[35] In an article for the *National Gazette* published Dec. 19, 1791, Madison wrote: "Public opinion sets bounds to every government, and is the real sovereign in every free one," in William T. Hutchinson et al., eds., *The Papers of James Madison,* 19 vols. to date (Chicago and Charlottesville, 1962-), 14:170. See also "Charters" (p. 192): "All power has been traced up to opinion. The stability of all governments and security of all rights may be traced to the same source. The most arbitrary government is controuled where the public opinion is fixed"; and "British Government" (p. 201): "The boasted equilibrium of this government, (so far as it is a reality) is maintained less by the distribution of its powers, than by the force of public opinion."

with Butler's assessment of Solon's role in formulating the Athenian constitution. Although "according to Plutarch" Solon had "the sole and absolute power of newmodeling the constitution" of Athens, he "confessed that he had not given to his countrymen the government best suited to their happiness, but most tolerable to their prejudices."[36] Madison demonstrated that he understood the problem perfectly when he noted that "the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side."[37] But, as Madison also knew, in undertaking "the singular and solemn . . . experiment for correcting the errors of a system by which this crisis had been produced," "it is impossible for the people spontaneously and universally to move in concert towards their object; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions,* made by some patriotic and respectable citizen or number of citizens."[38] While the people are incapable of acting "spontaneously and universally," they are nonetheless "the only legitimate fountain of power."[39] Indeed, Madison wrote a few years later that "a republic involves the idea of popular rights. A representative republic *chuses* the wisdom, of which hereditary aristocracy has the *chance;* whilst it excludes the oppression of that form."[40] And the republican form of government, more than any other, presupposes the capacity of the people to make wise choices, although not necessarily in the sense of being able to formulate the choices in the first instance.

This is the precise sense in which Madison addressed the Convention on July 5:

> The Convention ought to pursue a plan which would bear the test of examination, which would be espoused & supported by

[36] *Federalist* No. 38, Rossiter, ed., *Federalist Papers,* pp. 232–33.

[37] *Federalist* No. 49, ibid., p. 315.

[38] *Federalist* No. 40, ibid., pp. 252–53.

[39] *Federalist* No. 49, ibid., p. 313; in *Federalist* No. 22 (p. 152), Alexander Hamilton had remarked that "the fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."

[40] Hutchinson et al., eds., *Papers of Madison,* 14:179.

> the enlightened and impartial part of America, & which they could themselves vindicate & urge. It should be considered that altho' at first many may judge of the system recommended, by their opinion of the Convention, yet finally all will judge of the Convention by the system. The merits of the system alone can finally & effectually obtain the public suffrage. He was not apprehensive that the people of the small States would obstinately refuse to accede to a Govt. founded on just principles, and promising them substantial protection.[41]

This view was echoed many times during the course of the Convention. Gouverneur Morris, among others, spoke in support of Madison: "We must look forward to the effects of what we do. These alone ought to guide us. Much has been said of the sentiments of the people. They were unknown. They could not be known. All that we can infer is that if the plan we recommend be reasonable & right; all who have reasonable minds and sound intentions will embrace it, notwithstanding what had been said by some Gentlemen."[42] What made the Convention a valuable improvement "on the ancient mode of preparing and establishing regular plans of government" was the fact that the task of formulating the Constitution was given to a deliberative body serving as the representatives of the people and that the resulting plan was to be submitted to an *enlightened* citizenry for its approval. This was a situation totally unlike the one faced by Solon.[43] Ancient republicanism was not the model for the Convention's "select experiment" in republicanism.[44]

The argument in the Convention was not about the neces-

[41] Farrand, ed., *Records of the Convention,* 1:528.

[42] Ibid., pp. 529–30. See also p. 372: "Mr. Randolph feared we were going too far, in consulting popular prejudices. Whatever respect might be due to them, in lesser matters, or in cases where they formed the permanent character of the people, he thought it neither incumbent on nor honorable for the Convention, to sacrifice right & justice to that consideration"; and p. 474 (Hamilton): "We must therefore improve the opportunity, and render the present system as perfect as possible. Their good sense, and above all, the necessity of their affairs, will induce the people to adopt it."

[43] *Federalist* No. 38, Rossiter, ed., *Federalist Papers,* p. 233.

[44] Farrand, ed., *Records of the Convention,* 1:256 (Edmund Randolph).

sity of working within the bonds of consensus but what the consensus was. Roche argues that "a serious case can be made that the advocates of the New Jersey Plan, far from being ideological addicts of states'-rights, intended to substitute for the Virginia Plan a system which would both retain strong national power and have a chance of adoption in the states."[45] But there was much uncertainty expressed in the Convention about how much of a consensus existed in favor of the confederal form of government. James Wilson, for example, made the point that it was not the people so much as the state politicos who were opposed to a national government. His remark deserves to be quoted at length:

> With *regard to the sentiments of the people,* he conceived it difficult to know precisely what they are. Those of the particular circle in which one moved, were commonly mistaken for the general voice. He could not persuade himself that the State Govts. & sovereignties were so much the idols of the people, nor a natl. Govt. so obnoxious to them, as some supposed. . . . Where do the people look at present for relief from the evils of which they complain? Is it from an internal reform of their Govt.? No. Sir, It is from the Natl. Councils that relief is expected. For these reasons he did not fear, that the people would not follow us into a national Govt. and it will be a further recommendation of Mr. R.'s plan that it is to be submitted to *them* and not to the Legislatures, for ratification.[46]

This was a view that was frequently expressed in the Convention. It was not the people who were most likely to object to a plan that encroached upon the existing federal relationship, but those who held positions of power under that system.[47] Apart from considerations of legitimacy, the members

[45] Roche, "Founding Fathers," p. 806.

[46] Farrand, ed., *Records of the Convention,* 1:253.

[47] See, among others, ibid., p. 133 (James Wilson): "The opposition was to be expected . . . from the *Governments,* not from the Citizens of the States"; p. 49 (Wilson): "On examination it would be found that the opposition of States to federal measures had proceeded much more from the Officers of the States, than from the people at large"; p. 123 (Rufus King): "The Legislatures also being to lose power, will be most likely to raise objections. The people having already parted with the necessary powers it is

of the Convention were under no illusions that it was the people, not the state legislatures, who were most likely to look favorably upon the innovations contained in the new Constitution. And, as for the problem of legitimacy, this would be resolved by the acceptance of the people.[48] Ironically, a strong case could be made that the Convention was more representative of the sentiments of the people than the various state legislatures. Later events seem to support this assertion.

Roche cites John Dickinson's oft-quoted statement of August 13 as an expression of the general attitude of the delegates. During the course of a rather desultory argument about whether the lower house should have the exclusive power of originating money bills, Dickinson remarked that "experience must be our guide. Reason may mislead us."[49] This statement is conclusive evidence for Roche that the delegates were practical politicians, not men of theory or principle. But read in its proper context, Dickinson's statement does not support Roche's contention. In the debate over this question, *there was no principle at stake.*[50] "It was not Reason," Dickinson proclaimed, "that discovered the singular & ad-

---

immaterial to them, by which Government they are possessed, provided they be well employed"; p. 137 (George Read): "If we do not establish a good Govt. on new principles, we must either go to ruin, or have the work to do over again. The people at large are wrongly suspected of being averse to a Genl. Govt. The aversion lies among interested men who possess their confidence"; 2:476 (Madison): "Mr. Madison considered it best to require Conventions; Among other reasons, for this, that the powers given to the Genl. Govt. being taken from the State Govts the Legislatures would be more disinclined than conventions composed in part at least of other men; and if disinclined, they could devise modes apparently promoting, but really thwarting the ratification."

[48] See below.

[49] Roche, "Founding Fathers," p. 799 (John Dickinson's remark is found in Farrand, ed., *Records of the Convention,* 2:278). Similar importance is placed on William Peterson's remark of June 9: "A little practicable Virtue [is] preferable to Theory" (Roche, "Founding Fathers," p. 806; Farrand, ed., *Records of the Convention,* 1:186); this remark is recorded in Paterson's notes, but not those of Madison, King, or Robert Yates.

[50] Madison had remarked on June 13 that "commentators on the Brit: Const: had not yet agreed on the reason of the restriction on the H. of L.

mirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them. This is then our guide."[51] Dickinson was replying to Wilson and Madison who had earlier argued that the experience of vesting the power to initiate money bills in the lower house of the state legislatures had been a source of faction and contention. Dickinson denied that the short experience of the state legislatures outweighed the long experience of Great Britain. "Shall we oppose to this long experience," he mused, "the short experience of 11 years which we had ourselves, on this subject."[52] In this argument *both* sides appealed to experience; but the question could not be resolved on the basis of experience alone. Which experience was authoritative?[53]

In *The Federalist,* Madison wrote that in considering the central problems of republican government, "theoretic reasoning, in this as in all other cases, must be qualified by the lessons of practice."[54] Experience must always be tested in the

---

in money bills. Certain it was there could be no similar reason in the case before us" (Farrand, ed., *Records of the Convention,* 1:233).

[51] Ibid., 2:278.

[52] Ibid.

[53] John Rutledge outlined the dilemma nicely when he remarked in reply to Dickinson that "the friends of this motion are not consistent in their reasoning. They tell us that we ought to be guided by the long experience of G.B. & not our own experience of 11 years: and yet they themselves propose to depart from it. The H. of Commons not only have the exclusive right of originating, but the Lords are not allowed to alter or amend a money bill." Dickinson, of course, had supported the proposal restricting the origination of money bills to the House but allowing the Senate to amend. It is not surprising, therefore, that Rutledge would inquire as to what experience Dickinson was using for his guide, as it was obviously not that of Britain or the American states (ibid., p. 279).

[54] *Federalist* No. 43, Rossiter, ed., *Federalist Papers,* p. 276; in *Federalist* No. 20, ibid., p. 138, Madison had written that "experience is the oracle of truth; and where its responses are unequivocal they ought to be conclusive

light of some standard that is itself not a part of the historical experience. Experience, not theoretic reasoning, is the qualifier—theoretic reasoning is thus the principal ingredient in this amalgam of theory and practice that Madison understood to be statesmanship. Madison succinctly expressed the statesman's view of the matter in the notes compiled for his speech to the Convention on August 7: "We must not shut our eyes to the nature of man, nor to the light of experience."[55] Experience is the guide only when seen or interpreted in the light of human nature—that is, in the light of political philosophy.

To concede that the Convention delegates conceived of their task in eminently practical terms is not to concede that there was no principled integrity in their deliberations. Even Roche notes that "what is striking to one who analyzes the Convention as a case-study in democratic politics is the lack of clear-cut ideological divisions in the Convention. Indeed," Roche proclaims, "I submit that the evidence—Madison's *Notes,* the correspondence of the delegates, and debates on ratification—indicates that this was a remarkably homogeneous body on the ideological level."[56] It is unlikely that Roche's use of the term *ideological* is meant to convey the idea of theoretical principle, but it is close enough for our present purposes. What divided the delegates at the Convention was not so much issues of ideology or principle but the practical details of implementing those principles. The famous compromises of the Convention should be understood not as a sign of a lack of principle, but in fact as attempts to accommodate constitutional principle. The Constitution may indeed be described as a "bundle of compromises," but the compromises hammered out at the Convention—every one

---

and sacred." It is doubtful from the context, however, that Madison ever considered experience to be "unequivocal." For a penetrating discussion of this issue, see Douglass Adair, "'Experience Must Be Our Only Guide': History, Democratic Theory, and the United States Constitution," in Colbourn, ed., *Fame and the Founding Fathers,* p. 107.

[55] Farrand, ed., *Records of the Convention,* 3:451.

[56] Roche, "Founding Fathers," p. 803.

of them seeking accommodation of a particular point of view—took place within a common theoretical horizon. And this was the theoretical horizon that had been created by the Declaration of Independence, a document that, as Thomas Jefferson explained, "was intended to be an expression of the American mind."[57]

John Hancock, president of the Continental Congress, in his official letter transmitting the Declaration of Independence to the States remarked that "the important Consequences resulting to the American States from this Declaration of Independence, considered as the Ground and Foundation of a future Government, will naturally suggest the Propriety of proclaiming it in such a Mode, as that the People may be universally informed of it."[58] It is significant to note that from the beginning the Declaration was considered to be the "Ground and Foundation" of any future government or governments in America. On June 19, 1787, in the course of the Convention, Luther Martin, who later left without signing the Constitution, rose to remark that "the separation from G[reat] B[ritain] placed the 13 States in a state of nature towards each other; that they would have remained in that state till this time, but for the confederation."[59] Martin, of course, was an advocate of a strictly confederal form of government. But the question of whether the states had ever been in the state of nature with one another was not simply a metaphysical dispute. If the thirteen colonies achieved their independence of each other at the same time they gained their independence from Great Britain, then the arguments for a strong national government that entrenched upon state sovereignty could hardly be credited.

James Wilson of Pennsylvania rose to answer Martin, re-

[57]Thomas Jefferson to Henry Lee, May 8, 1825, Thomas Jefferson, *Writings,* ed. Merrill D. Peterson (New York, 1984), p. 1500.

[58]Paul H. Smith, ed., *Letters of Delegates to Congress, 1774–1789,* 16 vols. to date (Washington, D.C., 1979-), 4:396; see Dennis J. Mahoney, "Declaration of Independence," in Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., *The Encyclopedia of the American Constitution,* 4 vols. (New York, 1986), 2:545–46.

[59]Farrand, ed., *Records of the Convention,* 1:324.

marking that he "could not admit the doctrine that when the Colonies became independent of G. Britain, they became independent also of each other." As Madison recorded in his notes, Wilson "read the declaration of independence, observing thereon that the *United Colonies* were declared to be free & independent, not *Individually* but *Unitedly* and that they were confederated as they were independent, States." This speech of Wilson's was quickly seconded by Hamilton, who "denied the doctrine that the States were thrown into a State of nature."[60] The interesting point about this colloquy is that both arguments rested "on a deeper stratum of agreement—as any disagreement which can be compromised must. The basic understanding of government and individual rights expressed in the Declaration of Independence was taken for granted. . . . But different conclusions were drawn."[61]

Indeed, both the small and the large republic arguments were drawn from the Declaration. Both were about how best to secure the republican regime of natural rights specified in that document. Roger Sherman succinctly expressed this sentiment when he stated that "the question is not what rights naturally belong to men; but how they may be most equally & effectually guarded in Society."[62] As Herman Belz has recently written, "Republicanism was the political philosophy of the American Revolution."[63] The radical core of this political philosophy was the substitution of natural rights for historical rights—the natural rights of man for the historical rights of Englishmen. Harry Jaffa writes:

> The preamble to the Declaration of Independence may be a succinct restatement of the theory that underlay the English Revolution of 1688, but it had little in common with the public rhetoric of that revolution. The latter explicitly accused James II only of violating a traditional constitution, not of violating natural rights. The teachings of John Locke may have served to justify revolution to Englishmen after the event; they served to

[60] Ibid., see also p. 552 (Elbridge Gerry).

[61] Storing, "Constitutional Convention," p. 61.

[62] Farrand, ed., *Records of the Convention,* 1:450.

[63] Herman Belz, "Constitutionalism and the American Founding," in Levy, Karst, and Mahoney, eds., *Encyclopedia of the Constitution,* 2:483.

> justify Americans *in* the event. It is doubtful that many Englishmen ever would have been swayed by an appeal to universal human equality; it is undeniable that this appeal was most powerful in the American Revolution.[64]

In short, the radical core of the American Revolution was the change from history to nature as the ground of political right. And it was this change that supplied the ground of the new Constitution.

Generally, this translated into the notion of a constitutional government that not only derived its legitimate powers from the consent of the governed but operated by means of consent. The central tenet of the Declaration of Independence—the principle that "all men are created equal"—provided the natural right foundation of American constitutionalism. For in equality the Framers found a nonarbitrary point of departure for the establishment of political right; equality, after all, is the abiding characteristic of human nature. And, because equality is grounded in human nature, it necessarily points to nature or natural right. The human species is unique in that it is the only species that has no natural rulers; human beings are free to choose—or at least have the potential to choose—their form of government, a privilege that was accorded by nature's God to no other species. The human species is therefore unique, and the regime founded on the recognition of this uniqueness will also be unique.[65]

I think there can be little doubt that the Framers were attempting to put into practice the principles of the Declaration of Independence. It is long past the time when we could take seriously Beard's implication that the Constitution represented a Thermidorian reaction *against* the principles of the Declaration. Yet the Constitution was not totally successful. Insofar as it allowed the continued existence of slavery, it could never be a complete expression of the principles of the Declaration. It was only after the passage of the Re-

[64] Harry Jaffa, *Equality and Liberty* (New York, 1965), p. 126.

[65] I have discussed this question *in extenso* in "Natural Right in the American Founding," in J. Jackson Barlow, Leonard W. Levy, and Ken Masugi, eds., *The American Founding: Essays on the Formation of the Constitution* (Westport, Conn., 1988), pp. 195–223.

construction amendments that it could be said that the Constitution came into formal harmony with the Declaration.

But however much slavery was tolerated as an act of political expedience, its tolerance was considered by the Framers as an *exception* to the principles of the Declaration. This point was neatly expressed by Representative William A. Newell arguing for the passage of the Fourteenth Amendment before the House of Representatives in February 1866:

> The combined wisdom of . . . patriotic men produced our present Constitution. It is a noble monument to their ability; but, unfortunately, like all human instruments, it was imperfectly constructed, not because the theory was wrong, but because of the existence in the country of an institution so contrary to the genius of free government, and to the very principles upon which the Constitution was founded, that it was impossible to incorporate it into the organic law so that the latter could be preserved free from its contaminating influence. . . . The framers of the Constitution did what they considered best under the circumstances. They made freedom the rule and slavery the exception in the organization of the Government. They declared in favor of the former in language the most emphatic and sublime in history, while they placed the latter, as they fondly hoped, in a position favorable for ultimate extinction.[66]

The Framers treated slavery as a *necessary* evil to be expunged from the polity as soon as circumstances would allow.

The greatest force working toward the abolition of slavery would be the regime's dedication to the principle that "all men are created equal." This dedication would ensure that slavery would be considered as an exception to the principle and therefore never a legitimate part of the regime. Only a denial of the principle—a denial that would destroy the regime itself—could therefore justify slavery. But this would not be a principled justification; its only basis would be force without right. As Abraham Lincoln—surely America's profoundest explicator of the Founding—explained in 1857, the authors of the Declaration

> did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to

[66] *Congressional Globe,* 39th Cong., 1st sess., p. 866.

> confer it immediately upon them. In fact they had no power to confer such a boon. They mean simply to declare the *right,* so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence. . . . The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use.[67]

The Declaration thus, in Lincoln's view, set up "a standard maxim" of political right, a maxim derived from natural human equality and therefore grounded in natural right. Stephen A. Douglas's "squatter sovereignty," which would have left the decision of whether "to vote slavery up or down" to local majorities, was simply grounded upon positivism—that is, the right of the stronger (and in democracies the stronger is the majority). And it was Douglas who insisted that the Declaration of Independence had meant only to include those of British descent. This doctrine, of course, became a leading tenet of the infamous *Dred Scott* decision. Had there been a move at the Convention to abolish slavery, the Convention would have collapsed and the Constitution would have been stillborn. As Madison and the more thoughtful Federalists realized, without a strong national government the prospects of ever abolishing slavery would be remote.

Madison pointed out in the Convention that the principal division was not between the large and small states but between the slaveholding and nonslaveholding states.[68] The reason for this remark by Madison is evident: the division between large and small states—however much it may have agitated the Convention—did not trench directly upon the question of republican principles; the division between slaveholding and nonslaveholding states did. As Madison noted

[67] Abraham Lincoln, "Speech at Springfield, Ill.," June 26, 1857, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* 9 vols. (New Brunswick, N.J., 1953–55), 2:406.

[68] Farrand, ed., *Records of the Convention,* 1:486.

during the Convention, "Where slavery exists, the Republican Theory becomes still more fallacious."[69] The question of federalism could reach a workable compromise without directly threatening the purity of the republican principles that informed the work of the Convention. The arguments about federalism, after all, were about what form of government, national or federal, would best *secure* republican principles. Madison and the other leading Federalists were adamant that republican liberty demanded an energetic national government, while those favoring a more confederal form of government were just as adamant that the best advantages for republican liberty were found in the state governments. But the question of slavery—while it too found its compromise in the Convention—was a compromise with republican principles. This was the tragic flaw of the Founding, a flaw that almost proved fatal to the republic in the Civil War. That it did not was due to the fact that it was still possible to rededicate the nation to those founding principles that had, by necessity, received only an incomplete expression in the Constitution. Contrary to what Justice Marshall has said, the Constitution did survive the Civil War; it was not replaced but completed by the Reconstruction amendments.

Frederick Douglass, a former slave and an abolitionist leader, understood the matter in precisely this light. In a speech delivered in February 1863, Douglass remarked that "the birth of our freedom is fixed on the day of the going forth of the Declaration of Independence." "The slaveholders," he continued, "are fighting for Slavery, and the slave system being against nature—they are fighting against the eternal laws of nature. . . . A great man once said it was useless to re-enact the laws of God, meaning thereby the laws of Nature. But a greater man than he will yet teach the world that it is useless to re-enact any other laws with any hope of their permanence."[70] A few months later, Douglass explained the importance of the Declaration as the ground of the Con-

[69] Ibid., p. 319.

[70] Frederick Douglass, "The Proclamation and a Negro Army: An Address Delivered in New York, on 6 February 1863," in John Blassingame, ed., *The Frederick Douglass Papers*, 3 vols. to date (New Haven, 1979-), 3:564, 554.

stitution: "I hold that the Federal Government was never, *in its essence,* anything but an anti-slavery Government. . . . If in its origin slavery had any relation to the Government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed."[71] The essence of the Constitution, of course, found its expression in the arguments of the Declaration of Independence—those arguments derived from human nature and couched in the language of "the eternal laws of nature."

It is certain that the members of the Reconstruction Congress saw themselves as explicitly addressing the task of completing the regime of the Founding. This was the thrust of the remarks of Representative Thaddeus Stevens before the House of Representatives in May 1866:

> I beg gentlemen to consider the magnitude of the task which was imposed upon the [Joint Committee on Reconstruction]. They were expected to suggest a plan for rebuilding a shattered nation—a nation which though not dissevered was yet shaken and riven . . . through four years of bloody war. It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now.[72]

References to the Declaration of Independence as "organic law" were so frequent throughout the debates in the thirty-ninth Congress that it can hardly be doubted that the Reconstruction Congress was, in some sense, self-consciously attempting to restore the Declaration as the authoritative source of the Constitution's principles.[73]

[71] Frederick Douglass, "Negroes and the National War Effort: An Address Delivered in Philadelphia, Pennsylvania, on 6 July 1863," ibid., p. 596 (emphasis added).

[72] *Congressional Globe,* 39th Cong., 1st sess., p. 2459.

[73] See Daniel A. Farber and John E. Muench, "The Ideological Origins of the Fourteenth Amendment," *Constitutional Commentary* 1 (1984):259, 272.

A delicate question arose at the Convention with respect to its authority to propose a new Constitution. The Continental Congress had called the Convention "for the sole purpose of revising the Articles of Confederation, and reporting to Congress and the several Legislatures, such alterations and provisions therein, as shall . . . render the Federal Constitution adequate to the exigencies of Government, and the preservation of the Union."[74] The leading Federalists in the Convention did not try to disguise the fact that they wished to scrap the Articles of Confederation and erect a "real and regular Government, as contradistinguished from the old Federal system."[75] Madison's study of ancient and modern confederacies had convinced him that a confederacy could not be the foundation of genuine government. He told his fellow delegates that the Articles of Confederation rested on "improper principles," and that no amount of reform could transform it into a viable form of government.[76] As Hamilton later wrote in *The Federalist,* "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."[77] Hamilton's critique of those who still argued for the confederal principle was devastating: "They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority without a diminution of State authority; at sovereignty in the Union and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio.*"[78] Thus, as Madison explained, the "exigencies of Government" required that the principle of Confederation must give way to the national

[74] Quoted in *Federalist* No. 40, Rossiter, ed., *Federalist Papers,* pp. 247–48.

[75] Madison to Jared Sparks, Nov. 25, 1831, quoted in Warren, *Making of the Constitution,* p. 116.

[76] Farrand, ed., *Records of the Convention,* 2:8.

[77] *Federalist* No. 15, Rossiter, ed., *Federalist Papers,* p. 108.

[78] Ibid.

principle, and if some believed that it was politically impossible to recommend a national government, then it was possible to recommend one that was "partly national and partly federal" in form, but national in principle.

The Convention, Madison argued, was charged with accomplishing two principal objects: revising the Articles of Confederation and rendering the federal Constitution "adequate to the exigencies of government." In Madison's view, the two charges, at bottom, were contradictory. The Convention was therefore forced to choose the more important of the two—providing for the "exigencies of government." Ultimately, however, Madison had resort to the Declaration to justify the work of the Convention. Its members, he wrote, "must have reflected that in all great changes of established governments forms ought to give way to substance; that a rigid adherence in such cases to the former would render nominal and nugatory the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'"[79] Thus Madison justified the Convention's work by an appeal to natural right, reasoning that the members of the Convention "must have borne in mind that as the plan to be framed and proposed was to be submitted to *the people themselves,* the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities."[80]

Another question touched upon the legitimacy of the Convention's work, that is, its decision not to follow the forms prescribed for ratification by the Articles of Confederation, which required submission to the state legislatures. Instead, the Convention chose to submit the new Constitution directly to the people. This became a matter of some controversy at the Convention, and some delegates were troubled by what they regarded as the highhandedness of the proposal. On June 5 Roger Sherman argued that popular ratification was unnecessary since the Articles already provided for the assent by the state legislatures. Madison was quick to respond, re-

[79] *Federalist* No. 40, ibid., p. 253.

[80] Ibid.

vealing the importance of the mode of ratification: if the state legislatures were allowed to approve the new instrument of government, the implication would be that the states were creating the new federal government and the whole would "be considered as a Treaty only of a particular sort, among the Governments of Independent States. . . . For these reasons as well as others he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves."[81]

The idea that the people were the ultimate authorities in republican government was a theme that was frequently voiced within the secret confines of the Convention proceedings. The decisive exchange on the manner of ratification occurred on August 31, near the end of the Convention's deliberations. Many delegates had come to realize that following the procedures of allowing state legislatures to pass on the new Constitution would likely spell its doom. Gouverneur Morris on this day "said he meant to facilitate the adoption of the plan, by leaving the modes approved by the several State Constitutions to be followed." Madison at this point was forced into making a very revealing speech supporting ratification by conventions chosen by the people. He noted that submitting the Constitution to the state legislatures would not succeed because "the powers given to the Genl. Govt. being taken from the State Govts the Legislatures would be more disinclined than conventions composed in part at least of other men; and if disinclined, they could devise modes apparently promoting, but really thwarting the ratification. . . . The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over." In this instance, Madison concluded, "first principles might be resorted to."[82]

As expected, Luther Martin rose to oppose Madison, pointing out "the danger of commotions from a resort to the

[81] Farrand, ed., *Records of the Convention,* 1:122–23.

[82] Ibid., 2:476. In a remark earlier in the proceedings that went largely unnoticed, Randolph spoke to this point with the utmost boldness: "There are certainly reasons of a peculiar nature where the ordinary cautions must be dispensed with; and this is certainly one of them. He wd. not as

people & first principles in which the Governments might be on one side & the people on the other." Rufus King replied that the states "must have contemplated a recurrence to first principles before they sent deputies to this Convention." With this, the Convention consented to the "resort to first principles" by approving the proposal to submit the Constitution to conventions chosen by the people.[83]

In his explanation of the Convention's decision in *The Federalist,* Madison was quite explicit. He called it a question "of a very delicate nature" to determine "on what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it." This question, he said, "is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed."[84] Here, then, at almost the literary center of *The Federalist* is Madison's reference to "the transcendent law of nature and of nature's God" as being the object of the resort to first principles. Everyone, of course, recognized this quotation as being from the Declaration of Independence. No one could have mistaken Madison's intention in relying on the Declaration to answer this question of such "a very delicate nature." The ultimate foundation of the Constitution is the Declaration and its requirement that all legitimate government be derived from the consent of the governed. And, as Madison noted later in *The Federalist,* the central tenet of "republican theory" holds 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."[85] This,

---

far as depended on him leave any thing that seemed necessary, undone. The present moment is favorable, and is probably the last that will offer" (1:255).

[83] Ibid.

[84] *Federalist* No. 43, Rossiter, ed., *Federalist Papers,* p. 279.

[85] *Federalist* No. 49, ibid., pp. 313–14.

Madison notes, is the greatest expression of the"manly spirit" of the Revolution.[86]

I think that there can be little doubt that the Framers of the Constitution were self-consciously attempting to give practical effect to those natural rights principles that had been enunciated in the Declaration of Independence. The spirit that pervaded the Convention was one of engaging in a great republican experiment. And if there were some whose sentiments disposed them in the direction of a mixed regime—and there were some—even they recognized that the lack of a preexisting class structure and the republican"genius" of the people would make anything but a republic impossible. As Madison wrote in *The Federalist,* "The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible."[87] Thus, what informs the Constitution is the "spirit of the revolution," that is, the Declaration.

Any genuine interpretation of the Constitution must therefore read the text of that document in the light of the principles of the Declaration. Neither Attorney General Meese nor Justice Brennan adopted this as a viable view of constitutional jurisprudence. Each took an extreme, Meese attempting to interpret the text without resort to principle, and Brennan resorting to principle—informed only by the vaguest notions of the "evolving demands of human dignity"—without reference to the Constitutional text. But it is only in the light of the principles of the Declaration that the text can be understood. The Fifth Amendment provides that "no person" shall "be deprived of life, liberty, or property, without due process of law." Does this clause include slaves?

[86] *Federalist* No. 14, ibid., p. 104.

[87] *Federalist* No. 39, ibid., p. 240.

Are slaves to be considered as "persons" or as "property"? We know how this question was answered in *Dred Scott.* But Chief Justice Roger Brooke Taney in the *Dred Scott* opinion was forced to conclude that blacks were not included in the Declarations's phrase "all men are created equal." Here, Taney was wrong, as Lincoln many times pointed out. But what is decisive is that the question can only be settled by reference to the principles of the Declaration, not by the literal language of the Constitution. A similar analysis could be made of Brennan's view of "cruel and unusual punishment." Here Brennan ignores the *explicit* language of the Constitution in the name of evolving concepts of human dignity. This view, if it were to prevail, would simply make the idea of a written constitution absurd, to paraphrase John Marshall in *Marbury* v. *Madison* (1803).

In the last years of his life, James Madison worked on a preface to his notes on the Constitutional Convention that he wanted to be published posthumously. The preface, although never finished, was finally published in 1840, four years after his death. In the peroration, Madison, almost fifty years after the event, reflected on the spirit and the motives of the delegates.

> Whatever may be the judgment pronounced on the competency of the architects of the Constitution, or whatever may be the destiny of the edifice prepared by them, I feel it a duty to express my profound & solemn conviction, derived from my intimate opportunity of observing & appreciating the views of the Convention, collectively & individually, that there never was an assembly of men, charged with a great & arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them, than were the members of the Federal Convention of 1787, to the object of devising and proposing a constitutional system which would best supply the defects of that which it was to replace, and best secure the permanent liberty and happiness of their country.[88]

Madison's words sound hopelessly naive to our jaded ears. That men could act for public-spirited motives for "the per-

[88] Adrienne Koch, ed., *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (New York, 1969), p. 19.

manent liberty and happiness of their country" seems incredibly superficial to an age that expects to find realistic motives in class consciousness or pragmatism. Yet I suspect we could be well served by a little naïveté in our attempt to recover the spirit of the Founding. Charles Warren characterized the attempt to interpret history in terms of economics or sociology as history that "leaves out of account the fact that a man may have an inner zeal for principles, beliefs, and ideals. . . . Those who contend, for instance, that economic causes brought about the War of the Revolution will always find it difficult to explain away the fact that the men who did the fighting thought, themselves, that they were fighting for a belief—a principle."[89] And if we find statesmen who were attached to principles and animated by ideas, I see no need to be embarrassed by that. This does not make us less sophisticated, but it may get us nearer the truth.

[89] Warren, *Making of the Constitution,* pp. 3–4.

Reprinted from HERMAN BELZ, RONALD HOFFMAN and PETER J. ALBERT, eds. **TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION** (Charlottesville: University Press of Virginia, 1992).