

IN CONGRESS, JULY 4, 1770.

Unanimous Declaration of the thirteen united States of America

THE  
**RISE and FALL of**  
**CONSTITUTIONAL**  
**GOVERNMENT**  
*in* **AMERICA**

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*A* **GUIDE to UNDERSTANDING**  
*the* **PRINCIPLES of the**  
**AMERICAN FOUNDING**

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**THOMAS G. WEST**  
**DOUGLAS A. JEFFREY**



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# **THE RISE & FALL OF CONSTITUTIONAL GOVERNMENT IN AMERICA**

This essay explains the principles of the American founding. It shows how those principles gave rise to constitutional government and a free society, and how freedom was extended to all Americans after the Civil War.

It will also show how the Founders' principles were opposed by a new theory that arose in the Progressive Era; how that new theory finally came to dominate American politics in the 1960s; and how that theory has changed our government and our society, and threatens our liberty and the liberty of our children.



# 1

## **THE THEORY OF THE AMERICAN FOUNDING: THE DECLARATION OF INDEPENDENCE**

The Continental Congress declared America's independence on July 2, 1776, but Americans celebrate their independence on July 4. This was the day the Founders signed the Declaration of Independence, which announced the principles justifying American independence. To understand America, principles are important in a way they are not to other countries.

The principles of the Declaration are universal in character, derived from an understanding of human nature, or, as its first sentence puts it, the "Laws of Nature and of Nature's God." This is an important point: The American Revolution was not based on a tradition specifically tied to one people, such as "the rights of Englishmen," but on ideas or principles true for all men everywhere. These principles are the discovery of human reason, because they are rooted in human nature. Religion and divine revelation may confirm this discovery. A tradition may embody it. But they are knowable to any human mind reflecting on the nature of man.

What are these principles?

## Equality

The Declaration's statement of principles begins: "We hold these truths to be self-evident, that all men are created equal..." Equality is the first self-evident truth, upon which the others rest. The important question is: equality in what sense? Humans obviously differ in intelligence, talents, beauty, strength, and many other attributes. What then did the Founders mean by calling human equality a "self-evident truth"?

They meant something very definite: Human beings are equal in the life and liberty they are born with and deserve to keep. As stated in the first sentence of the Virginia Declaration of Rights of 1776, which became the model for several other states' Bills of Rights: "all men are by nature equally free and independent."

In other words, although human beings are unequal in many ways, no one human or class of humans is superior to another human or class of humans in the way that all humans, since they are rational creatures, are superior to dumb beasts. No one who is not mentally deranged is irrational in the way that all cattle are irrational. James Madison explains in *The Federalist* 54 that every human being, but no cow, is held morally accountable for violence committed against others, because every man is free to choose his behavior. To that extent, all men are equal and therefore deserve to be treated as such.

There is a second consideration pointing to the self-evident truth of equality. Not only does the lowliest person have some share in reason; the most excellent person has some share in selfish passion. However superior the best among us may be in regard to wisdom and virtue, no creature of flesh and bones is exempt from self-interest. No one can be presumed free from the temptation to abuse power over others. Therefore no human can be trusted with absolute power in the way that the most perfect being imaginable—God or an angel— could reasonably be trusted. "If angels were to govern men," wrote Madison in *The Federalist* 51, "neither external nor internal controls on government would be necessary."

Fifty years after he wrote the Declaration, shortly before he died, Thomas Jefferson reiterated the Founders' understanding of equality:

“The mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.”

### Natural Rights

The second self-evident truth announced in the Declaration is that human beings are “endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.” This principle follows from, and explains, the principle of equality.

First, what is a “right”? According to the Founders, a right is a claim that a person may rightfully make against someone who would deprive him of what is his own. If you own something, like your clothes or your books, then you have a right to them. If someone takes them from you, then you have a legitimate claim against that person. He owes you your clothes or your books; he has a duty to give them back—or rather he has a duty not to take them in the first place.

A natural right, then, is a claim to what one rightfully owns by birth, or by way of one’s nature as a human being. Natural rights are unalienable because they cannot be alienated or given away to someone else. We should note also that a right from one point of view is a duty from another: if you have a right to liberty, I have a duty to respect that right.

But how is it that a thing comes to belong to you? The Founders would have answered something like this: You are born with it, or you acquire it by means of something that is inherently yours, such as an effort of your mind or body, or by the free gift of someone else. You get your life from God and nature. You get your clothes or your books by paying for them with the money that you make from your own work or that someone voluntarily gives you.

It is only after you have acquired your property in some legitimate way that your right to own property comes into play. The Founders would not have said, as some people now think, that you have a “right” to decent housing, health care, recreation, or any other particular thing you want or need before you have worked to get them. That would

mean that someone else has a duty to work to get clothes and books for you. This would be something like making that person your servant. It would be a violation of that person's right to liberty.

The Declaration specifically mentions three unalienable rights of human beings, or possessions that all men everywhere have by birth or nature: life, liberty, and the pursuit of happiness. No one may rightfully deny us these things. It is worth remarking that the Declaration does not proclaim a right to happiness itself. Happiness, like property, is not something we have by nature. Rather we are born with minds and talents that we are free to use to pursue happiness.

The Declaration says that these three rights are "among" our natural rights. We may be said to have others in addition—although these additional rights might also be seen as part of the right to liberty. Among the most important of these additional rights, as we may read in other official documents of the founding period, are the rights of conscience and property. These rights, like the rights of free speech and a free press, came to be among those protected in the Constitution's "Bill of Rights."

The right of conscience means religious freedom. As explained in the Virginia Declaration of Rights of 1776: "religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are entitled to the free exercise of religion, according to the dictates of conscience." Each of us has a right to worship God in his own way and time. No one may compel us to worship God in the way that he thinks best.

The right of religious liberty is not a right to exclude religion from public life, as is so often asserted now. In the minds of the Founders, religious liberty is certainly valuable as a means to prevent religious tyranny. Madison writes in *The Federalist* 51 that in a large republic, "the society itself will be broken down into so many parts, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." But the same Madison, writing three years ear-

lier in the Memorial and Remonstrance against Religious Assessments, said that the right of religious liberty “is in its nature an unalienable right. It is unalienable...because what is here a right towards men, is a duty towards the Creator.... This duty is precedent, both in order of time and degree of obligation, to the claims of civil society.” The right to religious liberty follows from the duty that all human beings owe to God. The deepest reason for religious liberty is not to free man from God and religion, but to free him to perform his duties to God without being coerced into an obnoxious mode of worship by the fallible human beings in government.

As for property rights, they were at the heart of the dispute that led to the American Revolution. When Americans listed the rights of man, they often said “life, liberty, and property.” Boston’s “Rights of the Colonists” (1772) was typical: “Among the natural rights of the colonists are these: First, a right to life; secondly to liberty; thirdly to property.”

Property rights can also be seen as a part of the right to liberty or, equally, as a part of the right to pursue happiness. As James Madison explained in his essay “On Property”: “In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.” The idea of a right to property begins with the fact that each man owns himself—by nature each man is his own ruler. Because we own ourselves, and our labor, we are free to work and keep the fruits of our labor. And because one cannot be happy without some measure of property (i.e., clothes, food, shelter, and other things) and because it is necessary to make a living in order to acquire them, there is a natural right to work. Abraham Lincoln, a man who understood the principles of America as well as anyone, liked to call this the right of “free labor.” “Every man,” said Lincoln, “is born with two hands, and one head, and one mouth. The plain implication is that the head should direct those hands in the feeding of that mouth.” The right to earn property, and to keep the property that one earns, is fundamental.

The doctrine of natural rights recognizes the natural equality and, at the same time, the natural inequalities in human nature. Insofar as human beings are rational creatures with equal claims to life and liberty, they are rightfully treated the same. Insofar as they differ, they are

rightfully treated differently: the talented, the hardworking, and the virtuous are allowed to display their superior qualities. The principles of America encourage these high traits and many others. They challenge every equal human being to aspire to their best.

### Consent

The third self-evident truth in the Declaration is “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” The first question this answers is, Why do we need government?

Outside of government, people are in what the Founders called a “state of nature.” They have natural rights, but in this complete state of freedom (or rather anarchy) those rights are jeopardized. “[I]n a state of nature,” writes James Madison in *The Federalist* 51, “the weaker individual is not secured against the violence of the stronger.” In such a state, “even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves.” Men living without government are tempted to act according to their selfish passions or interests rather than their reason. As Madison says, “If men were angels, no government would be necessary.” That is, human beings are not perfectly rational, or good. As a result, death, slavery, and misery characterize the state of nature. Therefore people join to form governments to secure their natural rights to life, liberty, and the pursuit of happiness.

This self-evident truth also answers the question, How should government operate? As the Declaration explains, governments must derive “their just powers from the consent of the governed.” The word “just” here means two things. First, the only legitimate powers of government are those that have been consented to by the people. For example, as the Declaration’s list of grievances shows, government acts tyrannically, or unjustly, when it acts without obtaining the consent of the people. What the Founders called “republican government,” then, is the only fully legitimate form of government. A republic, Madison

wrote in *The Federalist* 39, is “a government which derives all its powers directly or indirectly from the great body of the people.”

But while consent is necessary for government power to be legitimate, consent in itself is not the sole standard of legitimacy or goodness. That is, the people do not have the right to consent to unjust powers. Put another way: Just because the people have consented to something does not make it right. We may only rightly or justly consent to those powers of government that do not violate the unalienable rights of individuals.

And this points to the real challenge of self-government: Government must obtain the consent of the people, but the people must be of such a character that they will give their consent only to good or just measures. Consent must be enlightened consent, which means it must be consent with a view that the basis of one’s own right to give his consent is the same basis of the rights of others to give their consent.

Consent has two aspects: consent in establishing government and consent in operating government. The first, which the Founders called the “social compact,” is nicely defined in the Massachusetts state constitution of 1780 as an association “by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” This occurred in America, for instance, when elected representatives in each state wrote the state constitutions, and again when delegates elected by the people of each state voted to ratify the U.S. Constitution of 1787.

After the people join together to form a government, they must also give their consent, on a regular basis, to its operation. This requirement arises from the fact that the people are not only the source of political power, but that they retain their unalienable right to liberty and therefore may never delegate power to the government permanently. Thus the Declaration of Independence lists at least ten instances in which Britain violated the Americans’ right to ongoing consent to government, expressed through elected representatives. For example, the king had refused to approve laws passed by colonial legislatures “for the accommodation of large districts of people, unless those people would

relinquish their right of representation in the legislature, a right inestimable to them and formidable to tyrants only.” The king had also “kept among us in times of peace standing armies and ships of war without the consent of our legislatures.” Above all, Britain is condemned “for suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.”

It is not good enough that rights be secured by a king or other unelected rulers. When conditions are favorable, the form of government most consistent with the equal liberty we are born with is democracy. As Thomas Jefferson wrote: “the republican is the only form of government which is not eternally at open or secret war with the rights of mankind.”

## Revolution

The Declaration’s statement of principles concludes: “whenever any Form of Government becomes destructive of these ends, it is the Right of the people to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

This right of revolution follows logically from the principles above. Government exists to protect natural rights, and government derives its just powers from consent. If it is not doing this, the people should get rid of it and set up a new one.

The right to revolution is reflected in the early American conviction that the people have a right to keep and bear arms and to govern themselves in all local matters through local governments close to the people. James Madison wrote in *The Federalist* 46, “Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”

The right to revolution does not mean that it is right or good to overthrow a government that is misbehaving in some ways but which is doing a tolerably decent job in most. The Declaration says: “Prudence indeed will dictate that governments long established should not be changed for light and transient causes.” “Prudence” is practical wisdom or good sense. In this context it means that people should think long and hard before they try to overthrow a government that is protecting most people’s rights most of the time. A revolution is a dangerous thing. It throws men back into the state of nature, where destructive passions will be unleashed and violence may become uncontrolled. Being a dangerous cure—a cure that may prove worse than the disease—revolutions should only be prescribed in circumstances where success and real improvement are likely.

### **God and Honor**

A common modern criticism of the founding is that it enshrines the principle of self-interest at the heart of the regime. The Declaration speaks of rights, but critics argue that it does not seem to have much to say about duties. If rights come first, and if the first right is the right to life, it seems that our obligations to others are contingent on our rights. In other words, what seems to come first in the Declaration is selfishness—looking out for one’s own life, liberty, and happiness.

John Locke, to whom the Founders looked as the ablest spokesman of the first principles of government, is sometimes said to teach a “selfish system of morals,” in which one has no genuine moral obligations to others. This is arguably untrue of Locke, and it is certainly untrue of the Founders, who emphatically placed honor and duty ahead of narrow self-interest. The Declaration says that when a people is subjected to a long train of abuses aiming at absolute despotism, “it is their right, it is their duty,” to change the government. As a sign that this duty is higher than one’s own personal survival or selfish interest, the end of the Declaration affirms, “We pledge to each other our lives, our fortunes, and our sacred honor.” The Founders’ sense of honor taught

them that they must be ready to sacrifice their lives and property for the sake of their duty, establishing and preserving a free government.

Honor and duty are superior to rights and self-interest. The Founders' clearest statement of this conviction occurs in the "Declaration of the Causes and Necessity of Their Taking up Arms," co-authored by Jefferson and John Dickinson, and approved by the Continental Congress in 1775: "We have counted the cost of this contest, and find nothing so dreadful as voluntary slavery. Honor, justice, and humanity, forbid us tamely to surrender that freedom which we have received from our gallant ancestors.... We cannot endure the infamy and guilt of resigning succeeding generations to that wretchedness which inevitably awaits them, if we basely entail hereditary bondage upon them.... [We are] with one mind resolved to die freemen rather than to live slaves." No "selfish system of morals" can account for the Founders' conviction that slavery and dishonor are worse even than death.

Another common misunderstanding of the Declaration is that it is hostile to religion in general, and Christianity in particular. Nothing could be further from the truth. In fact, instead of being indifferent to religion, the Declaration contains its own theological teaching. This is because the ultimate source of our rights and duties is God. There are four references to God in the Declaration:

- The "laws of nature and of nature's God" entitle the United States to independence.
- Men are "endowed by their Creator with certain unalienable rights."
- The Continental Congress appeals "to the Supreme Judge of the world for the rectitude of our intentions."
- The signers, "with a firm reliance on the protection of divine Providence," pledge to each other their lives, fortunes, and sacred honor.

The Founders believed in the separation of church and state in the sense that no religious sect was to be the official religion of the country. But they were far from condemning government support of particular religious doctrines. In fact, the principles of the nation depended from the very beginning on a particular “religious doctrine,” namely, the Declaration’s own theology of God as author of the laws of nature and source of the rights of mankind.

### **Summary**

The political theory of the American founding—the natural rights theory—is grounded in universal principles derived from human nature, and requires of government two things: First, that it operate by the consent of the people, and second, that it secure the equal rights of individuals. This was a radical and unprecedented departure from European practice during the centuries leading up to the American Revolution. Those governments were based on religion or class, and they assigned rights unequally, in the belief that human beings are not created equal.



# 2

## **IMPLEMENTING THE PRINCIPLES OF THE AMERICAN FOUNDING: THE UNITED STATES CONSTITUTION**

In theory, one might expect protection of rights, and consent, to go together. In practice, they can conflict. A well-ordered government must reconcile them. As we will see, this is not an easy thing. Human nature includes not only reason, but also selfish passions and interests. People often follow the latter, and consent to the violation of the rights of others.

### **Why a New Constitution in 1787?**

The situation in America in 1787, under the Articles of Confederation established after the Revolution, was this: every state governed itself through elected representatives, and a national Congress was elected by the people's representatives in the state legislatures. The Declaration's requirement of democracy was being met, but government was not protecting equal rights.

Rights were insecure for two reasons. First, in the area of foreign policy, the Confederation was ineffectual. For instance, Spain had closed the Mississippi River to U.S. shipping and refused to acknowledge U.S.

boundaries. American ships had become vulnerable to foreign deprivations. The protection of life and property—the first duty of government—was impossible without a stronger national government.

The second area of government failure was in domestic policy. The state governments were violating individual rights to property, and even to life and liberty. For example, state legislatures routinely overturned court decisions in order to give special treatment to individuals, passing *ad hoc* exceptions to enforcement of contracts. Some legislatures also sided with debtors against lenders by printing worthless currency and forcing businesses to accept it as legal tender. In the language of Madison in *The Federalist* 10, these legislatures had fallen under the sway of *factions*—groups of citizens, whether majority or minority, acting on passions or interests adverse to the rights of others and the common good.

To repeat: America had *government by consent*, but not government that *secured equal rights*. This was the challenge faced by the Framers of the Constitution. They had to bring the practice of American government into line with the principles of the Revolution. They succeeded in this extremely difficult task, and their success can be attributed to six key elements.

### Constitutionalism

There was an early tradition in the American colonies of written fundamental laws. This practice implied that there should be a law higher than the ordinary laws or statutes passed by the legislature. The first state constitutions were not like this. They were written by state legislatures, and they were generally changeable by a simple act of those legislatures. If a legislature wanted to do something the state constitution did not permit, it could simply change that constitution.

This was bad for many reasons. In short, however, it led to unlimited government. The theory of the American Revolution says that governments exist to secure rights. People delegate that job to government, and give it only certain powers. A constitution is a device to keep it

from going beyond those powers. A constitution keeps the government within bounds.

The original state constitutions could not do this, because they could be changed by the state legislature at will. Objections to this practice began to arise as early as 1776, for instance in Massachusetts, where a special convention was chosen by the people to write a state constitution. This idea of holding extraordinary conventions made it clear that government was subordinated to a higher or supreme law. This idea was adopted by those who called the Constitutional Convention, which met in Philadelphia in 1787.

The idea of a written constitution embodies the two great themes of the Declaration: consent and protection of equal natural rights. The people's own law—the Constitution—governs the government even after the government is established. And the fact that it is a written document, changeable only in rare circumstances, reflects the conviction that government's duties are guided and limited by a permanent standard of natural right.

### **Rule of Law**

In the understanding of the Founders, one important means to ensure that government by consent truly protects the rights of all citizens is to require that government govern by the *rule of law*. As understood by the Founders, laws are rules that are general; they apply equally to all persons similarly situated. And this follows from the idea of equal natural rights: If the source of rights is nature, and if every man has an equal share in human nature, then every man possesses the same natural rights; and if the purpose of government is to protect rights, then it must offer equal protection to each and every citizen, which is accomplished through the rule of general laws that apply to and protect each person equally.

The rule of law also means that no one is above the law, not even those who make the law. If all men possess equal rights, then those who live under the laws must be allowed to participate in making those laws,

and those who make the laws must live under the laws they make.

There are many things a government must do, however, that are not amenable to general rules. For example, the details of waging a war, or the choice of which crimes to prosecute first, are by their nature discretionary. In our system, they fall under the power of the executive. But in the ordinary direction that government gives to citizens and the limits that it sets on them, no less than the protection government offers them, it must do so by general rules that do not favor or disfavor particular individuals or classes.

### **Separation of Powers**

Following earlier modern political theorists, the Framers understood government by law to include three distinct powers: making laws, enforcing laws, and judging particular violations of law. Placing all three powers in the same hands is, according to Madison in *The Federalist* 47, the very definition of tyranny, because there would be no external or internal checks on the power of government. Men are not perfect, whether they are in the government or out of it. No single authority can be trusted with all the powers of government to itself. Much as having a written Constitution would check or limit the power of the government from without, having distinct legislative, executive, and judicial powers of government would check or limit it from within.

In violation of this principle, the Articles of Confederation concentrated the powers of the federal government into the same hands, the Congress. Most of the state constitutions in effect did the same. They set up governments that enabled one branch (the legislative) to force the other branches (executive and judicial) to submit to its will. In his critique of the Virginia Constitution of 1776, Jefferson wrote: "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a

single one. 173 despots would surely be as oppressive as one...An elective despotism was not the government we fought for.”

In addition to preventing tyranny, separation of powers is a positive means to help government do its job. The distinct powers of government entail different duties, requiring different virtues for good performance. The Framers of the Constitution gave each branch—legislative, executive, and judicial—a different mode of election, different sizes, different tasks, and different terms of office. In this way, the Framers aimed to give them the virtues and interests needed to secure rights democratically.

The virtue of the legislative branch is *deliberation*. Its members must think and reason together about what must be done. They must devise general policies or laws that will meet the needs of the country. Since laws require at least a majority of both houses of Congress for approval, their passage necessarily involves a consensus of a substantial number of people representing the diverse interests of far-flung constituencies. In *The Federalist* 70, Hamilton explains why it is right for Congress to be a large body: “In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.”

The legislature was divided into two separate “Houses”: the upper house, or Senate, and the lower house, or House of Representatives. This division was intended to force or incline the legislature to reconcile differences among interests by reaching a consensus based on reason, and to prevent the legislative body from becoming so powerful that it would usurp powers rightfully belonging to the other branches of government.

The Senate has fewer members with longer (six-year) terms. Each state, regardless of size, gets two members. Originally senators were appointed by state legislatures, not by popular vote, which helped to guarantee that the authority of state governments would not be invaded by the national government (see below, *Federalism and Local Self-Government*).

The House of Representatives has more members with shorter (two-year) terms, and its members are elected by popular vote. The number

of representatives to the House that each state can send is proportionate to their population, larger states having more, and smaller states having fewer members.

The chief virtue required of the executive is *energy*. This active virtue complements the slower deliberative virtue of the legislature. The executive—enforcer and administrator of the laws, prosecutor of crimes, and commander of the armed forces—needs to be able to act decisively, forcefully, quickly, and in some cases secretly. These qualities, wrote Hamilton, “will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number.” So the executive power was lodged in a single individual with a term of four years. Such a unitary executive would naturally have the responsibility for everything that his subordinates in the administrative bureaucracy might do; having that responsibility, he must also have the power to supervise and direct those subordinates.

The virtue of the judiciary is *judgment*. Its job, as John Marshall once wrote, is “solely, to decide on the rights of individuals” in cases at law. A case is typically a dispute between two parties, one of whom claims to have suffered an injury for which the law provides restitution. For example, one party (the executive branch of the government, speaking for the people in the name of a law passed by Congress) alleges that the other (the accused) has counterfeited money. Counterfeiting is an injury to the public peace because it is in effect theft from those who accept the worthless currency. The prosecutor asks the court to find him guilty and assess the legal punishment. The Constitution made the courts independent of elections to ensure *dispassionate and impartial judgment*, so that judges would not be pressured by elected officials to reach their decisions in accord with popular whim or anger. The independent courts help to assure that when an individual is brought before the law, he is given a fair and impartial trial, free of political influence or pressure from powerful officials in the elected branches.

The “good behavior” term of office for federal judges—in effect, a lifetime appointment, barring any egregious violations of the law or other impeachable offenses—has often been misunderstood as an antidemocratic part of the Constitution. For the Founders, however,

judges could be trusted to remain in office indefinitely because of their clearly subordinate role. Their job was to judge cases *according to the law*, meaning, under the direction of rules approved by the people's representatives. The Founders would have rejected a view often promoted in today's law schools, which claims that judges, who never have to stand for reelection, in effect have a lawmaking role coequal with the legislature.

### Checks and Balances

To separate the powers of government on paper is one thing; to keep them separate in practice is another. Americans had learned this from their first state constitutions, just after the Revolution. They found that one branch, the legislature, tended to take over the powers of the others. Why? At the time, the British king and British royal governors, along with their administrative and judicial appointments, were the principal objects of Americans' fear and suspicion. So the state constitutions generally established weak executives and judiciaries and powerful legislatures. As a result, the legislative body in the state governments became not just predominant, as it must be in a free government, but all-powerful—"extending the sphere of its activity and drawing all power into its impetuous vortex," in Madison's memorable phrase in *The Federalist* 48. As noted above, violations of rights abounded.

To strengthen separation of powers and prevent legislative despotism, the Framers incorporated what Hamilton in *The Federalist* 9 called "legislative balances and checks" in the federal Constitution. One check was to forbid the elected legislature from tampering with the fundamental law, the Constitution, as we saw above. Another was to divide the Congress into two houses, with different constituencies, term lengths, sizes, and functions. This made it more difficult for the two parts of the legislature to act unjustly in concert. A third check was to give the President a limited veto power over congressional legislation (Congress may override a president's veto only if two-thirds of the members of each house approve), along with the responsibility to rec-

commend laws to the legislature. These amounted to an executive share in legislation. A fourth was to create an independent judiciary capable of reviewing ordinary legislation in light of the written Constitution. This feature, later called “judicial review,” means that when a legislature makes a law that violates the Constitution, the courts must refuse to enforce that law upon individuals who come before them.

Earlier theoretical treatments of separation of powers had looked to the British government as a model. But that government was popular or republican in only one of its three parts, the House of Commons. A hereditary aristocracy filled the House of Lords, and the executive was a hereditary monarch. This model ran counter to the natural rights theory, and so was rejected by the Framers. Rather, the Americans saw for the first time that separation of powers is most compatible with a republican form of government.

In America, the separate branches would keep each other in line constitutionally, but each would be based on the people at large, not on separate classes in society.

### **Representation**

The Founders agreed that because the people are the ultimate source of all political power, government must be democratic, or “republican,” in nature. They were confronted, however, with two problems. First, in a country as large as the United States, it is not feasible to have direct participation in governmental affairs. The people are too numerous and too dispersed to participate in the day-to-day affairs of government. Second, a more important problem was to combine self-government with *good* government. The Founders understood that the real political and constitutional challenge was to design a system of government that would prevent democracy or self-government from turning into mob rule, or tyranny of the majority, which was exactly what was happening in many of the states under the Articles of Confederation. Republican government, at its best, should filter the reason of the public from the irrational passions of the public, which are usually adverse to the rights

of others.

The answer to both these problems was representation. Representation allows the people to have a voice in government by sending elected representatives to do their bidding, while avoiding the need of each and every citizen to vote on every issue considered by government. Perhaps more importantly, though, is that a system of representation fosters lawmaking by those in the community best qualified for such things. In the words of *The Federalist* 10, representation helps “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”

### **Federalism and Local Self-Government**

Another constitutional device to prevent tyranny by dividing power is *federalism*. The authority of the national government would be exercised only on matters of truly national scope, such as foreign policy and national security, general regulation of commerce, and other “great and national objects.” The states, according to Madison in *The Federalist* 45, would have general authority over “all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.”

As with separated powers, federalism has a second purpose apart from preventing tyranny. It makes government work better because, as Madison explains in *The Federalist* 10, “local and particular interests” differ from place to place, and so are not conducive to regulation by general rules or by a remote body like Congress. They are handled better by state and local governments, where the representatives are “acquainted with all their local circumstances and lesser interests.” That allows “the great and aggregate interests,” which are conducive to laws operating from the center, to be referred to the national government.

From the early colonial days on, the Americans had strong town

governments, especially in New England. These towns, wrote John Adams, “are invested with certain powers and privileges, as, for example, to repair the great roads or highways, to support the poor, to choose [their local officials and] their representatives in the legislature. The consequences of these institutions have been that the inhabitants [have] acquired from their infancy the habit of discussing, of deliberating, and of judging of public affairs.”

Alexis de Tocqueville made similar observations on the benefits of the American tradition of local self-government in the 1830s. “Local institutions are to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.” Local self-government fosters the kind of civic spiritedness and love of liberty that keeps individuals from becoming preoccupied with or enslaved by their private passions and interests.

### Summary

In *The Federalist* 9, Alexander Hamilton said that the “science of politics” had “received much improvement” in modern times. That is what made possible, he said, a “free government” (government by consent) that is compatible with the “principles of civil liberty” (equal rights). Hamilton mentions separation of powers, legislative balances and checks, courts with judges holding their offices during good behavior, representation of the people through elected legislatures, and a large republic spread over an extensive territory. These devices enabled the Constitution to reconcile the Declaration’s requirements of consent and the protection of equal rights.

Consent was insured by making each branch of government popular or representative. In each case, the members are appointed directly by the people (the House of Representatives) or indirectly by someone elected by the people (the Senate, president, and subordinate executive officials) for limited terms of office. The judiciary, appointed by the

president, was made compatible with popular government by confining its role to applying laws approved by the popular branches.

The Constitution promoted protection of rights by leaving scope for state and local self-government; by placing the three powers of the national government in separate hands; by checking the legislative branch; and by giving the members of each branch personal motives to support constitutionalism. Combined, these devices subordinate the government to the higher law of the Constitution and ultimately, through it, to the principles of the Revolution as articulated in the Declaration of Independence.

# 3

## **EXTENDING CONSTITUTIONALISM: SLAVERY AND CIVIL RIGHTS**

The controversy over slavery leading up to the Civil War illustrates in dramatic fashion the problem of reconciling consent with equal rights. Founder John Jay wrote: “That those who know the value of liberty, and are blessed with the enjoyment of it, ought not to subject others to slavery, is, like most other moral precepts, more generally observed in theory than observed in practice. This will continue to be too much the case while men are impelled to action by their passions rather than their reason.”

### **The Incomplete Founding**

The American Revolution was founded in opposition to slavery: “We are taxed without our own consent.... We are therefore SLAVES,” wrote John Dickinson in 1768. All the leading Founders opposed black slavery for the same reason they supported American independence—the principles of the Declaration of Independence. “Slavery,” wrote Benjamin Franklin, “is an atrocious debasement of human nature.” Because of the logic of the Revolution, opposition to slavery grew

quickly in the Northern and Middle states. It even began to take hold in many Southern states. In 1776, slavery existed in virtually every part of world. Slavery was legal in every state in America in 1776. But by 1787 the principles of the American Revolution were beginning to have an effect on slavery in America, and slavery was well on its way to abolition throughout the north, while hundreds of thousands of slaves had been emancipated in the South.

However, the progress toward emancipation was incomplete. One important question in the South that stymied Jefferson and many other men of good will was: Would it be possible to live together in peace and fellow citizenship with the former slaves, once they are free? There was a real fear of a race war, especially in those parts of the South where the slaves outnumbered the free. There was the obvious problem of prejudice on one side, and deep resentment on the other. There was a concern that the condition of the blacks was so degraded that it would be hard or impossible for them to become responsible citizens. Most people agreed that slavery was wrong in the abstract. But how to get rid of slavery lawfully and peacefully was the great difficulty. However impractical it may have been, the solution that many looked to was voluntary colonization of ex-slaves in a country that would be willing to receive them. But this hope proved too cumbersome and unpopular, with both whites and blacks, to make any headway.

According to Madison, slavery was the most divisive question at the Constitutional Convention. Its opponents were faced with the choice of allowing slavery to continue in the short term or breaking up the union. This is an important point to understand: If the opponents of slavery had been unwavering in their demand that slavery not be permitted under the new Constitution, the Southern states would have left the already weak Articles of Confederation and formed their own union, which certainly would have been built around strong protections of slavery. Not one slave would have been freed, and the prospects for ending slavery in the future would have been grim. Instead, however, the delegates to the constitutional convention made several concessions to slavery, and chose to tolerate slavery as a necessary evil, thus ensuring that the union would remain intact. In this

sense the American founding was incomplete. Slavery was allowed to continue to exist. But at the same time, a union was formed based upon the principles of the Declaration of Independence, thus making the elimination of slavery a moral and political necessity.

For various reasons, the Founders had faith that slavery would eventually die out on its own, without a crisis of union. When it became clear that this would not occur—indeed, during the first half of the nineteenth century, slavery became more entrenched—Americans faced another choice. They could keep their slaves and reject the founding principles. Or they could affirm their principles and take measures to place slavery, in Abraham Lincoln’s phrase, “in course of ultimate extinction.” A split between these irreconcilable positions led to the Civil War.

### **The Civil War and the Completion of the Founding**

South Carolina Senator John C. Calhoun and other Southern leaders in the 1830s turned against the principles of the founding. They rejected the idea of equal rights, attacked the Declaration of Independence, embraced the idea that black slavery was a “positive good,” and demanded extension of slavery westward into the territories acquired in the Louisiana Purchase and Mexican War. Some Northerners, like Illinois Senator Stephen Douglas, hoped to walk a middle road in the dispute, allowing slavery to expand without throwing out the principles of the Founders. Douglas tried this impossibility by asserting that the Founders never meant to include blacks when they wrote the Declaration and by supporting the idea of “popular sovereignty,” whereby citizens of territories and new states would be permitted simply to vote slavery up or down.

Lincoln refuted Douglas’s distorted reading of the history of the founding and rejected the idea of popular sovereignty, arguing that “one cannot logically say that anybody has a right to do wrong.” He recalled Northerners to the Declaration, which he placed at the center of his rhetoric during the 1850s. With the new Republican Party he

rallied a national majority to stop the extension of slavery. Through his speeches and later his conduct of the war, he brought the nation back to its original principles.

The Civil War resolved the long-smoldering issue of slavery, through the Emancipation Proclamation in 1863 and later the Thirteenth and Fourteenth Amendments, abolishing slavery and extending citizenship and the protection of fundamental civil rights to the newly freed slaves. The Fifteenth Amendment secured voting rights to the former slaves and their descendants. The American Revolution was now complete, at least in principle.

From the 1870s to the 1890s, these legal changes were enforced with some success in the South, and with better success in the North. But in spite of the best post-war efforts of Congress, the citizenship rights of blacks were not secured in the South. An imperfect accommodation between whites and blacks was eventually reached, which denied blacks in the South not only the right to vote, but even some of their property rights. In the North, blacks became equal citizens, with the right to vote, to serve on juries, and to make the same use of their property and talents as other citizens.

When the decision was finally made in the 1964 Civil Rights Act and 1965 Voting Rights Act to abolish the last vestiges of the “Jim Crow” restrictions on voting and property rights in the old South, it was based on an appeal to the theory of the founding—the principles of the Declaration, often appealed to by Martin Luther King and others in the civil rights movement.

### Summary

For three-quarters of a century, slavery was a stain on America, a blatant violation of its first principles. The paradox of its existence here was brought into stark relief when the argument arose in the 1830s that slave ownership is a property right—an irrational and immoral argument because it forgets that property rights flow from the right to liberty, the very right that prohibits slavery.

In the years before and during the Civil War and again in the civil rights era of the 1950s and '60s, the principles of the American founding were the impetus for justice. Lincoln said it best about the connection between the principles of the founding and civil rights in an 1858 speech commenting on Fourth of July celebrations. There are many Americans, he noted, who are not blood descendants of the American Founders:

If they look back through this history to trace their connection with those days by blood, they find they have none; they cannot carry themselves back into that glorious epoch and make themselves feel that they are part of us. But when they look through that old Declaration of Independence, they find that those old men say that "We hold these truths to be self-evident, that all men are created equal," and then they feel that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as if they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration, and so they are. That is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world.



# 4

## **MAINTAINING CONSTITUTIONALISM: MORALITY AND REPUBLICAN CITIZENSHIP**

Madison wrote at the end of *The Federalist* 55: “As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.” In other words, the more democratic a government is, the more important is the people’s character. In a monarchy, the moral qualities of the people matter less, because as long as the king is sober and sensible, the government will be so too. But in a democracy, a mindless and barbarous people will not respect each other’s rights. They will elect rulers who promise to exploit those not in the majority, and their liberty will soon be lost.

### **Democratic Virtues**

According to the Founders, republican government requires three kinds of civic virtue. First, the people must be enlightened about and devoted to the theory of natural rights, and committed by this knowledge to democracy and the protection of equal rights. They must be clearheaded enough

to discern and elect those who are well qualified for public office.

Second, the people must possess self-restraint. They must be able to control their passions at least enough to respect the rights of others. They also need the capacity to postpone immediate gratification of their desires. They must respect those who deserve respect, pay their debts, obey the law, and perform their daily duties. In a word, they must be capable of living responsibly.

Third, the people must also be self-assertive. They must have the spirit of the old Revolutionary War flag: "Don't tread on me!" They must be vigilant against those, at home or abroad, in or out of government, who might wish to trammel on their rights. They must be courageous and manly, with a sense of honor, so that in hard times they will stand up and fight, and not slink away slavishly so as to avoid trouble and danger.

The Founders were concerned with virtue not merely in a utilitarian way, as a necessary condition for republican government. They also believed that private happiness is dependent on restraint of the passions, and they said so frequently. George Washington, for instance, said in his first inaugural address that "there is no truth more thoroughly established than that there exists in the economy and course of nature an indissoluble union between virtue and happiness." In short, to be truly happy a people must be virtuous, and if a people are virtuous they will be happy.

### **Promoting Morality**

The Founders employed or endorsed several means to promote moral education. Generally, these consisted of political means (that is, constitutions, laws, and the examples of statesmen); schools, both private and public; and private institutions such as families and churches.

*Political Means.* Political freedom itself, if it is decentralized, fosters citizen virtue. We have already cited Tocqueville's *Democracy in America* to the effect that "Local institutions...put [liberty] within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it."

Specific constitutional provisions are also helpful for purposes of education. Bills of Rights are an example. Madison said of them: “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free government, and, as they become incorporated within the national sentiment, counteract the impulses of interest and passion.”

John Adams credited state militia laws (requiring most adult males to be armed and ready to fight) and the habits of local self-government with being a source of “that prudence in council and that military valor and ability, which have produced the American Revolution.” Other examples were laws upholding public decency and providing support to family life.

Of increasing importance after the American Revolution were laws to protect property. Their emphasis was not on existing property—though they protected it as well—but on the right of all to acquire and use property. Thus these laws too had a moral purpose: to make it possible for families to be independent by producing enough wealth to do away with degrading dependence on others, and to foster such self-reliant virtues as sobriety and industry.

The tone of American life was also affected by the speeches and actions of statesmen, who are looked up to by the people as models. In our early history, this was most evident in the respect accorded George Washington. As Washington said in his First Inaugural Address, the foundation of American national policies “will be laid in the pure and immutable principles of private morality.” When Washington died, President Adams said in an address to Congress: “His example is now complete, and it will teach wisdom and virtue to magistrates, citizens, and men, not only in the present age, but in future generations...”

*Schools.* Vigorous public school systems and state-supported universities could be found in the North, and occasionally in the South, well before the Civil War. Of the leading Founders, Jefferson devoted the most thought and effort to this cause. The main purpose of pre-university education, he wrote, was to “instruct the mass of our citizens in... their rights, interests, and duties as men and citizens.” This included

reading, writing, arithmetic, and the information they might need for their own business.

As for university education, Jefferson said it was “to form the statesmen, legislators and judges on whom public prosperity and individual happiness are so much to depend.” The university is to “develop their reasoning faculties” and “enlarge their minds, cultivate their morals, and instill into them the precepts of virtue and order.” All of this is in order “to form them to habits of reflection and correct actions, rendering them examples of virtue to others, and of happiness within themselves.”

Ordinarily, the federal government had no role in public education. The Constitution reserved that power to the states. However, Congress does have exclusive responsibility over the national capital and federal territories that have not yet become states. The first six presidents tried to persuade Congress to establish a national university in Washington. And in the Northwest Ordinance of 1787, organizing the lands north of the Ohio River and west of Pennsylvania, Congress called for schools in which moral and religious instruction would take place: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”

*Private Institutions.* The Founders did not expect education to be conducted only by public authorities. In those days, as today, the main educational institution was the family. The precepts, discipline, religion, and example of parents were foremost in the moral and intellectual development of children. Accordingly, as noted above, laws were designed to support the strength of the family.

Religion was also important. Of course, America’s Founders supported the separation of church and state. They enshrined that separation in the First Amendment, no less than the prohibition against religious tests for public office found in Article VI of the Constitution. There would be no sect or faith designated as the official religion of the nation which citizens would be penalized for failing to accept.

But government approval and support of religion was thought to be not only compatible with liberty, but indispensable for it. For instance, Jefferson and Madison supported a Virginia bill prescribing penalties

for anyone doing business on the Sabbath. They did so in the very same year that Madison successfully persuaded the Virginia legislature to pass Jefferson's Bill for Establishing Religious Freedom, an outstanding expression of freedom of conscience.

President Washington, in his Farewell Address, expressed the consensus of the Founders on the need for government support of religion: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens.... And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

### Summary

The crises of 1787 and 1861—years when consent was at odds with equal rights and America's survival hung in the balance—illustrate the importance of citizen virtue to democracy. The second-last clause of the Virginia Bill of Rights says: "no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." The cultivation of virtue—through laws and through various means of upholding property rights and local self-government, schools, religion, and strong families—was considered one of the government's chief duties.



# 5

## **THE MODERN REJECTION OF THE PRINCIPLES OF THE AMERICAN FOUNDING**

For well over 100 years there has been an organized and powerful movement to transform American constitutional government into a new form that has been called bureaucracy, the administrative state, and the welfare state. This modern revolution—which we will call liberalism, as it calls itself—is as radical as the American Revolution was in 1776. It began with a new theory of human nature and the human condition.

### **Critique of Natural Rights**

At the beginning of the Progressive Era in the late nineteenth century, many educated Americans began to turn away from the natural rights theory of the founding. Their thought was greatly influenced by the doctrines of relativism and historicism—the denial of objective truth and the doctrine that “values” change over time. This rejection occurred on both the political right and the political left.

On the right, for example, William Graham Sumner wrote: “There are no dogmatic propositions of political philosophy which are universally and always true; there are views which prevail, at a time, for

a while, and then fade away and give place to other views.” On the left, Woodrow Wilson—pretending to agree with the Declaration of Independence but in fact rejecting it—wrote that the Declaration’s unalienable rights to life, liberty, and the pursuit of happiness mean that “each generation of men [may determine] what they will do with their lives, what they will prefer as the form and object of their liberty, in what they will seek their happiness.” In *The New Freedom*, Wilson openly criticized the Declaration as outdated bunkum, complaining that “some citizens of this country have never got beyond the Declaration of Independence, signed in Philadelphia, July 4, 1776.”

In our time, again on both the right and the left, this rejection of natural rights is almost universal among intellectuals. Alasdair MacIntyre, for example, a conservative defender of tradition, scorned the idea of natural rights in his book *After Virtue*: “I mean those rights which are alleged to belong to human beings as such and which are cited as a reason for holding that people ought not to be interfered with in their pursuit of life, liberty, and happiness...[T]here are no such rights, and belief in them is one with belief in witches and unicorns.” And liberal Richard Rorty, widely considered the most influential philosophy professor in America in the last century, dismissed the Declaration’s natural law argument as a “language game” that is no more true than another “language game” that would promote slavery over freedom. Nor is this bias restricted to intellectuals: when Clarence Thomas was nominated to the Supreme Court, his professed belief in natural law was treated by politicians and the media as if he had proclaimed the earth flat.

The rejection of the idea of natural rights required a new understanding of the purpose of government and its relationship with the people. This new understanding became the basis of modern liberalism and its redefinition of equality and rights.

### **The New Meaning of Equality**

Just as the ground of the American Founders’ natural rights theory was a conception of human nature, the ground of the modern rejec-

tion of natural rights was a denial of human nature. Historian Richard Hofstadter's dismissal of nature in the 1940s was typically matter-of-fact, with an allusion to the theory of evolution: "[N]o man who is as well abreast of modern science as the Fathers were of eighteenth-century science believes any longer in unchanging human nature."

John Dewey, one of the twentieth century's most influential American thinkers, expanded on the idea that human beings have no nature. According to Dewey, men are born as empty vessels, as nothing in themselves. As such, the individual becomes a product of an historical context: "Social arrangements, laws, institutions...are means of creating individuals...Individuality in a social and moral sense is something to be wrought out."

If human beings are nothing on their own, it follows that they can do nothing on their own. Intelligence, talents, and virtues, as well as rights—all the things the Founders said humans were born with—must be produced by the social order. According to Dewey, "The state has the responsibility for creating institutions under which individuals can effectively realize the potentialities that are theirs..."

This theory reverses the relationship between the people and the government: rather than the people delegating power to the government, the government has to empower the people. It is not enough, as the Founders thought, for government to leave people alone and protect their rights by requiring others to leave them alone. Dewey viewed people as essentially needy or disabled, and it is precisely when they are left alone that this need or disability is greatest. The government of the New Deal in the 1930s worried about the needs and disabilities of workers, whereas today's government worries about the needs and disabilities of ethnic minorities, women, homosexuals, the disabled, and the unhealthy. In all of these cases, the new role of government is to give those whom it considers most needy or disabled better treatment, and others worse.

In short, the denial of human nature leads from an understanding of equality in terms of natural rights to an understanding of equality as something to be produced by government through unequal treatment. President Lyndon Johnson officially announced this new conception in

a speech at Howard University in 1965: “We seek...not just equality as a right and a theory but equality as a fact and equality as a result.”

### **Rights Redefined**

To achieve “equality as a result,” rights had to be redefined. Rather than being rightful claims to one’s own possessions, rights in the new view are rightful claims to the resources of others. Thus, rather than speak as the Founders did of rights to life, liberty, and the pursuit of happiness, Americans today speak of rights to housing, education, welfare, and medical care. In essence, “rights” have come to mean that people who are not as hard working, as talented, as responsible, or as fortunate have rightful claims on the money and resources of others.

Two other differences between the Founders’ and the modern liberal view of rights should be noted. First, according to the Founders, rights adhere to individuals, whereas rights today are customarily assigned according to group membership (minorities, women, farmers, students, the elderly, the sick, etc.). Second, rights today are assigned: they are not seen as existing prior to government, but as government gifts.

These two understandings are mutually exclusive. One of the clearest public admissions of this came in a 1987 Supreme Court case: A man sued a government agency that had given a job to a woman who was admittedly less qualified. Justice William Brennan, speaking for the court, asked “whether the agency plan *unnecessarily* trammelled the rights of male employees” (emphasis added). His answer was no. In other words, modern liberals believe that it is perfectly acceptable for the government to trammel the rights of some citizens in order to give benefits to other citizens believed by government to be more worthy or more needy.

### **Summary**

The Progressive Era denial of human nature and rejection of natural rights led to the adoption of a new goal for government: equal condi-

tion rather than equal rights. This goal requires the government to assign rights unequally. To this point, it is primarily property rights that have been affected: redistribution of wealth is the operative mode of American government today. But government has also begun to reassign speech rights. Those who are thought too wealthy no longer have the right to publish whatever they wish. Government now limits that right through campaign finance laws. All this is counter to the principles of the founding. As Jefferson wrote:

To take from one, because it is thought his own industry and that of his fathers has acquired too much, in order to spare to others, who, or whose fathers have not, exercised equal industry and skill, is to violate arbitrarily the first principle of association, the guarantee to everyone the exercise of his industry and the fruits acquired by it.

Nor are the wealthy the only ones targeted by liberal proponents of the administrative state. President Obama's "regulatory czar," law professor Cass Sunstein, has long favored reinstatement of the so-called Fairness Doctrine to curb the influence of conservative talk-radio, as well as regulating the Internet to curb what he calls "consumer sovereignty"—meaning the freedom of all Americans to decide for themselves where to go on the Internet for news and commentary.



# 6

## **IMPLEMENTING THE THEORIES OF MODERN LIBERALISM: THE WELFARE STATE**

The Framers of the Constitution designed American government to protect equal rights. A written Constitution, separation of powers, federalism and various public supports to morality were means to facilitate this goal. But as we have seen, over the past century, the goal of government has increasingly shifted to producing an equality of condition. Given this new goal, one would expect new government arrangements and practices to follow. This occurred, resulting in the new administrative or welfare state.

### **Constitutionalism Derailed: Institutions Transformed**

As a matter of logic, the denial of human nature and rejection of natural rights undercut the very idea of constitutionalism—the idea enshrined in the American founding by the existence of a fundamental written law. The purpose of constitutionalism is to limit the ordinary operation of government in order to protect equal rights. It becomes an impediment when the government seeks to subvert equal rights in the pursuit of other ends. As Woodrow Wilson put it: “Living political

constitutions must be Darwinian in structure and practice.” They must be open to constant reinterpretation to allow government wide scope to accomplish its evolving goals. Limited government, the legacy of the Founders, must be transformed into unlimited government.

As a practical matter, the separation of powers, the cornerstone of the Framers’ Constitution, has been effectively dismantled since the late 1960s.

*Judiciary.* Under the Framers’ Constitution, the job of the courts was to take the laws passed by Congress and the fundamental law of the Constitution and apply them to particular cases in which one party claims that another has done wrong. In the words of Chief Justice John Marshall, they were to be “servants of the law.” Under today’s “living constitution,” the courts have taken on a new role of participating actively in the formation of public policy, in effect giving themselves a legislative and executive role.

An example of legislating based on a pretense of interpreting the Constitution is *Roe v. Wade*, the 1973 Supreme Court decision striking down state laws restricting abortions. The justices clearly knew that there is not a right to abortion in the Constitution. They just did not care. As Justice William Brennan said in 1986, the Framers’ Constitution belongs to a “world that is dead and gone,” and therefore their “values” do not apply to our world. For this reason, most modern judges care little about the original meaning of the Constitution in their constitutional jurisprudence.

An example of judicial legislation based on a pretense of interpreting congressional law is our current policy regarding wetlands. Congress never passed any law giving government the authority to regulate wetlands. The relevant portion of the Clean Water Act simply required permits for discharging materials into the “navigable waters” of the United States. Yet federal courts have ruled that “navigable waters” include potholes and dry land that has certain kinds of “hydrophytic” plants growing on it.

Examples of courts executing the law are takeovers by federal judges of local school districts (to implement busing to achieve racial balance) and state prison systems (to give prisoners more pleasant conditions).

In the former case, courts in effect had to throw out existing law, create new law, and then go on to execute the law that they declared contrary to the law of Congress. After all, the 1964 Civil Rights Act explicitly forbids courts “to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils from one school to another.”

*Executive.* Under the Framers’ Constitution, we had a single executive—the president. Under today’s “living constitution,” we have multiple executives: the policy-makers in the various federal agencies. In many of these agencies the president is forbidden by law or by court order to control agency activity. Law also forbids him to fire most federal employees, even if they are working actively against the policies of his administration. Thus the president is no longer able to fulfill his constitutional duty to “take care that the laws be faithfully executed.”

*Legislative.* Under the Framers’ Constitution, Congress’s role was to deliberate and pass general laws. Checks and balances aimed to keep it from encroaching on the powers of the executive. Under today’s “living constitution,” Congress has consolidated extensive control over the executive branch by numerous devices: It imposes reporting requirements on some agencies that are so frequent and detailed that they bring Congress into day-to-day decision-making. There is constant contact between congressmen and their staffers and sympathetic executive branch officials. Recalcitrant bureaucrats are threatened with reduced budgets or abolition of their jobs. Congress also uses committee reports to give detailed instructions—instructions that are not laws and therefore are neither voted on by Congress nor signed by the president—to executive agencies. At the extreme, Congress has initiated criminal investigations of executive officials whom Congress especially dislikes.

In short, the courts no longer adjudicate the law, but legislate based on personal beliefs. The President no longer executes the law, but finds his powers reduced by a bureaucracy beyond his control. The Congress still makes laws, but decreasingly deliberates and increasingly administers.

### **Administrative Centralization**

Under the Framers' Constitution, the national government was limited to areas of national concern. One could see this in practice by the fact that when bills were introduced in Congress, there was often debate about whether it fell into Congress's purview. The day-to-day administration of the laws remained decentralized. Under today's "living constitution," nothing is out of bounds to the national government. Administration of the day-to-day lives of Americans has become highly centralized. Roads, bridges, and schools are paid for in part by federal money and subject to federal regulation. Indeed, not a mile of sewer can be laid anywhere in America without federal permission. Running a major business, and sometimes even a small business, requires constant attention to what is going on in Washington, D.C. The authority of state and local governments has been much reduced; these governments often stand to the national government as claimants for federal dollars, in effect becoming tools of Washington, D.C.

Administrative centralization also renders it impossible for the government to act consistently with the rule of law, as opposed to ad hoc rule making, with exceptions for those who complain most effectively—typically major donors to politicians. Regulating the details of American life—who hires whom, who builds what, who receives what kind of medical treatment, etc.—cannot be done with general rules. In other words, a return to the rule of law would require Congress to return vast areas of policy-making to the states and localities, and to private citizens.

### **Morality Reconsidered**

Under the Framers' Constitution, moral education was publicly promoted and public decency upheld in numerous ways. Under today's "living constitution" this is much less the case. There are two reasons.

First, the citizen character necessary for constitutional government—combining the virtues of self-restraint, self-reliance, and liberty-loving

self-assertiveness—is quite different from the character that gets along in the welfare state. The latter would be non-assertive about defending rights, and/or inclined to seek special treatment on the basis of needs or disabilities and an incapacity for self-reliance.

More deeply, the denial of human nature at the root of the “living constitution” has an amoral implication: absent a common human nature, there is no rational basis for an objective understanding of right and wrong. In this view, moral principles are simply prejudices and all “life styles” are equal. This explains the aversion of modern liberals toward any hint of government promotion of traditional morality or religion.

In 1992, four members of the Supreme Court gave voice to this side of liberalism as follows: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” If one has the right to define the meaning of the universe and the meaning of life, one certainly must have the right to define right and wrong. This is the basis of the doctrine of “value relativism,” which states that all moral judgments of right and wrong are “values,” and all values are subjective and relative, nothing more than personal preferences.

Whatever else might be said about this understanding, it is completely opposite the view of Jefferson, the author of the Declaration of Independence, who wrote in 1819 that human beings “are inherently independent of all but moral law,” and who believed that right and wrong were grounded in self evident truths about an unchanging human nature.

### **Circumventing Consent**

What about the requirement that government operate by the consent of the governed? In the Declaration, this followed logically from natural rights. Does the rejection of natural rights mean that government need no longer seek the consent of the governed?

Woodrow Wilson presented the Progressive form of government as

more democratic than the Founders' constitutionalism. He and many subsequent liberal leaders assumed that the people would follow them in pursuing their visions of a better society. This faith faltered in the late 1960s when it became clear that a "silent majority," as President Nixon called it, continued to believe in the older conception of rights, or at least to have serious reservations about the new. This is the majority that continued to vote in every presidential election between 1968 and 2004 for a candidate who believed, or said he believed, that the national government was too big and intrusive and needed cutting back. Even in 2008, it is not clear the majority understood that they were voting for a great expansion of government when they voted for Barack Obama. The popular reaction against the so-called stimulus package and then against the health care reform bill suggests they did not.

In response to this resistance by the American people to the liberal agenda of transforming government and society, a new conception of unelected representation—one that enables needy or disabled groups to have special access to government—was developed to replace the older system. Rather than passing general laws, to be executed by the executive power and upheld by the courts, Congress began setting up federal agencies with broad responsibility—creating a safe environment, for instance, or preventing job discrimination.

These agencies, with input from congressmen and help from the courts, then began making ad hoc rules for different industries and individuals and different parts of the country. It is over this implementation process—what will be the specific rules and who will be exempted from these rules—that the real policy-making process occurs today. The process is extra-constitutional, and as such unaccountable—indeed largely invisible—to the American people. The main players are bureaucrats, congressmen, judges, and organized interest groups. It is these groups, rather than the voters, who are best represented in today's system of government.

This movement from representative government that is accountable to the people to a bureaucratic or administrative state that operates by command-and-control has accelerated during the first two years of the Obama administration. The health care reform bill extended fed-

eral regulatory control over one-sixth of the American economy, and it will likely be years before we know the full nature and extent of control extended by the 2,300-page finance reform bill a few months later. Speaking of the latter, Senator Christopher Dodd, one of its chief authors, was shockingly honest about the new political dispensation. “This is about as important as it gets,” he said, “because it deals with every single aspect of our lives.” But at the same time, he said, “No one will know until this is actually in place”—that is, when the unelected regulators are in place, and when interest groups intervene with pressure and with litigation, and judges get involved—“how it works.”



# 7

## **CONCLUSION: WHERE DO WE GO FROM HERE?**

Earlier Americans were confident that most citizens, acting through self-governing associations like families, churches, and businesses, could take care of their own needs. Government existed to secure the conditions where this was possible. In the prevailing view that has arisen in the past century, based on theories of the Progressive Era, citizens are thought to be unable to manage their own lives without extensive and detailed government regulation of the economy and of social relations. The resulting administrative or welfare state has radically altered Americans' way of life.

But can we, or should we, re-embrace the principles of constitutional government, the principles of the American founding? It is often said that twenty-first century America is too complex to be governed according to an eighteenth century document. As recently as 1965, however, America was already a modern society—wealthy and highly industrialized—and the government was still operating largely under the Founders' Constitution, in accordance with the principles of the Declaration. In fact, it remains a viable choice to return to that way of life today.

Nor should that choice be understood in terms of “turning the clock

back.” On the occasion of the 150th anniversary of the Declaration of Independence, President Calvin Coolidge said:

About the Declaration there is a finality that is exceedingly restful. It is often asserted that the world has made a great deal of progress since 1776, that we have had new thoughts and new experiences which have given us a great advance over the people of that day, and that we may therefore very well discard their conclusions for something more modern. But that reasoning cannot be applied to this great charter. If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final. No advance, no progress can be made beyond these propositions. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction can not lay claim to progress. They are reactionary.

But the window of opportunity for a return to constitutional government will not stay open forever. We see in the European Union today how once great peoples can become so degraded by dependence on government that they are incapable of acting reasonably and grow indifferent to freedom. In *The Federalist* 57, James Madison wrote of “the vigilant and manly spirit which actuates the people of America, a spirit which nourishes liberty, and in return is nourished by it.” “If this spirit,” he goes on to say, “shall ever be so far debased as to tolerate a law not obligatory on the Legislature as well as on the people, the people will be prepared to tolerate anything but liberty.” It is a sign that our spirit of vigilance has already diminished somewhat that for decades, we have allowed Congress to exempt itself from laws that apply to the rest of us, and that the idea of requiring Congress to discontinue this practice has become a partisan issue.

There are two further reasons to believe that time grows short. One is the unsustainable national debt that we are compiling due to entitlement programs. Already unsustainable prior to the passage of the health care reform bill—which if not repealed will lead inexorably to a national health care system—this debt crisis is now exacerbated and the time has grown nearer when America will be in the situation that we see today in Greece. At that point—and one must reasonably assume that this is understood and welcomed by those who led the fight for the health care bill—we will by necessity, not by choice, be forced to impose on ourselves the levels of taxation that exist in Europe, probably through a value-added tax. At that point, it would be awfully difficult if not impossible to return to constitutional government.

In addition, the only means we possess for such a return is through the electoral process. And as we have shown above, that process is under attack by supporters of the administrative state. Campaign finance laws and the idea of regulating the Internet to restrict the freedom of Americans to determine where to obtain news and commentary are two lines of this attack. Another is the opposition to laws that would cut back on election fraud. And let us not forget that President Clinton's original nominee to the top civil rights post in the U.S. Justice Department was well known for her support of the idea of doing away with the principle of one man-one vote in order to control the outcome of elections. That is now a respectable position to hold in liberal law schools.

In a speech delivered on nationwide TV in 1964, Ronald Reagan said the following:

This idea—that government was beholden to the people, that it had no other source of power—is still the newest, most unique idea in all the long history of man's relation to man. This is the issue of this election: Whether we believe in our capacity for self-government or whether we abandon the American Revolution and confess that a little intellectual elite in a far-distant capital can plan our lives for us better than we can plan them ourselves.

You and I are told we must choose between a left or right, but I suggest there is no such thing as a left or right. There is only an up or down. Up to man's age-old dream—the maximum of individual freedom consistent with order—or down to the ant heap of totalitarianism. Regardless of their sincerity, their humanitarian motives, those who would sacrifice freedom for security have embarked on this downward path. Plutarch warned, “The real destroyer of the liberties of the people is he who spreads among them bounties, donations and benefits.”

The Founding Fathers knew a government can't control the economy without controlling people. And they knew when a government sets out to do that, it must use force and coercion to achieve its purpose. So we have come to a time for choosing.

Now more than then—perhaps more than at any time since the Civil War—we Americans have come to a time for choosing.



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